Bloomberg BNA

Tax Management
Transfer Pricing Report™

U.S. Customs: Slow Going on Transfer Pricing Policy

More than 18 months have passed since U.S. Customs and Border Protection (CBP) implemented a new policy regarding post-importation transfer pricing adjustments. In this article, the authors discuss the impact of the new policy on three subsequent rulings of CBP. They conclude that taxpayers with U.S. import operations should continue to document all aspects of their intercompany pricing (including any post-importation adjustments) with the kinds of contractual, financial, and accounting support set forth in the rulings.

Damon V. Pike and Cylinda Parga
The Pike Law Firm, P.C.

More than 18 months have passed since the new policy of U.S. Customs and Border Protection (CBP) regarding post-importation transfer pricing adjustments became effective. Effective as of July 30, 2012, this long-awaited policy is set forth in HQ W548314 (CBP HQ Ruling Letter), which officially revoked HQ 547654 (21 *Transfer Pricing Report* 162, 6/14/12).

CBP issued the final policy after completing a notice, comment, and review process, during which it received numerous comments on its initial draft of the policy.

Widely regarded as the most significant development in customs valuation law since the passage of the Trade Agreements Act of 1979, the new policy provides much-needed guidance on the impact of transfer pricing policies on the declared customs values (and attendant duty liability) for related-party sales of tangible goods.

Nevertheless, since the policy went into effect, CBP has issued only three new rulings applying the policy to import transactions.

While many more ruling requests concerning the new policy are in the pipeline, the three rulings issued to date provide the only published guidelines for importers/taxpayers to follow since the new policy was announced. This article summarizes those new rulings with the details necessary for proper planning and compliance. Overall, the rulings further cement CBP's reputation as a global leader among customs authorities in developing a practical solution to the vexing issue of interpreting its own statute (customs valuation) in light of the business reality that customs values for related-party imports are based largely on another agency's statute (transfer pricing). CBP's focus on the "total evidence" also portends a more flexible approach that will be developed through the issuance of further rulings.

Damon Pike is president of The Pike Law Firm, P.C., of Decatur, Ga., specializing in customs and international trade consulting and litigation. Cylinda Parga is the firm's senior attorney. They may be contacted at: damon@thepikelawfirm.com and cylinda@thepikelawfirm.com. The firm can be found online at thepikelawfirm.com.

Policy Background

Under the new policy, when companies use intercompany transfer prices for purchases from related-party sellers, any post-importation price adjustments may form part of the customs value and should therefore be reported to CBP if the adjustments meet the requirements of a new, five-factor test for formula pricing. In addition, importers must continue to demonstrate that the "circumstances of sale" test is met, showing that the related-party status does not influence the price declared as the customs value.[1]

First Ruling: HQ H219515

On Oct. 11, 2012, CBP issued HQ H219515, in which it considered whether an importer could properly use "transaction value" as the method for appraising the

[1] The new policy and its relationship with CBP's existing valuation regime is discussed in depth by the authors in a previous article. *See* Damon V. Pike and Cylinda Parga, "U.S. Customs' new landmark transfer pricing policy," *Transfer Pricing International Journal*, Vol. 13, No. 7, July 2012.

 ISSN 1063-2069

customs value of merchandise it wished to import in future transactions.[2] For the contemplated prospective transactions, the importer would purchase the subject merchandise (analytical instruments described as ''chemistry products, data products, and mass spectrometry instruments'') from a number of foreign related companies.

In examining whether the contemplated import transactions would qualify for valuation under the transaction value method, CBP identified and addressed the following three issues:

- Do transactions between the importer and the related manufacturers constitute *bona fide* sales?
- Do the circumstances of sale establish that the price actually paid or payable by the importer to the related manufacturers is not influenced by the relationship of the parties and is acceptable for purposes of transaction value?
- Is it acceptable to take post-importation price adjustments (upward and downward) into account in determining transaction value?[3]

Bona Fide Sales

CBP first examined whether the prospective importation sales transactions between the buyer and seller qualified as *bona fide* sales within the meaning of U.S. laws and regulations. This *bona fide* sale inquiry is generally the first issue examined by CBP in any valuation inquiry, because, by definition, the transaction value method of appraisal may only be used for transactions where a *bona fide* sale for export to the U.S. exists.

When considering whether a transaction constitutes a *bona fide* sale, CBP considers a range of factors, such as ''whether the purported buyer assumed the risk of loss for, and acquired title to, the imported merchandise. Evidence to establish that consideration has passed includes payment by check, bank transfer, or payment by any other commercially acceptable means.''[4] CBP may also examine ''whether the purported buyer paid for the goods, and whether, in general, the roles of the parties and the circumstances of the transaction indicate that the parties are functioning as buyer and seller.''[5] Additional factors CBP will consider are ''whether the buyer provided or could provide instructions to the seller, was free to sell the transferred item at any price he or she desired, selected or could select its own downstream customers without consulting with the seller, and could order the imported merchandise and have it delivered for its own inventory.''[6]

In HQ H219515, the importer submitted various documentation to CBP to substantiate its *bona fide* sale claim, such as sample purchase orders, invoices, and proof of payment. The importer also submitted distributor agreements with its foreign manufacturers, clearly outlining the terms governing passage of title and risk of loss. Finally, the importer established that it could provide instructions to the seller, that it would be free to resell the imported goods at any price, that it could select its own customers, and that it would import the merchandise for delivery to its own inventory. Based upon all of these factors, CBP concluded that the contemplated transactions qualified as *bona fide* sales.

Circumstances of Sale

After concluding that the sale from the related party constituted a *bona fide* sale, CBP next considered whether the related-party relationship between the buyer and seller influenced the sales price. When considering this question, CBP will generally examine the ''circumstances of the sale'' (COS) to determine whether those circumstances indicate that the relationship influenced the sales price. (In cases where such a relationship does influence the sales price, CBP will not permit the use of transaction value as the method of appraisal.)

As explained by CBP in HQ H219515, the regulations set forth several *illustrative* (not exhaustive) examples of specific factors CBP may consider when conducting a COS analysis to determine if the relationship between the buyer and the seller influenced the price:

- Customs will consider pertinent details of the transaction, for example, the manner in which the parties organize their commercial relations and the methods used to derive the price in question, to determine whether the relationship influenced the price actually paid or payable.[7]
- In making this determination, Customs will also seek evidence that the price has been settled in a manner consistent with the normal pricing practices of the industry in question, or with the manner in which the seller settles prices for sales to unrelated buyers.[8]
- Furthermore, if it is shown that the price is adequate to ensure recovery of all costs plus a profit that is equivalent to the seller's total profit realized over a representative period of time, in sales of merchandise of the same class or kind, then Customs will accept that the relationship did not influence the price.[9]

In HQ H219515, the importer submitted evidence intended to show that the sales at issue were unaffected by the related-party status of the buyer and seller. This evidence included:

- information comparing its own profitability to that of its competitors;
- an independent report commissioned by the importer's parent company and conducted by Ernst & Young (EY), which discusses pricing practices in the analytical instruments industry;
- a transfer pricing study; and
- detailed information regarding the way the related parties establish their intercompany transfer prices in order to demonstrate that such prices are set consistently with the methodology described in the transfer pricing study.[10]

Although CBP noted that ''this evidence provided by the Importer is not entirely objective,'' it considered the

---

[2] Merchandise imported into the U.S. is appraised in accordance with Section 402 of the Tariff Act of 1930, as amended. 19 U.S.C. §1401a. The preferred method of appraisal is the transaction value method, which is defined as ''the price actually paid or payable for merchandise when sold for exportation to the United States,'' plus certain enumerated additions when applicable. *See Id.* §1401a(b)(1)(A)–(E); 19 C.F.R. §152.103(b)(1).

[3] HQ H219515 at 5.

[4] *Id.* at 6, citing HQ 545705 (Jan. 27, 1995).

[5] *Id.*, citing HQ H005222 (June 13, 2007).

[6] *Id.*

[7] *Interpretive Note 1*—19 CFR §152.103(l)(1)(i).

[8] *Interpretive Note 2*—19 CFR §152.103(l)(1)(ii).

[9] *Interpretive Note 3*—19 CFR §152.103(l)(1)(iii).

[10] HQ H219515 at 7–8.

   ISSN 1063-2069

EY report about the pricing practices of the industry to be ''highly relevant for our overall analysis of the Importer's pricing structure because it further substantiates the Importer's practice of setting its prices.''[11] CBP found information in the report regarding the importer's gross profits to be particularly persuasive, because it demonstrated that the importer's gross profits were ''fairly consistent'' with the gross profits earned by ''dominant players'' in the analytical instrument industry.[12] Despite the fact that ''the gross margins of the competitors were not used in the Importer's transfer pricing study presented to the IRS,'' CBP noted that ''this quantitative data serves as additional evidence that prices are set consistently in the industry.''[13]

Although the language of the ruling suggests that CBP found the EY pricing practices study to be the most persuasive evidence submitted by the importer to establish that the importer's intercompany transfer prices were not influenced by its relationship with the seller, CBP also took into account the information contained in the transfer pricing study submitted by the importer. In discussing the transfer pricing study, CBP first noted that ''the existence of a transfer pricing study does not, by itself, obviate the need for CBP to examine the circumstances of sale in order to determine whether a related party price is acceptable.''[14] CBP further explained that:

> Information provided to CBP in a transfer pricing study may be relevant in examining the circumstances of the sale, but the weight to be given this information will vary depending on the details set forth in the study. *See* HRL H037375; HRL 548482, dated July 23, 2004. A significant factor, by way of example, is whether the transfer pricing study has been reviewed and approved by the IRS. *See* HRL H037375; HRL 546979, dated August 30, 2000. Whether products covered by the study are comparable to the imported products at issue is another important consideration. *See* HRL H037375; HRL 547672, dated May 21, 2002. The methodology selected for use in a transfer pricing study is also relevant. *See* HRL 548482, dated July 23, 2004.[15]

CBP took issue with several aspects of the importer's transfer pricing study. First, it noted that the transfer pricing study had not yet been approved by the IRS.[16] Additionally, CBP noted that the transfer pricing study used the comparable profits method (CPM) to conduct its analysis. CBP views the CPM as ''the least relevant [transfer pricing] method for customs purposes,'' and is therefore disinclined to give it significant weight during its own COS analysis.[17] Finally, CBP noted that the comparable companies selected for the transfer pricing analysis did not distribute or sell products ''of the same class or kind'' as the imported merchandise. Because of this fact, CBP stated that ''the comparison between the Importer and these other companies cannot be considered consistent with the market as a whole.''[18]

However, despite these issues, CBP ultimately concluded that the transfer pricing study's ''underlying facts and the conclusions reached'' did present information relevant to the COS between the related parties. In particular, CBP noted that the transfer pricing study confirmed the gross profit margins of the importer that were discussed in the EY report regarding the pricing practices of the industry.[19]

Based upon the totality of evidence submitted by the importer, CBP concluded that the related-party sales price for the import transactions at issue would not be influenced by the related nature of the buyer and seller. Thus, CBP stated that transaction value should be used to appraise the merchandise upon importation into the U.S.[20]

Post-Importation Adjustments

The final issue considered by CBP in HQ H219515 was whether the importer should take post-importation price adjustments (either upwards or downwards) into account when calculating the transaction value of the imported merchandise. CBP noted that such adjustments may frequently occur pursuant to a transfer pricing study, such as the one commissioned by the related parties involved in the ruling.

In discussing the impact of transfer price adjustments on the customs value of the prospective imported merchandise, CBP took note of the new policy and five-factor test set forth in HQ W548314, noting that:

> In order to claim the post-importation adjustments (upward and downward), all of the following factors must be met:
>
> 1. a written transfer pricing policy in place prior to importation, and the policy is prepared taking IRS code section 482 into account;

[11] *Id.* at 9.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 10, citing HQ H037375 (Dec. 11, 2009) and HQ 546979 (Aug. 30, 2000).

[15] *Id.*

[16] As noted by CBP, ''[a]ccording to the Importer's submission, there is no Advance Pricing Agreement ('APA') with the Internal Revenue Service ('IRS'). However, the Importer states that it applied for an APA and submitted its transfer pricing study for the IRS' approval.'' HQ H219515, at 4. This phrasing is awkwardly worded because transfer pricing studies under Section 482 are never ''approved'' by the IRS. They are simply prepared by the taxpayer ''for the file'' as a means of penalty avoidance and are never presented to the IRS unless requested (such as during an audit). Instead, as an alternative to preparing a transfer pricing study, U.S. importers/taxpayers may seek an APA (which can be unilateral or bilateral) with the IRS. While the APA begins with a submission by the taxpayer to the IRS that covers the requirements of Section 482—but is not a ''transfer pricing study'' *per se*—the APA process results in an ''approval'' because an APA is a binding contract between the IRS and the taxpayer (normally covering a five-year period) that is signed by both parties. Thus, an APA and a transfer pricing study are separate and distinct documents and processes under Section 482.

[17] *Id.*

[18] *Id.* at 11.

[19] *Id.* at 10. It is worth noting that during its discussion of the importer's gross profit margin, CBP stated that ''CBP is of the view that the operating profit margin is a more accurate measure of a company's real profitability because it reveals what the company actually earns on its sales once all associated expenses have been paid. Nevertheless, in certain circumstances, gross profit can be considered.'' *Id.* However, it is not entirely clear how CBP reached the conclusion that the transfer pricing study ''confirmed'' the gross margins of the industry study given that the study used the CPM as the transfer pricing method. The CPM uses operating margin, not gross margin, as the profit level indicator (PLI).

[20] *Id.* at 11.

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 U.S.; and

5. no other conditions exist that may affect the acceptance of the transfer price by CBP.

Therefore, if the importer meets the above -referenced factors, CBP will accept the adjusted values because the prices would be established pursuant to a ''formula,'' even though the prices were not fixed at the time of the importation.[21]

Applying the above test to the import transactions at issue, CBP concluded that the importer had submitted evidence establishing all five factors. Such evidence included its written transfer pricing study and information establishing that the company would book any future profit adjustments directly to its cost of goods sold account. In this case, the importer had a written transfer pricing study in place prior to importation and prepared in accordance with Section 482—confirming the gross profits which were verified by other substantiating information.[22] In conclusion, CBP stated that ''as long as the Importer maintains and provides accounting details from its books and/or financial statements to support the post-importation adjustments upon making a claim with CBP, the Importer may claim downward and upward post-importation adjustments.''[23]

Second Ruling: HQ H018314

On March 18, 2013, CBP HQ issued HQ H018314. The case underlying this ruling began when the importer of record filed six ''Reconciliation'' entries with the Port of Boston in order to make a post-importation, downward adjustment to the transaction value of imported merchandise it purchased from a related party.[24] The Port of Boston questioned the sufficiency of the importer's documentation to support the use of transaction value, and thus denied the importer's downward adjustments. Consequently, it liquidated the Reconciliation entries without taking the adjustments into account. This decision prompted the importer to file a protest with CBP, which in turn prompted the issuance of this ruling.[25]

In determining whether it should grant the importer's protest, CBP performed the same general analysis as that discussed above in HQ H219515, identifying the following three issues for further examination:

1. Do transactions between the [related-party] middleman . . . and the Protestant/Importer constitute *bona fide* sales?

2. Is the related party price fixed or determinable pursuant to an objective formula at the time of importation for purposes of determining transaction value?

3. Do the circumstances of the sale establish that the adjusted price actually paid or payable by the Protestant/Importer to the middleman was not influenced by the relationship of the parties and is acceptable for purposes of transaction value?[26]

Bona Fide Sales

As in HQ H018314, CBP began its analysis by examining whether the related-party transactions at issue met the definition of a *bona fide* sale. The importer submitted various evidence to support its *bona fide* sale claim, including a distributor agreement defining the passage of title and risk of loss, information regarding the payment of freight costs, a representative purchase order and commercial invoice including the terms governing the sales transaction, and payment records establishing proof of payment for the specific transactions at issue. The importer also provided additional information to establish the other *bona fide* sale factors, such as its ability to select its own customers and to sell the imported merchandise at any price. Based upon the information and evidence presented by the importer, CBP concluded that the transactions at issue qualified as *bona fide* sales.

Objective Formula

CBP next considered whether ''the related party price [was] fixed or determinable pursuant to an objective formula at the time of importation for purposes of determining transaction value.''[27] Note that CBP took a slightly different approach to examining the valuation questions at issue in this ruling, compared to HQ H219515. In the previous ruling, CBP first conducted its COS analysis and then considered whether the transfer price was set pursuant to a formula such that post-importation price adjustments should be reported by the importer. CBP conducted its analysis in this later ruling in an inverse order, first considering the ''formula/post-importation adjustment'' question before engaging in the COS analysis. This seems to be ''out of order,'' *i.e.*, because the formula issue relates to whether post-importation adjustments can be consid-

[21] *Id.* at 12.

[22] Again, it is not entirely clear how CBP reached the conclusion that a transfer pricing study using operating margin as the profit level indicator could confirm the gross profits of the industry study.

[23] *Id.* at 13.

[24] Reconciliation is a CBP program that allows importers to ''flag'' various issues at the time of entry for later reconciliation because the final information needed for the respective declaration is not available at the time of entry. Value is one of the issues that can be flagged. Any final information (such as the adjusted customs value) must be reported no later than 21 months from the date of the first entry covering by the Reconciliation flagging.

[25] A protest is filed on Custom Form 19 whenever an importer wishes to challenge a CBP decision that would result in a duty refund if approved. Protests must be filed within 180 days of the subject entry's liquidation date. Liquidation represents the final assessment of duty by CBP and normally occurs 314 days after the filing of an entry.

[26] HQ H018314 at 5.

[27] *Id.* at 7.

   ISSN 1063-2069

ered, CBP would not even reach this issue if it found that the COS test was not met—and, thus, that transaction value did not apply. Thus, the more logical approach seems to be the one set forth in HQ H219515.

Nonetheless, in performing its analysis of whether the importer set its intercompany prices pursuant to an existing formula, CBP considered a variety of evidence and information submitted by the importer:

- a memorandum of understanding (MOU) memorializing an agreement that was allegedly in place between the buyer and seller for many years prior to the MOU's date of execution, setting forth the formula used by the related parties to set their transfer prices;[28]
- excerpts of transfer pricing studies covering three separate fiscal years;
- a submission prepared by the importer's accounting firm; and
- several manufacturing and distributor agreements containing various terms governing the transactions between the related parties.

Based upon the totality of evidence submitted by the importer, CBP concluded that the intercompany transfer prices were set pursuant to a pre-existing formula, such that they were acceptable for use in the transaction value method of appraisement. Pursuant to this finding, CBP also concluded that the importer should report any post-importation adjustments made to the intercompany prices.

The specific analysis CBP performed to reach these conclusions involved examining each of the five factors set forth in HRL W548314 (and specifically enumerated in the discussion of the previous ruling). In the course of its analysis, CBP noted that ''[the importer] sets its preliminary prices based on budgeted financials and in accordance with the MOU . . .[and its] prices are later adjusted so that [the importer] can realise the targeted operating margin . . . consistent with the range set in the . . . formal transfer pricing study.''[29] In addition to the MOU, CBP also considered the importer's transfer pricing study and various intercompany agreements. The totality of these documents convinced CBP that the importer had a written transfer pricing policy in place prior to importation, thus satisfying the first factor of the ''five factor'' test.[30]

Regarding the second of the ''five factors''—whether 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—CBP noted that any adjustments made by the importer pursuant to its transfer pricing policy were entered on its accounting books as adjustments to the cost of goods sold account, thus confirming that the adjustments were calculated for income tax purposes.

In order to provide additional support for this factor, the importer provided a variety of relevant documentation showing that the importer's final financial numbers (taking into account any post-importation price adjustments) were used to prepare the importer's tax returns. Such documentation included excerpts of transfer pricing studies for three separate fiscal years, financial statements and tax documents for the same three fiscal years, any applicable debit/credit notes (submitted on a quarterly basis), the corresponding journal entries, a book income reconciliation providing the book income used in the tax return, and relevant excerpts from the corporate tax returns. Based upon this information, CBP concluded that the importer met the second of the five factors.[31]

Additionally, CBP used the same documentation to determine that the importer met another of the five factors—whether the company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the U.S. Based largely on its examination of this same documentation, CBP concluded that the importer also successfully met this factor.[32]

The next of the five factors examined by CBP was whether the importer'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. In examining this factor, CBP considered the three years' worth of transfer pricing studies submitted by the importer, as well as the various intercompany agreements which contained sections referencing both the transfer pricing studies and any adjustments made pursuant to those studies. Additionally, CBP noted that the importer's Customs Compliance Manual (adopted by the importer prior to importation) provided detailed information regarding the importer's method for adjusting its transfer prices on a quarterly basis—and referenced the transfer pricing studies. All of this documentation led CBP to determine that the importer had met the requirements of this factor.[33]

Finally, CBP considered the final of the five factors: whether any other conditions existed that could affect its acceptance of the transfer price. CBP concluded no such conditions existed, without any substantive discussion.

To summarize its examination of the ''five factor'' test, CBP stated that:

> [i]n this particular case and based on the above referenced factors, Protestant'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). Accordingly, CBP is of the view that post-importation adjustments (both upward and downward), to the extent they occur, may be taken into account in determining the transaction value under 19 USC §1401a(b).[34]

Having established that the importer's intercompany sales transactions constituted *bona fide* sales and that the transfer prices were based upon a formula, CBP finally turned to the question of whether the circumstances of the intercompany sales affected the transfer price.

Circumstances of Sale

In support of its assertion that the COS indicated that the relationship between the buyer and seller did *not* in-

[28] Note that this MOU was prepared specifically for purposes of the protest at issue, instead of being a pre-existing document.
[29] *Id.* at 8.
[30] *See id.*

[31] *Id.* at 11.
[32] *Id.* at 12–13.
[33] *Id.* at 11–12.
[34] *Id.* at 14.

fluence the intercompany transfer price for the imported merchandise, the importer submitted a detailed memorandum prepared by its outside accounting firm (and supplemented by excerpts from the importer's financial statements), outlining its position that intercompany prices were set at arm's length.

In support of its position, the importer presented pricing information showing that the price it paid to the related seller was comparable to that paid by unrelated buyers located in Japan. Although CBP noted that it ''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''.[35]

In this case, the unrelated Japanese company was the only unrelated entity which purchased the imported merchandise from the seller during the relevant time period. Even though the seller used different pricing methodologies to set its prices to the unrelated Japanese company and the related-party importer, the importer was able to establish to CBP's satisfaction that the prices were comparable over a period of two fiscal years.[36] The importer accomplished this by using a weighted average approach based upon relevant sales volume data provided by the importer.

In addition to this unrelated price comparison analysis, the importer submitted evidence indicating that the intercompany transfer prices resulted in the seller earning all of its costs plus a profit, pursuant to the example set forth in 19 CFR §152.103(l)(1)(iii), stating that ''if it is shown that the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm's overall profit realized over a representative period of time (*e.g.*, on an annual basis), in sales of merchandise of the same class or kind, this would demonstrate that the price has not been influenced.''

Before discussing the evidence submitted by the importer, CBP noted that:

> A very important consideration in the all costs plus a profit example is the ''firm's'' overall profit. In applying the all costs plus a profit test, CBP normally considers the ''firm's'' overall profit to be the profit of the parent company. Thus, if the seller of the imported goods is a subsidiary of the parent company, the price must be adequate to ensure recovery of all the seller's costs plus a profit that is equivalent to the parent company's overall profit. The regulations do not give us the definition of ''equivalent'' profit; however, if the profit of the seller is equal to or higher on the U.S. imports than the firm's overall profit, the purchase price would not be artificially low for Customs' purposes. Finally, CBP regulations do not define what profit we are to consider—gross profit or operating profit. However, CBP is of the view that the operating profit margin is a more accurate measure of a company's real profitability because it reveals what the company actually earns on its sales once all associated expenses have been paid. Nevertheless, in certain circumstances, gross profit can be considered.[37]

To support its case, the importer presented the following profit information:

- the operating profit of the related-party seller (a middleman rather than the actual manufacturer of the merchandise);
- a separate calculation representing the combined profit of the seller/middleman and the actual contract manufacturer, representing the total profit attributable to the manufacture of the imported merchandise; and
- the global operating profit of the parent company.

In comparing these profit figures, CBP concluded that over a four-year period and with or without the inclusion of the manufacturer's profits, the profit of the seller/middleman ''exceeds both the operating margin of the parent company and of the middleman's profit in global sales in goods of the same class or kind. Therefore, the profits earned by the middleman (independently, or in conjunction with the contract manufacturer) on sales to the Protestant exceed the global profits earned by both the middleman and the parent company on sales of [the imported merchandise].''[38]

CBP added this profit analysis to the other information and evidence provided by the importer, and concluded that:

> In view of the information submitted by the [importer] concerning the prices of the [imported merchandise] sold by the middleman to the unrelated party in Japan compared to the [related-party transfer prices] and the examination of the all costs plus a profit method, supported by the MOU and EY transfer pricing study, CBP finds the use of the transfer pricing study (prepared for tax purposes) to satisfy the circumstances of the sale test to be unnecessary. Protestant sufficiently explained the differences in prices between the related and unrelated parties and provided the necessary evidence to show that taking the adjusted prices into account, the seller's operating profit was higher than the profit of the parent company. Thus, Protestant has satisfied the circumstances of the sale test. Accordingly, the transaction value is an acceptable method of appraisement in the instant case.[39]

Having completed its analysis of all three valuation issues it identified as relevant to the importer's claim, CBP ordered the port to grant the protest, thus ratifying the importer's use of transaction value as the method of appraisement and permitting it to make post-importation adjustments to its intercompany transfer prices.

Third Ruling: HQ H024857

On Jan. 7, 2014, CBP HQ issued HQ H024857. Similar to the two rulings discussed above, HQ H024857 involved an importer requesting the use of the transaction value method of appraisal for importations of goods purchased from its German parent company. In performing its analysis of the acceptability of the importer's intercompany prices, CBP again examined the following three issues:

- Do transactions between the importer and the related manufacturer/seller constitute *bona fide* sales?

[35] *Id.* at 15–16, citing W548314 (May 16, 2012).
[36] *Id.*
[37] *Id.* at 17.
[38] *Id.*
[39] *Id.* at 18.

   ISSN 1063-2069

■ Is it acceptable to take post-importation price adjustments (upward and downward) into account in determining transaction value?

■ Do the circumstances of the sale establish that the price actually paid or payable by the importer to the related manufacturer/seller is not influenced by the relationship of the parties and is acceptable for purposes of transaction value?[40]

The importer in this ruling prepared and submitted a variety of information to CBP in support of its use of the intercompany prices. The first document was a global price list established by the parent company/seller for its sales to both related and unrelated customers. This seller created the global price list using a variety of historical data, *e.g.*, historical pricing data relating to the sale of similar machines by competitors. The seller used this price list to set the intercompany prices it charged to the related-party importer, minus a certain percentage based on various product lines. In addition to the global price list, the importer also submitted sample invoices from the seller to unrelated parties, marketing contracts between the buyer and the seller, and a transfer pricing study to document the importer's compliance with the transfer pricing requirements of U.S. and German tax authorities.

Bona Fide Sale

To begin its analysis of the first issue—whether the transactions constituted *bona fide* sales—CBP examined the variety of documentation supplied by the importer relating to the transfer of title between the parties. This included written purchase orders for each sales transaction, a sample entry summary, accounts payable reconciliation linking payments by the importer to specific invoices from the manufacturer, and wire transfer records documenting the transfer of funds from the importer to the manufacturer pursuant to specific invoices.

CBP first noted that the documents established that the imported merchandise was shipped directly to the U.S. pursuant to specific purchase orders, thus meeting the requirement that the imported good be clearly destined for the U.S. at the time of sale. The importer issued a purchase order to manufacturer/seller for machines and spare parts based on purchase orders from its customers in the U.S.

CBP next noted that the prices on the sample invoices reflected the formula specified by the marketing contract, and that the importer could mark up the product upon resale to any of its customers so long as it achieved the profit margin formula set forth in the marketing contract. The marketing contract formula was based upon the transfer pricing formula set forth in the transfer pricing study. Also relevant to CBP's analysis was the fact that the importer could select its own customers without consulting the seller. According to CBP's *bona fide* sales analysis, all of these factors weighed in favor of a finding that the import transactions did qualify as *bona fide* sales.

Finally, CBP noted that, according to the submitted documentation, title did not transfer between the importer and the seller until after the merchandise was imported into the U.S., when the importer would remit payment to the seller. Post-importation passage of title is somewhat unusual in a *bona fide* sale analysis, resulting in the following commentary from CBP:

> [P]assing of title after the date of importation, where all of the factors lead to the conclusion that a sale for export takes place, does not disqualify a sale from being a *bona fide* sale. *See* HRL H012659, dated November 17, 2007. Additionally, HRL 545504, dated May 5, 2005, states that for purposes of the transaction value provision, a *bona fide* sale may be found to exist even though actual payment has not been made for the goods.[41]

CBP ultimately concluded that because all of the other factors it examined supported the existence of a *bona fide* sale, it was immaterial that the title did not transfer between the parties until after importation; thus, a *bona fide* sale did indeed exist between the importer and the seller.

Post-Importation Adjustments

After establishing the presence of a *bona fide* sale, CBP turned to the second part of its analysis—whether the importer could take post-importation price adjustments (both upward and downward) into account in determining transaction value. CBP began by reciting the new "five factor" test set forth in HQ W548314.

In this case, CBP examined the five factors and determined that the importer could claim any post-importation price adjustments, both upward and downward adjustments. The most notable part of CBP's analysis is the fact that CBP explicitly stated that "when a related party price is determined in accordance with a formal transfer pricing policy that is in place prior to importation, the transfer price will be considered 'fixed' for purposes of applying transaction value even though the policy provides for post-importation adjustments to be made to the transfer price."[42]

CBP further stated that "[i]t is our position that in this case where the Importer provided us with its formal transfer pricing study [prepared in accordance with the IRS Code Section 482 and the OECD Transfer Pricing Guidelines], there is a valid transfer pricing formula, which establishes the price in effect prior to the importation."[43] This explicit ratification of the use of a formal transfer pricing study to establish a valid transfer pricing formula is the first time that CBP has so clearly articulated such a position. (Such a position should provide companies with a powerful "customs incentive" for preparing a formal transfer pricing study in addition to the already-existing penalty avoidance incentive offered by Section 482).

Upon establishing that a valid transfer pricing formula existed at the time of importation (pursuant to the transfer pricing study), CBP completed its "five factor" analysis. First, CBP noted that the importer had been reporting post-importation adjustments to Customs (made in accordance with Section 482) for many years.[44] Also relevant was the fact that the importer's

[40] *Id.* at 4.

[41] *Id.* at 6.

[42] HQ H024857 at 7.

[43] *Id.*

[44] The importer reported them via "administrative letters" to the local port of entry accompanied by duty payments for the upward adjustments because it was not enrolled in Reconciliation during those years. It should be noted that an ongoing controversy exists whether such payments are subject to the

documentation (the transfer pricing study and its marketing contract, both in place prior to importation) set forth the method by which any compensating adjustments would be calculated, should the importer's gross margin fall outside of the acceptable range established by the transfer pricing study. CBP also noted that "the transfer pricing policy and the Marketing Contract specifically cover all merchandise, the price of which is to be adjusted, as necessary. Both documents are signed by all parties and clearly specify how the transfer price is to be determined, what adjustments are to be made, and how these adjustments are to be determined. At the end of each year, the Importer uses the formula to determine the final price."[45]

Finally, CBP concluded that, based on the documentation provided by the importer, no other conditions existed that could affect CBP's acceptance of the transfer price by CBP. Thus, after reviewing the totality of the information regarding the importer's post-importation adjustments, CBP stated that "as long as the Importer maintains and provides accounting details from its books and/or financial statements to support the post-importation adjustments upon making a claim with CBP and describes the method of allocation of such adjustments, the Importer may claim downward and upward post-importation adjustments."[46]

Circumstances of Sale

CBP then turned to the last issue remaining in its analysis—whether the COS establish that the relationship between the importer and seller did not affect the price actually paid or payable—thus permitting the transfer price to be used for the purposes of transaction value. CBP noted that this COS analysis remained necessary even after its ruling in HQ W548314, where it "determined that the Importer needed to show that the relationship of the parties did not influence the adjusted prices."[47]

In this case, the importer could actually establish that the seller also sold the same imported merchandise to unrelated parties outside of the U.S. In fact, only three global distributors out of 57 were related to the seller—including the U.S. entity. Such a scenario is highly unusual in related-party valuation rulings because the seller almost always sells to related distributors on a global basis, *i.e.,* there are no sales of the imported merchandise (or very few; usually in small, developing markets) to unrelated importers. Even though the unrelated buyers in this ruling were located outside of the U.S., CBP stated that it would still "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 transaction at issue."[48]

In this case, the importer successfully established that the seller's transactions with unrelated buyers were relevant to the COS analysis because the seller used the same global price list for all of its sales, regardless of the location of the purchaser or whether the purchaser was related or unrelated. Additionally, the importer also established its marketing contract with the seller was identical to the marketing contracts existing between the seller and unrelated purchasers/distributors. CBP noted that:

> These marketing contracts further show that the manufacturer/seller settles its prices to the importer in a manner consistent with those to unrelated distributors—both use pricing formulas that seek to return a profit to the manufacturer/seller based on the global price list price minus the discount. These documents indicate that the manufacturer/seller charges all of its unrelated distributors and the related importer the same price, with the only difference being that the provisional price to the related distributors is settled after the importation due to the post-importation adjustments made in accordance with the income-tax mandated requirements. Therefore, the foreign manufacturer/seller deals with unrelated buyers in the same way that it deals with related buyers.

Having accepted that the importer successfully established that its transfer prices were "settled in a manner consistent with the way the seller settles prices in sales to unrelated buyers," CBP ended its COS analysis without considering the other elements of the COS test, *e.g.*, whether the transfer pricing study demonstrated that the prices were settled according to the normal pricing practices of the industry or that the transfer prices satisfied the all costs plus a profit test.

Having thus concluded its analysis, CBP held that the importer could use its transfer prices to establish a transaction value for customs valuation purposes, and that the importer should report any post-importation adjustments to its prices to CBP.

Conclusion

Although CBP HQ has issued only three rulings to date expounding upon its new policy regarding transfer pricing and post-importation adjustments, those rulings are instructive. For global traders and taxpayers, the "roadmap" established by the so-called "five-factor" test sets forth the kinds of documentation needed to support the finding of an existing "formula" for intercompany pricing that will be acceptable to CBP.

CBP's conclusion in HQ H024857 that a transfer pricing study can be used to establish the existence of a transfer pricing formula raises new questions about the weight such studies will be afforded going forward. While awaiting further guidance, taxpayers with U.S. import operations should continue to document all aspects of their intercompany pricing (including any post-importation adjustments) with the kinds of contractual, financial, and accounting support set forth in the rulings discussed herein.

"Prior Disclosure" process for self-reporting violations to the CBP. Some ports of entry think they are, but such a view is misplaced—for the simple reason that no violation has taken place when an importer follows CBP's policy and reports the "price actually paid or payable" as a result of its transfer pricing formula and tenders any duties owed.

[45] *Id.* at 8.

[46] *Id.* at 9.

[47] *Id.*

[48] *Id.*, citing HQ W548314 (May 16, 2012).

   ISSN 1063-2069