

HQ **H022287**

December 30, 2010

VAL-2 OT:RR:CTF:VS **H022287** CMR

CATEGORY: Valuation

U.S. Customs and Border Protection Port of New York/Newark 1100 Raymond  
Boulevard Newark, NJ 07102

RE: Application for Further Review and Protest 4601-07-102332; denial of adjustments; Reconciliation  
entries

Dear Port Director:

This is in response to an Application for Further Review of Protest 4601-07-102332, received by Customs and Border Protection (CBP) on November 21, 2005. The protest is against your port's liquidation of certain reconciliation entries submitted by the importer (also the protestant), [Party A] (hereinafter, "the importer"). The protest was timely filed against your decision to liquidate the entries based on the original entered value and to reject any adjustments to value reflected in the reconciliation entries.

The Application for Further Review was properly approved pursuant to 19 CFR §§ 174.24 and 174.25 as the protestant argues the port's decision in this matter is inconsistent with previous rulings issued by Customs and Border Protection (CBP) Headquarters regarding the acceptability of transfer pricing between related parties and the significance of an Advanced Pricing Agreement (APA) in considering whether the parties' relationship influenced the price. The rulings argued to be inconsistent with the port's decision are not merely cited, but discussed in the memorandum in support of the protest and application for further review.

Protestant has requested confidential treatment be extended to certain information presented in support of the protest. In response to a request from CBP to specifically identify the information for which confidentiality is sought and after meeting with CBP personnel to discuss the substantive issues in this protest, including the request for confidentiality of certain information, Protestant's counsel has clarified and submitted justification for the extension of confidentiality for certain information contained herein. Therefore, CBP will extend confidential treatment to certain exhibits and information regarding the subject merchandise. With regard to the memorandums of November 18, 2005 and June 25, 2008, CBP will withhold any numeric information, such as percentages or values. Information contained in this decision that is to be redacted prior to release of a public version of this decision is identified by means of bracketing and underlining. Under the provisions of 31 CFR 1.6, if a Freedom of Information Act request is made for the Protestant's submission, Protestant will be notified and given an opportunity to further justify the request for confidentiality with regard to specific information contained therein and, if appropriate, an opportunity to prevent disclosure of information through judicial action.

FACTS:

The entries at issue are reconciliation entries filed under the Customs and Border Protection (CBP) Automated Commercial System (ACS) Reconciliation Prototype Program. As explained on the CBP web site: "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 which provides the final and correct information. The Reconciliation is then liquidated, with a single bill or refund, as appropriate."

The importer purchases, among other things, [certain merchandise] from its parent, [Party B]. As the parties are related, they used transfer prices under transaction value as the method of appraisement for the imported merchandise. The importer flagged entries of merchandise for later reconciliation and then filed reconciliation entries to reconcile the value for the merchandise. During the time of the filing of the reconciliation entries at issue, the importer was in the process of negotiating a new Advance Pricing Agreement (APA) with the IRS to cover the taxable years ending December 31, 1999 through December 31, 2005. This APA covered the same goods

purchased by the importer [certain merchandise] from its parent. The APA is a bilateral APA as the IRS and the [foreign] Tax Administration reached agreement on its implementation. The period of the APA includes the time during which the underlying entries subject to the reconciliation entries were filed. The transfer prices for the entries at issue were therefore subject to the APA between the importer and the Internal Revenue Service (IRS) for tax purposes.

The subject protest involves four reconciliation entries involving multiple underlying entries. Counsel for the importer asserts that the adjustments to the transfer prices are required under the APA and that section 1059A of the Internal Revenue Code (IRC) requires the importer to apply the APA adjusted value for Customs purposes. Counsel submits that the downward adjustments to transaction value were the result of lump-sum payments required by the APA. If profit margins of the importer fell outside a specified range, counsel argues the APA required that funds be allocated as adjustments to the transfer pricing between the related companies.

Counsel asserts that the parties meet the circumstances of the sale test to show the related party prices were not influenced by the relationship. However, the only evidence cited by counsel to support this assertion is the existence of the bilateral APA. Counsel cites to Headquarters Ruling Letter (HQ) 548482, dated July 23, 2004, to argue that his client “is entitled to rely upon the APA valuation of its products for establishing the appropriate transaction value.” See Protest Addendum and Memorandum in Support of Application for Further Review, dated November 18, 2005. Counsel also cites to **HQ 546979**, dated August 30, 2000; and **HQ 548233**, dated November 7, 2003, for support.

In addition, in supplemental arguments submitted in support of the protest, counsel argues that the APA constitutes a valid formula for purposes of transaction value appraisement under 19 U.S.C. § 1401a(b). Citing 19 CFR § 152.103(a)(1), which states:

(a) Price actually paid or payable – (1) General. 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 . . . [;]  
counsel argues that the importer’s APA adjustments meet the requirements to qualify as formula adjustments. He argues the agreement for post-entry adjustments is in writing, subject to objective contingencies outside of the importer’s control and made pursuant to a formula.

Finally, counsel claims that his client has an established treatment of the valuation of its merchandise as CBP accepted and liquidated its reconciliation entries filed during the years 1999 through 2001 in which adjustments in value were made pursuant to its APA. During those years, the adjustments were generally

upward adjustments resulting in the tender of additional customs duties. However, in support of the treatment claim, counsel submitted three CF-28s in which the port sought additional information regarding downward adjustments in reconciliation entries. In response to the CF-28s, the importer cited to the APA which was in the process of being finalized with the IRS as the basis for the adjustments in the reconciliation entries. All three reconciliation entries were liquidated with duty refunds issued. In addition, in his July 12, 2010, supplemental submission, counsel submits that the importer is entitled to treatment for entries during 2003 through 2005 based on the treatment established in the period 1999 through 2003. Further support for the treatment claim was submitted in the form of a spreadsheet identifying entries, the year (and quarter of that year) the entry was made, the products, dates of liquidation, the downward percentage change, whether CBP issued a CBP Form 28 seeking additional information, and the actual refund amount issued. The liquidations with refunds occurred between May 23, 2002 and December 5, 2003.

The adjustments for the reconciliation entries at issue are downward adjustments which would result in the importer receiving duty refunds. Your port rejected the reconciliation entries and liquidated the entries as entered because of a failure on the part of the protestant to justify the downward adjustments.

The line item spread sheets for two of the reconciliation entries were included in the information forwarded to this office for consideration of the protest. We note for many items that the value has been reduced down to zero. We note that in one of the reconciliation entries, we found goods classifiable in provisions clearly outside the scope of the APA. Specifically, under the Harmonized Tariff Schedule (HTS) column of the spread sheet we found listed subheading 4911.10.00, Harmonized Tariff Schedule of the United States (HTSUS), which in the 2003 HTSUS provided for "Other printed matter, including printed pictures and photographs: Trade advertising material, commercial catalogs and the like."

In reaching our decision in this matter, this office has considered the materials in the record reflecting the view of the port and the arguments submitted on behalf of the importer by counsel, including the Protest and counsel's addendum in support of the protest and application for further review, dated November 18, 2005 (including a copy of the APA between the importer and the IRS); the Customs Protest and Summons Information Report, dated January 11, 2008; supplemental arguments submitted by counsel, dated June 25, 2008, and July 12, 2010; a Technical Assist Review Report, prepared by the Office of Regulatory Audit, dated March 30, 2007; and the discussion with counsel and his client during a meeting with CBP personnel on June 16, 2010 at our offices.

#### ISSUE:

Is the importer entitled to the downward adjustments as claimed under transaction value for the reconciliation entries at issue?

Is the importer entitled to liquidation of the reconciliation entries as submitted to CBP under a claim of treatment?

#### LAW AND ANALYSIS:

Merchandise imported into the United States is appraised in accordance with section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA) codified at 19 U.S.C. § 1401a. The preferred method of appraisement under the TAA is transaction value, defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus certain enumerated additions set forth in the statute. We note that in this case, the existence of a bona fide sale between the

parties is not at issue and therefore we will not address it here.

When the importer entered the subject merchandise, the entries were flagged for reconciliation on value. In filing the reconciliation entries, the importer seeks downward adjustments for the value of the entered merchandise. For numerous items, the importer seeks to adjust the value down to zero. Your port has questioned the validity of these adjustments.

Circumstances of the sale test

The reconciliation entries at issue involve related parties as defined in section 402(g) of the Tariff Act of 1930, as amended by the TAA, codified at 19 U.S.C. § 1401a. Under 19 U.S.C. § 1401a(b)(2)(A)(iv), transaction value is used for appraisement of imported merchandise “only if” the buyer and seller are unrelated, or if the buyer and seller are related, transaction value is acceptable under 19 U.S.C. § 1401a(b)(2)(B). Section 1401a(b)(2)(B) provides that transaction value is acceptable between related parties only if an examination of the circumstances of the sale indicates that the relationship did not influence the price or the price closely approximates certain test values, i.e., the price of identical or similar merchandise sold to unrelated buyers for export to the United States at or about the same time as the imported merchandise or the deductive value or computed value for identical or similar merchandise exported to the United States at or about the same time as the imported merchandise.

The Statement of Administrative Action (SAA) for the TAA discussed the use of transaction value by related parties. It addressed the two methods, circumstances of the sale and test values, by which to determine whether transaction value between related parties would be acceptable. With regard to the circumstances of the sale, the SAA stated:

. . . the Customs Service will examine relevant aspects of the transaction, including the way in which the buyer seller organize their commercial relations and the way in which the price in question was arrived at, . . . If it is shown that the buyer and seller, although related, buy and sell to each other as if they were not related, this will demonstrate that the price has not been influenced by the relationship and the transaction value will be accepted.

The SAA goes on to offer three examples of how the parties may show their transaction is not influenced by the relationship. The examples are that the price is settled in a manner consistent with the normal pricing practices of the industry in question, or with the way the seller settles prices with unrelated buyers; or, the price is sufficient to ensure recovery of all costs plus a profit equivalent to the firm’s overall profit over a representative period of time in sales of merchandise of the same class or kind. “Statement of Administrative Action,” H.R. Doc. No. 153, 96 Cong., 1st Sess., Pt II, at 449 (1979). These examples are repeated in the CBP Regulations at 19 CFR § 152.103(l). However, as recently stated by CBP in HQ **H029658**, dated December 8, 2009, “[t]hese are examples to illustrate that the relationship has not influenced the price, but other factors may be relevant as well.”

Counsel for the importer relies heavily on HQ **546979**, dated August 30, 2000, and HQ **548233**, dated November 7, 2003, in arguing that the bilateral APA is evidence that the parties meet the circumstances of the sale test. In these rulings, CBP allowed the use of transaction value between related parties who had bilateral APAs in which the transfer pricing methodology used in the APAs was the Comparable Profits Method (CPM). The importer’s APA transfer pricing methodology is the CPM. Counsel cites relevant excerpts from these rulings which support his argument regarding the significance of a bilateral APA.

However, while acknowledging other factors were present in **HQ 546979**, counsel fails to recognize that the additional factors in that ruling and in **HQ 548233** make thos...[more information - please download the word document to see the complete ruling]

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