

# ACI's 10<sup>th</sup> Advanced Forum on Import Compliance & Enforcement

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## How to Properly Classify and Value Goods Related to Research & Development

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Tweeting about this conference?

**#ACICustoms**



# Classifying & Valuing Imported R&D Products

- What's the problem?
  - Tariff Classification / duty rate
  - Customs Valuation rules
  - Customs value of pre-production, prototype, 1<sup>st</sup> run samples are significantly higher in value
  - Must declare and pay customs duties and fees on true value to develop and produce R&D product

# Classifying & Valuing Imported R&D Products

- Valuation of imported R & D Products
  - What method of valuation applies?
    - Is there a “price paid”? (Transaction value)
    - Are the parties related?
    - If TV is excluded, what alternative method will apply?
  - TV – Is the price accurate and complete?
    - Need to ask – How was it determined?
    - What about assists and supplemental payments?
    - Generra Rule
    - Development / commercialization milestone payments – HQ W563417 (Guidant- pharmaceutical compound Everolimus)

# Classifying & Valuing Imported R&D Products

- HQ H011276, February 4, 2008 -- Pharmaceutical Research Materials – GlaxoSmithKline
  - Fallback method
  - Arises from prior disclosure concerning valuation of research and development ("R&D") materials
  - Database cost capture: (1) project, (2) cost center, and (3) expense type.
    - External expenditures: materials, external consultants, contract manufacturing, external laboratory testing, and other similar costs.
    - Internal: site-related costs, salaries, contract labor, travel, entertainment, relocation, recruitment, non-project specific laboratory costs and supplies, office costs, utilities, maintenance, and depreciation



# Valuing Imported R & D Products

- Semiconductor Wafers
  - 1<sup>st</sup> Run – Very High Cost
  - Allocate product develop costs over expected commercialized production runs
  - Company used “standard cost” to report values

# Valuing Imported R & D Products

- Foreign R & D for imported products and its impact on customs valuation

- **Specific R&D** necessary for the production of the imported merchandise. “[Blue-sky research](#)” excluded.

research conducted prior to the selection of the lead compounds is "conceptual in nature" and that it is unnecessary for the production of any of the imported APIs, drug products, or biological agents. Again, this finding assumes that GSK can segregate these costs within a particular cost center.

- Generally can an only be addressed case-by-case -- based on the facts, circumstances, and evidence presented.
- HQ H011276, February 4, 2008 (Glaxo ruling)





# Classifying & Valuing Imported R&D Products

- Term “prototype” means originals or models of articles that—
  - Are either in the preproduction, production, or postproduction stage and
  - are to be used exclusively for development, testing, product evaluation, or quality control purposes; or
  - are either in the production or postproduction stage and:
  - associated with a design change from current production
  - (including a refinement, advancement, improvement, development, or quality control in either the product itself or the means for producing the product).



# Classifying & Valuing Imported R&D Products

- Note 7 cont.,
  - May be imported only in limited non-commercial quantities
  - may not (generally) be sold after importation or incorporated into other products that are sold (see below)
  - Articles subject to quantitative restrictions, antidumping orders, or countervailing duty orders may not be classified as prototypes



# Classifying & Valuing Imported R&D Products

- Note 7, cont.,
  - Articles subject to OGA requirements may be classified as prototypes if they comply with all applicable provisions of law and otherwise meet the definition of “prototypes”.
  - Report the 8-digit number (or 10-digit number, if any) found in 9817 in addition to the HTS number appearing in chapters 1-97 which would be applicable but for the provisions of heading 9817



# Classifying & Valuing Imported R&D Products

- Section 10.91 CR
  - Use of 9817 tariff number on entry is a “declaration” of eligibility and qualification (think 1592/false statements)
  - CBP may also ask importer for submission of proof of actual use.
  - Request may be made within 3 years of import/ liquidation of entry can be suspended
  - Declaration requirements:
    - A description of the use that is being and/or that has been made of the articles;
    - A statement that the articles have not and are not to be put to any other use; and
    - A statement that the articles or any parts of the articles have not been and are not intended to be sold, or incorporated into other products that are sold



# Classifying & Valuing Imported R&D Products

- Following “use,” may be sold for “scrap waste, or recycling.” See 10.91(c).
  - If sold for scrap, etc., applicable duty must be paid on the prototypes or parts as scrap, waste, or recycling.
  - Must provide notice of such sale to the port where the entry of the prototype was made
  - Notice is required whether or not duty is owed on scrap.
  - blanket notice covering all sales that occur over a quarterly (3-month) calendar period can be filed

# Classifying & Valuing Imported R & D Products

- Notice must include:
  - The identity of the prototype and entry number under which it was imported;
  - a copy of the declaration of actual use, if proof of actual use was requested
  - a detailed description of the condition of the prototype following use for the intended permissible purposes, including any damage, degradation or deterioration to the article;
  - The name and address of the party to whom the article was sold, and (if known) the use to which the party intends to put the article;
  - The HTSUS subheading number and rate of duty for scrap, waste, or recycled material, as applicable;
  - The value of the scrapped material; and
  - The title of the party executing the declaration and the date of execution.



# Classifying & Valuing Imported R & D Products

- Value for used prototypes or parts sold (10.91(c)(2))
  - The value is the market value based on the character and condition following use for the purposes prescribed in HTSUS subheading 9817.85.01.
  - Should take into consideration any damage, degradation or deterioration resulting from use cause prior to their sale as scrap, waste, or for recycling.
  - The market value will generally be measured by the selling price.

# Classifying & Valuing Imported R & D Products

- “Samples” under HTSUS 9811.00

Heading/ Subheading	Stat Suf- fix	Article Description	OGA	Unit of Quantity	Rat
					1
					General
9811.00.60 EN9811 CAN		-- Any sample (except samples covered by heading 9811.00.20 or 9811.00.40), valued not over \$1 each, or marked, torn, perforated or otherwise treated so that it is unsuitable for sale or for use otherwise than as a sample, to be used in the United States only for soliciting orders for products of foreign countries	FD3		Free



# Classifying & Valuing Imported R & D Products

- Samples under 9811.00.60
  - Products valued at more than \$1 each may not be entered free of duty under subheading 9811.00.60, unless
  - marked as a sample or treated in some way to rendered unsuitable for commercial sale, or any use other than as samples for obtaining orders.
  - words "Sample-Not-For-Resale" permanently marked in a readily visible place



- Real world examples :

- Classification of Chemical Compounds for Pharmaceuticals, HQ H254047 --November 4, 2014
- Honda Fit EV and the related spare parts -- HQ H166815, August 1, 2011
- Investigational New Drug ("IND") -- HQ 563139, February 8, 2005
- Imported Sample Garments -- HQ 563080, October 26, 2004
- Importation of intermediate used to produce a product excluded HQ 562734, August 13, 2003



# Speaker Bio

- George Tuttle is an attorney with the San Francisco Bay Area law firm of George R Tuttle Law Offices.
- He has been in practice for over 30 years. His practice emphasis is on Customs, international trade regulation, and export compliance and related matters.
- He assists companies with compliance audits and to develop effective compliance programs; determine correct customs duties, values, product classifications, and duty preference eligibility; obtain rulings, file protests; and resolve penalty, seizure and enforcement cases. He also litigate trade cases before the United States Court of International Trade and the CAFC.
- Mr. Tuttle has written and contributed to several articles and books published by the American Bar Association's International Law Section, including Chapter 9 of the recently revised "Customs Law Handbook" pertaining to Customs Audits.
- Additional information about Mr. Tuttle and the firm can be found at [www.tuttlelaw.com](http://www.tuttlelaw.com) .

