

**First Sale  
Customs Valuation  
Questionnaire**

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## **Establishing that a Sale between a Vendor and a Manufacturer Could be the Basis for Transaction Value - Questionnaire**

### **The Legal Basis for the “First Sale” Rule**

In numerous rulings, Customs Headquarters has set forth the following as the legal basis for the “first sale” rule. Merchandise imported into the U.S. is appraised 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 preferred 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 certain statutory additions. 19 U.S.C. § 1401a(b)(1).

In *Nissho Iwai American Corp. v. United States*, 16 C.I.T. 86, 786 F. Supp. 1002, reversed in part, 982 F. 2d 505 (Fed. Cir. 1992), the Court of Appeals for the Federal Circuit reviewed the standard for determining transaction value when there is more than one sale which may be considered a sale for exportation to the U.S. The case involved a foreign manufacturer, a middleman, and a U.S. purchaser. The court held that the price paid by the middleman/importer to the manufacturer was the proper basis for transaction value.

The court further stated that in order for a transaction to be viable under the valuation statute, it must be 1- a sale; 2- negotiated at arm’s length; and 3- involving goods clearly destined for the U.S.

Customs presumes that the transaction value is based on the price paid by the importer. An importer may request appraisement based on the price paid by the middleman to the foreign manufacturer in situations where the middleman is not the importer. However, it is the importer’s responsibility to show that the “first sale” price is acceptable under the standard set forth in *Nissho Iwai*. That is, the

importer must present sufficient evidence that the alleged sale was a *bona fide* “arm’s length sale,” and that it was “a sale for export to the United States” within the meaning of 19 U.S.C. § 1401a.

### **Treasury Decision 96-87 Explains the Documents Required to Support a “First Sale” Claim**

In Treasury Decision (T.D.) 96-87, dated January 2, 1997, a copy of which is enclosed as **Exhibit 1**, the Customs Service (now Customs and Border Protection (CBP)) advised that the importer must provide a description of the roles of the parties involved and must supply relevant documentation addressing each transaction that was involved in the exportation of the merchandise to the U.S. The documents may include, but are not limited to purchase orders, invoices, proof of payments, contracts, and any additional documents (e.g., correspondences) that establishes how the parties deal with one another. The objective is to provide CBP with “a complete paper trail of the imported merchandise showing the structure of the entire transaction.”

T.D. 96-87 further provides that the importer must also inform CBP of any statutory additions and their amounts. If unable to do so, the sale between the middleman and the manufacturer cannot form the basis of transaction value.

In order to determine whether a “first sale” claim is appropriate, please complete the following questionnaire. Note - your vendors and manufacturers will have to provide much of the information requested, and their long term commitment is essential when contemplating a “first sale” program.

**Overview of the Parties Involved**

1 - Please provide the names and addresses of all the parties involved in the multi-tiered transaction.

2 - Please describe their roles in causing the merchandise to be imported into the United States.

3 - Please provide copies of any contracts or other agreements between the parties.

4 - Are any of the parties related or under common ownership?

5 - Who is the importer of record?

**Were There One or More *Bona Fide* Sales?**

6 - Did the Importer purchase the goods from the Vendor?

7 - When did the Importer take title and assume risk of loss?

8 - Do the shipping or insurance documents support that?

9 - Did the Middleman purchase the goods from the Manufacturer/Factory?

10 - When did the Middleman/Vendor take title and assume risk of loss?

11- For how long did the Middleman have title to the goods?

12 - Please explain how this is reflected on the purchase orders or commercial invoices and shipping or banking documents.

**Were the Sales Negotiated at Arm's Length**

13 - How were the prices negotiated between the Vendor and Manufacturer?

Note - a sale between unrelated parties is presumed by Customs to be at arm's length.

14 - How were the prices negotiated between the Importer and Vendor?

**Were the Goods Clearly Destined For the United States?**

15 - Are there "back to back" purchase orders from the Importer to the Vendor and from the Vendor to the Factory?

16 - Do these documents clearly show that the merchandise is destined for the United States?

17 - Is there any special marking, labeling, SKUs or other processing that indicates that at the time of manufacture, the goods were clearly destined for the United States?

18 - Does the outer packaging indicate that the goods were clearly destined for the United States?

19 - Is there anything else that indicates that at the time the goods were ordered from the factory, they were clearly destined for the United States?

**Total Amount Paid to Factory?**

20 - In addition to the invoice from the Factory or Middleman, are there any of the following that are not included in the price?

1. Packing Costs;
2. Commissions;
3. Assists, Tooling, Design, R&D;
4. Royalties or License Fees;
5. Proceeds of Subsequent Resale.

21 - In addition to the invoice value, are there any other payments made by the Importer or the Middleman to the Factory?

**Documentation Required to Support a “First Sale” Claim**

As discussed above, Treasury Decision 96-87 requires an importer to provide a description of the roles of the parties involved and must supply relevant documentation addressing each transaction that was involved in the exportation of the merchandise to the U.S.

The documents may include, but are not limited to purchase orders, invoices, proof of payments, contracts, and any additional documents (e.g. correspondences) that establishes how the parties deal with one another. The objective is to provide CBP with “a complete paper trail of the imported merchandise showing the structure of the entire transaction.”

In accordance with T.D. 96-87, please provide the documents that support the claim that the sale from the factory was 1- a sale; 2- negotiated at arm's

length; and 3- involving goods clearly destined for the U.S. Also, for ease of reference, please put them in chronological order, identifying them and noting any common numbers, for example, a P.O. number, that is common to multiple invoices or payment documents. The documents can be annotated to explain how they support a “first sale” claim.

Documents should include:

- 1 - P.O. from Importer to Vendor
- 2 - P.O. from Vendor to Factory
- 3 - Invoice from Factory to Vendor
- 4 - Invoice from Vendor to Importer
- 5 - Payment from Importer to Vendor
- 6 - Payment from Vendor to Factory
- 7 - Any other documents that could support a “first sale” claim.

### **Responsible Personnel**

- 22 - Who is responsible for “first sale” compliance for the Importer?
- 23 - Who is responsible for “first sale” compliance for the Middleman?
- 24 - Who is responsible for “first sale” compliance for the Manufacturer?
- 25 - Who is responsible for completing this questionnaire and how can they be contacted?

**END OF QUESTIONNAIRE**

# EXHIBIT 1



## DETERMINING TRANSACTION VALUE IN MULTI-TIERED TRANSACTIONS

### T.D. 96-87

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The primary method of appraising imported merchandise is transaction value. Transaction value is the price actually paid or payable for imported merchandise when sold for exportation to the United States plus certain statutory additions. This notice clarifies some of the issues that arise in multi-tiered transactions in determining which is the sale for exportation to the United States for the purpose of determining transaction value. It also sets forth the documentation and information needed to support a ruling request that transaction value should be based on a sale involving a middleman and the manufacturer or other seller rather than on the sale in which the importer is a party.

DATES: All future ruling requests that in a multi-tiered arrangement transaction value is properly based on a sale not involving the importer must be supported by the evidence discussed in this notice.

FOR FURTHER INFORMATION CONTACT: o o o

#### SUPPLEMENTARY INFORMATION:

The primary method of appraising imported merchandise is transaction value. Section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a), provides that the transaction value of imported merchandise is the price actually paid or payable for the merchandise when **sold for exportation to the United States**, plus specified additions. Thus, in order for imported merchandise to be appraised under transaction value it must be the subject of a bona fide sale between the buyer and seller and it must be a sale for exportation to the United States.

In *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), the Court of Appeals for the Federal Circuit reviewed the standard for determining transaction value in a three-tiered distribution system involving a middleman. The Court indicated that a manufacturer's price for establishing transaction value is valid so long as the transaction between the manufacturer and the middleman falls within the statutory provision for valuation. In this regard, the Court stated that in a three-tiered distribution system:

The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influence that affect the legitimacy of the sale price \* \* \* [T]hat determination can be made on a case-by-case basis.

Id. at 509. See also, *Synergy Sport International, Ltd. v. United States*, 17 C.I.T. \_\_\_\_, Slip OP. 93-5 (Ct. Int'l. Trade January 12, 1993).

After *Nissho Iwai*, Customs has received numerous ruling requests that transaction value is properly based on a sale which does not involve the importer, but rather a middleman and the

manufacturer or other seller. In our rulings, we have stated that in fixing the appraisement of imported merchandise, Customs presumes that the price paid by the importer is the basis of transaction value and the burden is on the importer to rebut this presumption. In order to rebut this presumption, in accordance with the *Nissho Iwai* standard, the importer must prove that at the time the middleman purchased, or contracted to purchase, the goods were "clearly destined for export to the United States" and the manufacturer (or other seller) and middleman dealt with each other at "arm's length." In reaching a decision, Customs must ascertain whether the transaction in question falls within the statutory provision for valuation, *i.e.*, that it is a sale, that it is a sale for exportation to the United States in accordance with the standard set forth above, and that the parties dealt with each at "arm's length."<sup>1</sup> As stated in *Nissho Iwai*, these questions are determined case-by-case based on the evidence presented.

In order for an importer to rebut the presumption discussed above, certain information and documentation must be provided. Specifically, the requestor must describe in detail the roles of all the various parties and furnish relevant documents pertaining to each transaction that was involved in the exportation of the merchandise to the United States. If there is more than one possible sale for exportation, information and documentation about each of them should be provided.<sup>2</sup> Relevant documents include, purchase orders, invoices, proof of payment, contracts and any additional documents (e.g. correspondence) which demonstrate how the parties dealt with one another and which support the claim that the merchandise was clearly destined to the United States. If any of these documents do not exist, or exist but are not available, the ruling request should so provide. What we are looking for is a complete paper trail of the imported merchandise showing the structure of the entire transaction.<sup>3</sup> If the request covers many importations, it is acceptable to submit documents pertaining to some of the importations provided complete sets of documents are furnished, the underlying circumstances are the same, and the documents are representative of the documents used in all the transactions. Any differences should be explained.

In addition, to establish whether the transaction is "at arm's length" the ruling request must state the relationship, if any, of the parties. In general, Customs will consider a sale between unrelated parties to have been conducted at "arm's length." If the parties to the requested transaction are not related as defined in 19 U.S.C. 1401a(g), then a statement to that effect should be made. However, if the parties to the requested transaction are related, then it is

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<sup>1</sup> Detailed information regarding *bona fide* sales and sales for exportation is contained in the Informed Compliance Publication, *What Every Member of the Trade Community Should Know About: Bona Fide Sales and Sales for Exportation*, November, 1996.

<sup>2</sup> For example, if the importer is trying to prove that a transaction between a middleman and the manufacturer is a viable transaction value, it should describe the role of all the parties (*i.e.*, the importer, the middleman and the manufacturer) and furnish evidence regarding both the alleged sale between the importer and the middleman and the alleged sale between the middleman and the manufacturer. The evidence must show that the middleman purchased the goods from the manufacturer and that the goods were clearly destined to the United States.

<sup>3</sup> An example of a complete paper trail is documentation which shows that: 1) the importer ordered 100 Style A hair driers at \$6 each from the middleman on January 5, 1996 listing the required specifications; 2) the middleman ordered 100 Style A hair driers at \$5 each from the manufacturer listing the importer's specifications on January 10, 1996; 3) the manufacturer shipped 100 Style A hair driers to the importer on February 10, 1996; the packing list shows that these goods are made to the importer's specifications; 4) on February 12, 1996, the middleman billed the importer \$600 for 100 style A hair driers and the importer paid this amount by check; and 5) on February 13, 1996, the manufacturer billed the middleman \$500 for 100 style A hair driers and the middleman paid this amount by check.

necessary to provide Customs with information which demonstrates that transaction value may be based on the related party sale as provided in 19 U.S.C. 1401a(b)(2)(B). (*i.e.*, that the circumstances of sale indicate that the relationship did not influence the price or that the transaction value closely approximates certain test values). For further information regarding related party transactions, see *Transfer Pricing; Related Party Transactions*, 58 Fed. Reg. 5445, January 21, 1993.

Also, in order for a particular transaction to be a viable transaction value there must be sufficient information available with respect to the amounts, if any, of the statutory additions set forth in 19 U.S.C. 1401a(b)(1) (*i.e.*, packing costs, selling commissions, assists, royalty or license fees, and proceeds of any subsequent sale). The statute provides that if sufficient information is not available, for any reason, with respect to any of these amounts, the transaction value of the imported merchandise concerned shall be treated as one that cannot be determined. Therefore, in order to determine whether a particular transaction may be the basis for transaction value, the requestor must provide Customs with sufficient information regarding the amounts, if any, of the statutory additions set forth in 19 U.S.C. 1401a(b)(1). For example, if the importer claims that transaction value should be based on the sale between the middleman and the manufacturer, the importer must inform Customs whether the middleman provided any assists to the manufacturer and if so, the value of the assists and how the value was determined. If the importer does not have this information, transaction value cannot be based on this sale.

Finally, Customs decisions will be based on the evidence presented when the ruling request is submitted. Although we would not be precluded from asking for additional information, this will not be done routinely. If insufficient evidence is provided, the claim will be denied.

In summary, the public should be aware that Customs presumes that transaction value is based on the price paid by the importer and in order to rebut this presumption and prove that transaction value should be based on some other price, complete details of all the relevant transactions and documentation (including purchase orders, invoices, evidence of payment, contracts and other relevant documents) must be provided, including the relationship of the parties and sufficient information regarding the statutory additions. Customs rulings will be based on the evidence submitted with the request.

Dated: December 13, 1996.