

ICC: Transfer Pricing and Customs Valuation - The Canadian Approach

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CBSA's focus is not limited to testing transfer prices for profitability

- CBSA will conduct a rudimentary profitability review of the transfer price to determine if the transfer price is acceptable.
- But that is not the end of the process and CBSA's major focus will be on all payment flows from the importer to related parties.

Acceptability of the transfer price - Customs Memorandum D13-4-5: *Transaction value method for Related Persons*

- CBSA will examine whether the relationship between the parties influenced its price
 - CBSA has a preference for objective data supporting prices rather than profitability analyses
 - APA's are not conclusive
 - Transfer Price Studies that ignore customs valuation may be used to undermine the transfer price as a customs value
- Test values:
 - Transaction, computed or deductive value of identical or similar goods

An acceptable transfer price does not mean the customs value is correct

- CBSA focuses on all money flows between the Canadian importer and related parties
 - Prime document is the CRA Form *T-106: Information Return of Non-Arm's Length Transactions with Non-Residents*.
 - CBSA uses the T-106 returns as a source of adjustments to the transaction value (transfer price)

Common adjustments to transaction value

- Royalties and Licence Fees
- Assists
- Subsequent Proceeds

Subsequent Proceeds

- July 2009: CBSA published D13-4-13, *Post-Importation Payments on Fees – Subsequent Proceeds*
- D-13-4-13 focuses on bringing various fees (for management, administration, research and development, advertising, etc.) into the customs value

Management & Administration Fees

- “...*there is no legislative basis for their exclusion as an addition to the price paid or payable.*” (D13-4-13)
- Management and administrative fees *may* be excluded from the price paid or payable where:
 - The services have been rendered for the operation of the Canadian business;
 - The amount of the charge is in accordance with an arm’s length charge; and
 - The services are justified for the Canadian business.
 - The onus is on the Canadian importer to demonstrate that all three conditions are met.

Research and Development Fees

- “...payments on account of research and development are considered captured by the expression ‘subsequent proceeds’, as an addition to the price paid or payable.” (D13-4-13)
- R&D fees *may* be excluded from the price paid or payable where:
 - The Canadian importer contracts to have R&D performed by the foreign company;
 - The Canadian company bears all the costs and the risks of failure; and
 - The Canadian company owns all the IP intangibles (and, therefore, the profits) that result from the R&D.

Marketing and Promotional Fees

- *“Marketing and promotion fees are types of payments that may be included in the definition of ‘subsequent proceeds’.” (D13-4-13)*
- Marketing and promotion fees may be excluded from the price paid or payable where
 - The fees are allocated to the Canadian importer on a reasonable basis to reflect marketing and promotion services received by the Canadian importer;
 - The Canadian importer can substantiate the reasonableness of the fees with “objective and quantifiable” data

