U.S. Customs and Border Protection

NOTICE OF REVOCATION OF A RULING LETTER HQ 547654 RELATING TO POST-IMPORTATION ADJUSTMENTS; TRANSFER PRICING; RELATED PARTY TRANSACTIONS; RECONCILIATION

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of the revocation of a valuation ruling letter and any treatment relating to post-importation adjustments made pursuant to a methodology specified in formal transfer pricing policies.

SUMMARY: Pursuant to Section 625(c), Tariff Act of 1930, (19 U.S.C. §1625(c)), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") is revoking Headquarters Ruling Letter ("HRL") 547654, dated November 8, 2001, relating to transfer pricing and the acceptability of post-importation adjustments, claimed pursuant to a formal transfer pricing policy. Similarly, CBP is also revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation was published on December 28, 2011, in the Customs Bulletin, Vol. 46, No. 1. Multiple comments were received concerning the notice of the proposed revocation.

EFFECTIVE DATE: This action is effective July 30, 2012.

FOR FURTHER INFORMATION CONTACT: Yuliya A. Gulis, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202) 325–0042.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are

informed compliance and shared responsibility. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin, Vol. 46, No. 1, on December 28, 2011, proposing to revoke HRL 547654, pertaining to transfer pricing and the acceptability of post-importation adjustments, claimed pursuant to a formal transfer pricing policy. Multiple comments were received concerning the notice of the proposed revocation. These comments are discussed in detail in HRL W548314 (Attachment A). As stated in the proposed notice, CBP is also revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this action.

In HRL 547654, CBP held that transaction value did not apply because the price was not fixed or determinable pursuant to an objective formula prior to importation as the price was within the control of the buyer and/or the seller. It is now CBP's position that subject to certain conditions, the transaction value method of appraisement will not be precluded when a related party sales price is subject to post-importation adjustments that are made pursuant to formal transfer pricing policies and specifically related (directly or indirectly) to the declared value of the merchandise. These adjustments, whether upward or downward, are to be taken into account in determining transaction value. Additionally, the importers that want

to apply the transaction value method are strongly encouraged to use Reconciliation to report the adjustments to CBP and to determine the transaction value.

Pursuant 19 U.S.C. §1625(c)(1), CBP is revoking HRL 547654 and any other ruling not specifically identified, to reflect the proposed changes according to the analysis contained in proposed HRL 548314, set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

Dated: May 16, 2012

IEVA K. O'ROURKE
for
MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

Attachment

HQ W548314

May 16, 2012

OT:RR:CTF:VS W548314 YAG

CATEGORY: Valuation

PORT DIRECTOR
PORT OF CHAMPLAIN
U.S. CUSTOMS AND BORDER PROTECTION
198 WEST SERVICE ROAD
CHAMPLAIN, NEW YORK 12919

RE: Transaction Value; Formulas; Post-Importation Adjustments; Revocation of HRL 547654

DEAR PORT DIRECTOR:

This is in reference to Headquarters Ruling Letter ("HRL") 547654, dated November 9, 2001, regarding the valuation of certain bulk chemicals. The Importer requested reconsideration of HRL 547654 in an internal advice request forwarded by your office. We have reconsidered HRL 547654 and determined that the methodology for determining the transfer price at issue constitutes an objective formula for purposes of applying transaction value and claiming post-importation adjustments. For the reasons set forth below, we hereby revoke HRL 547654.

On September 23, 2011, CBP published advance notice on this issue at cbp.gov and requested that the public provide comments on the broadening of CBP's interpretation of what constitutes a "formula" for purposes of using transaction value, thereby allowing post-importation adjustments. Many comments were received in response to CBP's request. All of the comments received were in support of CBP's proposed action, and CBP reviewed and took these comments into account in issuing its proposed revocation of HRL 547654, which was published on December 28, 2011, in the Customs Bulletin, Volume 46, Number 1, pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–182, 107 Stat. 2057, 2186 (1993). Eight (8) comments were received in response to the proposed revocation of HRL 547654, relating to transfer pricing and the acceptability of post-importation adjustments, claimed pursuant to a formal transfer pricing policy. While all of the comments supported the proposal, a few comments suggested some clarification and changes to the five factors that CBP discussed in examining whether there is a fixed price pursuant to a formula. Additionally, some commenters suggested that Reconciliation should not be mandatory. A discussion of the comments and CBP's reasoning are found in the "Law and Analysis" section below.

FACTS:

HRL 547654 determined that there were bona fide sales between the Importer and the Sellers. As discussed in HRL 547654, the related party Importer and Sellers used a transfer price to report the transaction value to U.S. Customs and Border Protection ("CBP") which was calculated by subtracting: transportation costs to the U.S., customs duties, fixed costs of the importer's U.S. operations, and the importer's profits from the anticipated resale price in the U.S. of the merchandise sold by the Importer to the U.S.

customers after importation. Due to the frequency and fluctuations of the adjustments because of the variations in sales prices and volumes of the imported merchandise, the related party Sellers proposed to defer certain deductions from the resale price until after the actual resale in the U.S. Under those circumstances, the Importer made entry at the resale price less freight costs, customs duties, and the Importer's profit. The deduction for the Importer's U.S. fixed costs would occur after resale in the U.S. Entries from all shipments to the U.S. between the Seller and Importer were flagged for Reconciliation with CBP. For those costs not known at the time of entry (*i.e.* the Importer's fixed costs in the U.S.), the Importer proposed to file quarterly Reconciliation entries with CBP to adjust its prices to reflect the actual costs. As part of the quarterly Reconciliation filing, the sum of the fixed costs would be allocated by product group to individual shipments made during the quarter based on the ratio of fixed costs to sales for each product grouping. In HRL 547654, CBP held that transaction value did not apply because the price was not fixed or determinable pursuant to an objective formula prior to importation. CBP found that the price was within the control of the buyer and/or the seller.

Subsequent to the receipt of the ruling, the Importer sought advice concerning the application of the ruling to its pending entries, and further information was provided. The company's "Intercompany Transfer Pricing Determination Policy," dated February 11, 2000, translated into English, was submitted to show how its inter-company prices are determined. On April 18, 2006, the Importer provided CBP with its complete Transfer Pricing Determination Policy, prepared for tax purposes.[1] In this case, the company's Transfer Pricing Determination Policy was prepared by its tax department.

The company's Transfer Pricing Determination Policy established a system for the calculation of the transfer price and the distinction between the variable and fixed costs. In pertinent part, the transfer pricing calculation for directly delivered sales between the Importer and Seller is established as follows:

> Transfer price for a sale between the Importer and Seller = Sales price to the U.S. customer (net of cash customer discount and rebates)[2] minus variable costs and a percentage of margin (profit).

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[1] The Internal Revenue Service ("IRS") regulates transfer pricing for tax purposes through Section 482 of the Internal Revenue Code, 26 U.S.C. §482 and the Section 482 regulations. The tax rules for transfer pricing are based on the premise that a taxpayer is dealing with another party at arm's length. A U.S. taxpayer may obtain approval in advance of its transfer pricing methodology through an Advance Pricing Agreement ("APA"). An APA is a prospective binding agreement between the taxpayer and the IRS regarding the correct transfer pricing methodology under section 482. However, more often, multinational companies prepare their own transfer pricing studies based on section 482 principles to support their transfer pricing practices. Although not approved by the IRS, these transfer-pricing studies are used to support the company's transfer pricing methodology in the event of an audit. These transfer pricing studies can be prepared by accounting firms, or they can be prepared internally by the companies.

[2] The Importer's Transfer Pricing Policy provides that discounts and rebates, if any, are taken into account prior to the importation of the merchandise.

The transfer pricing policy states that the variable costs borne by the Importer take into account the following (which are deducted from line 01 of the Analytical Income Statement (“AIS”))[3]:

- Post invoice adjustments (including credit notes for quality, resale price adjustments, claims. . .), which will rarely occur,
- Customer discounts, and
- Variances between the rebates used to calculate the transfer prices and actual costs.

According to the policy, none of the variable costs and profits (including the unknown discounts and rebates, which may be subject to value manipulation of the parties), are subject to any post-importation price adjustments. Therefore, the transfer price declared to CBP upon importation is fixed with respect to the application of the variable costs. Any fluctuations to the variable costs are not re-invoiced or remitted back to the seller/exporter. [4] The company’s Transfer Pricing Determination Policy established that fixed expenses in the U.S., for example, structural costs, depreciation and interest on working capital, would no longer be deducted from the invoice accompanying a shipment to the Importer, but rather, would be separately invoiced and paid to the Importer on a monthly basis after importation. In other words, via Reconciliation, the Importer seeks to report the actual, final amount paid to the Seller for the imported goods by reducing the value originally declared at the time of entry by the amount of fixed expenses paid by the Seller to the Importer. With the exception of the fixed costs, all elements of the transfer price are declared to CBP upon the importation; these elements are known, included in the value of the merchandise, and not subject to change.

For products to be warehoused by the Importer before resale, the transfer price is calculated as follows:

> Transfer price for a sale between the Importer and Seller = Expected sales price (“FSP”) minus logistic variable costs (“LVC”) of the Importer minus actual or expected variable costs and a percentage of margin (profit).

The Importer calculated the FSP to customers for each article taking into account the amount of sales net of cash customer discount and rebates. The Importer calculated LVC for each article from all forecasts relating to all sales ex-storage taking into account: variable transport costs from the warehouse to the customer (transportation cost plus insurance, duty, customs duty brokerage, variable storage), and variable transport costs from the producer to the warehouse (particularly the duties) incurred by the Importer. According to the policy, the variable costs incurred by the Importer include:

- Post invoice adjustments (including credit notes for quality, sale price adjustment claims . . .), which will rarely occur, deducted from line 01 of the AIS
- Customer discounts, deducted from line 01 of the AIS,

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[3] The Analytical Income Statement (“AIS”) is the income statement used to reflect the profit/loss of the business units. It is generated by the general ledger system. The information is accumulated for each business unit for the year and makes up the audited financial statements.

[4] If there are any post-importation adjustments for a variable expense (such as in the rare instance when there is a change in business practice), these adjustments are borne by the Importer, and, therefore, do not affect the transaction value or the price actually paid or payable to the Seller.

- Logistic costs: storage costs, rental and maintenance of trucks and containers (line 07 of the AIS), and
- Variances between the forecast (rebates and variable logistic costs) used to calculate the transfer price, and the actual costs.

Once again, pursuant to the company's Transfer Pricing Determination Policy, none of these variable costs are stated to be re-invoiced or remitted back to the seller/exporter.

The company's Transfer Pricing Determination Policy directs that only monthly budgeted fixed costs, incurred in the U.S., are to be analyzed quarterly and adjusted prospectively, if needed. In other words, the transfer pricing policy included a procedure to quarterly verify the actual versus budgeted fixed cost amounts as well as an explanation for any possible variances. The policy defines fixed costs as the following items of the income statement:

- Selling expenses,
- Commissions received/paid (only the commissions paid to the sub-agents),
- General and administrative expenses,
- Miscellaneous income and expenses (except the income allocated to this item corresponding to fixed costs invoicing),
- Interest on working capital, and
- Depreciation of assets not directly attributable to manufacturing.

These fixed costs are allocated to the resale activity. On the other hand, as is stated above, variable costs and profits are not subject to any post-importation price adjustments, as fluctuations in variable costs are not remitted to the seller. Additionally, the Importer books its adjustments for the fixed cost reimbursement as "Other Income." The Importer applied for and was approved to participate in the Reconciliation Prototype Program.

The company also provided CBP with a copy of an inter-company memorandum, dated December 20, 1999, which sets out the following method to calculate the fixed costs: budgeted fixed costs (structural costs + depreciation + interest on working capital). The budgeted fixed costs are directly invoiced as 1/12 (based on the approved budget amount), and the income is allocated to line 31 of the AIS (miscellaneous income and expenses).[5] This method is set in advance, and according to the new information submitted by the Importer, the amount of the fixed costs is known at the beginning of each year. The element that is not known at the time of importation is the level of total imports across which the fixed costs are allocated in a particular month. Therefore, the fixed costs paid are set; it is merely the allocation of those fixed costs to the individual import entries that cannot be fixed until after the month has passed.

The specified percentage of margin, referenced in the Company's Transfer Pricing Determination Policy, is calculated based on a study of comparable and available data, concerning sales in the uncontrolled market to allow a reasonable profit to be earned. The margin is confirmed as often as required by Section 482 of the Internal Revenue Code, 26 U.S.C. §482 and the Section

[5] This method is implemented by dividing the value of the particular import by the total "fixed costs" as reported on the Importer's income statement. The resulting ratio is multiplied by 1/12 of the total annual fixed costs to derive the amount of fixed costs allocated to a particular entry.

482 regulations, by a joint external study of the importer's and exporter's finance departments. The Importer also submitted a transfer pricing study, dated September 20, 2001, prepared by PricewaterhouseCoopers, LLP, for CBP review, which was not provided to CBP at the time HRL 547654 was decided. This transfer pricing study further confirms the margin the Importer utilizes in establishing its transfer price. The Importer's transfer pricing study also determines the range of profit margins the Importer's profit must fall within in order for the transfer price to be at arm's length. If, depending on the level of imports across which the fixed costs are allocated, the allocation of fixed costs causes the Importer's profit to fall outside of the range, the Importer must make the necessary adjustments to bring its transfer price within the range to be at arm's length.

Although certain post-importation price adjustments may occur pursuant to the Policy, the Importer is of the view that transaction value may be applied because the price is determined pursuant to an objective formula in place prior to importation. The Importer is also of the view that annual price adjustments made pursuant to the Policy should be taken into account and that Reconciliation should be used as the vehicle to make the adjustment. Finally, the Importer provided information and documentation in an attempt to establish that the related party price was acceptable under the circumstances of sale test, and to clarify the company's transfer pricing policy.

As indicated, the original ruling issued to the Importer determined that transaction value could not be applied because there was no fixed price or objective formula in place for determining the price prior to importation. In view of this finding, the ruling did not analyze the circumstances of the sale to determine whether the related party transaction value was acceptable or whether post-importation price decreases were precluded under 19 U.S.C. §1401a(b)(2)(2). Instead, after finding that the alternate methods of appraisement under 19 U.S.C. §1401a(b) through (e) were not applicable due to the unavailability of information, CBP appraised the merchandise under section 402(f) of the TAA (19 U.S.C. §1401a(f)), using a modified transaction value approach and permitted the Importer to use its figures through Reconciliation.

ISSUE:

1. Does the related party price, determinable pursuant to the transfer pricing policy, constitute a formula at the time of importation for purposes of determining transaction value, and if so, is it acceptable to take post-importation price adjustments (upward and downward) into account in determining transaction value?
2. Do the circumstances of sale establish that the price actually paid or payable by the Importer/Buyer to the Exporter/Seller is not influenced by the relationship of the parties and is acceptable for the purposes of using transaction value?

LAW AND ANALYSIS:

Merchandise imported into the United States is appraised for customs purposes in accordance with Section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. §1401a). The primary method of appraisement is transaction value, which is defined as "the price

actually paid or payable for the merchandise when sold for exportation to the United States," plus amounts for certain statutorily enumerated additions to the extent not otherwise included in the price actually paid or payable. *See* 19 U.S.C. §1401a(b)(1).

As provided in 19 U.S.C. §1401a(b)(4):

(A) The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

Section 152.103(a)(1), CBP Regulations (19 CFR §152.103(a)(1)) provides, in pertinent part, as follows:

> In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula, such as the price in effect on the date of export in the London Commodity Market.

However, rebates, or any other decrease in the price actually paid or payable made or effected after the date of importation are to be disregarded for the purposes of determining transaction value. 19 U.S.C. §1401a(b)(4)(B).

1. Does the related party price, determinable pursuant to the transfer pricing policy, constitute a formula at the time of importation for purposes of determining transaction value, and if so, is it acceptable to take post-importation price adjustments (upward and downward) into account in determining transaction value?

Related party transactions involve initial transfer prices that may be subject to adjustment after importation. It is common for the transfer price to be determined in accordance with the company's transfer pricing policy/formula. The term "transfer pricing policy" refers to Advance Pricing Agreements ("APA"s), transfer pricing studies prepared in accordance with 26 U.S.C. §482 (the IRS transfer pricing statute) or its foreign equivalent, and/or legally binding inter-company agreements/memoranda. Oftentimes such policies provide the method for determining the transfer price, which may include the setting of an initial price and then making various adjustments to the price after the importation based on specified criteria. For example, the transfer pricing policy may provide for the transfer price to be initially set based on certain estimated costs and for adjustments to be made at the end of the year based on the actual costs incurred. Further, adjustments may be made to account for certain additional expenses that may be incurred by the parties. In some cases, the transfer pricing policy may provide for year-end "compensating adjustments" to the transfer price to comply with the requirements of an APA entered into by the U.S. party and the IRS. In other words, the adjustments are taken to bring the profit margins of the companies within the range of profit margins established on the basis of a study of comparable data from the uncontrolled market, in order for the transfer price to be at arm's length for tax purposes. Depending

on the circumstances presented, such adjustments could similarly affect whether the price is considered fixed or determinable by an objective formula at the time of importation.

CBP has determined that where the price is not fixed at the time of importation, transaction value is not applicable. *See e.g.,* HRL 545618, dated August 23, 1996; HRL 545242, dated April 16, 1995; HRL 545798, dated October 28, 1994; HRL 546231, dated February 10, 1997; and HRL 546421, dated March 27, 1998. CBP has determined that the fixed price rule is satisfied when the price is determinable by an objective formula agreed upon prior to importation. In applying this provision, CBP ruled in HRL 542701, dated April 28, 1982, TAA No. 47, and subsequent rulings, that in situations in which the price paid or payable is determined pursuant to a formula, a firm price need not be known or ascertainable at the time of importation. Nevertheless, it is necessary for the formula to be fixed at importation so that a final sales price can be determined at a later time on the basis of some event or occurrence over which neither the seller nor the buyer has any control. *See also* HRL 545622, dated April 28, 1994.

CBP has previously determined that if a transfer price is subject to post-importation adjustments and those adjustments are within the control of either the buyer or the seller, the formula exception to the fixed price rule would not apply. *See* HRL 544680, dated June 26, 1992 (CBP did not consider the parties' arrangement to be a "formula" because the final determination to make additional payments depended on a subjective factor within the control of the importer, *i.e.*, importer's inspection of the imported merchandise). *See* HRL 545388, dated October 21, 1994 (the parties entered into a supplemental agreement after the importation decreasing certain royalty payments; CBP found that this was a decrease in the price that was "made or otherwise effected...after the date of importation..." and should be disregarded).

In many cases, the events in the transfer pricing formula that trigger the post-importation price adjustments (for example, the costs incurred or the profit earned) are to some extent within the control of the buyer and/or the seller. Accordingly, based on these prior decisions, many transfer pricing policies would not qualify as formulas within the meaning of 19 CFR §152.103(a)(1). In those cases, transaction value determined under 19 U.S.C. §1401a(b) could not be applied, even if the relationship between the parties did not affect the price. This result is not consistent with transaction value being the preferred method of appraisement.

Further, when transaction value cannot be applied, the merchandise must be appraised using one of the other valuation methods in 19 U.S.C. §1401a. In a few cases, CBP has determined that when transaction value could not be applied because the transfer price was not "fixed," the merchandise should be appraised using a modified transaction value under the fallback method, *e.g.,* HRL 545618, dated August 23, 1996; HRL 547654, dated November 8, 2001; and, HRL 544845, dated November 9, 1993. However, under the customs value law, the fallback method may only be used when all previous valuation methods cannot be applied. In HRL 545618, HRL 547654, and HRL 544845, CBP applied the fallback method of appraisement and permitted the importers to claim upward and downward post-importation adjustments because the information about the applicability of other methods was not available.

In HRL 547654, the price for the goods was arrived at pursuant to a methodology that included an initial sum subject to adjustments. The Importer provided CBP with limited details of the transaction and little documentation explaining the relevant transfer pricing policies. Thus, although there was a formula in HRL 547654 that determined the price prior to importation and allowed for certain post-importation adjustments, CBP found that the transfer pricing policy was not fixed and could not be considered an objective "formula" within the meaning of 19 CFR §152.103(a)(1) because the parties could control whether and to what degree the price would be adjusted. Accordingly, the use of transaction value was precluded for the proposed billing structure. However, CBP appraised the merchandise under section 402(f) of the TAA (19 U.S.C. §1401a(f)), using a modified transaction value approach and permitted the Importer to claim downward post-importation adjustments through Reconciliation. While this analysis was consistent with CBP's interpretation at the time, we now conclude that notwithstanding that there may be some element of control, additional considerations should be taken into account in evaluating whether an intercompany transfer pricing formula is an objective formula when it provides for post-importation adjustments to the price. Furthermore as one commenter notes, the use of other valuation methods, including the Fallback method will still be utilized if the requirements set forth in this decision are not satisfied.

After examining the additional submissions which have clarified the Importer's transfer pricing policy, CBP finds that the Importer's transfer pricing policy constitutes an objective formula. It is CBP's view that when analyzing whether transaction value may be used between related parties, which may result in post-importation adjustments, certain factors should be examined to determine whether there is a fixed price, pursuant to a formula.

In the notice of proposed revocation, CBP noted that since the following criteria were met, the use of transaction value was acceptable: (1) a written "Intercompany Transfer Pricing Determination Policy" sets out how the transfer price is to be determined prior to the importation; (2) the importer/buyer is the U.S. taxpayer, and it uses its transfer pricing methodology in filing its corporate income tax returns; (3) the company's transfer pricing policy specifically covers the products for which the value is to be adjusted; (4) the policy specifies what adjustments must be made to the transfer price, and the company provides detailed explanations and calculations of the adjustments incurred and claimed in the United States; and, (5) there is an absence of other conditions which may indicate that the compensating adjustments do not result in an arm's length price between the parties.

Multiple comments were submitted concerning this list of factors. Two commenters requested clarification whether this list is disjunctive or conjunctive, considering CBP's statements that no single factor is determinative and whether an objective formula exists will be made on a case-by-case basis. Simply stated, this list of factors is conjunctive; accordingly, all of the criteria must be met in order to claim post-importation adjustments.

Upon further consideration, CBP has concluded that to the extent a transfer pricing policy is not prepared in recognition of IRS rules, the policy could be viewed as within the control of the parties, and therefore, not constitute a formula within the meaning of 19 CFR §152.103(a)(1). Accordingly, factor (1) is clarified to provide note that the transfer pricing policy must be prepared in the manner consistent with Section 482 of the Internal Revenue Code, 26

U.S.C. §482, whether such policy is agreed to by the IRS, as in the case of an APA, or not. Further discussion pertaining to this change is discussed below concerning factor (2).

One commenter suggested CBP adopt a new factor in applying the circumstances of the sale test by stating that whenever the "objective formula" pricing requirement for transaction value is met, then, by definition, the circumstances of the sale test is met. Another commenter referred to factor (5) and asked whether this factor is synonymous with the circumstances of the sale or test values methods that CBP considers in analyzing whether the relationship between the related parties influenced the price.

It is well-settled that transaction value between a related buyer and seller is acceptable if an examination of either the circumstances of sale indicates that their relationship did not influence the price or if the transaction value of the imported merchandise closely approximates certain test values. 19 U.S.C. §1401a; 19 CFR §152.103. This continues to be the requirement per 19 U.S.C. §1401a. However, the factors listed are set forth to address the "payable" aspect of the price actually paid or payable in transaction value and whether potential post-importation adjustments, particularly downward adjustments, that under prior CBP decisions could not be taken into account, may now be accepted. If an import transaction involves post-importation adjustments, and an importer seeks to claim those downward adjustments (as upward adjustments always required reporting), then its transfer pricing policy must constitute a "formula" within the meaning of 19 CFR §152.103(a)(1). Further, those adjustments must satisfy either the circumstances of the sale or test values methods. Therefore, CBP does not agree that if the formula requirement is met, the circumstances of the sale test is met. Rather, the post-importation analysis has two requirements: (1) there is a "formula" within the meaning of 19 CFR §152.103(a)(1) that is analyzed using the factors, so that properly documented adjustments may be claimed if they occur; and (2) the parties satisfy the requirements under 19 U.S.C. §1401a to show that the relationship did not influence the price. CBP's analysis under these two requirements is not overlapping; one of the requirements deals with the appropriateness of claiming the post-importation adjustments in cases that fall under CBP's interpretation of a formula, fixed prior to the importation, and the other requirement goes to the validity of the prices declared to CBP. Moreover, rather than merely reflecting the circumstances of the sale or test values methods, factor (5) was meant to address other considerations that may affect the price, such as those referred to in 19 CFR §152.103(j). For example, such considerations may include the adjustments claimed for defective merchandise because such adjustments are subject to separate regulatory standards.

One commenter suggested the deletion of the reference to the U.S. taxpayer in factor (2) because this reference would preclude the adjustments made to a transfer price in a situation where both the buyer and seller are not U.S. taxpayers, and thus, not necessarily subject to the U.S. IRS rules. CBP is mindful of this concern; however, to provide certainty, it is necessary for the transfer pricing policies to meet the U.S. legal standards. Accordingly, CBP declines to accept this commenter's suggestion.

Another commenter alleges that factors (1) and (4) do not indicate the level of detail needed in the transfer pricing policy in order to be sufficient for customs purposes. Also, there are concerns about factors (3) and (5) because these factors are said to be subject to interpretation and not easily enforced.

For example, the commenter claims that factor (3) does not indicate how detailed the imported products have to be described, and factor (5) provides CBP with an ability to reject transfer pricing policies that do not sufficiently substantiate that the prices at issue are at arm's length.

Factors (1) and (4) taken together essentially require the importer to specify in its transfer pricing documentation how the adjustments are determined and maintain accounting details from its books and/or financial statements to support the claimed adjustments. The specificity of the information will be evaluated on a case-by-case basis; however, importers are encouraged to keep detailed records of their post-importation adjustments and all relevant documents that may assist CBP in its analysis. Factor (3) requires the transfer pricing policy to cover the goods for which an adjustment may later be made. For example, if the company imports vehicles and parts, CBP will not accept adjustments to the value of imported vehicles, if the company's transfer pricing policy only covers vehicle parts.

Taking into account all of the comments submitted with respect to CBP's list of factors, CBP revised the list of factors used to determine whether an objective formula is in place prior to importation for purposes of determining the price within the meaning of 19 CFR §152.103(a)(1) as follows:

(1) A written "Intercompany Transfer Pricing Determination Policy" is in place prior to importation and the policy is prepared taking IRS code section 482 into account;

(2) The U.S. taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return;

(3) The company's transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted;

(4) The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,

(5) No other conditions exist that may affect the acceptance of the transfer price by CBP.

Considering these factors in this particular case, we note that since the Importer claimed adjustments for the fiscal years 2001 and 2002, and the written transfer pricing policy was executed by relevant parties on February 11, 2000, the agreement, and thus, the formula was in effect prior to the importations subject to this internal advice request. Further, the agreement was prepared taking the IRS rules into account. We also note that the formula had an impact on the reported Customs values. Since the downward adjustments are reported in the Importer's accounting books as adjustments to "Other Income" and are made quarterly,[6] these adjustments specifically result in lower declared values for the merchandise. Such transfer pricing

[6] Adjustments made on the yearly or quarterly basis are more acceptable than adjustments booked in lump sum at the end of the multi-year APA term (if applicable), for example. If

adjustments indirectly relate to the originally-reported price actually paid by the Importer to the related Seller (adjustments must, directly or indirectly, relate to the value of the merchandise). In this case, based on the information provided by the Importer, the related party price (and the adjustments thereto) are determined pursuant to their transfer pricing policy. The Importer provided CBP with documentation that showed what adjustments are made on an entry-by-entry basis; therefore, adjustments are related to specific entries upon importation. The transactions in question are also not subject to any other consideration that may affect transaction value. Finally, the documents submitted by the Importer show how the adjustments are calculated and claimed. Specifically, only the budgeted fixed costs (and not the variable costs, absorbed by the Importer), incurred in the United States are adjusted after importation. None of the variable costs are stated to be re-invoiced or remitted back to the Seller/Exporter. On the other hand, the amount of the fixed costs is known at the beginning of each year and is set in advance, pursuant to the inter-company memorandum, dated December 20, 1999. The element that is not known at the time of importation is the level of total imports across which the fixed costs are allocated in a particular month. Therefore, the costs paid are set; it is merely the allocation of those costs to the individual import entries that cannot be fixed until after the month has passed. Taking into account the adjustments based on the fixed costs, the analysis undertaken by PricewaterhouseCoopers, LLP concluded that the Importer's average profit ratio was within the range for comparable transactions by similarly situated companies and that the Importer's implementation of its transfer pricing policy conformed to the applicable U.S. laws and regulations.

While some of the provisions of the transfer pricing policy in this particular case might be considered to be within the "control" of the parties under the prior understanding of "control" in CBP's previous decisions, such as the initial determination of the budgeted fixed costs by the company, the satisfaction of the factors set out above reduces the possibility of price manipulation and subjectivity in claiming post-importation adjustments. Here, the amount of fixed costs is set in advance and later simply allocated to the individual imports. Further, the transfer pricing policy includes a procedure to quarterly verify the actual versus budgeted fixed cost amounts as well as an explanation as to any possible variances. Therefore, we conclude that in this particular case and based on the above referenced factors, the Importer's transfer pricing policy may be considered an objective formula in place prior to importation for purposes of determining the price within the meaning of 19 CFR §152.103(a)(1).

Therefore, CBP is of the view that post-importation adjustments (both downward and upward), to the extent they occur, may be taken into account in determining the transaction value under 19 U.S.C. §1401a(b). We find the downward adjustments in the transfer price made pursuant to the valid transfer pricing study are not rebates of, or other decreases in, the price actually paid or payable that are made or otherwise effected between the buyer and seller after the date of importation of the merchandise into the United States (*see* 19 U.S.C. §1401a(b)(4)(B)). Instead, the post-importation adjustments represent an element of the determination of the price actually

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the adjustments are made at the end of the term, the importers must show that such adjustments would not result in the importers being out of the transaction value for Customs purposes).

paid or payable in accordance with 19 CFR §152.103(a)(1). Therefore, the post-importation adjustments made pursuant to the transfer pricing policy in this case simply reflect what should have been reported as the invoice price upon entry, had the exact price information of the imported merchandise been available at the time. Any such changes in the transfer price should be immediately reported to CBP.

In this particular case, the Importer uses Reconciliation to report downward and upward post-importation adjustments to the value initially declared upon the importation of the merchandise. Reconciliation allows the importer, using reasonable care, to file entry summaries with CBP with the best available information, with the mutual understanding that certain elements, such as the declared value, remain outstanding. At a later date, when the specifics have been determined, the importer files a Reconciliation entry which provides the final and correct information. The Reconciliation entry is then liquidated, with a single bill or refund, as appropriate. Furthermore, the Reconciliation entry can be filed as late as 21 months from the date of the first entry summary filed under that Reconciliation with extensions of time as available to importers. This flexibility makes Reconciliation an ideal vehicle to declare all upward or downward post-importation adjustments within the timeframe allowed by in the APA or a transfer pricing study or policy that directly (or indirectly) relate to the value of the merchandise. Thus, the Importer should continue to report all of its adjustments to CBP via Reconciliation.

Commenters reflected general support for the use of the Reconciliation program. However, two commenters argued that there is no legal basis for making participation in the Reconciliation program mandatory in order to report post-importation adjustments, and that other administrative mechanisms should be available to the importers, such as filing of post-entry amendments and protests, to claim downward post-importation adjustments and duty refunds. Additionally, recognizing that the Reconciliation program remains a test program at this point in time, a commenter urged CBP to formalize the Reconciliation Prototype Program through the adoption of formal regulations specifically contemplated by 19 U.S.C. §1484(b). Another commenter noted that currently the Reconciliation guidelines state that where a refund of an overpayment of duties and fees is sought, an aggregate reconciliation is not available unless the importer is willing to waive the right to a refund, and thus, refunds in duties can only be made on an entry-by-entry basis.

CBP recognizes the various concerns presented by the trade community and agrees that while Reconciliation is the most efficient mechanism for claiming these adjustments the use of Reconciliation is not mandatory. CBP strongly encourages importers who may anticipate post-importation adjustments to use the Reconciliation program. Reconciliation will allow importers time to gather their information to document that their transactions satisfy that the price is an arm's length price. If importers claim the adjustments outside of the Reconciliation program, they are expected to demonstrate at the time of entry that the price is at arm's length and to provide supporting information.

2. Do the circumstances of sale establish that the price actually paid or payable by the Importer/buyer to the exporter/seller was

not influenced by the relationship of the parties and is acceptable for the purposes of using transaction value?

Having established under the new approach that the Importer's transfer pricing policy constitutes a formula, despite the post-importation adjustments being within some control of the buyer and/or the seller, we must determine whether the imported merchandise may be appraised under transaction value. In order to use transaction value, there must be a bona fide sale for exportation to the United States. In HRL 547654, the question whether there was a bona fide sale was not at issue. Therefore, it is assumed that bona fide sales occurred. In addition, there are special rules that apply when the buyer and seller are related parties, as defined in 19 U.S.C. §1401a(g). Specifically, transaction value between a related buyer and seller is acceptable only if the transaction satisfies one of the two tests: (1) circumstances of the sale or (2) test values. *See* 19 U.S.C. §1401a(b)(2)(B); 19 CFR §152.103(l). While the fact that the buyer and seller are related is not in itself grounds for regarding transaction value as unacceptable, where CBP has doubts about the acceptability of the price and is unable to accept transaction value without further inquiry, the parties will be given the opportunity to supply such further detailed information as may be necessary to support the use of transaction value pursuant to the methods outlined above.

In this case, the Importer provided information regarding the circumstances of the sale. Under this approach, the transaction value between a related buyer and seller is acceptable if an examination of the circumstances of the sale indicates that although related, their relationship did not influence the price actually paid or payable. The CBP Regulations specified in 19 CFR Part 152 set forth illustrative examples of how to determine if the relationship between the buyer and the seller influences the price. In this respect, CBP will examine the manner in which the buyer and seller organize their commercial relations and the way in which the price in question was derived in order to determine whether the relationship influenced the price. If it can be shown that the price was settled in a manner consistent with the normal pricing practices of the industry in question, or with the way in which the seller settles prices with unrelated buyers, this will demonstrate that the price has not been influenced by the relationship. *See* 19 CFR §152.103(l)(1)(i)-(ii). In addition, CBP will consider the price not to have been influenced if the price was adequate to ensure recovery of all costs plus a profit equivalent to the firm's overall profit realized over a representative period of time. 19 CFR §152.103(l)(1)(iii). These are examples to illustrate that the relationship has not influenced the price, but other factors may be relevant as well.[7]

Detailed information has been confidentially provided by the Importer regarding the Seller's sale price data for the imported products. In view of this information submitted by the Importer concerning the prices of the merchandise sold to related and unrelated buyers around the world, which are established pursuant to the company's Transfer Pricing Determination Policy and further supported by the transfer pricing study prepared by

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[7] The fact that the "fixed price" requirement has been satisfied based on the acceptance of the Importer's transfer pricing policy, prepared for tax purposes, as formula, does not mean that the circumstances of the sale test is satisfied. The Importer must show that the relationship has not influenced the price.

PricewaterhouseCoopers, LLP, CBP finds the examination of whether the transfer pricing study itself (prepared for tax purposes), satisfied the circumstances of the sale test, to be unnecessary. Rather, the Importer has submitted detailed charts including data from 2000 and 2001 pertaining to the Seller's global sales of the imported products. The charts show the name of the customer, the country, the material number and name, the quantity, and unit prices. In addition, the charts include the total volumes and value as well as the average per unit sales price. They also include a weighted average per unit sale price. The charts allow a comparable product-by-product comparison of export sales to the United States (both related and unrelated customers) with export sales to third countries. There are numerous examples of sales of identical products (identified by either material name or material number) at comparable unit prices to unrelated customers both in the United States and abroad. An examination of the data reveals that the price for a particular product can vary throughout the year even to the same customer. The Importer states that the reason for this is that sales prices are driven by market conditions of supply and demand. In particular, most of the imported products are price sensitive depending upon numerous considerations such as the quantity of product purchased, the timing of the demand, and availability as to alternative sources. Other considerations that may vary the price include whether the customer has a long term purchase agreement or whether a sale is merely a "spot purchase." The customers for such products are often in industries whose business is cyclical in nature and very sensitive to changes in general economic conditions. These fluctuating market conditions are reflected in the varying sales prices for these products. Notably, these price differences occur equally for sales to unrelated parties as well as to related parties. Therefore, sometimes the prices can be lower for sales to parties that are not related than the prices for sales to related parties.

Based on the Importer's explanation of the differences in prices between related and unrelated parties and detailed documentation submitted to CBP, we find that the related party prices are settled in a manner consistent with the way the seller settles prices in sales to unrelated buyers. Although CBP generally requires that the comparison sales to unrelated buyers be sales to buyers in the United States, CBP will consider evidence regarding sales to unrelated buyers in other countries, provided the Importer presents an adequate explanation as to why it is relevant to the transactions at issue. In this instance, the Importer presented an adequate explanation as to why it is relevant to the transactions at issue and accounted for the differences in unit prices. The Importer also submitted price lists for the merchandise sold by the Seller to the unrelated parties in the United States. Thus, the Importer satisfied the circumstances of the sale test. Accordingly, transaction value is acceptable method of appraisement in the instant case.

HOLDING:

Based on the above referenced factors, in this case the Importer's transfer pricing policy may be considered a formula in place prior to importation for purposes of determining the price within the meaning of 19 CFR §152.103(a)(1). Therefore, all adjustments to the price pursuant to the Importer's transfer pricing policy, which were reported to CBP, shall be taken into account in determining transaction value. Lastly, we find that the

related party prices are settled in a manner consistent with the way the seller settles prices in sales to unrelated buyers.

Please note that this decision is issued on the assumption that all of the information furnished in connection with the consideration of this matter, including the internal advice and reconsideration requests, is accurate and complete in every material respect. Further, the application of this decision is subject to verification by the Office of Regulatory Audit should an audit be conducted.

This decision should be mailed by your office to the party requesting Internal Advice no later than 60 days from the date of this letter. On that date, the Office of Regulations and Rulings will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

EFFECT ON OTHER RULINGS:

Headquarters Ruling Letter ("HRL") 547654, dated November 9, 2001, is hereby revoked.

Sincerely,

IEVA K. O'ROURKE

for

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Branch