areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 8, 2007.

The Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians located within Coos County for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–1231 Filed 1–23–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2008–0001]

Notice of Meeting of the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Homeland Security Functions (COAC)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Departmental Advisory Committee on Commercial Operations of U.S. Customs and Border Protection and Related Homeland Security Functions (popularly known as ''COAC'') will meet on February 13, 2008 in Tucson, AZ. The meeting will be open to the public.

DATES: COAC will meet Wednesday, February 13th from 1 p.m. to 5 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held at the JW Marriott Starr Pass Resort & Spa, 3800 W. Starr Blvd., Tucson, AZ 85745. Written material and comments should reach the contact person listed below by February 7th. Requests to have a copy of your material distributed to each member of the committee prior to the meeting should reach the contact person at the address below by February 7, 2008. Comments must be identified by USCBP–2008–0001 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: traderelations@dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–344–2064.
- *Mail:* Ms. Wanda Tate, Office of International Affairs and Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, Room 8.5C, Washington, DC 20229.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the COAC, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Wanda Tate, Office of International Affairs and Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, 1300 Pennsylvania Ave., NW., Room 8.5C, Washington, DC 20229; *traderelations@dhs.gov*; telephone 202–344–1440; facsimile 202–344–2064.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C., app.), DHS hereby announces the meeting of the Departmental Advisory Committee on Commercial Operations of U.S. Customs and Border Protection and Related Homeland Security Functions (COAC). COAC is tasked with providing advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within DHS or the Department of the Treasury.

The fifth meeting of the tenth term of COAC will be held at the date, time and location specified above. A tentative agenda for the meeting is set forth below.

Tentative Agenda

1. Secure Freight Initiative/Advance Trade Data (10+2).
2. International Container Security.
3. C–TPAT (Customs-Trade Partnership Against Terrorism).
4. ITDS (International Trade Data System).
5. International Trade Issues/Updates.
6. Import Safety.
7. Intellectual Property Rights.
8 . World Customs Organization Updates.

Procedural

This meeting is open to the public. Please note that the meeting may close early if all business is finished.

Participation in COAC deliberations is limited to committee members, Department of Homeland Security officials, and persons invited to attend the meeting for special presentations.

All visitors to the hotel must check-in with CBP officials at registration held in the lobby at the JW Marriott Starr Pass Resort & Spa. Since seating is limited, all persons attending this meeting should provide notice, preferably by close of business Thursday, February 8, 2008, to Ms. Wanda Tate, Office of Trade Relations, U.S. Customs and Border Protection, Department of Homeland Security, Washington, DC 20229, telephone 202–344–1440; facsimile 202–344–2064.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Wanda Tate as soon as possible.

Dated: January 18, 2008.

Michael C. Mullen,

Assistant Commissioner, Office of International Affairs and Trade Relations, U.S. Customs and Border Protection.

[FR Doc. E8–1214 Filed 1–23–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

[USCBP–2007–0083]

Proposed Interpretation of the Expression ''Sold for Exportation to the United States'' for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed interpretation; solicitation of comments.

SUMMARY: ''Transaction value'' is the primary method of appraising imported merchandise and is defined in 19 U.S.C. 1401a as ''the price actually paid or payable for merchandise when sold for

exportation to the United States,'' plus specified additions to that amount. This document provides notice to interested parties that Customs and Border Protection (CBP) proposes a new interpretation of the phrase ''sold for exportation to the United States'' for purposes of applying the transaction value method of valuation in a series of sales importation scenario. CBP proposes that in a transaction involving a series of sales, the price actually paid or payable for the imported goods when sold for exportation to the United States is the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale. Under this proposal, transaction value will normally be determined on the basis of the price paid by the buyer in the United States. This proposed interpretation reflects the conclusions of the Technical Committee on Customs Valuation as set forth in Commentary 22.1, entitled *''Meaning of the Expression 'Sold for Export to the Country of Importation' in a Series of Sales.''*

DATES: Comments must be received on or before March 24, 2008.

ADDRESSES: You may submit comments, identified by docket number USCBP 2007–0083, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP 2007–0083.
- *Mail:* Trade and Commercial Regulations Branch, Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

Instructions: All submissions received must include the agency name and docket number for this proposed interpretive rule. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade, (202) 572–8740.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to submit written data, views, or arguments on all aspects of the proposed interpretation. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed interpretation, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

I. Transaction Value—The Valuation Agreement and U.S. Value Law

The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) (Valuation Agreement) sets forth the methods for determining the value of imported goods.[1] The General Introductory Commentary to the Valuation Agreement provides that the primary basis for customs value is ''transaction value'' as defined in Article 1. Article 1 provides that the customs value of imported merchandise ''shall be the transaction value, that is the price actually paid or payable for the goods when *sold for export to the country of importation,* adjusted in accordance with the provisions of Article 8. * * *'' [Emphasis added] The Agreement does not define the phrase ''sold for export to the country of importation.''

Under the U.S. value law, set forth at 19 U.S.C. 1401a, transaction value is also the primary method of determining the appraised value.[2] The U.S. value law substantively incorporates the definitions of ''transaction value'' and ''price actually paid or payable'' contained in the Valuation Agreement. The statutory additions that form part of transaction value are the ones provided for in Article 8 of the Valuation Agreement. Neither 19 U.S.C. 1401a, nor the implementing regulations set forth in part 152 of title 19 of the Code of Federal Regulations (19 CFR part 152), defines the phrase ''sold for exportation to the United States.''

II. Determining Transaction Value in a Series of Sales Situation

When the import transaction involves only one sale, it is generally easy to identify the sale for exportation to the United States for purposes of determining the price actually paid or payable. In that situation, there is only one buyer, usually located in the United States, and one seller, usually located in another country. Difficulties arise when the import transaction involves a series of sales.

Since it is common for import transactions to involve multiple parties and multiple sales, the issue of which sale must be used to calculate the price actually paid or payable arises frequently. Although this series of sales issue is critical to the proper determination of transaction value, the statute does not explicitly address this question.

CBP's current interpretation is to base transaction value on the price paid by the buyer in the first or earlier sale (*e.g.*, the sale between the manufacturer and the intermediary) provided the importer can establish by sufficient evidence that this was an arm's length sale and that, at the time of such sale, the merchandise was clearly destined for exportation to the United States. *See* T.D. 96–87, vols. 30/31 Cust. B. & Dec. Nos. 52/1 (January 2, 1997); Customs Informed Compliance Publication, entitled *Bona Fide Sales and Sales for Exportation to the United States,* and; numerous CBP rulings.[3] Application of this ''first-sale'' principle often results in the transaction value being determined on the basis of the price paid by a foreign buyer to a foreign seller. CBP has reassessed this current interpretation in light of a recent decision issued by the Technical Committee on Customs Valuation.

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[1] This Agreement was one of the codes resulting in 1979 from the Multilateral Trade Negotiations in GATT and provides a detailed set of valuation rules. These rules expanded and gave greater precision to the general valuation principles established in the GATT. The United States enacted the provisions of this Agreement into U.S. law in the Trade Agreements Act of 1979 (TAA), Public Law 96–39, 93 Stat. 144, codified at 19 U.S.C. 1401a. *See also* 19 U.S.C. 2503(a) and (c)(1). As a result of the 1994 Agreement establishing the World Trade Organization (WTO), the Agreement on Implementation of Article VII of the GATT is now commonly referred to as the WTO Valuation Agreement. For ease of reference, this document will refer to this Agreement as the Valuation Agreement. All Members of the WTO are required to implement and apply the provisions of the Valuation Agreement.

[2] Transaction value is the price actually paid or payable for the merchandise when sold for exportation to the United States plus specified amounts. *See* 19 U.S.C. 1401a(b)(1).

[3] The informed compliance publication, as well as customs rulings issued since 1989, are available to the public for downloading from the CBP Web site at *http://www.customs.gov.*

III. Technical Committee on Customs Valuation: Commentary 22.1, Meaning of the Expression ''Sold for Export to the Country of Importation'' in a Series of Sales

Article 18 of the Valuation Agreement established the Technical Committee on Customs Valuation (Technical Committee) ''with a view to ensuring, at the technical level, uniformity in interpretation and application of this Agreement''.[4] One of the responsibilities of the Technical Committee is to furnish information and advice on matters concerning the valuation of imported goods for customs purposes, as may be requested by any WTO Member or the Committee on Customs Valuation. The advice may take the form of advisory opinions, commentaries or explanatory notes (referred to collectively as instruments). At its 24th Session held at the WCO in April, 2007, the Technical Committee adopted Commentary 22.1, entitled *''Meaning of the Expression 'Sold for Exportation to the Country of Importation' in a Series of Sales.''*[5] The series of sales issue had been on the agenda of the Technical Committee for several sessions. Recognizing that this issue is important to the proper application of the transaction value method under Articles 1 and 8, and that different administrations have adopted different interpretations, the Technical Committee decided to study and clarify this issue.[6]

In Commentary 22.1, the Technical Committee states, ''[a] series of sales consists of two or more successive contracts for sales of goods. A basic issue in a series of sales is which sale should be used to determine the transaction value under Articles 1 and 8 of the Agreement. The purpose of this document is to clarify this issue.''

The Commentary includes an example illustrating a series of sales situation. In the example, A is a retail store located in the country of importation, B is a pen distributor located in country Z, and C is a pen manufacturer located in country X. A contracts with B for the purchase/sale of 1,000 pens of styles xx and yy. B contracts with C for the same amounts and styles of pens. C subsequently ships the pens directly to A. One of the questions posed was whether the price actually paid or payable for the imported goods when sold for export to the country of importation is the price A pays B in the last sale or the price B pays C in the first sale.

In the section of Commentary 22.1 entitled, *''Guidance derived from the provisions of the Agreement,''* the Technical Committee notes that the Agreement does not define or otherwise directly address the meaning of the expression ''sold for export to the country of importation.'' Therefore, the Technical Committee analyzes in great detail various provisions of the Agreement for guidance regarding the meaning of this phrase, including, for example, Article 8 relating to the adjustments that must be made to the price actually paid or payable in the determination of transaction value.

On the basis of this analysis, and in consideration of the fact that different countries' administrations may find it difficult to verify relevant information including accounting records that relate to the first sale, the Technical Committee reached the following conclusions:

> The Technical Committee is of the view that the underlying assumption of Article 1 is that normally the buyer would be located in the country of importation and that the price actually paid or payable would be based on the price paid by this buyer. The Technical Committee concludes that in a series of sales situation, the price actually paid or payable for the imported goods when sold for export to the country of importation is the price paid in the *last sale* occurring prior to the introduction of the goods into the country of importation, instead of the first (or earlier) sale. This is consistent with the purpose and overall text of the Agreement. [Emphasis added]
>
> In the example, consistent with the conclusion, the sale between A and B represents such a sale. Therefore, the price actually paid or payable for the imported goods when sold for export to Country I is 10,000 c.u. (the price A pays B in the last sale).

In view of the fact that CBP's current interpretation of the expression ''sold for exportation to the United States'' for purposes of applying the transaction value method of valuation in a series of sales situation is contrary to the considered views of the Technical Committee, as reflected in Commentary 22.1, CBP has undertaken a thorough examination of this series of sales issue under the U.S. value law. Based on this examination, CBP has concluded that the current interpretation as set forth in T.D. 96–87 and in CBP ruling letters is not correct. The reasons for this conclusion are discussed below. CBP is proposing a new interpretation to address how transaction value will be determined in a series of sales situation that is consistent with the conclusions of the Technical Committee in Commentary 22.1.

CBP further notes its understanding that most WTO Members already apply the interpretation set forth in Commentary 22.1. Therefore, adoption of the proposed interpretation would conform the U.S. interpretation regarding the application of transaction value in a series of sales to the current interpretation of most other WTO Members.

Discussion of Proposed Interpretation

I. Transaction Value—Statutory Language

Transaction value is derived from the price the buyer actually paid the seller for the imported merchandise. In this regard, the current statute directs 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.'' [Emphasis added] *See* 19 U.S.C. 1401a(b)(1) and 19 CFR 152.103(b). The term ''price actually paid or payable'' means the total payment made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller. *See* 19 U.S.C. 1401a(b)(4)(A) and 19 CFR 152.102(f). In determining transaction value, various costs must be added to the price actually paid or payable, to the extent they are not already included. *See* 19 U.S.C. 1401a(b)(1)(A)–(E).[7] These additions form an integral part of transaction value. If sufficient information is not available with respect to any of the specified amounts, the transaction value of the imported merchandise concerned will be treated, for purposes of this section, as one that cannot be determined. *See* 19 U.S.C. 1401a(b)(1). The statute also specifies certain limitations on the use of transaction value. For example, a related party transaction value is acceptable if it ''closely approximates * * * the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated *buyers in the United States* * * *.'' [Emphasis added] *See* 19 U.S.C. 1401a(b)(2)(B)(i).[8]

[4] Article 18 established the Technical Committee under the auspices of the Customs Cooperation Council, now known as the World Customs Organization (WCO). The WCO publishes the instruments of the Technical Committee in the Customs Valuation Compendium. Article 18 also established the Committee on Customs Valuation.

[5] Commentary 22.1 was published in July, 2007, as part of Amending Supplement 6, WCO Customs Valuation Compendium. A copy is included as ''Attachment A'' to this document.

[6] The Technical Committee asked Members to provide information about how each Administration addressed the series of sales issue. In response, the U.S. Administration submitted a copy of T.D. 96–87.

[7] These additions are listed in footnote 11 of this document.

[8] The various methods of establishing that a related party transaction value is acceptable are specified in 19 U.S.C. 1401a(b)(2)(B).

II. Transaction Value—Legislative History

Prior to the enactment of the TAA, imported merchandise was appraised, in general, on its export value.[9] Verification of facts in the country of export was frequently required to determine export value. The legislative history of the TAA makes it clear that Congress intended to replace the complicated ''export value'' system requiring investigations into the pricing practices in a foreign country with one in which the requisite information was easily obtainable and the determination of the appraised value was predictable and straightforward. *See* S. Rep. No. 96–249 and H. Rep. No. 96–317 to accompany H.R. 4537, 96th Cong. 1st Sess. (1979).

> The methods of valuation * * * represent a simplification of U.S. law and add significantly more predictability regarding the value which will be used for customs purposes. The use of transaction value as the primary basis for customs valuation will allow use of the price which the buyer and seller agreed to in their transaction as the basis for valuation, rather than having to resort to the more difficult concepts of ''freely offered,'' ''ordinary course of trade,'' ''principal markets of the country of exportation,'' and ''usual wholesale quantities'' contained in existing U.S. law.
>
> S. Rep. No. 96–249, at 119.
>
> An attempt has been made to ensure that these new rules are fair and simple, conform to commercial reality, and allow traders to predict, with a reasonable degree of accuracy, the duty that will be assessed to their products.
>
> *H. Rep. No. 96–317, at 79.*

The Court of Appeals for the Federal Circuit (CAFC) quoted the Senate Report language with approval in *Generra Sportswear Co.* v. *United States,* 905 F.2d 377, 380 (Fed. Cir. 1990). In *Generra,* the CAFC also indicated that the transaction value statute was enacted in order to provide a ''straightforward approach'' to valuation that would not require Customs to engage in ''formidable fact-finding.'' *See also VWP of America* v. *Untied States,* 175 F.3d 1327 (Fed. Cir. 1999).

In *Salant* v. *United States,* 86 F. Supp. 2d 1301 (C.I.T. 2000), a case involving the interpretation of the assist provision (assists are one of the additions to the price actually paid or payable), the Court of International Trade (CIT) indicated that the legislative history of the U.S. value law includes an examination of the GATT Valuation Code (Valuation Agreement) noting that 19 U.S.C. 1401a implemented the Agreement in the U.S. law.

It is therefore appropriate to examine the analysis of this issue by the Technical Committee. To that end, it is noted that the Technical Committee stated in Commentary 22.1:

> Article 1 does not refer to import transactions involving a series of sales and consequently does not provide criteria in that respect. Therefore, guidance must be sought from the purpose and the overall text of the Agreement, including an examination of its provisions. In addition, certain practical considerations are relevant.

Accordingly, the Technical Committee undertook a detailed examination of the Agreement. This examination included the General Introductory Commentary, the text, and interpretative notes to Articles 1, 6, 7, 8, and 9. The Technical Committee concluded that ''there are various indications in the General Introductory Commentary, Article 1 and other provisions of the Agreement that it was envisaged that Article 1 would normally be based on sales to buyers in the country of importation.''[10] Two of these indications, Article 8 regarding adjustments and Article 7 regarding the fallback method, are discussed below.

In paragraphs 14–20, Commentary 22.1, the Technical Committee analyzes the adjustments that must be made to the price actually paid or payable pursuant to Article 8. The Technical Committee observes that the determination of the proper sale upon which transaction value is based under Article 1 (*i.e.*, the first or last sale) directly affects what adjustments can be made under Article 8. Article 8 requires the addition of specified costs, including certain commissions *incurred by the buyer,* certain goods and services (referred to as assists under U.S. law) *supplied by the buyer,* certain royalties and license fees *paid by the buyer* and certain proceeds that *accrue to the seller.* Because these costs must be *incurred by the buyer, supplied by the buyer, paid by the buyer* or must *accrue to the seller,* the Technical Committee observes that ''in many cases it would not be possible to make the Article 8 adjustments if transaction value was determined based on (the price actually paid or payable by the buyer in) the first sale'', a result that was not intended. Based on the provisions of Article 1, Article 8, and the General Introductory Commentary, the Technical Committee states that ''the Article 8 adjustments are intended to fully reflect the substance of the entire transaction'' and that ''it is essential to apply transaction value in a series of sales situation in a manner that takes into account the substance of the entire commercial import transaction and permits the proper application of Article 8.'' The Technical Committee concludes that this occurs when transaction value is based on the last sale rather than the first sale:

> . . . [F]or example, under Article 8.1(a) and (c), selling commissions or royalties and license fees, are only to be included in the Customs value where they are incurred or paid *by the buyer.* Similarly, under Article 8.1(b), *the buyer* must supply the assist. In a series of sales, a buyer who is located in the country of importation would rarely be the buyer in the first sale. (Paragraph 17)
>
> Moreover, in a series of sales, the buyer in the first sale is not necessarily the party who pays the royalties or provides the assists. Therefore, the application of the first sale may preclude the addition of certain selling commissions, royalties and assists that otherwise would be included in the transaction value. Similarly, under Article 8.1(d), only proceeds that accrue directly or indirectly *to the seller* may be added to the price actually paid or payable. Proceeds paid by the buyer in the country of importation would not necessarily revert to the seller in the first sale. (Paragraph 18)
>
> In sum, a transaction value based on the first sale may not fully reflect the substance of the inputs resulting from, or forming part of the entire commercial chain as envisioned by the General Introductory Commentary, and Articles 1 and 8. In contrast, a transaction value based on the last sale will more fully reflect the substance of the entire transaction as envisioned. (Paragraph 21)

As indicated above, Article 8 is implemented in U.S. law in 19 U.S.C. 1401a(b)(1)(A)–(E). These provisions are substantively the same as Article 8 and include these same references to costs incurred by or paid by the buyer or proceeds that accrue *to the seller.*[11]

[9] Export value was defined as the ''price, *at the time of exportation* to the United States * * * at which such or similar merchandise is *freely sold or,* in the absence of sales, *offered for sale in the principal markets of the country of exportation,* in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States.'' [Emphasis added] 19 U.S.C. 1401a(b) (1976) and 19 U.S.C. 1402(d) (1976). The ''export value'' statute required an appraisement based on sales in the country of exportation at the time of the exportation, *i.e.*, the value of ''exported merchandise.''

[10] These are addressed in detail in Commentary 22.1. *See* ''Attachment'' to this document

[11] The additions under 19 U.S.C. 1401a(b)(1) include:

(A) The packing costs *incurred by the buyer* with respect to the imported merchandise;

(B) Any selling commission *incurred by the buyer* with respect to the imported merchandise;

(C) The value, apportioned as appropriate, of any assist; (An assist is defined as specified items if *supplied* directly or indirectly, and free of charge or at reduced cost, *by the buyer* of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise)

(D) Any royalty or license fee related to the imported merchandise that *the buyer* is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the Untied States; and

Continued

Therefore, the above considerations would also apply to the U.S. law. This means that the series of sales issue has a direct impact on the additions that can be made under 19 U.S.C. 1401a(b)(1)(A)–(E). In fact, CBP has encountered many situations where certain royalties, selling commissions or other required statutory additions could not be included in the transaction value due to the application of the first sale principle.

After analyzing various provisions of the Valuation Agreement that directly relate to the determination of transaction value under Article 1 (*i.e.*, the General Introductory Commentary, Article 1, Article 8, and the Note to Article 8), Commentary 22.1 refers to other provisions of the Valuation Agreement for further guidance (*i.e.*, Articles 6, 7 and 9). For example, in paragraph 23, the Technical Committee refers to the text of Article 7 (commonly referred to as ''the fallback method'') and finds indications therein that Article 1 was intended to be determined on the basis of the last sale, instead of the first (or earlier) sale. The fallback method is used when transaction value (Article 1) and the other methods of valuation (Articles 2–6) cannot be applied to determine the value. Paragraph 23 states:

> As provided in paragraph 2 of the Note to Article 7, the methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but with a reasonable flexibility. However, Article 7 indicates that this flexibility does not extend to allow the use of certain prices, including ''the price of goods on the domestic market of the country of exportation'' (*see* Article 7.2). This gives a clear indication of the intended scope of Article 1, namely that a sale that is prohibited under a flexible application of Article 1 cannot possibly be considered as valid under the normal application of Article 1. In a series of sales situation, the first sale often involves a sale between a producer and a local distributor in the same country. Clearly, these sales cannot be used to determine the Customs value under Article 7. It follows that such sales should also not be used to determine the value under Article 1.

The provisions of Article 7, including its prohibitions, are implemented in U.S. law in 19 U.S.C. 1401a(f).[12] CBP is of the view that these same observations can be made on the basis of 19 U.S.C. 1401a(f). CBP has also observed many instances where the first sale is between a manufacturer and distributor each located in the country of exportation (*e.g., see E.C. McAfee Co.* v. *United States,* 842 F.2d 314 (Fed. Cir. 1988), discussed below). The fact that Congress expressly prohibited the use of these sale prices under the fallback method (which permits a flexible application of the other statutory methods) provides a good indication that Congress assumed that these sale prices would not be used to determine transaction value. This anomaly does not arise when transaction value is determined on the basis of the last sale.

Based on its examination of all the provisions of the Valuation Agreement, and the Agreement's underlying purpose, the Technical Committee stated that it is of the view that the underlying assumption of Article 1 is that normally the buyer would be located in the country of importation and that the price actually paid or payable would be based on the price paid by this buyer. The Technical Committee therefore concluded that in a series of sales situation the price actually paid or payable is the price paid in the last sale occurring prior to the introduction of the goods into the country of importation, rather than the first, or earlier, sale.

Although Congress also did not explicitly address the series of sales issue in the U.S. value law, based on an examination of all the provisions of 19 U.S.C. 1401a and the legislative history, CBP is of the view that the underlying assumption of transaction value was that normally the buyer would be located in the United States and that the price actually paid or payable would be based on the price paid by this buyer. In light of the concerns expressed about export value (*i.e.*, that it was a complex valuation system that required foreign inquiries in order to determine the value), CBP is of the view that had Congress intended that under the transaction value statute the price actually paid or payable ought to be the price paid by a buyer in the first sale (usually a buyer located outside the U.S.) or that the required additions ought to be based on the costs incurred by that buyer in the first sale, it would have so provided. CBP also maintains that if Congress had intended that transaction value would be determined on the basis of a domestic sale in the country of exportation, it would not have included this prohibition under a flexible application of transaction value under the fallback method.

CBP is of the view that basing transaction value on the last sale occurring prior to the introduction of the goods into the United States reflects the proper construction of the statute and carries out the legislative intent of the TAA. In addition, it establishes a straightforward rule for determining transaction value in a series of sales situation that does not require CBP to engage in formidable fact-finding or to conduct foreign inquiries. This new approach will enable traders to predict with a reasonable degree of accuracy the customs value based on information readily available in the U.S. In addition, this proposal is consistent with the provisions and purpose of the Valuation Agreement, as clarified by the Technical Committee.

III. Court Decisions on Series of Sales Issue

A. Early court decisions and the invocation of the export value statute.

Two early court cases that considered the series of sales issue under the transaction value statute were *E.C. McAfee Co.* v. *United States,* 842 F.2d 314 (Fed. Cir. 1988) and *Nissho Iwai American Corp.* v. *United States,* 982 F.2d 505 (Fed. Cir. 1992).

E.C. McAfee Co. v. *United States* involved the importation of made-to-measure suits. The U.S. purchaser ordered the suits from a Hong Kong distributor who then contracted with a tailor in Hong Kong to assemble the clothing. After receiving the completed clothing from the tailor, the Hong Kong distributor delivered the clothing to the freight forwarder for transport to the United States and the purchaser in the U.S. The issue presented was whether transaction value should be determined on the basis of the price the U.S. purchaser paid to the distributor or the lower price the distributor paid to the Hong Kong tailor who assembled the clothing.

Although the transaction value statute applied to the importations at issue in *McAfee*, the CAFC concluded that it was necessary to follow the judicial precedents decided under the prior export value statute. The court adopted Customs' reasoning that the export value decisions were applicable to the issue presented because the phrase ''for exportation to the United States'' in the old export value statute ''is not significantly different from the quoted provision of the current statute.''

(E) The proceeds of any subsequent resale, disposal, or use of the imported merchandise that *accrue*, directly or indirectly, *to the seller.* [Emphasis added]

[12] 19 U.S.C. 1401a(f)(1) states: If the value of imported merchandise cannot be determined, or otherwise used for the purposes of this Act, under subsections (b) through (e), the merchandise shall be appraised for the purposes of this Act on the basis of a value that is derived from the methods set forth in such subsections, with such methods being reasonably adjusted to the extent necessary to arrive at a value. 19 U.S.C. 1401a(f)(2)(C) states: Imported merchandise may not be appraised, for the purposes of this Act, on the basis of the price of merchandise in the domestic market of the country of exportation.

McAfee 842 F.2d 314, 318.[13] The *McAfee* Court reasoned:

> The cited [export value] cases assume, without explanation, that if the importer establishes that his claimed, lower valuation falls within the statute, the importer is entitled to the benefit of that valuation even though Customs valuation also satisfies the same statutory requirements. While an argument could be made that Customs should have the option to impose the higher duty in such circumstances, the cited precedent is to the contrary. [Parenthetical added]
>
> *McAfee* at 318.[14]

The CAFC primarily relied on *United States* v. *Getz Bros. & Co,* 55 C.C.P.A 11 (1967) and other cases decided under the export value statute in finding that the price actually paid or payable must be based on the price the Hong Kong distributor paid to the Hong Kong tailor. It is noteworthy that *McAfee* did not take into account any of the new language in the transaction value statute or the legislative history of 19 U.S.C. 1401a.

The CAFC subsequently considered another series of sales situation in *Nissho Iwai American Corp.* v. *United States,* cited above, which involved imported subway cars. The issue presented was whether transaction value should be determined using the price the U.S. customer paid to the intermediary or the price the intermediary's parent company paid to the manufacturer. Relying on the analysis in *McAfee,* and the export value case law cited therein regarding the phrase ''for exportation to the United States,'' the CAFC determined that transaction value must be based on the ''first sale;'' that is, the sale between the intermediary and the manufacturer so long as that sale constitutes a viable transaction value.[15]

The court in *Nissho Iwai* utilized a two-prong test for determining whether the ''first-sale'' was a viable transaction value: The sale must be an arm's length sale and the goods must be clearly destined for export to the U.S. Based on the facts presented, the CAFC determined that these criteria were met and held that the custom-made subway cars at issue must be appraised based on the price the intermediary paid the manufacturer.

In *Synergy Sport International, Ltd.* v. *United States,* 17 C.I.T. 18 (1993), another transaction value case involving a series of sales that was decided shortly after *Nissho Iwai,* the CIT applied the reasoning in *Nissho Iwai* and concluded that the imported garments at issue should be appraised based on the price the intermediary paid to the manufacturer. The CIT stated that there was no allegation that the sale was not an arm's length sale and determined that the garments were clearly destined for export to the United States by virtue of the labels the manufacturer was required to place on the garments.[16]

Thus, the early court decisions that required transaction value to be determined on the basis of the price actually paid or payable in the first sale are based primarily on case law decided under the prior export value law and the similarity of some language from the export value law.

B. Recent Decisions Departing From the Statutory Analysis in Prior Court Cases on Series of Sales

More recently, the CAFC again had occasion to consider the relevance of certain court decisions decided under the prior export value law to the application of the transaction value statute. In *VWP of America, Inc.* v. *United States,* 175 F.3d 1327 (Fed. Cir. 1999), the CAFC held that the prior export value case law cannot properly account for the significant differences between the two statutes, citing *Generra,* which quoted from S. Rep. No. 96–249, as discussed above:

> In *Generra Sportswear Co.* v. *United States,* 905 F.2d 377, 380 (Fed. Cir. 1990), we referred to ''the critical difference'' between ''export value'' under pre-1979 law and ''transaction value'' under the present statute. In that context, we quoted with approval material from legislative history of the Trade Agreements Act: The use of transaction value as the primary basis for customs valuation will allow use of the price which the buyer and seller agreed to in their transaction as the basis for valuation, rather than having to resort to the more difficult concepts of ''freely offered,'' ''ordinary course of trade,'' ''principal markets of the country of exportation,'' and ''usual wholesale quantities'' contained in existing U.S. law.
>
> [a]s the Court of International Trade itself recognized, *Getz* and *Bjelland* were decided under the export value statute, which was repealed in 1979. In determining that transactions between [the parties] were not viable, the court applied incorrect standards, specifically, standards relevant under the now superseded export value statute. The correct standards are those set forth in the provisions of 19 U.S.C. 1401a discussed above.
>
> *VWP of America, Inc.* v. *United States* at 1334.

The substantial differences between export value and transaction value were also noted by the CIT in *Moss Manufacturing Co., Inc.* v. *United States,* 714 F. Supp. 1223 (C.I.T. 1989), *aff'd,* 896 F.2d 535 (Fed. Cir. 1990).

In light of the decisions in *VWP* and *Moss,* CBP is of the view that notwithstanding the fact that the export value and transaction value statutes each contain the phrase ''for exportation to the United States,'' the two statutes are substantially different. Therefore, the analysis of the series of sales issue under the transaction value statute should be based on a full analysis of the provisions of 19 U.S.C. 1401a and its legislative history, rather than on the only common wording found in both statutes and the cases decided under the export value statute.

IV. Difficulties in Administering the First Sale Principle in a Series of Sales

The application of the first-sale principle for transaction value in a series of sales requires considerable review of the specific facts and documentation presented. For example, determining whether fungible goods are clearly destined to the U.S. when they are sold to the intermediary is never clear-cut, especially when the merchandise is shipped to a foreign

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[13] The merchandise at issue in *McAfee* was addressed by CBP (formerly the U.S. Customs Service) in TAA #10/065056, entitled ''*Export Value: Dutiability of Sales from Manufacturers to Distributors*'' Customs Service Decision 81–72, 15 Cust. B. & Dec. 876, Oct. 17, 1980. In this ruling, CBP concluded that case law decided under the export value statute was also applicable to the interpretation of the transaction value statute, noting that both statutes include the language ''for exportation to the United States.'' CBP is now of the view that this conclusion was erroneous because CBP relied on the only phrase common to both statutes and did not take into account the remainder of the new statutory text that reflects the significant analytical change that Congress intended. (TAA #10 was subsequently revoked by an unpublished ruling, TAA #40/542643, October 19, 1981 due to discrepancies in the facts presented).

[14] CBP issued a general notice indicating that the holding of *McAfee* is limited by the language of the court to the facts of that particular case. According to the notice, the principles set forth within the court case should only be applied to the importation of made-to-measure clothing and only in situations where the distributor and tailor are located in the same country. *See* 22 Cust. B. & Dec. No. 18, 7–8 (May 4, 1988).

[15] In *Nissho Iwai,* the imported merchandise consisted of subway cars custom manufactured for the New York City Metropolitan Transit Authority (MTA). The MTA contracted with Nissho Iwai American Corporation (NIAC) for subway cars made according to its specifications. NIAC assigned its contract rights to its Japanese corporate parent, Nissho Iwai Corporation (NIC), and NIC contracted with the manufacturer, Kawasaki Heavy Industries (Kawasaki), for the subway cars. Kawasaki was directly involved in the negotiations and sale between MTA and NIAC and was named as the manufacturer in the MTA–NIAC contract. The custom-made subway cars manufactured by Kawasaki were imported by NIAC.

[16] That case involved garments imported by Synergy, a Hong Kong company with offices in the United States. Synergy sold the garments to J.C. Penney in the U.S. After J.C. Penney placed its order with Synergy, Synergy placed an order with Chinatex, the Chinese manufacturer. The issue presented was whether the garments should be appraised based on the price J.C. Penney paid to Synergy or on the price Synergy paid to Chinatex.

intermediary prior to the importation into the U.S. For example, the intermediary often sells the same merchandise both to buyers in the U.S. and to buyers in other countries but the claim is made that the inventory records and other evidence establish that the imported merchandise was clearly destined to the U.S. In these cases, CBP must review the inventory records and other evidence in order to evaluate the claim. In other cases, importers claim that the submitted paper trail relating to all the various sales in the series of sales is sufficient to establish that the imported merchandise was destined for a particular U.S. customer. Determining whether the merchandise was clearly destined to the U.S. customer requires a review of all of these documents and extensive fact-finding.

Considerable fact-finding is also necessary to determine whether a particular first sale transaction is a *bona fide* arm's length sale, especially when some or all of the parties involved in the series of sales are related parties or when the series of sales involves more than two sales and when additional parties, such as buying and/or selling agents, are involved in the series of sales transactions. In these cases, before a determination can be made that the first sale represents transaction value, it is necessary to examine the roles of the various parties and whether the claimed first sale is a *bona fide* arm's length sale. If the buyer and seller are related, CBP has to consider whether the relationship between the parties has affected the price. Assuming that a determination has been made that the first sale is an arm's length sale and that the goods are clearly destined to the U.S., additional fact-finding is necessary to determine whether all the statutory additions have been properly reflected.

The first sale principle also presents post-entry audit verification issues. This is due to the fact that the first sale usually involves a foreign sale and CBP does not have easy access to the records, including accounting records, which may be needed for verification purposes. CBP lacks direct access to the books and records relevant to the first sale transaction.[17]

The first-sale principle for determining transaction value also makes it difficult for an importer to meet its obligations under 19 U.S.C. 1484 to use reasonable care to properly declare the value of imported merchandise.[18] The importer's burden increases greatly when an importer declares a transaction value based on the first sale, a sale for which the importer may not have access to all the transaction documents and the surrounding details. In addition, without knowledge of all the particulars surrounding that sale, it is difficult for the importer to attest to the truthfulness of the value declaration as required by 19 U.S.C. 1485(a). For example, it may be impossible to know whether all the applicable statutory additions have been fully and accurately reported.

The proposed interpretation in this document addresses the above concerns by establishing a transparent standard for determining transaction value that is easily applied and based on information available in the United States. Under the proposal, transaction value is based on the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale. This will generally be the price paid by the buyer in the United States. CBP will be better able to verify the accuracy of the declared value when transaction value is based on the last sale. As a result, both CBP and importers will be better able to meet their shared responsibilities with respect to proper customs valuation.

V. Relevance of Technical Committee Commentary 22.1, Meaning of the Expression ''Sold for Export to the Country of Importation'' in a Series of Sales to Interpretation of U.S. Value Statute (19 U.S.C. 1401a)

The courts have previously considered the relevance of the Valuation Agreement as interpreted by the Committee on Customs Valuation to the proper interpretation of 19 U.S.C. 1401a.

Recognizing that 19 U.S.C. 1401a was promulgated specifically to implement the provisions of the Valuation Agreement, both the CAFC and the CIT have noted the importance of interpreting 19 U.S.C. 1401a in a manner consistent with GATT obligations. *See Luigi Bormioli Corp., Inc.* v. *United States,* 304 F.3d 1362 (Fed. Cir. 2002) and *Caterpillar Inc.* v. *United States,* 20 C.I.T. 1169, 941 F. Supp 1241 (CIT 1996). For this same reason, the CIT determined in *Salant,* cited above, that the legislative history of 19 U.S.C. 1401a includes an examination of the Valuation Agreement.

In the *Luigi Bormioli* case, the CAFC relied on a decision by the Committee on Customs Valuation regarding the proper interpretation of transaction value under Article 1 of the Valuation Agreement and under 19 U.S.C. 1401a. In that case, the CAFC considered the validity of T.D. 85–111, which concerned the treatment of interest payments under the transaction value statute. In T.D. 85–111, CBP determined that interest payments are not included in transaction value when the conditions specified therein are satisfied. This decision was issued in order to implement Decision 3.1 of the Committee on Customs Valuation, entitled *''Treatment of Interest Charges in the Customs Value of Imported Goods.''* The court in *Luigi Bormioli* noted that in the background to the document CBP stated, ''the 1994 GATT Committee Decision had prompted Customs to reassess its previous position.'' In upholding T.D. 85–11, the CAFC emphasized the fact that it incorporated the conclusions of the Committee on Customs Valuation in Decision 3.1 regarding the treatment of interest under the Valuation Agreement. It also noted that the Committee decision established a uniform and logical policy regarding the treatment of interest payments and the documentation required, and that such policy was consistent with the U.S. law and with the policy of the U.S. law. In its analysis, the *Luigi Bormioli* Court stated:

> We must first consider whether T.D. 85–111 is consistent with the statute. Although all the detailed criteria of T.D. 85–111 cannot be found in the explicit language of the statute, we think that the statute must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history. See *Fed. Mogul Corp.* v. *United States,* 63 F.3d 1572, 1581 (Fed. Cir. 1990) (''Absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.''). Here there are no such contrary indications. The GATT approach is quite consistent with the statute. Like 19 U.S.C. 1401a(b)(4)(A), the GATT broadly

[17] On December 8, 1993, Title VI (Customs Modernization of ''Mod Act''), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), went into effect. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Under the provisions of the Mod Act and 19 CFR part 163, certain persons are required to maintain specified records pertaining to the import transaction for examination and inspection by CBP (*i.e.*, an owner, importer, consignee, importer of record, and entry filer and other specified persons). Under these provisions, CBP may initiate an investigation or compliance assessment, audit or other inquiry for the purpose of ascertaining the correctness of the entry and insuring compliance with the customs laws. When transaction value is based on the last sale, it is likely that at least one of the parties to that sale would be subject to the recordkeeping requirements and the pertinent information relating to the sale is easily verified by CBP. This is often not the case when transaction value is determined based on the first sale.

[18] Section 484, as amended by the Customs Modernization Act, requires importers to use reasonable care to correctly value and classify entered merchandise. *See* 19 U.S.C. 1484.

defines ''price actually paid or payable.'' See 1994 GATT Interpretive Note. GATT is also consistent with the policy of the statute. The GATT parameters not only provide a uniform method to evaluate when 'interest' charges are included in transaction value, but they also serve to prevent importers from manipulating the amount of duties assessed on particular merchandise by simply designating part of the payment made for that merchandise as ''interest.'' Without a policy that requires both sufficient documentation of the transaction, and evidence of comparable prevailing rates and sales, an importer could easily reduce the ''price actually paid or payable'' of the goods by denominating charges that actually represented a portion of the price of the goods as ''interest.'' *Thus, we construe the statute to make it consistent with GATT.*

Under that construction, T.D. 85–111 is consistent with the statute because it is the same as GATT. In all relevant respects T.D. 85–111 and the 1984 GATT Committee decision set forth the same criteria * * * [Emphasis added]

Luigi Bormioli at 1369.

CBP is of the view that this decision strongly supports an interpretation of 19 U.S.C. 1401a that is consistent with the Valuation Agreement as clarified by the Technical Committee in Commentary 22.1. There are no contrary indications in the statutory language of 19 U.S.C. 1401a or its legislative history. In fact, CBP notes that most of the provisions in 19 U.S.C. 1401a mirror the provisions of the Valuation Agreement. Moreover, the relevant definitions of transaction value and price actually paid or payable and the provisions regarding the additions to be made to the price actually paid or payable under the Valuation Agreement and the U.S. value law are substantively identical. Similar to the circumstances considered in the CAFC's analysis and holding in *Luigi Bormioli,* CBP has reassessed its current position regarding the determination of transaction value in light of a decision issued by a Committee established under Article 18 of the Valuation Agreement and is proposing to adopt that Committee's conclusions. Most important, Commentary 22.1 clarifies the series of sales issue and provides a uniform method for determining transaction value in a series of sales in a manner that CBP believes is consistent with the text and legislative history of the U.S. value law.

Conclusions

I. Proposal for Adoption of Commentary 22.1

For the reasons discussed in this document, CBP proposes to change its current position with regard to the determination of transaction value in a series of sales context and to adopt the conclusions in Commentary 22.1. Specifically, CBP is proposing that in a series of sales situation, the price actually paid or payable for the imported goods when sold for exportation to the United States is the price paid in the last sale occurring prior to the introduction of the goods into the United States, instead of the first (or earlier) sale. The result will be that transaction value is normally determined on the basis of the price paid by the buyer in the United States.

If this proposed interpretation is adopted, it will result in the revocation of T.D. 96–87, the modification or revocation of administrative rulings that have analyzed the series of sales issue using the first-sale criteria, and the revocation of any treatment previously accorded by CBP to substantially identical transactions. In addition, the application of *McAfee, Nissho Iwai* and *Synergy* would be limited to the specific entries at issue in those cases.

II. Application of Proposed Interpretation to U.S. Value Law

In order to facilitate a greater understanding of how the proposed interpretation set forth in this document would apply to U.S. value law, it is useful to examine the proposed interpretation in the context of a series of sales example.

The example, set forth in paragraphs 4–9 of Commentary 22.1 (attached), reflects a common fact pattern addressed in numerous first-sale rulings issued by CBP; namely, the buyer in the country of importation (*i.e.*, the U.S.) begins the series of sales by agreeing to purchase certain items (in this case, pens) according to its specifications from a foreign distributor. The foreign distributor then orders these items from an unrelated manufacturer according to the buyer's specifications and the merchandise is shipped directly from the manufacturer to the buyer in the U.S. The example also presents an issue that often arises in first-sale rulings; namely, whether one or more additions to the price actually paid or payable apply. In the example, the buyer in the country of importation is required to pay certain proceeds of a subsequent resale to the distributor. The issue is whether these proceeds accrue, directly or indirectly, to the seller as provided in 19 U.S.C. 1401a(b)(1)(E).

Based on the facts presented in Commentary 22.1 and the various assumptions made (*e.g.*, all the relevant documentation pertaining to both sales can be produced), the pens in the example would currently qualify for appraisement based on the first sale between the distributor and the manufacturer if they were imported into the U.S. Based on the facts presented, the first sale is an arm's length sale and the pens were always clearly destined to the United States. Under this interpretation, the proceeds of the subsequent resale from the buyer in the U.S. to the distributor could not be included in the transaction value absent evidence that such proceeds accrued directly or indirectly to the seller in the first sale (*i.e.*, the manufacturer).

Under the proposed interpretation, the sale between the buyer in the U.S. and the distributor is the last sale prior to the introduction of the pens into the United States. Therefore, transaction value would be determined based on the price paid by the buyer in the U.S. to the distributor in this last sale. The proceeds of the subsequent resale paid by this buyer accrue directly to the seller in this last sale (*i.e.*, the distributor). Therefore, under the proposed interpretation, these proceeds would be added to the price actually paid or payable pursuant to 19 U.S.C. 1401a(b)(1)(E). Basing transaction value on the sale from the buyer in the U.S. to the foreign distributor is consistent with the statement in Commentary 22.1 that the underlying assumption of Article 1 (transaction value) is that normally the buyer would be located in the country of importation and that the price actually paid or payable would be based on the price paid by this buyer. Basing transaction value on this sale also allows for the inclusion of the applicable additions to the price actually paid or payable, in this case, the proceeds of the subsequent resale.

Solicitation of Comments

CBP will consider written comments timely submitted in accordance with the instructions set forth in the **ADDRESSES** section of this document in its review of the proposed interpretation of the term ''sold for exportation to the United States'' for purposes of applying the transaction value method of valuation in a series of sales importation scenario. Before making this proposed interpretation final, consideration will be given to any written comments timely received on this matter.

Dated: January 17, 2008.

W. Ralph Basham,

Commissioner, U.S. Customs and Border Protection.

Attachment—Meaning of the Expression ''Sold for Export to the Country of Importation'' in a Series of Sales

1. Introduction

1. A series of sales consists of two or more successive contracts for sales of

goods. A basic issue in a series of sales is which sale should be used to determine the transaction value under Articles 1 and 8 of the Agreement. Advisory Opinion 14.1—Meaning of the expression ''sold for export to the country of importation''—does not clarify the meaning of this phrase as applied to a series of sales situation. The purpose of this document is to clarify this issue.

2. As provided in the General Introductory Commentary of the Agreement, the primary basis for Customs value is transaction value. Transaction value is defined in Article 1 as ''the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8''. Price actually paid or payable is defined in the Note to Article 1 as ''the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods''.

3. In a series of sales, it is necessary to establish which of the sales should be taken into account in order to identify the price actually paid or payable for the goods when sold for export to the country of importation. Any series of sales will include a last sale occurring in the commercial chain prior to the introduction of the goods into the country of importation (the last sale) and a first (or earlier) sale in the commercial chain.[1] In the example below, there are two successive contracts for sales of the imported goods, one between importer A and distributor B (the last sale) and another between distributor B and manufacturer C (the first sale).

2. Example Illustrating a Series of Sales Situation

4. A is a retail store located in the country of importation I, B is a pen distributor located in country Z, and C is a pen manufacturer located in country X. There is no relationship between A, B, or C within the meaning of Article 15.4.

5. On July 10, 2004, retailer A contracts with distributor B for the purchase/sale of certain pens. Pursuant to the A–B sales contract:

- A agrees to purchase 1,000 pens from B for 10,000 currency units (c.u.);
- B will provide A with 400 pens of style xx and 600 pens of style yy;
- Each pen will display A's name and address;
- B can obtain the pens from any pen manufacturer in country X;
- The pens will be shipped directly from the manufacturer to A;
- Title will pass from B to A when the pens are boarded on the ship in country X;
- Payment is due within 30 days of shipment;
- A agrees to pay B 20% of the resale price for each pen A sells prior to October 1, 2004.

6. On July 12, 2004, B contracts with manufacturer C for the purchase/sale of certain pens. Pursuant to the B–C sales contract:

- B agrees to purchase 1,000 pens from C for 8,000 c.u.;
- C will provide B with 400 pens of style xx and 600 pens of style yy;
- Each pen will display A's name and address;
- C will ship the pens directly to A;
- Title passes from C to B when the pens leave C's factory;
- Payment is due within 30 days of shipment.

7. On August 10, 2004, C ships the pens to A. On August 20, the pens arrive in country I and A files a Customs entry. On September 1, A pays B 10,000 c.u. On September 5, B pays C 8,000 c.u. Prior to October 1, A sells 400 pens at 15 c.u. each. On October 5, A pays B 1,200 c.u. (20% of A's resale price for pens sold prior to October 1).

8. In this example, the last sale is the one between A and B and the first sale is the one between B and C.

3. Questions

9. Assuming transaction value is the appropriate basis for determining the Customs value of the imported pens, and that A is able to produce all the documentation pertaining to both the A–B and B–C sales (contracts, purchase orders, invoices, payment records):

(1) Is the price actually paid or payable for the imported goods when sold for export to country I 10,000 c.u. (the price A pays B in the last sale) or 8,000 c.u. (the price B pays C in the first sale)?

(2) Should the 1,200 c.u. payment from A to B be added to the price actually paid or payable as ''proceeds of a subsequent resale of the imported goods that accrues directly or indirectly to the seller'' pursuant to Article 8.1(d)?

4. Analysis

Guidance Derived From the Provisions of the Agreement

10. The Agreement does not define or otherwise directly address the meaning of the expression ''sold for export to the country of importation.'' However, it is easy to identify the sale for export to the country of importation that is used to determine transaction value under Article 1 when the import transaction involves only one sale. In that situation, there is only one buyer, usually located in the country of importation, and one seller, usually located in another country.

11. Article 1 does not refer to import transactions involving a series of sales and consequently does not provide criteria in that respect. Therefore, guidance must be sought from the purpose and the overall text of the Agreement, including an examination of its provisions. In addition, certain practical considerations are relevant.

12. As set forth below, there are various indications in the General Introductory Commentary, Article 1 and other provisions of the Agreement that it was envisaged that Article 1 would normally be based on sales to buyers in the country of importation.

13. There is explicit language in Article 1 that reflects the intended scope of Article 1. Pursuant to Article 1.1(a)(i), the Customs value of imported goods shall be the transaction value provided that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which are imposed or required by law or by the public authorities in the country of importation. The emphasized text is a good indication that the underlying assumption of Article 1.1(a)(i) was that the buyer of the goods sold for export to the country of importation would normally be located in the country of importation.[2]

14. The intended scope of Article 1 is also reflected in the provisions regarding the adjustments to the price actually paid or payable. The General Introductory Commentary makes it clear that the proper determination of transaction value depends on the application of Article 1 in conjunction with Article 8. Paragraph 1 of the General Introductory Commentary provides that ''the primary basis for Customs value under the Agreement is 'transaction value' as defined in Article 1''. It further states that ''Article 1 is to be read together with Article 8, which provides, inter alia, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for Customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods.

15. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass

[1] In a series of sales, it is common to refer to the various sales as the last sale and the first (or earlier) sale whether or not these terms are consistent with the chronological order of the sales contracts.

[2] This assumption would not apply if there was no buyer in the country of importation.

from the buyer to the seller in the form of specified goods or services rather than in the form of money.'' [3] If the specified amounts are not already included in the price actually paid or payable, Article 8 requires their addition. In others words, the transaction value method is intended to take account of the substance of the entire commercial import transaction preceding import of the goods, including the economic inputs and related transactions which arise therefrom.

16. Therefore, as mandated by the General Introductory Commentary, it is essential to apply transaction value in a series of sales situation in a manner that takes into account the substance of the entire commercial import transaction and permits the proper application of Article 8.

17. In many cases, it would not be possible to make the Article 8 adjustments if transaction value was determined based on the first sale. For example, under Article 8.1(a) and (c), selling commissions or royalties and licence fees, are only to be included in the Customs value where they are incurred or paid by the buyer. Similarly, under Article 8.1(b), the buyer must supply the assist. In a series of sales, a buyer who is located in the country of importation would rarely be the buyer in the first sale.

18. Moreover, in a series of sales, the buyer in the first sale is not necessarily the party who pays the royalties or provides the assists. Therefore, the application of the first sale may preclude the addition of certain selling commissions, royalties and assists that otherwise would be included in the transaction value. Similarly, under Article 8.1(d), only proceeds that accrue directly or indirectly to the seller may be added to the price actually paid or payable. Proceeds paid by the buyer in the country of importation would not necessarily revert to the seller in the first sale.

19. The example is illustrative. If the transaction value is determined on the basis of the first sale between B and C, C is considered the seller of the imported goods and the proceeds of the subsequent resale from A to B would not be proceeds that accrue directly to the seller. In the absence of evidence that the proceeds accrued indirectly to the seller, such proceeds could not be added pursuant to Article 8.1(d). However, if the transaction value is determined on the basis of the last sale between A and B, B is considered the seller and the proceeds paid to B would fall squarely within the provisions of Article 8.1(d). Under the latter interpretation, the transaction value takes into account the substance of the entire commercial transaction. In contrast, application of the first sale results in a transaction value that does not fully reflect the substance of the entire transaction.

20. In sum, a transaction value based on the first sale may not fully reflect the substance of the inputs resulting from, or forming part of the entire commercial chain as envisioned by the General Introductory Commentary, and Articles 1 and 8. In contrast, a transaction value based on the last sale will more fully reflect the substance of the entire transaction as envisioned.

21. Certain provisions of the Agreement use the terms ''buyer'' and ''importer'' interchangeably. For example, while Article 8.1(a)(i) stipulates that buying commissions incurred by the buyer are not to be added to the price actually paid or payable, the Note to that Article defines the term ''buying commissions'' as ''fees paid by an importer to the importer's agent for the service of representing the importer abroad in the purchase of the goods being valued.'' Also, while Article 8.1(b) stipulates that the value of certain elements supplied by the buyer is to be added to the price actually paid or payable, paragraph 2 of the Note to Paragraph 1(b)(ii) of Article 8 explains the value of the element in relation to the importer. Furthermore, paragraph 4 of that Note provides an illustrative case where an importer is the buyer who supplies the producer with a mould to be used in the production of the imported goods.

22. The Note to Article 6 states that ''as a general rule, Customs value is determined under this Agreement on the basis of information readily available in the country of importation''. This concept is also reflected in Article 7: ''If the Customs value of the imported goods cannot be determined under the provisions of Articles 1 to 6, inclusive, the Customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement * * * and on the basis of data available in the country of importation.'' With respect to the determination of transaction value under Article 1, it is the last sale, rather than the first sale, that will normally satisfy this general rule. As noted, the last sale normally involves a buyer located in the country of importation and information about this sale will usually be more readily available in the country of importation than information about the first sale.

23. As provided in paragraph 2 of the Note to Article 7, the methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but with a reasonable flexibility. However, Article 7 indicates that this flexibility does not extend to allow the use of certain prices, including ''the price of goods on the domestic market of the country of exportation'' (see Article 7.2). This gives a clear indication of the intended scope of Article 1, namely that a sale that is prohibited under a flexible application of Article 1 cannot possibly be considered as valid under the normal application of Article 1. In a series of sales situation, the first sale often involves a sale between a producer and a local distributor in the same country. Clearly, these sales cannot be used to determine the Customs value under Article 7. It follows that such sales should also not be used to determine the value under Article 1.

24. There are also other indications in the Agreement that it was not envisaged that the determination of transaction value would diverge, depending on whether the import transaction involved a single sale or a series of sales. For example, in the General Introductory Commentary, the Members recognize the need for a uniform system of valuation. In a series of sales, determining transaction value based on the last sale addresses this need for uniformity. In a single sale situation, the price actually paid or payable will normally be represented by the price paid by the buyer in the country of importation. If, in a series of sales situation, transaction value is based on the last sale, the result will generally be the same; namely, a transaction value based on the price paid by the buyer in the country of importation. On the other hand, if transaction value is based on the first sale, then the price actually paid or payable will generally be represented by the price paid by a buyer outside the country of importation and the result is a different transaction value.

25. It should also be noted that the Agreement allows Members to apply different treatments in certain cases. In this regard, Article 8.2 specifies that in framing its legislation, each Member shall provide for the inclusion in or the exclusion from the Customs value of certain transportation costs. Article 9 specifies that the currency conversion rate to be used shall be that in effect at the time of exportation or the time of importation, as provided by each Member. Since Article 1 provides no

[3] These goods or services are often referred to as assists.

such choice, the logical conclusion is that the authors envisaged that the resulting transaction value would be the same whether the importation involves a single sale or a series of sales (i.e., transaction value would normally be determined based on the price paid by the buyer in the country of importation). Otherwise, they would have either specified how transaction value should be determined in a series of sales situation or provided an explicit choice to Members.

Practical Consideration

26. In practice, the Customs administration may face difficulties in verifying information, including accounting records, related to the first sale when such information is held by the foreign intermediary or seller. This could include, for example, information and accounting records pertaining to the total payment made by the foreign intermediary to the seller and the Article 8 adjustments. Such difficulties are alleviated when the last sale is applied.

5. Conclusion

27. The Technical Committee is of the view that the underlying assumption of Article 1 is that normally the buyer would be located in the country of importation and that the price actually paid or payable would be based on the price paid by this buyer. The Technical Committee concludes that in a series of sales situation, the price actually paid or payable for the imported goods when sold for export to the country of importation is the price paid in the last sale occurring prior to the introduction of the goods into the country of importation, instead of the first (or earlier) sale. This is consistent with the purpose and overall text of the Agreement.

28. In the example, consistent with the conclusion, the sale between A and B represents such a sale. Therefore, the price actually paid or payable for the imported goods when sold for export to country I is 10,000 c.u. (the price A pays B in the last sale).

29. Accordingly, the 1,200 c.u. payment from A to B represents proceeds of a subsequent resale of the imported goods that accrues directly or indirectly to the seller under Article 8.1(d) that must be added to the price actually paid or payable in determining transaction value.

Com. 22.1
Amending Supplement No. 6—July 2007

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–956–07–1910–4482; Group No. 29, Illinois]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plat of survey; Minnesota.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM-Eastern States, Springfield, Virginia, 30 calendar days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 7450 Boston Boulevard, Springfield, Virginia 22153. Attn: Cadastral Survey.

SUPPLEMENTARY INFORMATION: This survey was requested by the U.S. Army Corps of Engineers.

The lands we surveyed are:

Third Principal Meridian, Illinois

T. 3 N., R. 10 W.

The plat of survey represents the corrective survey of a portion of the Lock and Dam No. 27 Acquisition Boundary in Township 3 North, Range 10 West of the Third Principal Meridian, The State of Illinois, and was accepted December 27, 2007. This corrective survey placed Angle Points Nos. 70 and 71 in their correct positions.

We will place a copy of the plat we described in the open files. It will be available to the public as a matter of information.

If BLM receives a protest against this survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Dated: January 16, 2008.

Joseph W. Beaudin,

Acting Chief Cadastral Surveyor.

[FR Doc. E8–1176 Filed 1–23–08; 8:45 am]
BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–200–1120–DD–241A]

Notice of Public Meeting, Twin Falls District Resource Advisory Council Meeting, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), and the Federal Lands Recreation Enhancement Act of 2004 (FLREA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) will meet as indicated below.

DATES: February 21, 2008. The meeting will start at 8:30 a.m. and end no later than 4 p.m. The public comment period will be from 9:30 a.m. to 10 a.m. The meeting will be held at the Red Lion Canyon Springs Hotel, 1357 Blue Lakes Boulevard, Twin Falls, Idaho, 83301.

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho 83301, (208) 736–2352.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include the following topics: welcome to new members, Field Office updates, energy projects discussion, Twin Falls District fire rehabilitation efforts and planning for upcoming tours for the RAC. Additional topics may be added and will be included in local media announcements. More information is available at *www.blm.gov/id/st/en/res/resource_advisory.3.html*.

All meetings are open to the public. The public may present written comments to the RAC in advance of or at the meeting. Each formal RAC meeting will also have time allocated for receiving public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: January 15, 2008.

Bill Baker,

District Manager.

[FR Doc. E8–1134 Filed 1–23–08; 8:45 am]
BILLING CODE 4310–GG–P