



Ottawa, July 4, 2014

# Memorandum D13-1-3

## Customs Valuation – Purchaser in Canada

### In Brief

This memorandum has been reviewed to provide additional information concerning the interpretation of the expression “carrying on business in Canada” for a purchaser in Canada in the determination of the value for duty made under the transaction value method.

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. This memorandum provides additional guidance with respect to identifying the purchaser in a sale for export to Canada. For interpretation of the phrase “sold for export,” reference should be made to [Memorandum D13-4-2, Customs Valuation: Goods Sold for Export to Canada](#).

### Legislation

Sections 45 and 48 of the [Customs Act](#)

[Income Tax Act](#)

[Valuation for Duty Regulations](#)

### Guidelines and General Information

1. Subsection 48(1) of the [Customs Act](#) (the 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,” identifies three 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 of the Act). These requirements are:
  - (a) the imported goods were sold for export to Canada;
  - (b) the purchaser in the sale for export is the purchaser in Canada; and
  - (c) the price paid or payable for the goods can be determined.
2. Subsection 48(1) of [the Act](#) contains the phrase “to a purchaser in Canada.” Subsection 45(1) of the Act states that the definition of “purchaser in Canada” has the meaning assigned by the [Valuation for Duty Regulations](#) (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 [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. Sections 2 and 2.1 of the [Regulations](#) identify the requirements to be met for a purchaser to be considered a “purchaser in Canada”. Following the hierarchical language of the Regulations, a purchaser will qualify as a purchaser in Canada either as (a) resident individual or business, (b) a permanent establishment in Canada, or (c) neither a resident nor a non-resident having a permanent establishment but importing goods for the purchaser’s own use or on the basis of speculation of future sales.

### **Individual Resident**

6. Section 2 of the [Regulations](#) identifies an individual resident as one 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 an individual resident purchaser is not subject to the requirement of carrying on business in Canada to be considered a purchaser in Canada. An individual purchaser who is a resident will qualify as a purchaser in Canada under paragraph 2.1(a) of the [Regulations](#). An individual purchaser who is not a resident may qualify as a purchaser in Canada under subparagraph 2.1(c)(i) of the Regulations if the conditions are met.

### **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 business in Canada must have been carrying on business in Canada; and secondly, the management and control of the business has to be in Canada.

### **Carrying on Business in Canada**

9. To be considered a “purchaser in Canada,” the business entity must be the purchaser involved in the transaction for imported goods and must be carrying on business in Canada. 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:

- (a) dedicates time, attention and labour to the management of the commercial entity in Canada;
- (b) incurs liabilities to other persons in Canada; and
- (c) must do these things with the expectation of making a profit in Canada and do so as the purchaser of the imported goods.

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

### **Management and Control in Canada**

11. To determine if a business is resident in Canada for purposes of the [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 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.

12. 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 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**

13. 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.

14. 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.

15. In most cases, the permanent establishment is a related party of a foreign parent who has established a subsidiary 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 its corporate structure or the management policies of a foreign parent.

16. Section 2 of the [Regulations](#) defines a "permanent establishment" as a fixed place of business (i.e., a place of management, a branch, an office, a factory or a 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 above and meets the definition for permanent establishment in the Regulations which is a fixed place of business in Canada.

### **Fixed Place of Business**

17. 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**

18. 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.

19. 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 [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 company and its subsidiary where the business of the company is carried on and the employees or dependent agents of both the controlling parent company and the purchaser in Canada branch have access. In other words, a branch of a multi-national company 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:

- (a) the actual use made of the premises, i.e., do they carry on the business of the foreign related party there;
- (b) whether and by what legal right the controlling foreign related party exercises or could exercise control over the premises; and
- (c) 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**

20. 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**

21. 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. Dependent agents working at the fixed place of business of a purchaser in Canada would also be considered to meet this requirement. Dependent 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.

22. 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 dependent 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 dependent 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.

23. 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 [Regulations](#) provide a possibility for businesses located outside of Canada that import goods under specific conditions to be considered as a purchaser in Canada.

## Purchaser Located Outside Canada

24. In situations where the purchaser in a sale for export to Canada 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. 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) of the Regulations, provided that the goods are not for sale in Canada.

25. More typically, a purchaser located outside Canada that has no presence as a resident or permanent establishment in Canada is a business entity that, purchases goods in a sale for export to Canada and has done so with the intent of reselling the goods. Subparagraph 2.1(c)(ii) of the [Regulations](#) applies to a foreign purchaser who purchases goods on speculation for the Canadian market without having entered into an agreement to sell the goods prior to its own purchase of the goods.

26. The CBSA interprets subparagraph 2.1(c)(ii) of the [Regulations](#) as presuming that goods are imported on speculation, when there is no identified purchaser located in Canada prior to the importation of the goods. The CBSA interpretation of the Regulations follows the logic that, inherent in a speculative venture is an intent to retain (or store) the imported goods in Canada before they are sold domestically, in order for the purchaser in the sale for export to Canada to meet the requirements of subparagraph 2.1(c)(ii) of the Regulations. Goods imported in such a venture 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 intent of the importation on speculation aspect central to subparagraph 2.1(c)(ii) of the Regulations has been met.

27. A purchaser that does not meet the criteria in subparagraph 2.1(c)(ii) of the [Regulations](#) will not be considered a purchaser in Canada, because that person has already entered into an agreement to sell the goods prior to their importation to a purchaser located in Canada. Therefore, that sale at the next level of trade to a purchaser located in Canada is the basis for the application of the transaction value method.

28. For more information on the application of the transaction value method, refer to [Memorandum D13-4-1, Transaction Value Method of Valuation](#), [Memorandum, D13-4-2, Customs Valuation: Goods Sold for Export to Canada](#) and [Memorandum D13-4-3, Customs Valuation: Price Paid or Payable](#).

## Additional Information

29. For more information, call contact the [CBSA Border Information Service](#) (BIS):

Calls within Canada & the United States (toll free): **1-800-461-9999**

Calls outside Canada & the United States (long distance charges apply):

1-204-983-3550 or 1-506-636-5064

TTY: **1-866-335-3237**

[Contact Us online](#) (webform)

[Contact Us](#) at the CBSA website

<b>References</b>	
<b>Issuing Office</b>	Trade and Anti-dumping Programs Directorate
<b>Headquarters File</b>	79070-4-1
<b>Legislative References</b>	<a href="#">Customs Act</a> <a href="#">Income Tax Act</a> <a href="#">Valuation for Duty Regulations</a>
<b>Other References</b>	<a href="#">D13-4-1</a> , <a href="#">D13-4-2</a> , <a href="#">D13-4-3</a>
<b>Superseded Memorandum D</b>	D13-1-3 dated July 8, 2009