

Global Trade Alert

NEVILLE PETERSON LLP

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Customs to Withdraw Proposal to Kill “First Sale” Rule of Valuation

Agency Had Proposed Rule that Would Have Increased Duty Assessments for Many Goods

United States Customs and Border Protection (CBP) has indicated that it will shortly withdraw its proposal to abolish the “first sale” rule of Customs appraisal, which the agency had recognized since 1992. The announcement of the impending withdrawal appeared in a letter from new Customs Commissioner Alan Bersin to the National Association of Manufacturers (NAM).

The announcement suggests that Customs intends to allow the “first sale” rule to remain in place, at least for the foreseeable future. It eliminates substantial uncertainty for many importers who had relied upon the rule, or who were planning to establish “first sale” programs.

“First Sale” Rule Applies in Multi-Tiered Transactions

Most goods imported into the United States are appraised, for Customs purposes, on the basis of “transaction value”, which is the “price actually paid or payable for the merchandise when sold for export to the United States”, plus certain statutory additions. In many cases, however, goods may undergo more than one sale “for exportation to the United States” – for instance, a sale from the manufacturer to a

middleman, and a resale from the middleman to a United States purchaser/importer. Customs’ position is that the price paid by the importer should generally be used as the basis for determining “transaction value”.

However, in the landmark 1992 case of *Nissho-Iwai America Corp. v. United States*, the Court of Appeals for the Federal Circuit ruled that transaction value could be based on the price in the first “sale for export to the United States” which is made on an “arms-length” basis, assuming adequate proof of the sale (invoices, proof of payment, etc.) can be established. Since that time, many importers, particularly of high duty-rate goods, have used the “first sale” appraisal rule to reduce their duty liability.

Proposal to Eliminate “First Sale” was Controversial

In 2008, Customs published a proposed rulemaking which would have eliminated the “first sale” appraisal rule and instead required that the “transaction value” of imported merchandise in all cases be based on the price in the last “sale for exportation” to the United States. The proposal was immediately controversial, and was opposed by many importer groups, who noted that the proposal was contrary to established United States law, as interpreted by the courts.

Following trade protests, the Congress included in the 2008 Farm Bill a “sense of Congress” provision that Customs not tamper

with the “first sale” rule until at least the end of 2010. At the same time, Congress directed the United States International Trade Commission (ITC) to conduct an informational study concerning the use of the “first sale” rule.

The ITC’s study concluded that the “first sale” appraisement rule was being used with respect to about 2.8% of United States imports, by value. The figure does not sound high, but represents a substantial percentage of goods moving in “multi-tiered transactions” which were eligible for use of the “first sale” rule. As anticipated, apparel, footwear, chemicals and machinery were the industries making greatest use of the rule.

Many major retailers have established “first sale” programs, to allow them to take advantage of the rule when purchasing goods through middlemen, and many suppliers to retailers have also established their own “first sale” programs.

“First Sale” Rule Still Controversial

While withdrawal of Customs’ “first sale elimination” proposal allows traders to breathe a sigh of relief for the near term, the fate of the “first sale” rule in the longer term remains in doubt. Revenue-hungry governments around the world would still like to see the rule abolished, and the World Customs Organization has published an interpretive note suggesting that the last “sale for exportation” should be used for Customs appraisement. Ultimately, however, it may be necessary to change the GATT/World Trade Organization Customs Valuation Code, upon which most WTO members have based their national Customs valuation statutes.

Withdrawal of the Customs proposal, however, would mean that firms importing goods into the United States would not need to concern themselves with loss of the “first sale” principle, at least in the foreseeable future.

Moving Ahead With “First Sale” Programs

Although Customs accepts the “first sale” principle, it does require that importers have adequate evidence proving (1) the bona fide nature of the sale selected for appraisement (2) payment of the “price paid or payable” in that sale, and (3) that the sale was “for export to the United States”.

Our firm stands ready to assist firms in establishing, auditing and evaluating “first sale” appraisement programs.

NEVILLE PETERSON LLP

17 State Street 1400 16th St., N.W.
New York, NY 10004 Washington DC 20036
212 635-2730 202 861-2959

www.npwtradelaw.com
