

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

HQ 544525

January 31, 1991

DOCUMENT-NO: [*1] VAL CO:R:C:V 544525 pmh

CATEGORY: Valuation

District Director of Customs
Boston, MA 02222-1056

REFERENCE: Application for Further Review of Protest No. 0401-89-000852; Pro-ration of Previously Undeclared Tooling Payments

Dear Sir:

The above-referenced protest and application for further review was filed against your decision regarding the appraised value of certain merchandise imported during the period of 1986 to 1989.

FACTS:

According to your March 30, 1990 memorandum, the subject merchandise consists of various models of fans, heaters and humidifiers. Holmes Products Corp., the purchaser of the imported merchandise, (hereinafter referred to as the company) made tooling payments during the years 1986 to 1989 to the foreign manufacturer (hereinafter referred to as the seller) and to unrelated third parties, to build molds used in the manufacture of the imported merchandise. The merchandise was imported from 1986 to 1989. At the time of importation, some of the merchandise was dutiable and some of the merchandise was duty-free under GSP. The company failed to report the tooling payments to Customs at the time of importation and did not disclose such payments until specifically questioned by Customs [*2] in 1989. At the time of disclosure in 1989, the countries from which the merchandise had been imported duty-free under GSP, had been removed from the list of beneficiary developing countries under GSP. Both the company and Customs agree that the company's tooling payments to the third party to produce molds, constitute assists; the tooling payments to the foreign manufacturer are indirect payments that constitute part of the price actually paid or payable for the imported merchandise.

In a July 13, 1989 letter, the company contends that if the merchandise was imported duty-free under GSP, the tooling payment attributed to that article is also duty-free. The company further contends that of the merchandise that was dutiable at the time of importation, the value of the tooling payment attributed to that merchandise should be reduced by 30% to account for a "direct ship factor." That is, approximately 30% of the merchandise was shipped directly to the ultimate U.S. purchaser. In those instances the ultimate U.S. purchaser was the importer of record and the invoice purchase price, upon which the duty-rate was based, reflected the tooling payments attributable to that merchandise. The [*3] company argues that, therefore, duty was already paid on the tooling payments attributable to that merchandise.

The concerned import specialist contends that because the company failed to disclose the tooling payments at the time of importation, it forfeited the option to pro-rate such payments after the fact. Furthermore, the import specialist contends that the company should not be allowed to declare any part of the tooling payments against liquidated entries from 1986-1989 that were duty-free under GSP.

ISSUE:

Whether the company forfeited its the option to pro-rate the value of certain tooling payments due to its failure to disclose such tooling payments at the time of importation, and if not, what method of pro-ration may be used.

LAW AND ANALYSIS:

With regard to those tooling payments that constitute assists, section 152.103(e) Customs Regulations (19 CFR 152.103(e)), provides that the apportionment of the value of assists to imported merchandise will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. In addition, we note that the Statement of Administrative Action, which has been specifically approved [*4] by Congress, provides the following:

Once a value has been determined for the assists...it is necessary to apportion that value to the imported merchandise. The apportionment of these elements will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment used will depend on the detail in the documentation provided by the importer to substantiate his requested method.

For example, if the entire anticipated production using the assist is destined for exportation to the United States, the value might be apportioned over the first shipment if the importer wished to pay duty on the entire value at one time, over the number of units produced up to the time of the first shipment, or over the entire anticipated production. ... Various possibilities for apportionment that are in accordance with generally accepted accounting principles exist.

Accordingly, in HRL 542361, dated July 14, 1981, Customs held that if the entire anticipated production using an assist is for exportation to the U.S., the total value of the assist may be apportioned over the first dutiable shipment if the importer [*5] wishes to pay duty on the entire value at one time. However, in TAA No. 35, dated July 21, 1981 Customs held that there is no authority to apportion the value of an assist entirely to the first duty-free entry. In that case, the total value of the assist covered dutiable as well as duty-free entries. Therefore, to apportion the total value of the assist to the duty-free entry would not be a "reasonable apportionment in accordance with generally accepted accounting principles," because duties owing on subsequent dutiable entries would never be collected.

The concerned import specialist in this case, contends that TAA No. 35 precludes the company's proposed method of apportionment. We disagree. The company does not propose apportioning the total value of the assist to a duty-free entry, thereby avoiding duty on certain dutiable entries. Rather, the company proposes apportioning the assist over all entries from 1986 to 1989, dutiable and duty free, and paying duty for the value of the assist attributable only to the dutiable entries. We find this method of apportionment to be reasonable and in accordance with generally accepted accounting principles. Consequently, the method of pro-ratio [*6] proposed by the company is acceptable under 19 CFR 152.103(e).

While the import specialist contends that the company has forfeited its right to pro-rate the value of these tooling payments, we point out that section 402 of the Tariff Act of 1930, as amended by the Trade Agreement Act of 1979 (TAA; 19 U.S.C. 1401) is not a penal statute. There is no authority in forfeiture. Consequently, we find that the company retains the option to pro-rate the value of the tooling payments over the entries from 1986 to 1989.

With regard to the tooling payments that constitute direct payments to the seller, we note that the Customs Regulations do not provide guidelines specifically for the apportionment of direct payments, as they do for assists. However, if the terms of the sales contract indicate how many units of the merchandise are being purchased, it is possible to pro-rate the price actually paid or payable. Accordingly, it would be possible to pro-rate the value of the tooling payments that constitute part of the price actually paid or payable for each entry, using the above-cited guidelines used for pro-rating assists. If the terms of the sales contract do not specify the number of units [*7] purchased, it would not be possible to pro-rate the price actually paid or payable or, consequently, the value of the direct tooling payments contained therein.

Finally, with regard to the estimated 30% "direct ship factor," we find that the company has not provided sufficient documentation to support this. The company would have to provide the actual invoices used when the merchandise was shipped directly to the ultimate U.S. purchaser, and such invoices would have to support that the cost of the tooling payments was reflected in the invoice price to the U.S. ultimate purchaser. Without such documentation we are unable to make a determination on the "direct ship factor."

HOLDING:

The company has not forfeited the option to pro-rate the value of certain tooling payments due to its failure to declare the tooling payments at the time of importation. The proposed method of pro-rating those tooling payments constituting assists is acceptable under the standards set forth in 19 CFR 152.103(e). The proposed method of pro-rating those tooling payments constituting part of the price actually paid or payable is acceptable if, under the terms of the original

sales contract, it is possible to [*8] pro-rate the price actually paid or payable for the imported merchandise, at the time of importation. You are directed to grant this protest, in whole or in part, in accordance with this decision. A copy of this decision should be attached to the Form 19, Notice of Action, to be sent to the protestant.

ISSUED-BY: Marvin M. Amernick for John Durant, Director
Commercial Rulings Division

CUSTOMS SERVICE DISCLAIMER: Inclusion of Customs ruling in LEXIS does not constitute publication of the ruling under 19 CFR 177.10(b). An established and uniform practice is created for Customs rulings only by full-text publication in the Customs Bulletin and only if the ruling concerns a rate of duty or change.

Legal Topics:

For related research and practice materials, see the following legal topics:
International Trade LawImports & ExportsGeneral Overview