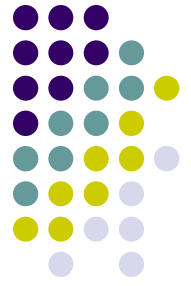
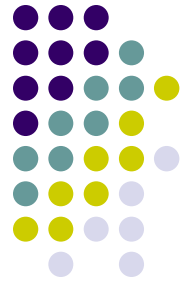




# The “Reasonable Care” Requirement



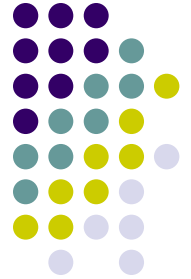
- The Law (19 U.S.C. 1484) requires importers (and their agents) to use “reasonable care” when providing Customs with information regarding:
  - Classification
  - Value
  - Rate of duty
  - Admissibility



# Importance of Correct Customs Values

- Obligation to Report The Correct Value
  - All invoices for imported merchandise are required to set forth . . . "the purchase price of each item . . . ." *19 U.S.C. § 1481(a)(5)*.
  - An importer making an entry . . . must file a declaration under oath stating . . . "the prices set forth in the invoice are true . . . [and that] all other statements in the invoice . . . or in the entry itself, are true and correct . . ." *19 U.S.C. § 1485(a)(2) & (3)*.

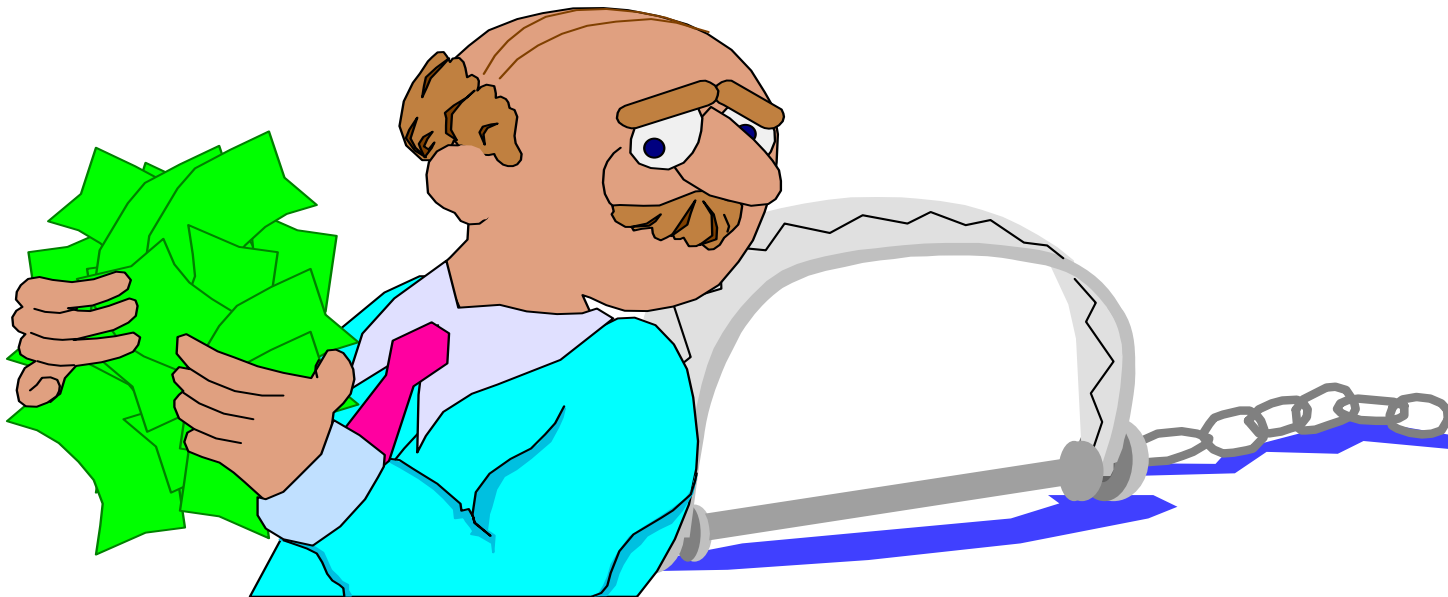
# Importance of Correct Customs Values

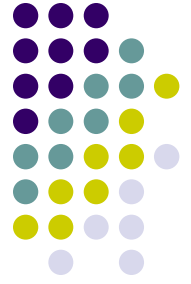


- **19 U.S.C. § 1952**

. . .No person, by fraud, gross negligence, or negligence--(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

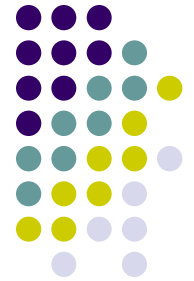
- *(i) any document, written or oral statement, or act which is material and false, or*
- *(ii) an omission which is material . . . .*





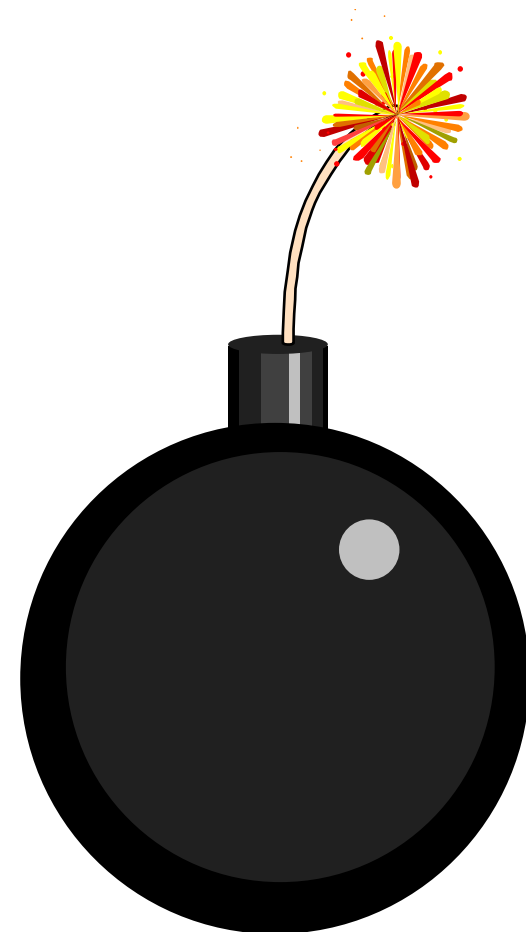
# Materiality of False Statements

- A document, statement, act, or omission is **material** if:
- Has the potential to influence or capability of influencing agency action, including:
  - determination of the classification, appraisement, or admissibility of merchandise (e.g., whether merchandise is prohibited or restricted);
  - determination of an importer's liability for duty (including marking, antidumping, and/or countervailing duty);
  - collection and reporting of accurate trade statistics;
  - determination as to the source, origin, or quality of merchandise;

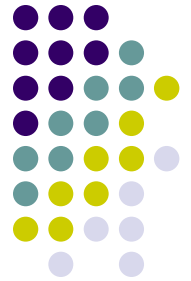


# What is Negligence?

- An act (or omission) done through the failure to exercise the same degree of [reasonable care and competence](#) expected from a person in the same circumstances in:
  - ascertaining the facts or in drawing inferences therefrom,
  - ascertaining the offender's obligations under the statute; or
  - communicating information in a manner so that it may be understood by the recipient.

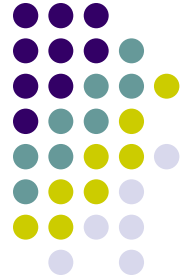


# What is Gross Negligence?



- **Gross negligence** results from acts (or omissions)
  - done with actual knowledge of or wanton disregard for the relevant facts
  - with indifference to or disregard for the offender's obligations under the statute.

# UNITED STATES v. FORD MOTOR COMPANY; *491 F. Supp. 2d 1248 (2007)*



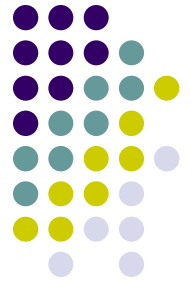
- Court imposed a maximum penalty of \$ 11,755,825, against Ford Motor Co. plus LOR of \$ 5,877,912
- Ford did not inform CBP that the values provided in the entry documents were not final and
- Failed to adhere to an agreement with port to report lump sum payments and reconcile payments with entries.



# Liability For Liquidated Entries

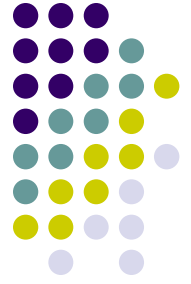
- 1592(d)– “. . . CBP shall require that such lawful duties . . . be restored, whether or not a monetary penalty is assessed . . . .” if a violation of 1592(a) occurred
- Customs may go back 5 yrs from date violation to collect additional duty and fees if negligence was involved
- Acting with “reasonable care” is a defense to 1592(d) assessment

# CBP Reasonable Care Guidelines: Valuation



- Customs Informed Compliance Publication on “Reasonable Care”
- Evidence of “acting with reasonable care”:
  - ✓ Consult the Customs Value laws and regulations
  - ✓ Customs Valuation Encyclopedia
  - ✓ Informed Compliance Publications
  - ✓ Rulings (CROSS) and court cases
  - ✓ Consult with a “Customs” expert
  - ✓ Obtain a Customs ruling
- Document your facts and conclusions!

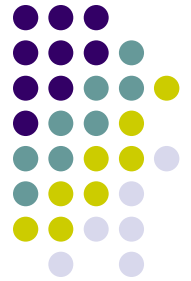
# Common Value Issues



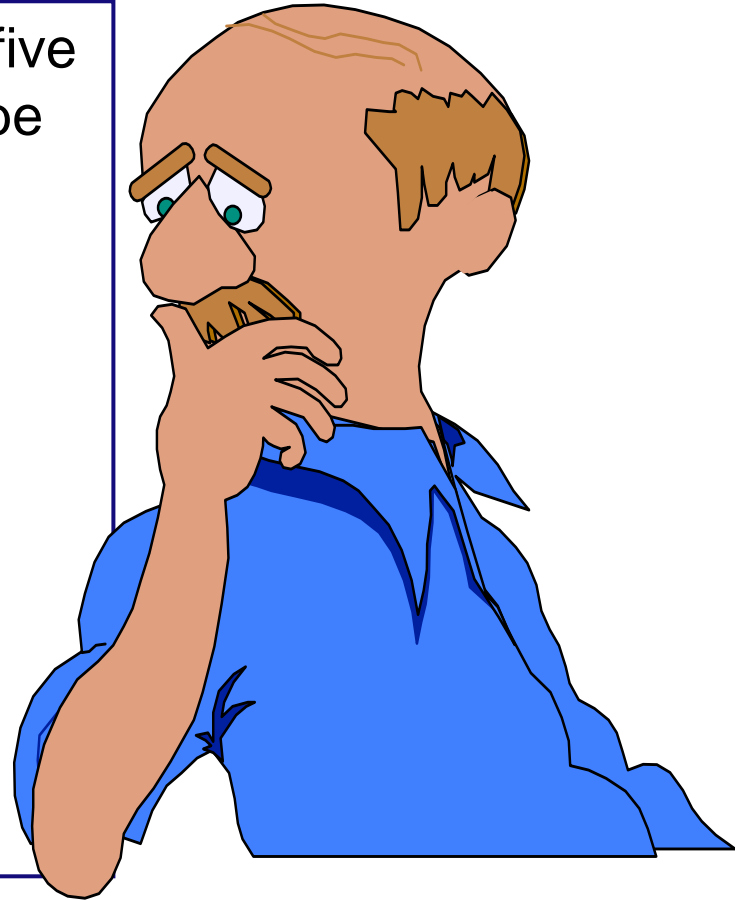
- ✓ Inadequate justification of intercompany transfer prices
- ✓ Additional Payments &/ or Assists
- ✓ Fictitious values (e.g. returns & defective goods)
- ✓ CIF Deductions
- ✓ 1<sup>st</sup> Sale Issues (Nissho Case)
- ✓ Royalty and Licensing fee payments

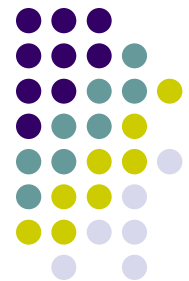
# Methods Of Customs Valuation

## 19 USC 1401a(a)



- Customs Value law provides for five methods of valuation, that must be applied in sequential order:
  - Transaction value
  - Transaction value of identical or similar merchandise
  - Deductive value
  - Computed value
  - a derived (fall-back) method reasonably adjusted to circumstances



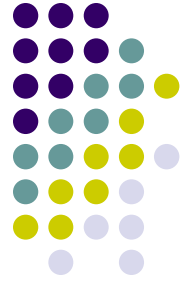


# Transaction Value

- What is Transaction Value?
  - Defined as:

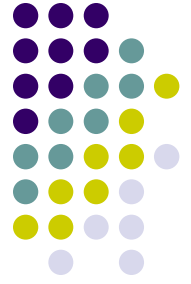
“transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States”, plus . . .
  - The word "payable" refers to a situation in which the price has been agreed upon, but actual payment has not been made at the time of importation.

# Transaction Value Sale for Exportation



- What is a “sale”?
  - the word "sale" is generally defined as a transfer of ownership in property from one party to another for a price or other consideration.
  - J.L. Wood v. United States, 62 CCPA, 25, 33, C.A.D. 1139, 505 F.2d 1400, 1406 (1974)
  - Did the transaction “**cause**” the export the United States?

# Transaction Value: Sale for Exportation

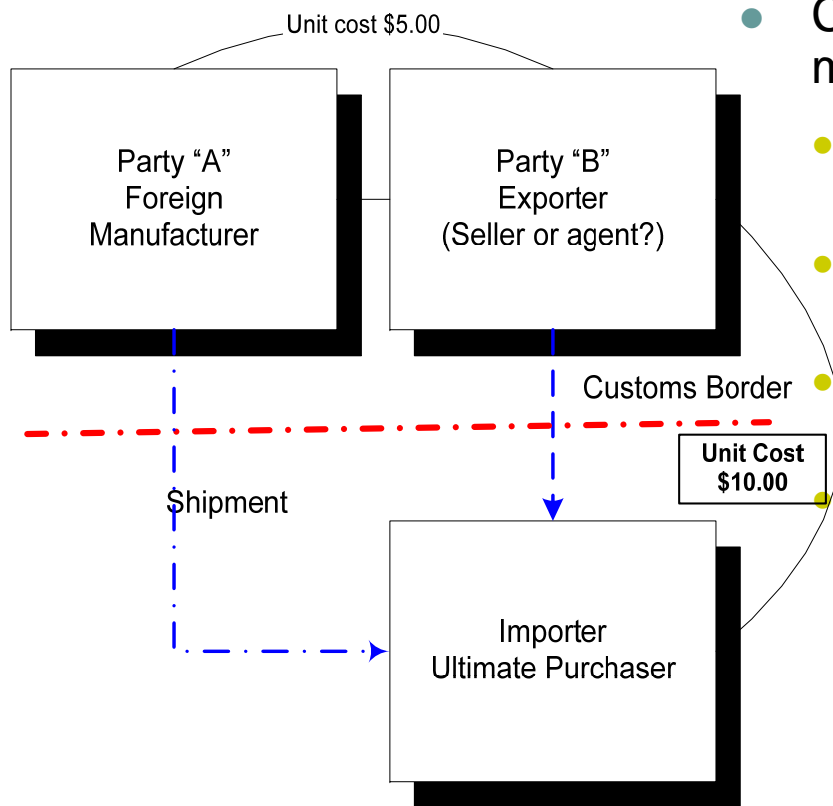


- Is there a “**sale**”?
  - The primary factors to consider
    - Has buyer assumed the risk of loss and
    - acquired title to the imported merchandise.
- Customs Informed Compliance Publications:
  - **Bona Fide Sales & Sales for Exportation** 11/96, Revised 1/2000  
Reprinted in 30/31 Customs Bulletin No.50/1, January 2, 1997
  - Determining Transaction Value in Multi-Tiered Transactions, T.D. 96- 87,  
Vol. 30/31, No. 52/1 Cust. B. & Dec. (January 2, 1997)
  - When does title and ownership transfer?
    - Problem with DDP and Vendor Managed Inventory agreements
    - Intcoterms do not define the moment of transfer of title



# Transaction Value Sales for Exportation & Multi-tiered Transactions

- Nissho Iwai American Corporation vs. U.S., 982 F.2d 505 (1992)



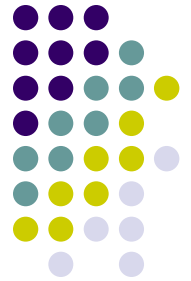
- Court held that Mfg selling price to middleman is acceptable when:
  - There is a sale (i.e., transfer of ownership of the goods)
  - negotiated at arm's length, free from any non-market influences
  - goods are clearly destined for export to United States
  - importers are required to place an "F" indicator next to the declared value when the transaction value of the imported merchandise is determined on the basis of the first sale.



# Sales for Exportation

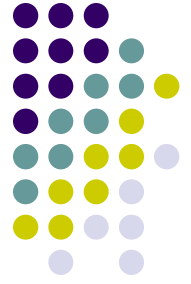
HQ H009727	5-Feb-08	What are "bona fide sales" and sales. "for exportation to the United States."
HQ H006576	19-Dec-07	Transaction Value; Related Parties; Dutiability of Service Fees; transaction between the Seller and Importer does not constitute a bona fide sale. Therefore, the transaction between the Importer and the Seller may not form the basis of appraisement of the imported merchandise
HQ H016966	17-Dec-07	Transaction between the Seller and Importer does not constitute a bona fide sale. Therefore, the transaction between the Importer and the Seller may not form the basis of appraisement of the imported merchandise
HQ H012659	14-Nov-07	Transaction value is precluded in instances where goods are shipped on consignment, as these transactions do not constitute bona fide sales.
HQ W548683	9-Oct-07	Bona Fide Sales & Clearly Destined for Exportation to the United States; T.D. 96-87; Nissho Iwai; First-Sale Price
HQ W563602	4-Sep-07	Nissho-Iwai; Sale for Export; Bona Fide Sale; T.D. 96-87
HQ 546318	12/31/1996	"Bona fide sales" and sales "for exportation to the United States."

# Transaction Value (1401a(b))



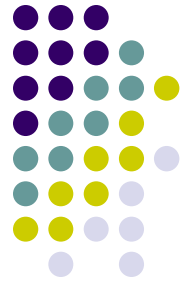
- When is transaction value appropriate?
  1. Must have a sale of the goods for export to the United States.
  2. No restrictions on disposition or use, except those
    - Imposed by law
    - Geographical resale territory
  3. **Value** and all additions must be **capable** of determination
  4. Are the parties **related**?

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

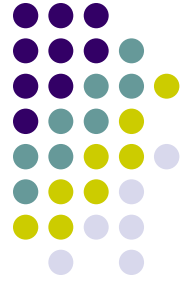


- Customs Valuation Statute 19 USC 1401a
  - 1401a (b)(2)(A) provides that transaction value shall be the appraised value of merchandise only if -
    - \*\*\* (iv) the buyer and seller are not related, or
    - the buyer and seller are related but the transaction value is found to be acceptable
  - Burden is on importer to establish that the relationship does not affect the price

# When are parties related?



- When are parties related? (19 U.S.C. 1401a(f))
  - (A) Members of the same family.
  - (B) Any officer or director of an organization and such organization.
  - (C) An officer or director of an organization and an officer or director of another organization, if each such individual is also an officer or director in the other organization.
  - (D) Partners.
  - (E) Employer and employee.
  - (F) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the voting stock or shares of any organization and such organization.
  - (G) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.



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

- The transaction value between a related buyer and seller will be acceptable if:
  - The value of the imported merchandise closely approximates an acceptable “test value”
  - Satisfies the “circumstances of the sale” test



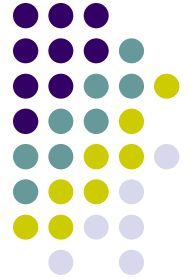
# 1401a(b)(2) Related Party Test

- Test Values
  - The value of imported merchandise closely approximates
    - Transaction value of identical or similar merchandise in sales to unrelated buyers in the United States; or
    - Deductive or computed value of identical merchandise or similar merchandise from other import transactions.
  - Use of “test values”
    - Customs will not accept “test values” as a means of verifying value unless there has been an actual appraisal entry at the test value

# Transaction Value Related Parties



- The “circumstances of the sale” Test
  - 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**
  - Three methods
    - Price reflects the normal pricing practice for the industry
    - Evidence that the parties negotiated over price
    - Selling price includes all costs plus an amount for profit and general expenses (most common method)



## “Normal Pricing Practices of the Industry”

- HQ 542261 (Mar. 11, 1981) (TAA No. 19)
  - References to prices published in a trade journal or similar public forum (the posted price) and
  - The posted price is used by other buyers and sellers as the basis of contract prices.

# Price Negotiation



- 543519 dated Sep. 5, 1985, aff'd by 554999 dated Jan. 5, 1989
- Documentary evidence must be available to establish that the parties, although related, bought and sold as if they are not related.
- The importer negotiates prices with the related party seller:
  - rejects the prices if dissatisfied and
  - may purchase from other suppliers.
  - The importer's sales divisions determine their U.S. resale prices and make their own management decisions.



# “All Costs Plus Profit” Method

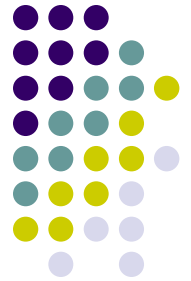
- 19 C.F.R. 152.103(l)(1)(iii)
  - An importer may demonstrate that the relationship does not influence the price by establishing that:
    - "the price is adequate to ensure recovery of all costs plus
    - a profit that is equivalent to the firm's overall profit realized over a representative period of time in sales of merchandise of the same class or kind . . ."
    - HQ 563400 March 29, 2006; good discussion of "circumstances of the sale" test

# Transaction Value Related Parties

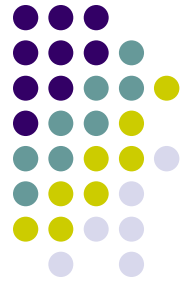


- HQ H006576 19-Dec-07
  - Related Parties; transaction value between the Seller and Importer does not constitute a bona fide sale. Therefore, the transaction between the Importer and the Seller may not form the basis of appraisement of the imported merchandise
- HQ 563400 29-Mar-06
  - Related parties; transfer pricing rejected “Circumstances of the sale” test
- HQ H017761 27-Sep-07
  - Related Pty Transaction Value; Rejected. Circumstances of sale

# Customs Position On Transfer Pricing



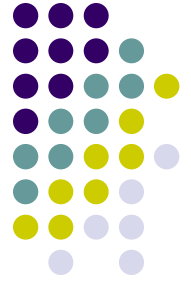
- April 2007, CBP published informed Compliance guide on:  
**TRANSACTION VALUE FOR RELATED PARTY TRANSACTIONS**
- Quotes:
  - “The mere fact that the importer has satisfied the requirements of Section 482 IRC, either through an APA or otherwise, does not mean that transaction value is acceptable under 19 U.S.C. §1401a.”
  - “It is still necessary for the importer to analyze whether the related party sale satisfies the circumstances of sale test or the test value method ... before making a value declaration . . .”
  - “An importer that relies solely on an APA or transfer pricing study to conclude that transaction value is acceptable would not be exercising reasonable care.”



# Acceptability of Transfer Prices Based On “IRS” Transfer Pricing Methodology

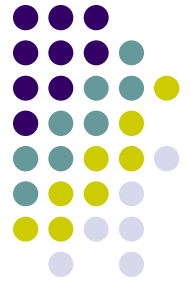
- HQ 546979, August 30, 2000
  - “While the goal of both the TAA and section 482 of the Tax Code is to ensure that the transactions between related parties are at arms length, the method of making that determination is different under each law.”
  - “Customs approach to related party transactions differs from the IRS approach . . . the [IRS] methods review profitability on an aggregate basis, [not a product by product basis](#).”
  - “Customs generally analyzes related party transactions at a more detailed product by product level . . .

# Customs Rulings Addressing Related Party Pricing

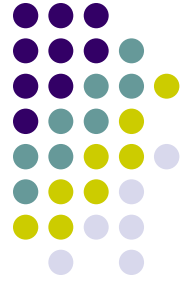


- HQ 548098, May, 2000-- Customs accepts the transfer price. Provided Cost/ Profit breakdown on three selected transactions and showed that profit was higher than seller's overall profit
- HQ 547672, May 2002 (Volvo Ruling)--Customs rejects transfer price based on [range of profits](#) European contract Mfg. industry.
- HQ 548095, September 19, 2002 -- Customs rejected transfer price based on [Comparable Profits Method](#).
- HQ 548233, November 2003-- Customs accepts transfer price. APA TP method is based on [CPM](#) and [Modified Resale Price Method](#) that set forth costs and profits of both selling and buying entities.
- HQ 548484, July 2004-- Customs rejects transfer price. Evidence showed that the tested party was the buyer and therefore there was no evidence that the seller received a price that enabled recovery of all costs plus a reasonable profit by seller.

# Summary: Related Party Pricing



- Importer should be prepared to provide worksheets and supporting documents for seller's:
  - Bill of Materials & material costs, labor and fixed costs for specific merchandise.
  - General expenses and actual profit for specific merchandise.
  - Comparison of actual profit on items under review to profits incurred by parent company.

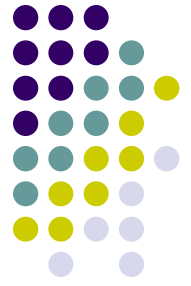


# Valuation: Standard Cost

- TAA #25 (HLR 542315 dated May 13, 1981) :
  - A “standard cost” declared on the customs entry represented the **actual amount** paid to the foreign vendor.
  - No payments for variances were subsequently remitted to the related supplier after importation.
- HQ 544481, May 8, 1991
  - Customs rejected use of standard cost.
  - Found that adjustments to the standard transfer price were made once a year, as opposed to every three months as in TAA #25.
  - The variance between standard and actual costs was an assist to the extent that values did not reflect the actual costs.
  - As noted in TAA #25, these determinations are fact-specific and must be made on a case-by-case basis.

# Transaction Value

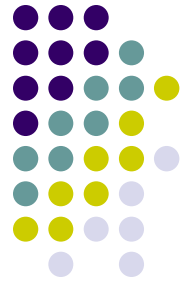
## Deductions: International Freight



- 19 USC 1401a(b)(4) excludes costs incurred for international transportation, insurance, and related services
- Importer must be able to document actual payments for int'l transportation, insurance and related services
- Customs informed compliance publication on - **Proper Deductions for Freight & Other Costs** and **T.D. 00-20**.
  - In HRL 546226 dated March 25, 1996, determined that if actual costs are not available or cannot be verified, costs for international transportation will not be excluded
  - HQ W563617 14-Sep-07 Foreign inland freight; no documentation was provided from the seller to evidence the actual costs it incurred for the foreign inland freight.

# Transaction Value

## Deductions: International Freight



- HQ H004683 12-Apr-07 Actual freight costs, as well as the "other charges" i.e., fuel surcharge, security charge, and handling fee, should not be included in transaction value.
- HQ H023812, April 4, 2008. Rejected deduction of international transportation costs for DDP transaction.
  - Documents did not enable CBP to ascertain the party that paid the freight.
  - The sea waybill indicated that freight was prepaid, which typically means payment by the shipper.
  - The waybill, however, identifies the freight forwarder as the shipper, and makes no reference to exporter.



# Foreign Inland Freight

- Deductions of foreign inland freight and other inland charges incident to the international shipment of merchandise are found in §152.103(a)(5)
- Ex-factory sales
  - If the price actually paid by the buyer to the seller for the imported merchandise does not include a charge for foreign inland freight and other charges for services incident to the international shipment of merchandise, those charges will not be added to the price.
- Sales other than ex-factory
  - Where the price actually paid includes a charge for foreign inland freight, whether or not itemized separately on the invoices or other commercial documents, charge will be part of the value to the extent included in the price.



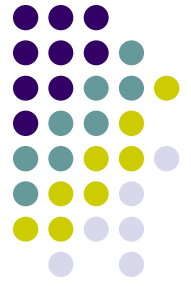
# Foreign Inland Freight

- Sales other than ex-factory. Allowable deductions
  - Charges for foreign inland freight and other services incident to the shipment of the merchandise to the United States may be considered incident to the international shipment of that merchandise within the meaning of §152.102(f)
    - if they are identified separately
    - Charges occurred after the merchandise has been sold for export to U.S. and
    - Placed with carrier for through shipment to the United States.
  - To ensure that the above criteria has been met Customs requires that a “through bill of lading” be presented.



# Foreign Inland Freight

- Only where it clearly would be impossible to ship merchandise on a through bill of lading (e.g., shipments via the seller's own conveyance) will other documentation satisfactory to the port director showing a sale for export to the United States and placement for through shipment to U.S. be accepted
- [\*All Channel Products vs. United States\*](#), 16 CIT 169 F. Supp. 1457 (1992), aff'd., 982 F.2d 513 (1992). Customs was correct in not deducting foreign-inland freight and related charges from CIF prices when no evidence of a through bill of lading was provided.
- Denied deduction in international freight charges for DDP transaction when insufficient evidence was provided as to who paid charges. HQ H023812, April 4, 2008.



# Transaction Value: Other Deductions (1401a(b)(1)(c)(3))

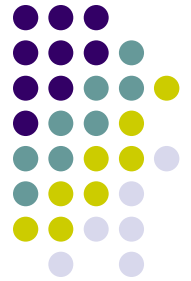
- Other deductions, if separately itemized:
  - Construction, erection, assembly, maintenance, or technical assistance provided with respect to the merchandise **after** importation
  - transportation of the merchandise after importation.
  - Customs duties and other Federal taxes

# Transaction Value



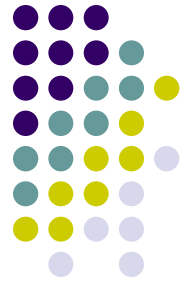
- Transaction value includes certain **statutory additions** if not otherwise included in the price:
  - packing costs
  - selling commissions
  - assists
  - royalty or license fees paid as a condition of importation
  - Proceeds of a subsequent resale, disposition, or use

# PRICE ACTUALLY PAID OR PAYABLE



- The term "price actually paid or payable" is:
  - “the total payment (whether direct or indirect) . . . for imported merchandise by the buyer to, or for the benefit of, the seller.”
    - Importer pays 3<sup>rd</sup> party supplier for materials purchased by foreign subsidiary and incorporated into finished goods imported into the United States.
- HRL 542984, April 8, 1993
  - Payment for [product liability insurance](#) made by the buyer to a third party insurer were part of the price actually paid or payable for the imported merchandise as indirect payments, where a condition of the sale required the seller to obtain suitable insurance and bear the cost thereof.

# Discounts



- Where a seller agrees to discount its price to a buyer, and
- The discount is agreed to and effected prior to importation of the merchandise
- The discounted price constitutes the price actually paid or payable for the merchandise
  - HQ H003356 2-Feb-07; discounts. Purchase Price discounts; defective merchandise discount; reviews rulings on allowance of discounts



# The Generra Presumption

- Rebuttable presumption that all payments made by a buyer to a seller are part of the price actually paid or payable for the imported merchandise.
  - (Generra Sportswear Co. v. U.S., 8 CAFC 132 (1990)) HQ 545526 dated Nov. 30, 1995.
  - Burden of establishing payments are unrelated rests on the importer. See Chrysler Corp. v. United States, 17 C.I.T. 1049 (Ct. Int'l Trade 1993).
  - Congress did not intend for CBP to engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, are for the merchandise or for something else. Moss Mfg. Co. v. United States, 896 F. 2d 535, 539 (Fed. Cir. 1990)

# PRICE ACTUALLY PAID OR PAYABLE



- Importers are often invoiced separately by vendors / suppliers for:
  - tooling, molds, packaging, and equipment
  - Expedited or “hot lot” manufacturing fees and mall lot or small quantity surcharges
  - Production modifications and **Non-reoccurring engineering (NRE)** or separate charges for startup or retooling
  - Testing costs
    - HQ 544508, dated June 19, 1990; 543645 dated Feb. 17, 1987; 542187 dated Nov. 7, 1980 (TAA No. 11).
  - HQ 546584 September 10, 1997
    - **Product liability insurance** payments are part of the price actually paid or payable in determining transaction value when paid by seller.

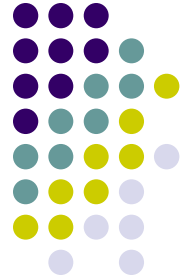
# PRICE ACTUALLY PAID OR PAYABLE



- Additional payments

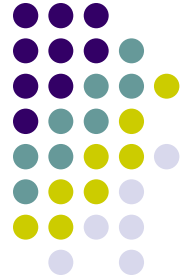
- Payments to a seller for mold costs and cutting dies are considered to be part of the price actually paid or payable for the imported merchandise. **HQ 544615 dated Sep. 11, 1991**
- Reimbursement for unused materials and components was not a part of the value. **544820 dated Oct. 18, 1991**

# PRICE PAID OR PAYABLE



- **545456 dated Oct. 21, 1994, affd. by 545995 dated Oct. 12, 1995.**
  - In addition to the transfer price of merchandise, buyer sent regular weekly payments to the seller which were used to pay the seller's operating expenses, including labor, overhead and administrative costs.
  - While the amounts in question are related to the imported merchandise, they are not identified with specific shipments.
  - The additional payments constitute part of the price actually paid or payable for the imported merchandise.

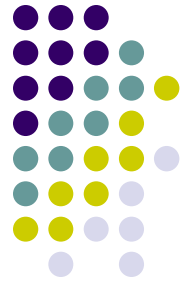
# PRICE ACTUALLY PAID OR PAYABLE: Management Fees



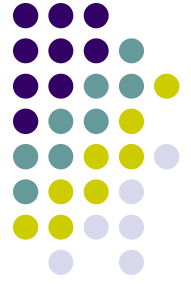
- **HQ 543512 dated Apr. 9, 1985**
  - separate fee paid to a related party seller for management services, accounting, finance, planning, and clerical activities is not part of the price actually paid or payable since the fee is unrelated to the manufacture of the imported merchandise.
- **542122, dated September 4, 1980**
  - Management services, accounting services, legal services and other services related to imported merchandise rendered abroad or in the U.S. are not assists under 19 U.S.C. 1401a(h).
  - Most recently cited with approval in HQ H010951, dated September 21, 2007
  - Must be separately itemized and billed.

# Transaction Value

## Sufficiency of information



- 19 U.S.C. 1401a(b)(1); 19 CFR 152.103(c)
  - Lump-sum payments from the buyer to the seller that cannot be linked to individual invoices or importations will not suffice to establish transaction value. HQ 543698, June 11, 1986.
  - HQ W563485 10-Sep-07 Rejection of transaction value; none of the payments could be linked to particular invoices; unless there is sufficient information to support transaction value between related parties, there is no occasion to consider whether the related party price is acceptable.
  - Inability to establish transaction value will result in application of alternative methods of valuation

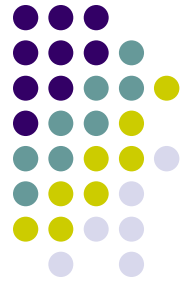


# Assists

19 U.S.C. 1401a(b)(1) states:

The transaction value of imported merchandise is the price actually paid or payable for the merchandise . . . plus amounts equal to . . . the value, apportioned as appropriate, of any assist . . .

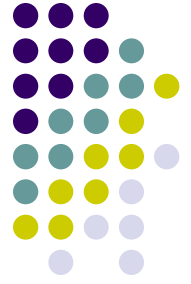
# Assists



Assists are defined (19 U.S.C. 1401a(h)) as:

- (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
- (ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.
- (iii) Merchandise consumed in the production of the imported merchandise.
- (iv) Engineering, development, artwork, design work, plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

# Assists



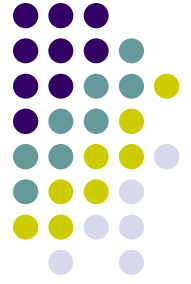
- To be treated as an "assist" the article or design must be:
  - Supplied directly or indirectly by the buyer
  - Provided free of charge or at reduced cost
  - Used in connection with the production or sale for export to the United States of the merchandise



# Test Equipment

- Test equipment provided free of charge to the foreign manufacturer by the U.S. importer will constitute an assist within the meaning of section 402(h)(1)(A) of the TAA if the equipment is:
  - used for testing during the production process and
  - Testing is essential to the production of the product. **544508 dated June 19, 1990.**
  - **HQ H023814 2-Jun-08** Testing Equipment ICT fixtures are dutiable assists even though the PCBA's can be produced without testing, if or when testing is performed it is part of the production process

# Valuing Assists (19 CFR 152.103(d))



- How do we value an assist?
  - Cost of acquisition if acquired by the buyer from an unrelated seller
  - Cost of production (including R & D) if the assist was produced by the buyer.
  - The value of the assist must include transportation costs to the place of production.
  - The cost of procuring an assist, i.e., receiving inspection, and warehouse costs are not part of the value of an assist.
- **HQ 548568, dated 10/19/2004**
  - Cost of production of an assist is to include the value of any license or royalty fee payments made for the design, manufacturing, or process rights to manufacture or produce the article
  - Would include any NRE or related expenses, such as masks or tooling costs



# Adjustments To Assist Value

- If the tools, dies, molds, or similar item has been used previously by the buyer, regardless of whether it had been acquired or produced by him, the original cost of acquisition or production will be adjusted downward to reflect its use before its value can be determined. HQ W548667, October 5, 2005– (Braumiller ruling)
- Repairs or modifications to an assist may increase its value

# Apportioning of the value of assists



- If the entire anticipated production using the assist is for exportation to the United States, the total value may be apportioned over:
  1. the first shipment, if the importer wishes to pay duty on the entire value at once
  2. the number of units produced up to the time of the first shipment, or
  3. the entire anticipated production.
- If the anticipated production is only partially for exportation to the United States, or if the assist is used in several countries, the method of apportionment will depend upon the documentation submitted by the importer. **Section 152.103(e)**
- **HQ H015975, September 13, 2007. Allowed apportionment of direct and indirect materials assists and associated freight costs relating to the production of lighting fixtures in Mexico in a monthly declaration such that all assists will be declared on the first entry of the month following the incurrence of such costs.**



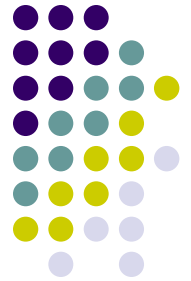
# Use in Connection With Production Waste & Scrap

- **545908 dated Nov. 30, 1995, Customs Bulletin, Vol. 29, No. 51, dated Dec. 20, 1995.**
  - Waste or scrap which results from the production of imported merchandise is considered to be consumed in the production of the imported merchandise and constitutes part of the value of the assist.
  - Unused components or materials, or rejected components or materials are not a part of the assist value



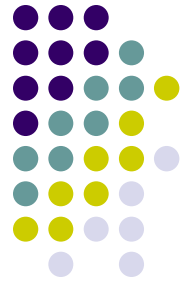
# Services Provided Abroad

- 1401a(h) (A) (iv)
  - Engineering, development, artwork, design work, and plans and sketches that are [undertaken elsewhere than in the United States](#) and are [necessary for the production](#) of the imported merchandise.
- (B) No service or work to which subparagraph (A)(iv) applies shall be treated as an assist for purposes of this section if such service or work:
  - is performed by an individual who is [domiciled within the United States](#);
  - is performed by that individual while he is [acting as an employee or agent of the buyer](#) of the imported merchandise; and
  - is [incidental](#) to other engineering, development, artwork, design work, or plans or sketches that are undertaken within the United States.



# Services Provided Abroad

- Are the activities necessary for the production of imported merchandise?
  - HQ 563369, January 11, 2006
    - Consideration of whether a sketch and a pattern are an assist
  - HQ 548566, October 19, 2004
    - Patterns of the prototypes constitute dutiable assists under 19 U.S.C. 1401a(b)(1)(D) as they are necessary for the production of the garments



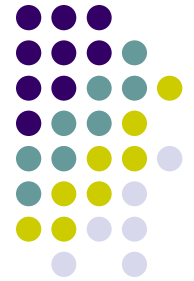
# Services Provided Abroad

- HQ 548540, July 28, 2004 (Nordstrom/Faconnable Ruling)
  - CBP reviews the issue of whether services performed abroad are necessary for the production of imported merchandise:
    - Do the services performed by the technical designer constitute an assist (U.S. nationals and one is a French national). **Yes**
    - Do the services performed by a U.S. domiciled technical design manager constitute an assist. **Yes.**
    - Do the services performed by the quality engineering/ quality control coordinator constitute an assist? **No.**



# Royalties & license fees

- The dutiable status of royalties or license fees paid by the buyer will be determined in each case and will depend on:
  - whether the buyer was required to pay them as a condition of sale of the merchandise for exportation to the United States, and
  - to whom and under what circumstances the royalty or license fee was paid.
- Separate license fees paid to seller for right to distribute or resell is a “proceed of subsequent resale.”
- General Notice, Dutiability of Royalty Payments, Vol. 27, No. 6, Cust. B. & Dec., February 10, 1993



# Royalties & license fees

- Royalties or license fees for patents covering a process to manufacture imported merchandise generally will be dutiable.
- Payments made by the buyer to a third party for the right to:
  - Distribute or resell imported merchandise
  - Generally considered selling expenses of the buyer and will not be added to the price actually paid or payable for the imported merchandise unless:
    - The payments are a condition of the sale of the merchandise for exportation to the United States.



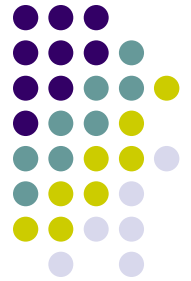
# Royalties & license fees

- In HQ H004991, dated April 2, 2007
  - The fact that the royalty payments are made to an unrelated third party is not entirely determinative
  - CBP's position is that royalties will be dutiable, even if paid to third parties, if they constitute a condition of the sale for exportation.
  - Payments based on the number of units sold or resold in the U.S. is “not relevant to determining the dutiability of the royalty payment.”
  - Royalty payments and license fees are a condition of sale when they are paid on each and every importation and are inextricably intertwined with the imported merchandise.



# Royalties & license fees

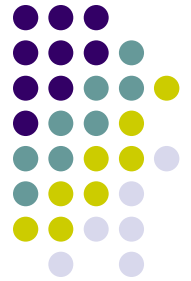
- HQ W548692; HRL 548489, August 4, 2004; and HQ H004991, April 2, 2007
  - CBP found that the royalty payments and the purchase of the imported goods were “inextricably intertwined,” even though:
    - there was no restrictions on the purchase or importation of the imported products in the license agreement, and
    - the manufacturing agreement was not tied to the payment of the royalty fee.
  - HQ H024980, July 22, 2008



# Royalties & license fees

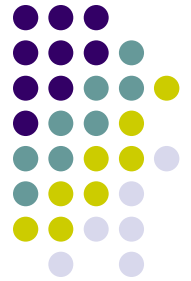
- General Notice, Dutiability of Royalty Payments, Vol. 27, No. 6, Cust. B. & Dec., February 10, 1993:
  - three factors are relevant in assisting in determining whether royalty payments are related to the imported merchandise and are a condition of sale:
    - whether the imported merchandise was manufactured under patent;
    - whether the royalty was involved in the production or sale of the imported merchandise and;
    - whether the importer could buy the product without paying the fee.

# Valuation of Returns, No Charge Shipments And Defective Goods



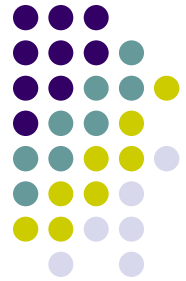
- [HQ W563557, December 26, 2006. \(Seagate Ruling\)](#)
  - The hard disc drive products are returned to the United States for processing in Texas before being sent on to a repair facility in Mexico.
  - Their importation is not the result of a sale, and thus, there is no sale for exportation to the United States.
  - Consequently, the subject merchandise cannot be appraised on the basis of transaction value.
  - The imported merchandise is not sold in the United States in its condition as imported, nor do there appear to be any such sales of identical or similar products. Accordingly, the merchandise cannot be appraised under the deductive value method.
  - Unable to determine the standard cost for a particular product when new, it does not track the age or the original selling price of a particular drive. Consequently, the computed value method is also unavailable.
  - Proposes using the fallback method based on a computed value that would be adjusted to account for the defective nature of the goods.
  - Specifically, it suggests appraising the defective goods at the average standard cost of a product (calculated at the product family level) less the average cost of repairing a product in that product family

# Valuation of Returns, No Charge Shipments And Defective Goods



- [In HQ 548688, October 20, 2005](#)
- CBP allow the imported defective power supplies to be appraised on the standard cost of new units, which include costs of parts, labor and other related expenses associated with the production of new units adjusted to exclude the average cost associated with the repair or recalibration of the units.
- [HQ 563407, April 13, 2006—](#)
  - imported used in-flight entertainment systems and components described above may be appraised on the basis of the fallback method
  - appraised based on a formula that uses:
    - the unit cost of a new article, which represents the cost of producing the article (material, labor and overhead plus profit), as described above, and then
    - subtracts the average historical cost of repair percentage, calculated on a yearly basis.
- [HQ 563407, April 13, 2006;](#)

# Valuation of Returns, No Charge Shipments And Defective Goods



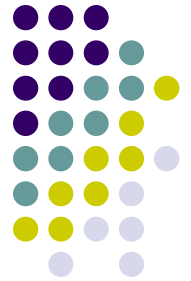
- **Super-deductive Value** HQ H020270, July 3, 2008 (Honda Ruling)
  - Damaged transmission cores imported for use in the production of rebuilt automobile transmissions
  - Honda sells the rebuilt transmissions to dealers in the United States at “dealer net prices”
  - Under deductive value, merchandise is appraised on the basis of the unit price at which it is sold in the U.S., in its condition as imported, in the greatest aggregate quantity (up to 90 days);
  - If merchandise is not sold in the condition as imported, the importer may elect for it to be appraised pursuant to the "superdeductive" method. See 19 U.S.C. 1401a(d)(2)(A)(iii).
  - “Superdeductive” method deducts from the selling price the cost of post import processing for goods sold within 180 days of importation



# Other Methods Of Appraisement

- If Transaction value can not be established
  - No sale
  - Related party status influences price
  - Lack of information
- CBP will resort to alternative methods
  - Transaction value of identical or similar merchandise
  - Deductive value
  - Computed value
  - a derived (fall-back) method reasonably adjusted to circumstances

# Transaction value of identical or similar merchandise

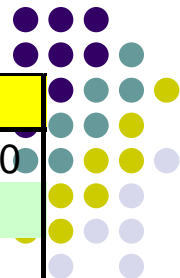


- Transaction value of identical or of similar merchandise (1401a(c)) uses the transaction value of previously imported merchandise that is --
  - Either identical or similar to the merchandise being appraised, and
  - Exported to the United States at or about the time that the merchandise being appraised is exported to the United States, and
  - At the same commercial level and in substantially the same quantity as the sales of the merchandise being appraised.



# Method #3: Deductive value

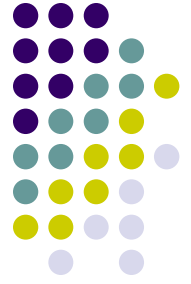
- Deductive value (1401a(d)) is defined as:
  - The price the merchandise is sold for to the first unrelated party at or about the time of importation (or within 90 days of importation):
  - The selling price must be reduced by an amount equal to -
    - The addition usually made for profit and general expenses in connection with sale in the United States,
    - costs associated with transportation and insurance incurred with respect to the international shipment of the merchandise from the country of exportation to the United States
    - Customs duties and other Federal taxes payable on the merchandise



(Example) Deductive Value Worksheet			
U.S. Selling Price (Unit Cost)			\$ 1,000.00
<b>U.S. Selling Expenses</b>			
Expenses connected with U.S. Sales			\$ 50.00
Commissions paid to 3rd party agents			\$ 30.00
Profit and General expenses (combined 8%)			\$ 73.60
Value added by U,S, Processing (repackaging)			\$ 0.50
Usual transportation cost prorated (domestic)			\$ 3.00
		<b>Total Selling expenses</b>	<b>\$ 157.10</b>
<b>International &amp; Customs Clearance Costs</b>			
International transportation costs			\$ 5.00
International Insurance (included in transport)			\$ -
Customs clearance and brokerage fees			\$ 2.50
Customs Duties and Fees paid at \$800 each (2.5% + 0.0021= .0271			\$ 21.68
		<b>Total Actual International Costs</b>	<b>\$ 29.18</b>
		Deductive Value (2E-10E-17E=)	\$ 813.72
		Estimated Declared value	\$ 800.00
		<b>Under reported Value</b>	<b>\$ 13.72</b>
		<b>Additional Duty due</b>	<b>\$ 0.37</b>

# Computed Value Method 19

## U.S.C. 1401a(e)



- Based on:
  - Cost of materials and processing incurred in the foreign production, plus
  - an amount for profit and general expenses of the producer company equal to
  - Amount usually reflected in sales of merchandise of the same class or kind, and
  - the value of any assists and packing.



Example Computed Value Worksheet		
1. Material Components Cost	Cost	
Material (Total)	\$ _____	Attachment A
Tools, dies, molds and similar items	\$ _____	Attachment B
Merchandise consumed in production	\$ _____	Attachment C
Engineering, development, artwork, design work and plans	\$ _____	Attachment D
Scrap	\$ _____	Attachment E
Freight	\$ _____	Attachment F
Customs Duties/ Fess	\$ _____	Attachment G
<b>Total Material Components Cost \$</b>	<b>\$ _____</b>	
Operating Expenses		
a. Direct Labor (+ fring benefits)	\$ _____	Attachment H
b. Depreciation of equipment	\$ _____	Attachment I
c. Utilities		Attachment J
d. Overhead:		
Production	\$ _____	Attachment K
General & Administrative expenses	\$ _____	Attachment L
<b>Total Operating Expenses</b>	<b>\$ _____</b>	
<b>Transportation to point of export (FOB)</b>	<b>\$ _____</b>	
U.S. Assist Costs* (other than materials included in item 1)		
a. Tools, dies, molds and similar items	\$ _____	Attachment M
b. Merchandise consumed in production	\$ _____	Attachment N
c. Engineering, development, artwork, design work and plans and sketches undertaken outside the United States	\$ _____	Attachment O
<b>Total Assist Costs</b>	<b>\$ _____</b>	
<b>Computed Value (6b+15b+18b+ 21b) =</b>	<b>\$ _____</b>	



# The “Fallback” Method

## 19 U.S.C. 1401a(f); 19 CFR 152.108

- When merchandise cannot be appraised under one of the methods set forth in 19 U.S.C. 1401a(b)-(e), value is to determined in accordance with the "fallback" method set forth in section 1401a(f).
- Provides that merchandise should be appraised on the basis of a value derived from one of the (b)-(e) methods, reasonably adjusted to the extent necessary to arrive at a value.
- Value may not be on the basis of:
  - the price in the domestic market of the country of export
  - the selling price in the U.S. of merchandise produced in the U.S.,
  - minimum values, or arbitrary or capricious values.