

“FIRST SALE” ALERT

For importers which use the “First Sale Rule” (FSR) to legally lower their duty burden, U.S. Customs & Border Protection (CBP) has plans to increase their scrutiny of FSR transactions. A new draft of an old “Informed Compliance Publication” [hyperlink to add for “Informed Compliance Publication”: http://www.strtrade.com/media/news/7221_ICPBonafide%20Revised1.pdf] sets forth proposed requirements to substantiate FSR claims. Most of these proposals center on documentary support that may be needed or requested to validate FSR. The lengthy list of documents is more of a “laundry list” than an actual set of guidelines which CBP auditors could follow, so revisions are clearly needed. Until the final revisions are adopted and published, however, importers should exercise “super reasonable care” in ensuring that any FSR claims can be supported with sufficient documentary evidence. For those importers *not* taking advantage of FSR, *now* would be the perfect time to examine potential implementation of this well-established and long-standing duty-saving rule!

TRANSFER PRICING UPDATE

In the wake of its revised transfer pricing policy it issued in July 2012, CBP continues to issue rulings regarding the validity of the related-party transfer prices of U.S. importers for customs valuation purposes. CBP Headquarters Ruling HQ H176775 (March 6, 2014) is another such ruling, in which HQ continues to demonstrate a welcome flexibility in allowing the use of transaction value for importers which purchase goods from related sellers.

In H228298 (an Internal Advice ruling that was issued to the local Port of Entry which had challenged the importer’s use of “transaction value”), CBP determined that related party intercompany sales transactions constituted *bona fide* sales for the purposes of establishing a customs value. The agency also determined that the import transactions of machine tools and parts at issue met the “circumstances of sales” test, meaning that the parties conducted the transactions at “arm’s length” and that the primary basis of appraisal (transaction value) could apply. Finally, CBP concluded that the importer should report any periodic post-importation transfer pricing adjustments (both upwards and downwards adjustments), in which case the importer would receive duty refunds for downwards adjustments or make duty payments for upwards adjustments.

In its analysis, CBP reviewed a variety of information supplied by the importer, including a bilateral Advance Pricing Agreement, an “Industry Practice Report” prepared by Ernst & Young, and consolidated financial statements and related accounting information. Unlike other recent rulings, CBP did not address whether the import transactions were *bona fide* sales. It focused instead on whether the relationship between the buyer and seller influenced the price under the so-called “circumstances of sale” (COS) test. CBP found that, while none of the evidence submitted fell within the illustrative examples of the COS test in its regulations, the “totality of the information considered and our examination of all relevant aspects of the transaction”

allowed the related price prices to serve as valid transaction values. Finally, CBP conducted its “five-factor test” regarding post-importation adjustments and determined that the importer **should** claim any such adjustments to its transfer prices (both upwards and downwards) through CBP’s Reconciliation program (in which the importer was already enrolled).

As this ruling demonstrates, local CBP Ports of Entry are increasingly focused on the transfer pricing/customs valuation issue and are actively questioning importers’ basis for substantiating the arm’s length pricing for related party imports. For importers which have no written inter-company pricing determination policy or other documentation to support their transfer prices for customs valuation purposes, compliance risks (as well as potential duty-saving refunds/savings) clearly exist.

NEW “TRUSTED TRADER” PROGRAM

On June 16, 2014, CBP announced its plan to unify its Customs-Trade Partnership Against Terrorism (“C-TPAT”) and Importer Self-Assessment (“ISA”) programs under a new test program called the “Trusted Trader” program. The Trusted Trader program will offer enrolled importers incentives and benefits not currently available to C-TPAT and ISA members, in addition to the standard incentives offered to importers enrolled in both of the existing programs. Some of these new benefits will include:

- Reduced FDA targeting/examination risk score;
- Penalty offsets which may result in the participant receiving credit towards a penalty liability in a mitigation proceeding;
- Trusted Trader participants who also participate in CBP’s Reconciliation program will be allowed to flag and un-flag entries for reconciliation retroactively post-entry, for up to 60 days prior to the liquidation date for the underlying entry summary;
- Drawback claimants will be exempt from on-site visits from Drawback Specialists, and full desk reviews will be limited to no more than one per year; and
- Participants who successfully complete the Product Safety portion of the Trusted Trader application will be eligible for additional Product Safety incentives established by the CPSC.

Click [here](#) for a full list of benefits in the *Federal Register* announcement of the program.

[CHRIS: here is the link to create the hyperlink for “click here;”

<https://www.federalregister.gov/articles/2014/06/16/2014-13992/announcement-of-trusted-trader-program-test>]

Interested parties may currently submit applications for participation in the program. The selection of initial test participants began on July 16, 2014.