SPC&B Update

A Newsletter for Clients of Sharretts, Paley, Carter & Blauvelt, P.C. September 27, 2011

I. CBP CONTEMPLATES EXPANDING ACCEPTABILITY OF TRANSFER PRICE FORMULAS INVOLVING POST-IMPORTATION ADJUSTMENTS UNDER TRANSACTION VALUE

II. CBP SCRUTINIZING PARTIES CONNECTED TO DDP/LDP TRANSACTIONS

I. Post-Importation adjustments. By means of a notice published on its Website, U.S. Customs and Border Protection (CBP) has announced that it is re-examining the applicability of transaction value to imported goods for which the price paid is subject to post-importation adjustments based on a company's transfer pricing policy or formula. Although CBP regulations provide that transaction value may be arrived at by the application of a formula, CBP has found in many cases that post-importation transfer pricing adjustments could not be accounted for under transaction value either because (1) the price was not determined through an objective formula, or (2) the adjustments resulted in a decrease in the transfer price which was considered a post-importation rebate which, by statute, cannot be taken into account in determining transaction value.

CBP is now considering accepting post-importation price adjustments in determining final, dutiable transaction value **provided** that the transfer pricing policy is established before importation ***and***:

(1) there is a written "Intercompany Transfer Pricing Determination Policy," which sets out how the transfer price is to be determined prior to the importation;

(2) the importer/buyer is the U.S. taxpayer, and it uses its transfer pricing methodology in filing its corporate tax returns and in determining the transfer price for the products covered by the transfer pricing policy;

(3) the company's transfer pricing policy specifically covers the products for which the value is to be adjusted;

(4) the policy specifies what adjustments are to be made to the transfer price, and how those adjustments are to be determined;

(5) the adjustments, although to a certain extent within the "control" of the parties, do not result in value manipulation;

(6) if adjustments are made, the company provides detailed explanations and calculations of the adjustments incurred in the United States and claimed after the importation;

(7) the relevant transfer pricing policy pursuant to which adjustments are claimed is in effect prior to the

75 Broad Street
New York, New York 10004
Phone: 212-425-0055
Fax: 212-425-1797
212-742-2180

SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.

www.spcblaw.com
Email: customs@sharretts-paley.com

1660 L Street, N.W.
Washington, D.C. 20036
Phone: 202-223-4433
Fax: 202-659-3904

importation; and

(8) there is an absence of other circumstances which may indicate that the compensating adjustments do not result in an arm's-length price between the parties.

No single one of the above factors would be considered determinative, and the finding as to whether an objective formula exists would be made on a case-by-case basis.

In addition, CBP is considering the view that downward adjustments in the transfer price made pursuant to the transfer pricing policy would **not** constitute post-importation "rebate[s] of, or other decrease[s] in, the price paid or payable." Thus, adjustments resulting in a reduction in the transfer price would be acceptable in arriving at the transaction value of imported goods.

CBP notes that, as with any other related party transaction, companies would still need to be able to demonstrate that the transaction value is acceptable either because the circumstances of the sale indicates that the relationship between buyer and seller did not influence the price actually paid or payable, or because the transaction value closely approximates one of the test values under the statute.

Finally, CBP contemplates that importers wishing to claim post-importation transfer pricing adjustments would be required to use CBP's reconciliation program in order to properly account for the total "price paid or payable" for imported merchandise affected by such adjustments.

CBP is informally requesting comments from the public prior to publishing a notice that would formally propose to revoke prior rulings inconsistent with the contemplated policy. Anyone interested in preparing comments for submission to CBP in connection with this matter should contact Gail Cumins at gcumins@spcblaw.com, Barry Levy at mbarrylevy@spcblaw.com, Peter Baskin at pjbaskin@spcblaw.com, Donna Shira at dshira@spcblaw.com, Kenneth Paley at kpaley@spcblaw.com, Alli Baron at abaron@spcblaw.com, or Allan Kamnitz at akamnitz@spcblaw.com, or call us at 212-425-0055.

II. DDP/LDP Transactions. U.S. Customs and Border Protection (CBP) Headquarters officials in the Office of Field Operations have confirmed that CBP is taking a closer look at Delivered Duty-Paid (DDP) and Landed Duty-Paid (LDP) transactions and the parties involved in them. The agency has found that in a number of DDP and LDP transactions, entities making entry either did not have the right to make entry or had no presence in the United States. Through its automated system, CBP is linking parties found to have participated in problematic DDP or LDP transactions to entities with whom they are associated in other transactions. As a result, even importers with newly assigned Importer Identification Numbers can come to CBP's attention if they are dealing with suspect parties. CBP is stressing that importers should make sure that other parties with whom they are transacting business are properly following all pertinent rules and regulations and is discouraging the use of such transactions.

If you have concerns about existing or contemplated LDP or DDP transactions, please contact Gail Cumins at gcumins@spcblaw.com or your SPC&B attorney contact at 212-425-0055.