

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

**BONA FIDE SALES  
&  
SALES FOR EXPORTATION  
TO THE UNITED STATES**



**AN INFORMED COMPLIANCE PUBLICATION  
AUGUST 2013**

**U.S. CUSTOMS and BORDER PROTECTION**

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**NOTICE:**

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

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## PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or "Mod" Act, became effective. The provisions in the Mod Act amended many sections of the Tariff Act of 1930 and related laws.

Two new concepts that emerge from the Mod Act are "informed compliance" and "shared responsibility," which are premised on the idea that in order to maximize voluntary compliance with the laws and regulations of U.S. Customs and Border Protection (CBP), the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposed an obligation on ~~the~~ CBP to provide the public with improved information concerning the trade community's rights and responsibilities under customs regulations and related laws. In addition, both the trade community and ~~the~~ CBP share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable ~~the~~ CBP to assess duties properly, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. ~~The~~ CBP is then responsible for fixing the final classification and value of the merchandise. The failure of an importer of record to exercise reasonable care could delay release of the merchandise and, in some cases, could result in the imposition of penalties.

~~The Office of~~ Regulations and Rulings of the Office of International Trade has been given a major role in meeting the informed compliance responsibilities of ~~the~~ CBP. In order to provide information to the public, ~~the~~ CBP has issued a series of informed compliance publications on new or revised requirements, regulations or procedures, and a variety of classification and valuation issues.

The Value Branch of ~~the Office of~~ Regulations and Rulings has prepared this publication on "Bona Fide Sales and Sales for Exportation to the United States." We sincerely hope that this material, together with seminars and increased access to administrative rulings of ~~the~~ CBP, will help the trade community to improve voluntary compliance with customs regulations and laws and to understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. As many complicated factors can be involved in customs issues, an importer may wish to obtain an advance or pre-importation ruling under the CBP regulations (19 CFR Part 177) or to obtain advice from an expert who specializes in customs matters, for example, a licensed customs broker, attorney or consultant.

Comments and suggestions are welcomed and should be addressed to the Executive Director, Regulations and Rulings, Office of International Trade, U.S. Customs & Border Protection (CBP) Service, 799 9th St. N.W. (Mint Annex), Washington, D.C. 20229.

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## INTRODUCTION

When goods are imported into the customs territory of the United States (the fifty states, the District of Columbia and Puerto Rico), they are subject to certain formalities involving ~~the~~ U.S. ~~Bureau of~~ Customs and Border Protection (“CBP”) of the U.S. Department of Homeland Security. In almost all cases, the goods are required to be “entered,” that is, declared to ~~the~~ CBP, and are subject to detention and examination by CBP officers to insure compliance with all laws and regulations enforced and administered by ~~the~~ CBP. As part of the entry process, goods must be classified in the Harmonized Tariff Schedule of the United States and their customs value must be determined.

Pursuant to the Customs Modernization Act, it is the responsibility of the importer of record to use “reasonable care” to enter, classify and value the goods and provide any other information necessary to enable ~~the~~ CBP to assess the correct duties, collect accurate statistics, and determine whether all other applicable legal requirements have been satisfied.

Under the authority of 19 U.S.C. § 1500(a), it is CBP’s responsibility to fix the final appraisement of merchandise in accordance with 19 U.S.C. § 1401a (as well as to fix the final classification and rate of duty applicable to the merchandise). This occurs after the importer of record, using reasonable care, has filed the declared value of the merchandise with ~~the~~ CBP. General customs valuation requirements are discussed in a CBP informed compliance publication entitled “*What Every Member of the Trade Community Should Know About: Customs Value*,” which is available from the CBP website: <www.cbp.gov>. The instant CBP informed compliance publication concentrates on ascertaining whether there has been a *bona fide* sale of merchandise for exportation to the United States for purposes of applying the transaction value method of appraisement.

## QUESTIONS AND ANSWERS

### 1. How is imported merchandise appraised?

All merchandise imported into the United States is subject to valuation or appraisement. The Trade Agreements Act of 1979, codified at 19 U.S.C. § 1401a, sets forth a hierarchy of methods for the appraisement of imported merchandise.

### 2. What is transaction value?

~~Under the Trade Agreements Act of 1979, the transaction value of imported merchandise is the primary or preferred method for determining the value of imported~~

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merchandise. Generally, transaction value is the price actually paid or payable for merchandise when sold for exportation to the United States, plus certain statutorily enumerated additions. —Unless there is a bona fide sale of the merchandise for exportation to the United States, the transaction value method cannot be used. An alternative method of appraisement must then be used.

### 3. What is the price actually paid or payable?

The price actually paid or payable for imported merchandise is the total payment, exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States, made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller. In order for a value to be considered a viable transaction value, CPB must be able to verify the price paid or payable, including statutory additions.

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### 4. What is the relevance of a “bona fide sale” and a “sale for exportation to the United States”?

By definition, transaction value requires that a sale of merchandise for exportation to the United States occur. This concept has two parts: (1) “bona fide” or “good faith” sales and (2) sales of merchandise for exportation to the United States. If it is shown that both (1) a bona fide sale and (2) a sale for exportation of the merchandise to the United States occurred, this component of transaction value is satisfied.

### 5. What is a “sale”?

A “sale” is the transfer of property from one party to another party for consideration.

### 6. What is “consideration”?

With regard to sales transactions, consideration means payment from one party to another for the imported merchandise. Evidence that would establish that consideration has passed from one party to another party includes evidence of payment by check, bank transfer, or payment by any other commercially acceptable manner. It also is necessary to demonstrate that payment was made for the imported merchandise in question. General transfers of money from one corporate entity to another that cannot be linked to a specific import transaction are not sufficient to show passage of consideration between the parties with respect to that import transaction.



## **7. What factors are determinative of a *bona fide* sale?**

Although several factors may indicate whether a *bona fide* sale has taken place between a potential buyer and seller of imported merchandise, no single factor is determinative. Rather, the relationship of the parties involved in the transaction is to be evaluated by an overall view of the entire situation, with the result in each case governed by the facts and circumstances of the individual case—and not by the labels that the parties may attach to the relationship.

## **8. What factors indicate whether property or ownership in property was transferred?**

In determining whether property or ownership in property has been transferred from a potential seller to a potential buyer, CBP considers whether the potential buyer has assumed the risk of loss for the imported merchandise (*i.e.*, the potential buyer was liable for the imported merchandise if lost or damaged during shipment) and acquired title to the imported merchandise (*i.e.*, the potential buyer legally possesses or owns the imported merchandise). In addition, CBP may examine whether the potential buyer paid for the merchandise (*i.e.*, consideration passed between the potential buyer and seller for the imported merchandise).

Transactions involving goods that are shipped on consignment do not constitute *bona fide* sales because the goods are not the subject of a sale. Therefore, the transaction value method of appraisement cannot be used to appraise goods shipped to the United States on consignment. Other examples where imported goods are not considered to be the subject of a sale include gifts, samples and promotional items furnished free of charge; goods imported under a leasing contract; and goods that were loaned. The transaction value method cannot be used to appraise such goods. Therefore, an alternative method of appraisement must be used in such situations.

## **9. What role does possession play in determining whether property or ownership in property was transferred?**

Although the possession of merchandise serves as a strong indication that the merchandise or ownership in the merchandise has been transferred from a potential seller to a potential buyer, it is not dispositive when considering whether such a transfer occurred. CBP still may find that the potential buyer assumed the risk of loss for and/or acquired title in the merchandise although the potential buyer never had actual or physical possession of the merchandise.

## 10. What significance is afforded to shipping or trade terms?

In situations where no other pertinent evidence has been made available, CBP may reach its determination concerning whether a *bona fide* sale occurred based on the terms of sale (e.g., FOB or CIF), indicating when title and risk of loss were transferred. Otherwise, the terms of sale will be considered as part of the overall view of the entire situation in conjunction with all other relevant evidence. CBP primarily will consider as controlling the terms of sale provided on the invoices and written contracts or agreements regarding the sale of the merchandise. The meaning of all such shipping or trade terms will be construed consistent with the "Uniform Commercial Code" and "Incoterms 2010<sup>9</sup>" (the official International Chamber of Commerce rules for the interpretation of trade terms), unless the transacting parties demonstrate through contracts, other legally enforceable agreements, or course of dealing, that they have afforded different meanings to the terms.

## 11. When does a "simultaneous passage of title" occur and what does it indicate about the transfer of title?

Particularly in situations where merchandise is shipped directly from the seller to the ultimate U.S. consignee, as opposed to being shipped from the seller to an intermediary (or middleman) and then to the ultimate U.S. consignee, the terms of sale may indicate that a "simultaneous passage of title" has occurred. In other words, based on the shipping terms, title and risk of loss pass from the seller to the intermediary, then immediately thereafter from the intermediary to the ultimate U.S. consignee. Consequently, the intermediary is considered to hold title only momentarily, if ever, and not to have borne the risk of loss according to the terms of sale. In such an instance and based solely on the shipping terms, a *bona fide* sale would not appear to have occurred between the seller and intermediary. In determining whether a *bona fide* sale occurred, however, CBP will consider other pertinent evidence or documentation if made available by the parties to the transactions.

### EXAMPLE:

*Invoices and contracts between the parties provide for the FOB point of shipment of goods between a seller in country X and an intermediary in country Y and for FOB point of shipment between the intermediary and ultimate consignee in the United States. The submitted documents also indicate the goods were shipped directly from country X to the United States.*

Unless otherwise agreed to by the parties, title and risk of loss will be considered to pass from the seller to the intermediary when the merchandise was delivered to the carrier for shipment, then immediately thereafter from the intermediary to the ultimate consignee in the United States. Hence, based on the shipping terms, a *bona fide* sale would not appear to have occurred between the seller and intermediary, but rather

would appear to have occurred between the seller and ultimate consignee in the United States, with the intermediary potentially serving as an agent (most likely for the seller). If available, however, it would be appropriate to consider other pertinent evidence or documentation concerning the *bona fides* of the sale.

## 12. What other factors indicate that a *bona fide* sale has occurred?

In determining whether a *bona fide* sale has occurred, CBP also will consider whether, in general, the roles of the parties and circumstances of the transaction indicate that the parties were functioning as buyer and seller. Whereas it is characteristic of a buyer-seller relationship for the parties to maintain an independence in their dealings, in a principal-agent relationship the former will control the actions of the latter. Specifically, CBP considers as evidence of a valid buyer-seller relationship whether the potential buyer:

- (a) provided (or could provide) instructions to the seller;
- (b) was free to sell the imported merchandise at any price it desired;
- (c) selected (or could select) its own customers without consulting the seller; and
- (d) could order the imported merchandise and have it delivered for its own inventory (as opposed to the seller delivering the merchandise directly to an ultimate U.S. consignee).

The fact that a potential buyer cannot assume the above tasks is an indication that the party is serving as an agent (i.e., selling or buying agent) rather than as an independent buyer. For further information concerning principal-agent relationships, see the CBP informed compliance publication entitled "*What Every Member of the Trade Community Should Know About: Buying and Selling Commissions*," which is available on the CBP web site: <[www.cbp.gov](http://www.cbp.gov)>.

## 13. What evidence or documentation, other than shipping or trade terms, indicates whether a *bona fide* sale has occurred?

Contracts, distribution and other similar agreements, invoices, purchase orders, bills of lading, proof of payment, correspondence between the parties, and company reports or brochures all may serve as evidence that a party possesses title in and assumed the risk of loss for the imported merchandise and functions as a buyer or a seller, thus indicating that a *bona fide* sale has occurred with respect to the transaction under consideration. Such documentation should be consistent in its entirety and with the transaction in general (i.e., consistent prices, dates, parties and merchandise). Further,

the documentation and language included therein should reveal the substance of the transaction, including the obligations and roles of each of the parties. While formal sales contracts and other types of memorialized agreements (such as distribution or production agreements) generally are most revealing in this regard, other documentation (such as purchase orders, invoices, and proof of payment) evincing or establishing the structure of the transaction are crucial, especially in the absence of any written agreements. The terminology used in such agreements and documentation (*i.e.*, "buyer," "seller," "principal," or "agent"), although indicative, is not dispositive of the role played by each of the parties in the transactions under consideration.

The United States Code, Title 19, sections 1508 and 1509, and the Code of Federal Regulations (CFR), Title 19, Part 163, both set forth the recordkeeping requirements to support the transaction value declared to CBP, as well as the persons required to maintain records. Section 163.1 of 19 CFR defines records as, among other things, any information made or normally kept in the ordinary course of business that pertains to any importation, declaration or entry. This includes, but is not limited to: statements, declarations, documents, electronically generated or machine readable data, electronically stored or transmitted information or data, books, papers, correspondence, accounts, financial accounting data, technical data, computer programs necessary to retrieve information in a usable form, and entry records (contained in the (a)(1)(A) list).

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Any owner, importer, consignee, importer of record, entry filer, or other person who imports merchandise into the customs territory of the United States or knowingly causes the importation of merchandise into the customs territory of the United States must maintain records and render such records for examination and inspection by CBP, upon CBP's request.

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In order for a value to be considered a viable transaction value, CPB must be able to verify the price paid or payable, including statutory additions. Examples of documentation that may be required by CBP to support the transaction value declared to CBP are contained in the attached appendix.

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#### **14. When does an inquiry concerning a sale of merchandise for exportation to the United States become relevant?**

As indicated above, once it has been established that a *bona fide* sale of merchandise has occurred, the law requires that the sale of the merchandise be for exportation to the United States in order to appraise the merchandise under the transaction value method.

#### **15. If more than one *bona fide* sale has occurred in a multi-tiered transaction, how is the transaction value of the imported merchandise to be determined?**

There is a presumption that transaction value is based on the price actually paid or payable by the importer, for the imported merchandise under consideration. The burden is on an importer to rebut this presumption. Therefore, in situations where more than one sale has occurred involving the imported merchandise and the importer wants to base transaction value on the price actually paid or payable

in a sale to which it is not the buyer (e.g., the price paid for the merchandise in a sale between the foreign manufacturer and a foreign middleman), the importer must be able to establish by documentary evidence that such a sale is a sale for exportation to the United States. This documentary evidence must satisfy the requirements set forth in *Nissho Iwai American Corporation v. United States*, 16 CIT 86, 786 F. Supp. 1002 (1992) *rev'd* 982

F.2d 505 (Fed. Cir. 1992) and in General Notice (T.D. 96-87), *Determining Transaction Value in Multi-Tiered Transactions*, Vol. 30/31, *Customs Bulletin* No. 52/1 (January 2, 1997). (See copy below.) Without such evidence, the importer has not overcome its burden to rebut the presumption discussed above, and CBP will base the transaction value for the imported merchandise on the price actually paid or payable for the merchandise by the U.S. importer (rather than on the manufacturer's price to the middleman or the first-sale price).

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## **16. When does a party serve as a middleman in a multi-tiered transaction?**

When at least two *bona fide* sales have occurred and the same party serves as a buyer (usually buying the imported merchandise from a foreign manufacturer) as well as a seller (usually selling the imported merchandise purchased from a foreign manufacturer to a U.S. importer or consignee) in a multi-tiered transaction, that party is considered to be a middleman. Depending on the manner in which such a multi-tiered transaction is structured, the importer of record, consignee, or any other type of buyer or seller, even if in the United States, may be a middleman. Where a multi-tiered transaction consists of more than two sales, generally there will be several middlemen.

## **17. When is a foreign manufacturer's price acceptable in accordance with the decision in *Nissho Iwai*?**

The *Nissho Iwai* case addressed the question of how to determine transaction value in a multi-tiered transaction. In that case, the New York City Metro Transit Authority (MTA) contracted to purchase subway cars from Nissho Iwai American Corporation (Nissho America). The price in the contract between the MTA and Nissho America represented the highest price from among the various prices involved in the sale and exportation of the subway cars to the United States. Kawasaki Industries of Japan (Kawasaki) and Nissho Iwai Corporation of Japan (Nissho Japan) participated in negotiations and in a bid proposal with the MTA. Nissho Japan purchased cars from Kawasaki, who was the primary Japanese manufacturer of the cars. Pursuant to the master contract, Kawasaki provided a warranty of performance to the MTA and Nissho America. As permitted by the contract, Nissho America assigned its contract rights to Nissho Japan. The issue before the courts was whether the transaction value of the subway cars was properly based on the Kawasaki-Nissho Japan sales price (i.e., the foreign manufacturer's price) or on the MTA-Nissho America price reflected in the master contract (i.e., the middleman's price).

The U.S. Court of Appeals for the Federal Circuit, in reversing the decision of the U.S. Court of International Trade, held that the foreign manufacturer's price was a valid transaction value as long as the transaction between the foreign manufacturer and the middleman was a sale negotiated at "arm's length" that was free from any non-market influences that could affect the legitimacy of the sales price and involved goods clearly destined for exportation to the United States. This presupposes that a *bona fide* sale occurred and that the use of transaction value is not otherwise precluded by the U.S. valuation law (e.g., there are no restrictions on the disposition or use of the merchandise; there are no conditions or considerations for which a value cannot be determined; or there is insufficient information concerning an enumerated statutory addition to the price actually paid or payable). Based on the evidence presented in *Nissho Iwai*, the court found that the transaction value of the subway cars was properly based on the Kawasaki-Nissho Japan sales price (i.e., the price of the sale of the imported merchandise from the foreign manufacturer to the middleman or the first-sale

price).

**18. What is the relevance of whether a sale is conducted at “arm's length” and is “clearly destined for exportation to the United States”?**

If a sale was not conducted at “arm's length” or the merchandise that was the subject of the sale was not “clearly destined for exportation to the United States,” that sale cannot serve as the basis for transaction value.

**19. When is a sale considered to have been conducted at “arm's length”?**

In general, CBP will consider a sale between unrelated parties to have been conducted at “arm's length.” If the parties are related, however, a sale will be considered to have been conducted at “arm's length” only (1) if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between the buyer and seller did not influence the price actually paid or payable or (2) if the transaction value closely approximates a test value. For further information, see “Transfer Pricing; Related Party Transactions,” 58 FR 5445 (January 21, 1993). See also 19 U.S.C. § 1401a(b)(2)(B) and 19 CFR § 152.103(j)(2). Also, for a list of persons who are considered related for purposes of related-party transactions, see 19 U.S.C. § 1401a(g)(1) and 19 CFR § 152.102(g).

**20. When is merchandise clearly destined for exportation to the United States in a multi-tiered transaction?**

Although such a determination can only be made on a case-by-case basis, CBP will consider that merchandise is clearly destined for exportation to the United States in a multi-tiered transaction when the evidence establishes that at the time the middleman purchased or contracted to purchase the imported merchandise from the foreign manufacturer, the only possible destination for the merchandise was the United States (i.e., at the time of sale, the imported merchandise was irrevocably destined for the United States).

It must be evident throughout the entire transaction that the merchandise is clearly destined for exportation to the United States. It is not sufficient, for example, to show after the merchandise was ordered and manufactured, at the time of shipment, near the end of the transaction, that it will be or was going to the United States. For instance, evidence that boxes for imported merchandise (e.g., table lamps) were addressed to the United States when delivered to a carrier is insufficient by itself to establish that the lamps were clearly destined for exportation to the United States. On the other hand, evidence that a U.S. retailer/importer had contracted for table lamps with a middleman



who, in turn, had contracted with a foreign manufacture for table lamps that were manufactured to conform to U.S. electrical requirements and the U.S. retailer's design specifications (e.g., shape, materials, colors); bore the U.S. retailer's labels, logos, unique stock numbers and bar codes; and were shipped directly from the country of manufacturer to the United States (thereby eliminating the possibility of diversion of the merchandise to another country) would show that the imported table lamps were clearly destined for exportation to the United States at the time the middleman purchased or contracted to purchase the lamps from the foreign manufacturer.

## 21. What evidence is needed to establish that merchandise is clearly destined for exportation to the United States in a multi-tiered transaction?

In order to establish that merchandise is clearly destined for exportation to the United States in a multi-tiered transaction, there must be a complete paper trail relating to the imported merchandise that shows the structure of the entire multi-tiered transaction. This would include invoices, sales contracts, purchase orders, proof of payment, shipping contracts or other documentation for each individual transaction involved in the multi-tiered transaction with consistent prices, dates, parties and merchandise. Other evidence would include manufacture, design, and other unique specifications or characteristics of the merchandise (often manifest in samples) made in conformity with the U.S. buyer's or importer's standards; labels, logos, stock numbers, bar codes and other unique marks; and markings, visas, warranties or other types of certification or characteristics required for the entry into and sale or operation of the imported merchandise in the United States. All this evidence must show that the only possible destination for the imported merchandise was the United States at the time the middleman purchased or contracted to purchase the merchandise from the foreign manufacturer.

## 22. What documentation and information is needed to support a determination that transaction value should be properly based on a sale to which the importer is not the buyer?

T.D. 96-87 sets forth the documentation and information needed to support a determination that transaction value should be based on a sale not involving the U.S. importer in a multi-tiered transaction. In order to determine whether a particular transaction may be the basis for transaction value, T.D. 96-87 requires an importer to submit sufficient information with respect to the amounts, if any, of the statutory additions set forth in 19 U.S.C. § 1401a(b)(1) (i.e., packing costs, selling commissions, assists, royalty or license fees and proceeds of any subsequent sale). CBP maintains the same rights and responsibilities in verifying the transaction value declared in a first sale transaction as it does in a sale in which the importer is the buyer. It requires an importer to provide (1) a detailed description of the roles of each of the parties involved in the multi-

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tiered transaction and (2) a complete paper trail relating to the imported merchandise that shows the structure of the entire multi-tiered transaction. Specifically, T.D. 96-87 requires an importer to have documentary evidence that establishes (1) that the alleged sale of the imported merchandise was a bona fide sale (see question 13 above); (2) that the merchandise was clearly destined for exportation to the United States (see question 21 above); and (3) that the alleged sale between the middleman and foreign manufacturer was at arm's length (see question 19 above). In order for a value to be considered a viable transaction value, CPB must be able to verify the price paid or payable, including statutory additions. In a multi-tier transaction, all parties involved in the purchase and resale of goods destined for the United States are required to maintain and provide records upon request from CBP. For example, CBP may require the ultimate consignee, importer, middleman, agent, and factory records to determine the proper valuation of the imported goods and if amounts related to statutory additions have been declared. Examples of documentation that may be required by CBP to support the transaction value declared to CBP are contained in Appendix I.

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The determination as to whether the importer has established through documentary evidence that transaction value should be based on a sale not involving the U.S. importer should be done on a case by case basis as the relationship of the parties; the roles of each member, and the accounting structures and methodologies of the parties will vary with each case. Specifically, the importer would be required to provide a different level of documentation to support the claim that "first sale" should apply where the manufacturer and middleman are not related than when they are related. Secondly, the importer would also be required to provide a different level of documentation to support the claim that "first sale" should apply where the manufacturer and middleman are related but there is another non-U.S. party who is the parent than when either the manufacturer or middleman are the parent. Thus no one set of documents will suffice for all cases. An example of each case is shown below with a list of examples of documentation including, but not limited to, those that the importer provided in support of a determination that transaction value should be based on the "first sale". The below are examples only, and will not meet the circumstances of all parties. Additional first sale rulings can be found at <http://rulings.cbp.gov/>.

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#### **Middleman and Manufacturer Not Related – (HQ W563605, dated November 19, 2009)**

**Bona Fide Sale – Evidence of transfer of title and risk of loss to the middleman taking into consideration "flash sales" where terms of sale between manufacturer, middleman and importer are FOB; copies of purchase contracts between importer and middleman and copies of purchase order between middleman and manufacturer; documentation showing middleman not restricted in choosing manufacturers and can set its own prices and determine its own profit; documentation showing middleman not acting as agent for another party; middleman acting as buyer and seller on own behalf.**

**Arm's length** - Since the parties involved are unrelated, there is a presumption that the transaction has been conducted at arm's length in the absence of evidence to the contrary.

**Clearly Destined for Export to the United States at the Time of the First Sale** – First Sale documents to reflect the purchase order number for the second sale and that the goods conformed to the importer's specifications and were labeled in accordance with U.S. labeling requirements and bore U.S. markings.

**Holding: The transactions between the middleman and the factories were bona fide sales at arm's length for the sale of merchandise for export to the United States. The transactions should be appraised on the basis of the first sale price.**

**Middleman and Manufacturer Related (Middleman Parent of Manufacturer) – (HQ H016585, dated December 30, 2008)**

**Bona Fide Sale** – Evidence of transfer of title and risk of loss to the middleman; evidence that the potential buyer has paid for the goods and whether the circumstances indicate the parties are functioning as buyer and seller. Purchase orders and commercial invoices to determine if there has been an exchange of consideration. Evidence of terms of sale between the manufacturer and the middleman indicating Ex Works basis.

**Clearly Destined for Export to the United States at the Time of the First Sale** – Instructions by the importer and the middleman instructing the manufacturer to ship the goods directly to the U.S. supported by the importer's purchase orders, the middleman's purchase orders, the manufacturer's invoice and the bill of lading. Both the importer and the middleman purchase order which indicate labeling is to be in accordance with U.S. country of origin and marking.

**Arm's length** – The importer did not provide complete financial statements for the parent (middleman) to show that the price the manufacturer charged was adequate to ensure its recovery of all costs plus 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. The importer submitted cost worksheets for the manufacturer for selected styles and audited income statements for the manufacturer only. The importer provided a transfer pricing study using the comparable profits method, but the IRC method was not used in setting the price of the imported goods; nor were the prices shown to be consistent with the industry in question.

**Holding: Protest denied. Information submitted does not support a finding that the sale was arm's length; therefore merchandise should be appraised on basis of transaction value between middleman and importer.**

**Possible Solutions:**

- 1. The importer could provide complete financial statements for the parent (middleman) to show that the price the manufacturer charged was adequate to ensure its recovery of all costs plus 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.**
- 2. The importer could provide a transfer pricing study that was used in setting the price of the imported goods and demonstrate that the price was settled in a manner consistent with industry practice.**

**Middleman and Manufacturer Related (Third Party Non U.S. Parent) – (HQ H106603, dated July 25, 2011)**

**Bona Fide Sale – (Not Discussed)**

**Clearly Destined for Export to the United States at the Time of the First Sale – (Not Discussed)**

**Arm's Length** – The importer provided financial information for the manufacturer and other related factories as well as the middleman but not the parent's financial information to meet the all costs plus a profit test.

**Holding: Protest denied. Information submitted does not support a finding that the sale was arm's length; therefore merchandise should be appraised on basis of transaction value between middleman and importer.**

**Possible Solution:**

**1. The importer could provide complete financial statements for the parent (holding company) to show that the price the manufacturer charged was adequate to ensure its recovery of all costs plus 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.**

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NOTE: When seeking an advance ruling, requesting internal advice or filing a protest, the above-mentioned documentation must be submitted with the advance ruling request, internal advice request or protest.

**23. How does an importer exercise reasonable care when declaring a value based on a transaction to which it is not the buyer?**

Under 19 U.S.C. § 1484, as amended, an importer shall, using reasonable care, complete an entry by filing with the CBP the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or, pursuant to an electronic data interchange system, such other information as is necessary to enable the CBP to, among other things, properly assess duties on the merchandise. This would include sufficient information to enable ~~the~~ CBP to determine in a multi-tiered transaction which of the various sales is the sale of the merchandise for exportation to the United States upon which transaction value should be properly based. Accordingly, before an importer declares a transaction value based on a transaction to which it is not the buyer, the importer should be sure that such a transaction satisfies the criteria discussed above and be prepared to submit supporting evidence as described T.D. 96-87, upon request by CBP.

An importer who declares a value to CBP without the necessary supporting documentation would not be exercising reasonable care and may be subject to a penalty or other enforcement compliance action.

## DETERMINING TRANSACTION VALUE IN MULTI-TIERED TRANSACTIONS

### T.D. 96-87

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The primary method of appraising imported merchandise is transaction value. Transaction value is the price actually paid or payable for imported merchandise when sold for exportation to the United States plus certain statutory additions. This notice clarifies some of the issues that arise in multi-tiered transactions in determining which is the sale for exportation to the United States for the purpose of determining transaction value. It also sets forth the documentation and information needed to support a ruling request that transaction value should be based on a sale involving a middleman and the manufacturer or other seller rather than on the sale in which the importer is a party.

DATES: All future ruling requests that in a multi-tiered arrangement transaction value is properly based on a sale not involving the importer must be supported by the evidence discussed in this notice.

FOR FURTHER INFORMATION CONTACT: o o o

#### SUPPLEMENTARY INFORMATION:

The primary method of appraising imported merchandise is transaction value. Section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a), provides that the transaction value of imported merchandise is the price actually paid or payable for the merchandise when **sold for exportation to the United States**, plus specified additions. Thus, in order for imported merchandise to be appraised under transaction value it must be the subject of a bona fide sale between the buyer and seller and it must be a sale for exportation to the United States.

In *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), the Court of Appeals for the Federal Circuit reviewed the standard for determining transaction value in a three-tiered distribution system involving a middleman. The Court indicated that a manufacturer's price for establishing transaction value is valid so long as the transaction between the manufacturer and the middleman falls within the statutory provision for valuation. In this regard, the Court stated that in a three-tiered distribution system:

The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influence that affect the legitimacy of the sale price \* \* \* [T]hat determination can be made on a case-by-case basis.

Id. at 509. See also, *Synergy Sport International, Ltd. v. United States*, 17 C.I.T. \_\_\_, Slip OP. 93-5 (Ct. Int'l. Trade January 12, 1993).

After *Nissho Iwai*, Customs has received numerous ruling requests that transaction value is properly based on a sale which does not involve the importer, but rather a middleman and the

manufacturer or other seller. In our rulings, we have stated that in fixing the appraisal of imported merchandise, Customs presumes that the price paid by the importer is the basis of transaction value and the burden is on the importer to rebut this presumption. In order to rebut this presumption, in accordance with the *Nissho Iwai* standard, the importer must prove that at the time the middleman purchased, or contracted to purchase, the goods were "clearly destined for export to the United States" and the manufacturer (or other seller) and middleman dealt with each other at "arm's length." In reaching a decision, Customs must ascertain whether the transaction in question falls within the statutory provision for valuation, *i.e.*, that it is a sale, that it is a sale for exportation to the United States in accordance with the standard set forth above, and that the parties dealt with each at "arm's length."<sup>1</sup> As stated in *Nissho Iwai*, these questions are determined case-by-case based on the evidence presented.

In order for an importer to rebut the presumption discussed above, certain information and documentation must be provided. Specifically, the requestor must describe in detail the roles of all the various parties and furnish relevant documents pertaining to each transaction that was involved in the exportation of the merchandise to the United States. If there is more than one possible sale for exportation, information and documentation about each of them should be provided.<sup>2</sup> Relevant documents include, purchase orders, invoices, proof of payment, contracts and any additional documents (e.g. correspondence) which demonstrate how the parties dealt with one another and which support the claim that the merchandise was clearly destined to the United States. If any of these documents do not exist, or exist but are not available, the ruling request should so provide. What we are looking for is a complete paper trail of the imported merchandise showing the structure of the entire transaction.<sup>3</sup> If the request covers many importations, it is acceptable to submit documents pertaining to some of the importations provided complete sets of documents are furnished, the underlying circumstances are the same, and the documents are representative of the documents used in all the transactions. Any differences should be explained.

In addition, to establish whether the transaction is "at arm's length" the ruling request must state the relationship, if any, of the parties. In general, Customs will consider a sale between unrelated parties to have been conducted at "arm's length." If the parties to the requested transaction are not related as defined in 19 U.S.C. 1401a(g), then a statement to that effect should be made. However, if the parties to the requested transaction are related, then it is

<sup>1</sup> Detailed information regarding *bona fide* sales and sales for exportation is contained in the Informed Compliance Publication, *What Every Member of the Trade Community Should Know About: Bona Fide Sales and Sales for Exportation*, November, 1996.

<sup>2</sup> For example, if the importer is trying to prove that a transaction between a middleman and the manufacturer is a viable transaction value, it should describe the role of all the parties (*i.e.*, the importer, the middleman and the manufacturer) and furnish evidence regarding both the alleged sale between the importer and the middleman and the alleged sale between the middleman and the manufacturer. The evidence must show that the middleman purchased the goods from the manufacturer and that the goods were clearly destined to the United States.

<sup>3</sup> An example of a complete paper trail is documentation which shows that: 1) the importer ordered 100 Style A hair driers at \$6 each from the middleman on January 5, 1996 listing the required specifications; 2) the middleman ordered 100 Style A hair driers at \$5 each from the manufacturer listing the importer's specifications on January 10, 1996; 3) the manufacturer shipped 100 Style A hair driers to the importer on February 10, 1996; the packing list shows that these goods are made to the importer's specifications; 4) on February 12, 1996, the middleman billed the importer \$600 for 100 style A hair driers and the importer paid this amount by check; and 5) on February 13, 1996, the manufacturer billed the middleman \$500 for 100 style A hair driers and the middleman paid this amount by check.

necessary to provide Customs with information which demonstrates that transaction value may be based on the related party sale as provided in 19 U.S.C. 1401a(b)(2)(B). (*i.e.*, that the circumstances of sale indicate that the relationship did not influence the price or that the transaction value closely approximates certain test values). For further information regarding related party transactions, see *Transfer Pricing; Related Party Transactions*, 58 Fed. Reg. 5445, January 21, 1993.

Also, in order for a particular transaction to be a viable transaction value there must be sufficient information available with respect to the amounts, if any, of the statutory additions set forth in 19 U.S.C. 1401a(b)(1) (*i.e.*, packing costs, selling commissions, assists, royalty or license fees, and proceeds of any subsequent sale). The statute provides that if sufficient information is not available, for any reason, with respect to any of these amounts, the transaction value of the imported merchandise concerned shall be treated as one that cannot be determined. Therefore, in order to determine whether a particular transaction may be the basis for transaction value, the requestor must provide Customs with sufficient information regarding the amounts, if any, of the statutory additions set forth in 19 U.S.C. 1401a(b)(1). For example, if the importer claims that transaction value should be based on the sale between the middleman and the manufacturer, the importer must inform Customs whether the middleman provided any assists to the manufacturer and if so, the value of the assists and how the value was determined. If the importer does not have this information, transaction value cannot be based on this sale.

Finally, Customs decisions will be based on the evidence presented when the ruling request is submitted. Although we would not be precluded from asking for additional information, this will not be done routinely. If insufficient evidence is provided, the claim will be denied.

In summary, the public should be aware that Customs presumes that transaction value is based on the price paid by the importer and in order to rebut this presumption and prove that transaction value should be based on some other price, complete details of all the relevant transactions and documentation (including purchase orders, invoices, evidence of payment, contracts and other relevant documents) must be provided, including the relationship of the parties and sufficient information regarding the statutory additions. Customs rulings will be based on the evidence submitted with the request.

Dated: December 13, 1996.



## ADDITIONAL INFORMATION

### The Internet

The home page of U.S. Customs and Border Protection on the Internet's World Wide Web, provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information -- which includes proposed regulations, news releases, publications and notices, etc. -- that can be searched, read on-line, printed or downloaded to your personal computer. The web site was established as a trade-friendly mechanism to assist the importing and exporting community. The web site also links to the home pages of many other agencies whose importing or exporting regulations that U.S. Customs and Border Protection helps to enforce. The web site also contains a wealth of information of interest to a broader public than the trade community. For instance, on June 20, 2001, CBP launched the "Know Before You Go" publication and traveler awareness campaign designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is <http://www.cbp.gov>

### Customs Regulations

The current edition of *Customs Regulations of the United States* is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; telephone (202) 512-1800. A bound, 2003 edition of Title 19, *Code of Federal Regulations*, which incorporates all changes to the Regulations as of April 1, 2003, is also available for sale from the same address. All proposed and final regulations are published in the *Federal Register*, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about on-line access to the *Federal Register* may be obtained by calling (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time. These notices are also published in the weekly *Customs Bulletin* described below.

### Customs Bulletin

The *Customs Bulletin and Decisions* ("Customs Bulletin") is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. Each year, the Government Printing Office publishes bound volumes of the *Customs Bulletin*. Subscriptions may be purchased from the Superintendent of Documents at the address and phone number listed above.

## Importing Into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The February 2002 edition of *Importing Into the United States* contains much new and revised material brought about pursuant to the Customs Modernization Act ("Mod Act"). The Mod Act has fundamentally altered the relationship between importers and U.S. Customs and Border Protection by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The February 2002 edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between U.S. Customs and Border Protection and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to his or her importation.

Single copies may be obtained from local offices of U.S. Customs and Border Protection, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An on-line version is available at the CBP web site. *Importing Into the United States* is also available for sale, in single copies or bulk orders, from the Superintendent of Documents by calling (202) 512-1800, or by mail from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054.

## Informed Compliance Publications

U.S. Customs and Border Protection has prepared a number of Informed Compliance publications in the "*What Every Member of the Trade Community Should Know About:...*" series. Check the Internet web site <http://www.cbp.gov> for current publications.



## Value Publications

*Customs Valuation under the Trade Agreements Act of 1979* is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.000-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system. A copy may be obtained from U.S. Customs and Border Protection, Office of [International Trade, Regulations and Rulings, Valuation and Special Programs](#) Branch, [90 K NE, 1300 Pennsylvania Avenue, NW, \(Mint Annex\)](#), Washington, D.C. 20229.

*Customs Valuation Encyclopedia* (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. A copy may be purchased for a nominal charge from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054. This publication is also available on the Internet web site of U.S. Customs and Border Protection.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from U.S. Customs and Border Protection ports of entry. Please consult your telephone directory for an office near you. The listing will be found under U.S. Government, Department of Homeland Security.

### **“Your Comments are Important”**

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of U.S. Customs and Border Protection, call 1-888-REG-FAIR (1-888-734-3247).

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## First Sale Transaction Value Supporting Documentation

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### Criteria and References

19 U.S.C. §1401a(b) Transaction Value

19 U.S.C. §1509 Examination of books and witnesses

19 U.S.C. §1508(a) Record keeping

19 CFR §152.103 Transaction Value

19 CFR §163 Recordkeeping

Nissho Iwai American Corp v. United States, 982 F2d 505 (Fed Cir. 1992)

Synergy Sport International, Ltd. v. United States, 17 CIT 18 (1993)

HQ H029330 January 2, 2009

HQ W563605 November 19, 2009

HQ H016585 December 30, 2008

HQ H023269 October 27, 2010

HQ H106603 July 25, 2011

ICP Customs Value

ICP Determining the Acceptability of Transaction Value for Related Party Transactions

### Examples of supporting documents that CBP may request when evaluating first sale.

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These examples include but are not limited to:

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1. Purchase orders, confirmations, and emails regarding the order of the merchandise and subsequent revisions.
2. Sales confirmations and emails regarding the order and subsequent revisions
3. Documentation concerning price negotiations including price quotes, emails, price lists, accepted and rejected bids and cost elements comprising the value of the imported merchandise
4. Contracts/agreements (purchase, sales, agency, distribution, shipping, etc.)
5. Commercial invoices (manufacturers, subcontractors, middleman, vendors, ultimate consignees, and agents, and assist providers, as applicable).
6. Transportation Records/Freight records from the manufacturer through the port of export and proof of payment, including foreign inland freight and freight from country of origin to country of export
7. Transportation Records/Freight records from the supplier of assists to the manufacturer as well as the foreign entry summary for importation of the materials, if applicable
8. Insurance for the imported merchandise from the factory door to the port of importation, including proof of payment (provide copy of letter of credit, wire transfer, and bank statement showing the actual debit for the payment as well as any additional banking documentation concerning the payment)
9. Inventory records for the receipt of goods into inventory, including the middleman's inventory and storage of merchandise prior to importation, as applicable

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10. Proof of payment to manufacturers, suppliers of assists, subcontractors, middlemen, vendors, trading companies, etc. for the cost of materials, finished goods and other charges related to the imported merchandise (provide copy of letter of credit, wire transfer, and bank statement showing the actual debit for the payment as well as any additional banking documentation concerning the payment)
11. Proof of payment for commissions paid to all agents and subagents (provide copy of letter of credit, wire transfer, and bank statement showing the actual debit for the payment as well as any additional banking documentation concerning the payment)
12. Form 7501 and invoices for any other merchandise paid for in conjunction with any bulk payment
13. Documentation for any charge-backs or credit / debit memos issued in connection with the sampled transactions for quantity shortages, quality issues, price adjustments, etc., if applicable
14. Importer's accounting and financial records including the audited financial statements (including any notes and supporting schedules), trial balance, general ledger, cash disbursement and purchase journals (showing transaction level detail) for applicable period supporting the price actually paid or payable and all information relating to statutory additions
15. Middleman's accounting and financial records including, the audited financial statements (including any notes and supporting schedules), trial balance, general ledger, cash disbursement and purchase journals (showing transaction level detail) for applicable period supporting the price actually paid or payable and all information relating to statutory additions
16. Manufacturer's accounting and financial records including, the audited financial statements (including any notes and supporting schedules), trial balance, general ledger, cash disbursement and purchase journals (showing transaction level detail) for applicable period supporting the price actually paid or payable and all information relating to statutory additions
17. Overall parent company's accounting and financial records including, the audited financial statements (including any notes and supporting schedules), trial balance, general ledger, cash disbursement and purchase journals (showing transaction level detail) for applicable period supporting the price actually paid or payable and all information relating to statutory additions
18. All contracts and agreements relevant to the import transactions including Agency Agreements, Purchasing Agreements, Financing Agreements, Distributorship Agreements, Royalty and License Agreements, Transfer Pricing Agreements, Advance Pricing Agreements, etc.
19. Cost Sheets and Product Specification Sheets
20. Records related to the manufacture, design, unique specifications or characteristics of the merchandise (labels, logos, stock numbers, bar codes, unique marks and markings, warranties, certifications).
21. Industry pricing practices
22. Marketing studies
23. Sales to unrelated parties of similar or identical merchandise
24. Financial and accounting records (financial statements; tax returns; chart of accounts; general ledger account activity; production records; labor, materials

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and overhead expense records; bills of materials; inventory records; selling, general and administrative expense records; etc.)

25. Supplier Manuals

26. Vendor Guidelines

27. Export/freight documents

28. Records relating to quality control and the disposition of rejected merchandise

29. Invoice and proof of payment for hangers, if applicable

30. Bills of lading

31. Packing list

32. Country of Origin Certificates

33. Correspondence records

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Visit our Internet web site: <http://www.cbp.gov>