

# ClientAlert

## International Trade

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### CBP Announces Policy Change That Will Permit Importers to Rely on Transfer Pricing Policy to Determine Customs Value

On May 30, 2012, US Customs and Border Protection (CBP) announced a change in its position as to when a price determined pursuant to a transfer pricing policy may be used for purposes of determining transaction value for CBP purposes. It is now CBP's position that transaction value (e.g., the invoice price) may be used for customs purposes even when based on a price determined pursuant to a formula set forth in a transfer pricing policy. CBP also clarified that post-importation adjustments can be used to revise customs value to receive refunds (or determine additional duties).

#### CBP Has Historically Rejected Valuation Under the Transaction Value Method Where Post-Importation Adjustments Were Made Pursuant to a Transfer Pricing Policy

Transfer prices between US companies and their foreign affiliates give rise to issues under both income tax and customs valuation laws and regulations. Customs valuation laws differ from the tax requirements under which intercompany transfer prices are set. The preferred method of appraising imported merchandise for customs purposes is transaction value, which is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus certain statutorily prescribed additions to the extent they are not already included in the price. Transaction value between related parties is acceptable if the circumstances of the sale of the imported merchandise indicate that the relationship did not influence the price actually paid or payable ("arm's length"), or if the transaction value closely approximates "test values." When value cannot be determined based on transaction value, imported goods must be valued according to one of five alternative bases of appraisal, according to a hierarchy. Importers generally prefer to use transaction value because it is less burdensome than the alternative bases of appraisal.

While customs valuation and income tax laws share the common goal of ensuring that related parties value their transactions at arm's-length prices, the fact that an importer's transfer price satisfies Internal Revenue Service (IRS) requirements is not determinative of whether CBP will accept such price for customs valuation purposes. Tax rules often require a company to make transfer pricing adjustments after goods have been imported into the United States, which CBP has generally found problematic with respect to imported goods valued under the transaction value method. CBP has determined that the price must be fixed at the time of importation for transaction value to be an appropriate basis of



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appraisal. Although CBP has considered the fixed price rule to be satisfied when the price is determinable by an objective formula agreed upon prior to importation, it has held that any post-importation adjustments must be triggered by some event or occurrence over which neither the seller nor the buyer has any control.

## **CBP's Change in Policy Takes a Step Toward Converging Tax and Customs Valuation Rules**

CBP's change in policy takes a step toward converging views of customs valuation and tax authorities by allowing an importer to use transaction value for appraising imports from related-party sellers, even when the transfer prices are subject to post-importation adjustments. In new ruling letter HQ W548314, which revokes HQ 547654, CBP recognized that the events in a transfer pricing formula that trigger post-importation price adjustments are often, to some extent, within the control of the buyer and/or the seller. CBP determined that—notwithstanding that there may be some element of control on the part of the buyer and/or seller—an intercompany transfer pricing formula that provides for post-importation adjustments to the price is considered an objective formula. Consequently, transaction value may be used, and post-importation adjustments are to be taken into account in determining transaction value, if all five of the below criteria are met:

- A written "Intercompany Transfer Pricing Determination Policy" is in place prior to importation and the policy is prepared taking IRS code section 482 into account.
- The US 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.
- No other conditions exist that may affect the acceptance of the transfer price by CBP.

CBP further stated in HQ W548314 that importers that want to apply the transaction value method where post-importation transfer pricing adjustments are made "are strongly encouraged" to use reconciliation to report the post-importation adjustments to CBP. Reconciliation allows an importer to file entry summaries with CBP with the best available information at the time of importation, and with the mutual understanding that certain elements, such as the declared value, remain outstanding. When the declared value is later determinable, the importer may file a reconciliation that provides the final and correct information.

Note that the above five factors address the "payable" aspect of the price actually paid or payable in transaction value, and whether post-importation adjustments are to be taken into account in determining transaction value. In order for transaction value to be considered an acceptable basis of appraisal, related parties must still separately demonstrate either that: (i) the circumstances of sale indicate that the relationship did not influence the price; or (ii) the transaction value of the imported merchandise closely approximates certain test values.

In order to benefit from CBP's policy change, importers should take steps to:

- Identify potential duty savings in the form of potential downward post-importation adjustments to the customs value.
- Apply to participate in CBP's reconciliation program in order to revise customs value to account for post-importation adjustments.
- Review their current customs valuation methodology to ensure they are in compliance with CBP requirements.

A copy of HQ W548314 may be viewed [here](#). Please let us know if you have any questions.

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