



Ottawa, July 8, 2009

# MEMORANDUM D13-1-3

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## **In Brief**

### **CUSTOMS VALUATION – *PURCHASER IN CANADA REGULATIONS* (*CUSTOMS ACT, SECTION 48*)**

1. This memorandum provides information on the treatment of a purchaser in Canada in the determination of the value for duty made under the transaction value method. It reflects revised policy interpretation with respect to the court's interpretation of "purchaser in Canada."
2. This memorandum also includes new references to sources of the Canada Border Services Agency's (CBSA) information.



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## CUSTOMS VALUATION – PURCHASER IN CANADA REGULATIONS (CUSTOMS ACT, SECTION 48)

This memorandum explains the Canada Border Services Agency (CBSA) interpretation and application of the phrase “sold for export to Canada to a purchaser in Canada” when appraising the value of imported goods under the provisions of section 48 of the *Customs Act*, the transaction value method. For interpretation of the phrase “sold for export,” reference should be made to Memorandum D13-4-2, *Customs Valuation: Sold for Export to Canada (Customs Act, Section 48)*. This memorandum does not supersede Memorandum D13-4-2; rather, it provides additional guidance with respect to identifying the purchaser in a sale for export to Canada.

### VALUATION FOR DUTY REGULATIONS

2. The definitions in this section apply in these Regulations.

“Act” means the *Customs Act*. (*Loi*)

“permanent establishment,” in respect of a person, means a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business. (*établissement stable*)

“resident” means

- (a) an individual who ordinarily resides in Canada;
- (b) a corporation that carries on business in Canada and of which the management and control is in Canada; and
- (c) a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada. (*résident*)

Meaning of “Purchaser in Canada”

2.1 For the purposes of subsection 45(1) of the Act, “purchaser in Canada” means

- (a) a resident;
- (b) a person who is not a resident in Canada but who has a permanent establishment in Canada;
- (c) or a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,

(i) for consumption, use or enjoyment by the person in Canada, but not for sale, or

(ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

### GUIDELINES AND GENERAL INFORMATION

1. Subsection 48(1) of the *Customs Act*, which reads “the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined,” establishes four requirements that must be met in order to apply the transaction value method (assuming that the importer has complied with the remaining provisions of section 48). These requirements are:

- (a) the imported goods were sold;
- (b) the sale was “for export to Canada”;
- (c) the purchaser in the sale for export is the “purchaser in Canada”; and
- (d) the price paid or payable for the goods can be determined.

2. Subsection 48(1) of the *Customs Act* contains the phrase “to a purchaser in Canada.” Subsection 45(1) states that the definition of “purchaser in Canada” has the meaning assigned by the Regulations.

3. In order to establish if a sale for export to Canada has occurred, the provisions of Memorandum D13-4-2 should be consulted. Imported goods continue to be considered sold for export to Canada if:

(a) the vendor, in consideration of a price, has transferred or has agreed to transfer, title of the subject goods to a “purchaser in Canada”; and

(b) it can be clearly demonstrated that, as a condition of the sale agreement, the subject goods were destined for Canada without possibility of diversion. In the event more than one sale of the goods imported to Canada has occurred, the transaction in which the person in Canada is directly involved is the relevant sale for export.

4. Determination of who is a purchaser in Canada, under the *Valuation for Duty Regulations*, is an integral part of the transaction value method along with the other elements noted above. Once the relevant sale for export transaction has been identified, it must be determined whether the purchaser in that transaction is a purchaser in Canada.

## PURCHASER IN CANADA

5. Section 2.1 of the Regulations allows for three possibilities to be considered a purchaser in Canada: resident purchaser (either an individual or business), purchaser with a permanent establishment, or non-resident importer purchaser.

### Individual Resident

6. The subject matter of this memorandum primarily concerns the criteria commercial importers are required to meet in order to qualify as Purchasers in Canada. Individuals can also qualify as Purchasers in Canada. With respect to individuals, a resident is defined in section 2 of the Regulations as an individual who “ordinarily resides” in Canada. The question of whether an individual ordinarily resides in Canada is essentially a question of fact. An individual “ordinarily resides” in the place where they regularly, normally, or customarily live in the general routine of their life. The issue of residency will not normally be difficult to determine with respect to individuals and does not usually present a problem for the purposes of establishing a transaction value.

7. Note that individual resident purchasers are not subject to the requirement of carrying on business in Canada to be considered Purchasers in Canada.

### Business Residents

8. Section 2 of the Regulations defines the term resident for both incorporated and unincorporated businesses. There are two conditions that must be met in order for an incorporated or unincorporated business to meet the resident requirement of paragraph 2.1(a) of the Regulations. The first is that the corporation in Canada must have been carrying on business in Canada; and secondly, the management and control of the corporation has to be in Canada.

### Carrying on Business in Canada

9. To be considered a “purchaser in Canada,” the business entity must be carrying on business in Canada. Carrying on business in Canada is defined as follows:

A business that holds itself out to others as engaged in the selling of goods or services can be said to be carrying on business when the following three elements are present:

- (i) the occupation of time, attention and labour in the management of the commercial entity in Canada;
- (ii) the incurring of liabilities to other persons in Canada; and
- (iii) the business must do these things with the expectation of making a profit in Canada.

If a business meets the above-noted criteria and is considered to be buying and selling goods on their own account for a profit, it meets the requirement for carrying on business in Canada.

### Management and Control in Canada

10. To determine if a business is resident in Canada for purposes of the *Valuation for Duty Regulations*, the extent of management and control exercised by the business over its affairs and day-to-day operations must be considered. The extent of management and control varies from business to business and therefore it must be determined on a case-by-case basis. Generally, for customs valuation purposes, management and control pertain to the Canadian business entity's ability to make decisions and issue instructions necessary to run a business located in Canada.

11. The history of a business's activities must be examined and a thorough analysis of the facts must be performed before a conclusion can be reached as to the degree of management and control that exists in Canada. It must be noted that no one factor is determinative. Nor will it be concluded that management and control do not exist simply because one or several factors are not present in a particular case. The whole of the business's activities must be reviewed in order to make a determination. The following are some of the factors that will be examined and considered to establish whether management and control are exercised by a Canadian business:

(a) The general authority to conduct business in Canada is to be considered in the context and nature of the carrying on of the specific business in Canada. For example, if the business is a retail outlet, then management and control of that outlet's operations, rather than the management and control of the worldwide operation and all its facets, is the central factor;

(b) There should be formal organization of the Canadian business's board of directors within a Canadian context i.e. a distinct board of directors for the Canadian business should meet and exercise its authority over the Canadian operations. The residency of the Canadian board members is not relevant;

(c) The Canadian entity is not significantly influenced or controlled by another party located outside Canada (i.e., this means the control over the day-to-day activities and functions of the Canadian business necessary to maintain the continuous operation of the business remains with the employees or dependant agents of the Canadian entity);

(d) The Canadian entity maintains separate books and records in relation to the Canadian business operations, and prepares separate financial statements in accordance with the requirements of Canada's *Income Tax Act*.

## Permanent Establishment

12. When a Canadian business entity does not meet the requirements to be considered a resident, section 2.1 of the Regulations directs them to consider paragraph 2.1(b): Permanent Establishment.

13. Permanent establishments are similar to residents in that they are also physically located in Canada, they maintain separate books and records in relation to the Canadian business operations, and they prepare separate financial statements in accordance with the requirements of Canada's *Income Tax Act* for the Canadian business.

14. In most cases, the permanent establishment is a related party of a foreign parent who has established a branch operation in Canada but whose day-to-day operations are not wholly managed and controlled in Canada (as they would be in the case of a resident), due to their corporate structure or the management policies of a foreign parent.

15. Section 2 of the Regulations defines a "permanent establishment" as a fixed place of business (i.e., place of management, branch, office, factory, workshop) through which business is carried on. A permanent establishment may qualify as the purchaser in Canada in a sale for export to Canada provided it carries on business as outlined in paragraph 7 and meets the definition for permanent establishment in our *Valuation for Duty Regulations* which is a fixed place of business in Canada.

### Fixed place of business

16. The CBSA definition of "Fixed Place of Business" contains the following three elements, which must all be met in order to meet the permanent establishment requirement of paragraph 2.1(b) of the Regulations.

- (a) There must be a place of business in Canada.
- (b) The place of business in Canada must be fixed.
- (c) The business of the purchaser in Canada must be carried on through the fixed place of business in Canada.

### There must be a place of business in Canada

17. Section 2 of the Regulations lists examples of fixed places of business that "include a place of management, a branch, an office, a factory or a workshop through which the person carries on business." While the presence of an importer at a particular location in Canada does not necessarily make that location a fixed place of business, the term "place of business" can cover any premises, facilities, or installations in Canada used for carrying on the business of the purchaser in Canada.

18. It may occur that the purchaser in Canada's place of business could be situated in the business facilities of another enterprise. In order to allow this location to be considered as a place of business for purposes of the *Valuation for Duty Regulations*, the purchaser in Canada's

business must have control over the premises, the formal legal right to use that particular place for their business, and there must be common (public) understanding that it is the purchaser in Canada's place of business. The common understanding that the facility is the purchaser in Canada's place of business can be indicated by clear identification of the business's existence through the use of signs, letterhead, business cards, etc.

**Note:** The term "place of business" in a related party situation contemplates a fixed place of business of both a parent corporation and its subsidiary where the business of the corporation is carried on and the employees or dependant agents of both the controlling parent company and the purchaser in Canada branch have access. In other words, a branch of a multi-national corporation cannot be located in a private home where only the homeowner has legal access. For a location to be considered to be a place of business for CBSA purposes, the factors to be taken into account would include:

- (i) the actual use made of the premises, i.e. do they carry on the business of the foreign related party there;
- (ii) whether and by what legal right the controlling foreign related party exercises or could exercise control over the premises; and
- (iii) the degree to which the premises were objectively identified with the foreign related party's business.

### The place of business in Canada must be fixed

19. The place of business must be established at a distinct place meaning that there has to be a link between the place of business and a specific geographical point within Canada. However, where the nature of the business activities is such that these activities are often moved between locations, a single place of business will generally be considered to exist where a particular location may be identified as constituting a coherent whole commercially with respect to that business (the place of management, branch, office, factory, workshop, etc.). The place of business must also have a certain degree of permanency, i.e., it is not of a purely temporary nature.

### The business of the purchaser in Canada must be carried on through the fixed place of business in Canada

20. To determine if the business of the purchaser in Canada is wholly or partly carried on through a fixed place of business in Canada, the activities of its employees in Canada must bear some evident relationship to the purchaser in Canada's business. If so, the purchaser will be considered to have met this requirement of the "permanent establishment" definition.

**Note:** An employer/employee relationship is understood to mean that an employer exercises control over its employees through the ability, authority, or

right of a payer to direct their personnel concerning the manner in which the work is done and what work will be done. Dependant agents working at the fixed place of business of a purchaser in Canada would also be considered to meet this requirement. Dependant agents are defined as an individual(s) authorized by the purchaser to work for them at the purchaser's fixed place of business in much the same way as an employee would.

21. Persons constituted as separate Canadian business entities (such as independent agents) in some form of commercial relationship with the purchaser cannot be considered to be employees or dependant agents; for example, a mail-drop in a third party business centre or shelf space in a third party warehouse (whether or not the office or warehouse fills and ships orders for the vendor) will not constitute a fixed place of business for the purchaser in Canada. When there are no employees (or dependant agents as described above) of a business enterprise carrying on its business, and instead, independent agents act in the ordinary course of their own business to represent and/or conduct the activities of a client, the independent agents are carrying on their own business and would not be considered to have met the requirement of carrying on the purchaser's business in a fixed place of business. In cases such as this, the import transaction should be examined to determine at what level of trade the relevant sale for export has been made.

22. If the requirement for a fixed place of business has not been met after it has first been determined that the business entity is not a resident, and that the purchaser does not qualify as a permanent establishment, the *Valuation for Duty Regulations* provide a possibility for businesses located outside of Canada that import goods under specific conditions as a non-resident importer to be considered as a Purchaser in Canada.

### **Purchaser Located Outside Canada – “Non-Resident Importer”**

23. In situations where the person is not a resident or does not have a permanent establishment, then paragraph 2.1(c) of the Regulations should be examined to determine if the person qualifies as a purchaser in Canada. Such persons are commonly referred to as **non-resident importers**. A purchaser located outside Canada that has no presence as a resident or permanent establishment in Canada and who purchases goods in a sale for export to Canada for its own use, enjoyment or consumption in Canada can qualify as a “purchaser in Canada” under subparagraph 2.1(c)(i), provided that the goods are not for sale in Canada. More typically, a non-resident importer is a business that, under the transaction value method, imports goods and accounts for and is responsible for the payment of any applicable duties and taxes in respect of those imported goods.

24. Subparagraph 2.1(c)(ii) applies to non-resident importers that have no presence as a resident or permanent establishment in Canada, who purchase goods on speculation for the Canadian market without having entered into an agreement to sell the goods to a resident prior to its own purchase of the goods. Conditions concerning retention of the imported goods for domestic speculation apply to these importers. In such cases, the imported goods must still be the subject of a sale for export as described in Memorandum D13-4-2 or else a subsequent method from the valuation hierarchy must be employed.

25. CBSA interprets subparagraph 2.1(c)(ii) of the *Valuation for Duty Regulations* as presuming non-resident importers are importing goods for purposes of speculation as they do not have a resident purchaser or agreement to sell to a resident, prior to the non-resident importer's purchase of the goods. The CBSA interpretation of the Regulations follows the logic that, inherent in such a speculative venture is the intention to retain (or store) the imported goods in Canada before they are sold domestically in order for the non-resident importer to meet the requirements of subparagraph 2.1(c)(ii) of the *Valuation for Duty Regulations*. Goods imported in this way are typically stored for a period before a domestic sale occurs. Indications that the goods were stored (or plans to that effect were in place) after importation and before their domestic sale will determine that the intention of the importation on speculation aspect central to subparagraph 2.1(c)(ii) has been met.

26. A non-resident importer that does not meet the criteria in subparagraph 2.1(c)(ii) of the *Valuation for Duty Regulations* as set out in paragraphs 21 to 23 of this memorandum, will not be considered a “Purchaser in Canada.” Therefore, the sale to the next level of trade to a Canadian resident or permanent establishment in Canada will be the sale for export to a purchaser in Canada; or the transaction value method is not applicable and a subsequent method from the valuation hierarchy will apply (see Memorandum D13-4-2 for details).

### **SUMMARY**

27. The preceding interpretations of sections 2 and 2.1 of the *Valuation for Duty Regulations* address the requirements that must be met by commercial importers in order to qualify as a “Purchaser in Canada” under the transaction value method. Carrying on business in Canada while meeting one of the following:

- (a) a resident individual or a business deemed resident because of management and control in Canada;
- (b) not a resident but a permanent establishment as defined by a fixed place of business; or
- (c) neither a resident nor a permanent establishment but a non-resident importing and retaining goods on the basis of speculation.

28. Section 2.1 of the Regulations lists the purchaser in Canada options in order. In following the hierarchical language of the Regulations an importer can first determine whether or not the conditions of paragraph 2.1(a) are met, if not, then secondly, the condition of paragraph 2.1(b), and if not (a) or (b), then lastly, the conditions of paragraph 2.1(c).

29. The requirements of paragraph 2.1(a), (b), or (c) cover all the situations under the transaction value method where it is obligatory to be a purchaser in Canada. As such, meeting the requirement of any of paragraph 2.1(a) or 2.1(b) or subparagraph 2.1(c)(ii), while at the same time, meeting the requirement for carrying on business in Canada will indicate that a business entity is a purchaser in Canada. If an importer does not meet the necessary criteria of the *Valuation for Duty Regulations*, they will not be able to account for their goods under the transaction value method.

30. Importers must determine their eligibility for purchaser in Canada status based on how they meet the criteria of each paragraph of the subsection in order; while understanding that the applicable transaction for determining value for duty in a single sale, or in a series of sales, is the one in which the purchaser in Canada is involved. Before addressing the purchaser in Canada requirement, the importer should ensure that the relevant sale for export to Canada has been identified.

#### **ADDITIONAL INFORMATION**

31. For more information on the treatment of purchaser in Canada with respect to customs valuation, contact the CBSA's Border Information Service at **1-800-461-9999** for service in English or **1-800-959-2036** for service in French.

32. For more information concerning additional criteria that must be met in order to apply the transactional value method, see Memorandum D13-4-2 – *Customs Valuation: Sold for Export to Canada (Customs Act, Section 48)* and Memorandum D13-4-3 – *Customs Valuation: Price Paid or Payable (Customs Act, Section 48)*.

**REFERENCES**

<b>ISSUING OFFICE –</b> Origin and Valuation Division Trade Programs Directorate Admissibility Branch	<b>HEADQUARTERS FILE –</b> HEG 79070-4-1
<b>LEGISLATIVE REFERENCES –</b> <i>Customs Act</i> , sections 45 to 55 <i>Valuation for Duty Regulations</i>	<b>OTHER REFERENCES –</b> D13-1-1, D13-4-2
<b>SUPERSEDED MEMORANDA “D” –</b> D13-1-3, April 9, 2001	

Services provided by the Canada Border Services Agency are available in both official languages.

