



Ottawa, June 13, 2008

# MEMORANDUM D13-4-12

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## **In Brief**

### **COMMISSIONS AND BROKERAGE (CUSTOMS ACT, SECTION 48)**

1. This memorandum provides information on the treatment of commissions and brokerage in a calculation of value for duty made under the transaction value method. It reflects revised policy interpretation with respect to an agent's fiduciary responsibility to his or her principal.
2. The memorandum also includes new references to sources of the Canada Border Services Agency's (CBSA) information.



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## COMMISSIONS AND BROKERAGE (CUSTOMS ACT, SECTION 48)

This memorandum explains the treatment of commissions and brokerage in a calculation of value for duty made under the transaction value method.

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### Legislation

The following legislative excerpts are found in part III of the *Customs Act*:

45.(1) In this section and sections 46 to 55

“price paid or payable” in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor;

“sufficient information” in respect of the determination of any amount, difference or adjustment, means objective and quantifiable information that establishes the accuracy of the amount, difference or adjustment;

48.(1) Subject to subsections (6) and (7), 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 and if...

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to...

(i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale

(6) Effect of the absence of sufficient information – Where there is not sufficient information to determine any of the amounts required to be added to the price paid or payable in respect of any goods being appraised, the value for duty of the goods shall not be appraised under this section.

### GUIDELINES AND GENERAL INFORMATION

1. Subparagraph 48(5)(a)(i) of the *Customs Act* indicates that the price paid or payable in the sale of goods for export to Canada, to a purchaser in Canada, will be adjusted by adding amounts for commissions and brokerage for the goods incurred by the purchaser, except when the amounts are paid or payable to an agent to represent the purchaser abroad in the purchase of the imported goods. These excepted amounts are usually referred to as buying commissions, and if they are invoiced or identified separately from the goods, they do not need to be added to the price paid or payable for the goods.

2. An agent is a person in a commercial relationship with a principal. An agent acts on a principal’s behalf and ordinarily is a separate business entity. An agent can buy or sell goods, possibly in his or her own name, but always for the account of his or her principal. An agent can act on behalf of either a purchaser or vendor in concluding a contract of sale for goods. An agent’s remuneration generally takes the form of a commission, usually expressed as a percentage of the selling price of the goods. To determine whether a payment to an agent is to be added to the price paid or payable, it is necessary to determine whether the agent is a selling agent acting on behalf of a vendor, a buying agent acting on behalf of a purchaser or a broker.

3. A selling agent is a person who acts for the account of a vendor. The agent looks for customers and collects orders on behalf of the vendor and, in some cases, may arrange for storage and delivery of goods. A payment made to a selling agent for services rendered in the conclusion of a contract is generally called a **selling commission**. Usually, goods sold through a selling agent cannot be bought without payment of the selling agent’s commission. This payment can be made in one of the following two ways:

(a) Foreign suppliers who deliver their goods for orders placed through a selling agent pay for the agent’s services themselves and quote prices to their customers that include the agent’s commission. In such

cases, the invoice price is not to be adjusted to exclude the amount for the agent's services; and

(b) The terms of the sale require the purchaser to pay an amount other than the price paid or payable for the goods, either through the vendor or separately, for the agent's services. This amount must be added to the price paid or payable when determining the value for duty.

4. A buying agent is a person who acts for the account of a purchaser. The buying agent performs his or her activities using funds provided by the purchaser. A buying agent's activities include finding suppliers, informing the vendor of the desires of the purchaser, placing orders, collecting samples, inspecting goods and, in some cases, arranging for the insurance, transport, storage or delivery of the goods. A payment made by a purchaser to an agent to represent the purchaser abroad in buying imported goods is usually referred to as a **buying commission** and is not added to the price paid or payable for the imported goods if it is invoiced or identified separately from the goods. However, if the invoiced price for the goods includes such an amount, it cannot be deducted from the price paid or payable.

5. A broker is generally a third party that does not act on its own account, but rather acts for both the vendor and the purchaser together and usually has no role other than to put both parties in touch with each other. The broker's remuneration is called **brokerage** and is usually calculated as a percentage of the selling price of the goods. The percentage amount earned by brokers reflects their limited risks and responsibilities in a transaction.

6. "Brokerage" does not mean amounts charged by a customs broker for services rendered to clear goods through customs. Brokerage is a payment made to an intermediary for its participation in concluding a contract of sale.

7. If the brokerage is paid by the vendor of the goods, it will usually be included in the invoice price charged to the purchaser. In such cases, it will be represented in the calculation of value for duty as part of the price paid or payable. In cases where the brokerage is paid by the vendor and charged separately to the purchaser, it must be included in the price paid or payable. Alternatively, the purchaser and vendor may each pay part of the brokerage charge, or the purchaser alone may pay the charge. In these cases, the brokerage amount must be added to the price paid or payable to the extent that it is paid by the purchaser and is not already included in the price.

#### **Fiduciary responsibility of agent to purchaser**

8. The buying agent has a fiduciary responsibility to his or her principal, the purchaser. This responsibility means that the agent must act in the interest of the purchaser. The purchaser is entitled to complete disclosure from the agent regarding:

(a) transactions initiated by the agent for the purchaser;

(b) relationships or activities occurring between the agent and the vendor of the goods; and

(c) parties controlled by, related to or engaged in business with the agent or the vendor of the goods.

9. If the agent makes a complete disclosure to the purchaser, and the importer contracts to engage the agent, then the agent's fiduciary responsibility has been satisfied, and the agent is deemed to be acting in the best interest of the purchaser. An agency agreement alone is not sufficient evidence that a principal-agent relationship exists in which an agent has met his or her fiduciary responsibility to a purchaser.

10. The CBSA may request that an importer provide documentation (for example, contracts, invoices, letters of credit and correspondence) which establishes the nature of the arrangement between the purchaser and the agent or identifies any relationship between the agent and a stranger to the agent-purchaser agreement. The importer may be requested to obtain information from the agent identifying all activities in which the agent has an interest in respect of the imported goods before the agent can be deemed to have met his or her fiduciary responsibility to his or her principal (the purchaser). If the information provided to the CBSA indicates that full disclosure of an agent's activities was not made to its principal, a payment made by a purchaser to its agent may be identified as:

(a) an addition to the price paid or payable of the goods under subparagraph 48(5)(a)(i); or alternatively

(b) an element of the price paid or payable as required by subsection 45(1).

11. In the event that an agent does not meet his or her fiduciary responsibility to a purchaser and the amount of the payment made to the agent cannot be identified, valuation under the transaction value method is precluded pursuant to subsection 48(6) of the *Customs Act*, and value for duty will need to be calculated under one of the alternate valuation methods identified in sections 49 to 53 of the Act.

#### **Treatment of bundled payments**

12. A purchaser may enter into an agreement with an agent to pay an amount for more than the service of representing the purchaser abroad in respect of a sale. If charges or amounts payable to an agent other than an agent's commission are identified but are itemized separately, then the individual charges or amounts may be:

(a) an addition to the price paid or payable of the goods under an alternative provision of subparagraph 48(5)(a); or

(b) an element of the price paid or payable as required by subsection 45(1).

13. If such charges or amounts are not itemized separately, then the importer bears the onus of providing sufficient information to substantiate their apportionment. If this sufficient information cannot be provided, valuation under the transaction value method is precluded consistent with the authority of subsection 48(6) of the *Customs Act* and value for duty must be calculated under one of the alternate valuation methods identified in sections 49 to 53 of the Act.

#### **Additional information**

14. Decisions of the Canadian International Trade Tribunal (CITT) that address an agent's fiduciary responsibility to his or her principal include the *Chaps Ralph Lauren, Division of 131384 Canada Inc. and Modes Alto Regal* decision (AP-94-190 and AP-94-191), the *Sherson Marketing Corporation* decisions (AP-98-002, AP 98-097 and AP-98-098) and the *Brown Shoe Shops* decision (AP-2002-096), which can be accessed on the CITT's Web site at [www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca).

15. For more information on the treatment of commissions and brokerage 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. A list of CBSA regional client services offices can be accessed on the CBSA's Web site at [www.cbsa.gc.ca/sme-pme/](http://www.cbsa.gc.ca/sme-pme/).

16. Lists of regional client services offices and all other D13 memoranda series are available at no charge on the CBSA's Web site at [www.cbsa.gc.ca](http://www.cbsa.gc.ca).

**REFERENCES**

<b>ISSUING OFFICE –</b> Origin and Valuation Division Trade Programs Directorate Admissibility Branch	<b>HEADQUARTERS FILE –</b> 79070-4-4
<b>LEGISLATIVE REFERENCES –</b> <i>Customs Act</i> , section 48	<b>OTHER REFERENCES –</b> D13-4-7
<b>SUPERSEDED MEMORANDA “D” –</b> D13-4-12, March 28, 2001	

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

