



Advanced Topics in Customs Compliance Conference



First Sale Rule vs. Buying Commission: Unpacking the Pros, Cons, and Pitfalls



George Tuttle III, Tuttle Law

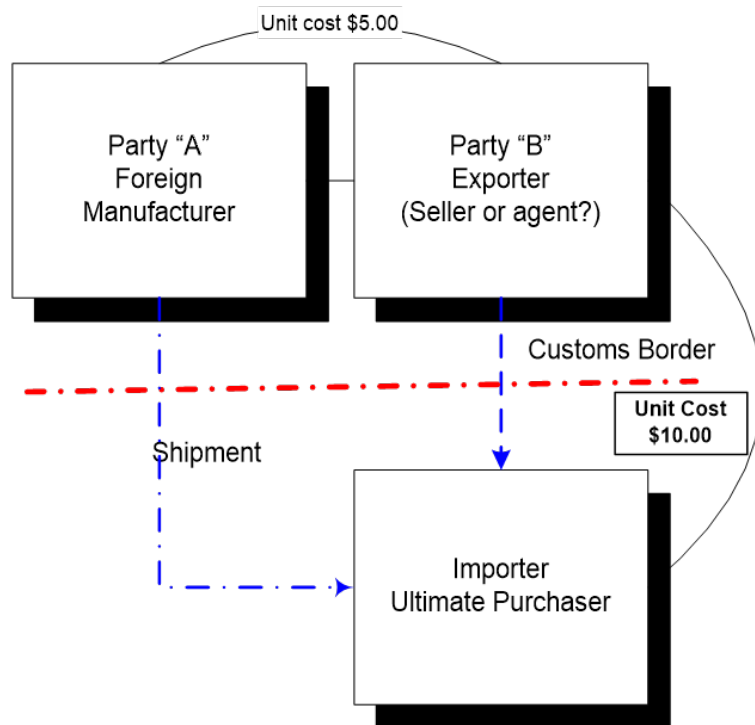


Use of “First Sale” For Customs Valuation in Multitiered Transactions



- 19 U.S.C. §1401a, et seq., sets forth the rules for appraisement of imported merchandise.
- The preferred method of appraisement is **transaction value**.
- The **transaction value** of imported merchandise is the price actually paid or payable for merchandise when **sold for exportation to the United States**, plus certain statutorily enumerated additions.
- In **Nissho Iwai American Corporation vs. U.S.**, the Court explained that if there are two (or more) sales for exportation to the United States, the importer is free to select the lower of the two prices.

Use of “First Sale” For Customs Valuation in Multitiered Transactions



(Drop-shipment)

- ❖ Many import transactions involve an intermediary who assists either the seller/MFG or the Buyer in the sale or purchase of the imported merchandise.
- ❖ Identifying the role of the **intermediary** is important in determining the **transaction value** of the imported merchandise.
- ❖ An intermediary may function as an independent buyer/seller or as either a buying or selling agent
- ❖ When the intermediary functions as an agent, the actual sale is between the foreign seller and the buyer with the agent acting as a facilitator. and receives a commission.




Use of “First Sale” For Customs Valuation in Multitiered Transactions

- Nissho Iwai American Corporation vs. U.S., 982 F.2d 505
 - Court held that Mfg. selling price to middleman is an acceptable “TV” when:
 - There is a **sale** between the Mfg. and middleman
 - Negotiated at arm's length
 - Goods are **clearly destined for export** to United States
- Reaffirmed in Target Stores v. United States, 31 CIT 154, 157, 471 F. Supp. 2d 1344, 1347 (2007).
- Questions
 - Is there a **sale** between the MFG and the intermediary? Is the sale for “export to the United States”?
 - Are the parties **related**?
 - Is middleman acting as an “Agent” or a “Seller”?
 - Are there any value additions?

*What Every Member of the
Trade Community Should Know About:*

**DETERMINING THE
ACCEPTABILITY OF
TRANSACTION
VALUE FOR
RELATED PARTY
TRANSACTIONS**




AN INFORMED COMPLIANCE PUBLICATION
APRIL 2007

U.S. CUSTOMS and BORDER PROTECTION

*What Every Member of the
Trade Community Should Know About:*

**Buying and Selling
Commissions**




AN INFORMED COMPLIANCE PUBLICATION
OCTOBER 2006

U.S. CUSTOMS and BORDER PROTECTION

*What Every Member of the
Trade Community Should Know About:*

***Bona Fides Sales
And Sales
For Exportation***



An Advanced Level
Informed Compliance Publication of the
U.S. Customs Service
Revised January, 2000



Transaction Value: First Sale Issues



- If the foreign manufacturer and the reseller are **related**, the sale will not be acceptable to CBP unless the **intercompany sale** between the manufacturer and the reseller is a **valid transaction value**. HQ H256779, January 20, 2016
 - HQ H255028, November 21, 2014:
 - ... it is the importer's responsibility ... to show that the "first sale" price is acceptable under the standard set forth in Nissho Iwai. [That is, the importer must present sufficient evidence that the alleged sale was a bona fide "arm's length sale," and that it was "a sale for export to the United States"](#) within the meaning of 19 U.S.C. 1401a.
 - Related middleman will have to provide documentation to support "circumstances of sale" test
 - All costs + profit test
 - Same sales price to unrelated parties
 - Price established in a manner consistent with normal industry pricing practice
 - Absence of any statutory additions provided to mfg by middleman or importer



“First Sale” For Customs Valuation



❖ What is a sale?

- Customs defines a “sale” as the transfer of property from one party to another for consideration.
- In determining whether property or ownership has been transferred, Customs considers whether the potential buyer has assumed the **risk of loss** (i.e., is liable for goods if lost or damaged during shipment) and/or **acquired title** (i.e., legally possesses or owns) to the goods.

“First Sale” For Customs Valuation

❖ Other factors that indicate a bona fide sale has occurred

- Customs considers as evidence of a buyer-seller relationship whether the potential buyer:
 - provided (or could provide) instructions to the seller on what to do with the merchandise;
 - was free to sell the items at any price he or she desired;
 - selected (or could select) his or her own customers without consulting the seller; and
 - could order the imported merchandise and have it delivered for his or her own inventory.



“First Sale” For Customs Valuation

- “Clearly destined for export to the United States”
 - Goods shipped directly to the United States. HQ 547382, February 14, 2002
 - Purchase order and invoices specify the goods are for/destined to the U.S.
 - Manufacture, design, and other unique specifications or characteristics of the merchandise – labels, logos, stock numbers, or unique marks are in conformity with U.S. buyer's standards
 - Marking, visas, warranties or other types of certification or characteristics required for entry or operation in the U.S.
 - Avoid simultaneous transfers of title or passage of risk of loss



Transaction Value: First Sale Issues



- Incoterms: Risk of loss and the simultaneous (back-to-back) transfer of title
 - Middleman should possess merchandise or risk of loss
 - In HQ H016966, dated December 17, 2007, CBP stated that:

Whenever there is a purported series of sales, and the same terms of sale are used in both transactions, there is a concern that the middleman obtains risk of loss and title only momentarily or never at all and thus has nothing to sell to the ultimate purchaser.

... the use of identical terms of sale suggested that there was only one sale. Based on that and other factors, CBP concludes that there was not a bona fide sale between the manufacturer and the middleman.
 - ❑ See HQ H236428, September 8, 2014; HQ 546192, February 23, 1996
 - ❑ HQ H272113, March 9, 2016 – rejects First Sale appraisement of merchandise
 - ❑ HQ H224598, December 30, 2014– accepts First Sale appraisement of merchandise



First Sale: Title and Transfer Issues



- Does the middleman “**own**” or possess the goods prior to the sale to the Importer/ buyer?
- The problem with simultaneous or flash transfer of title
 - Where the middleman and the buyer obtain **title at virtually the same moment**, as evidenced by both parties having the **same terms of sale**, CBP is more likely to closely scrutinize a transaction.
 - By itself, flash transfer of title does not equate to a failure to show a bona fide sale (for instance, see HRL W563605, dated November 19, 2009).
 - But this factor along with who carries **the risk of loss** are considered by CBP in its determination of whether a **bona fide sale** has occurred.



First Sale

Title and Transfer Issues



- HRL H016966, dated December 17, 2007
 - "Whenever there is a purported series of sales, and the same terms of sale are used in both transactions, there is a concern that the middleman obtains risk of loss and title only momentarily or never at all and thus has nothing to sell to the ultimate purchaser."
 - "In such situations the middleman may be a buying or selling agent rather than an independent buyer/seller and the sale will be said to occur between the party identified as the first seller and the ultimate U.S. purchaser."
 - A determination of when title and risk of loss pass from the seller to the buyer in a particular transaction depends on whether the applicable contract is a "shipment" or "destination" contract.
HQ H246429, January 7, 2014

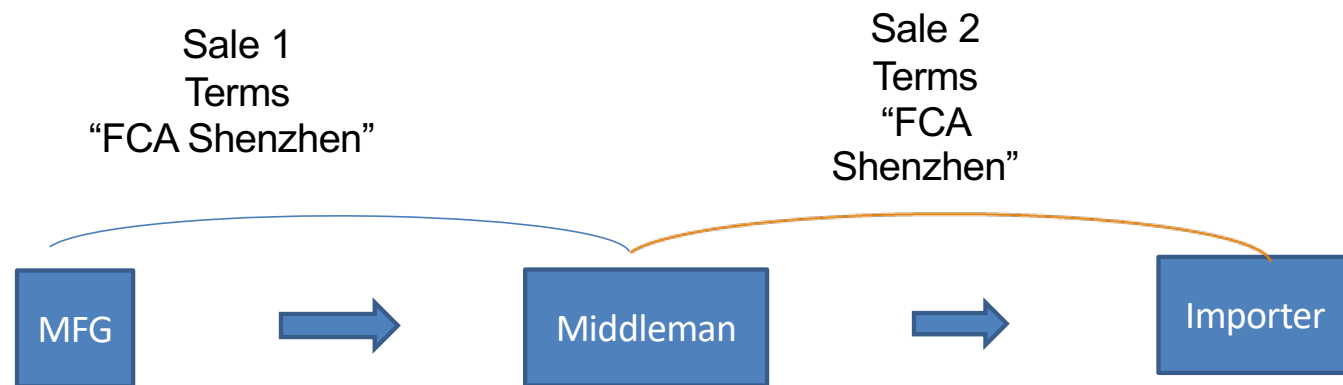
First Sale

Title and Transfer Issues

➤ Title Transfers

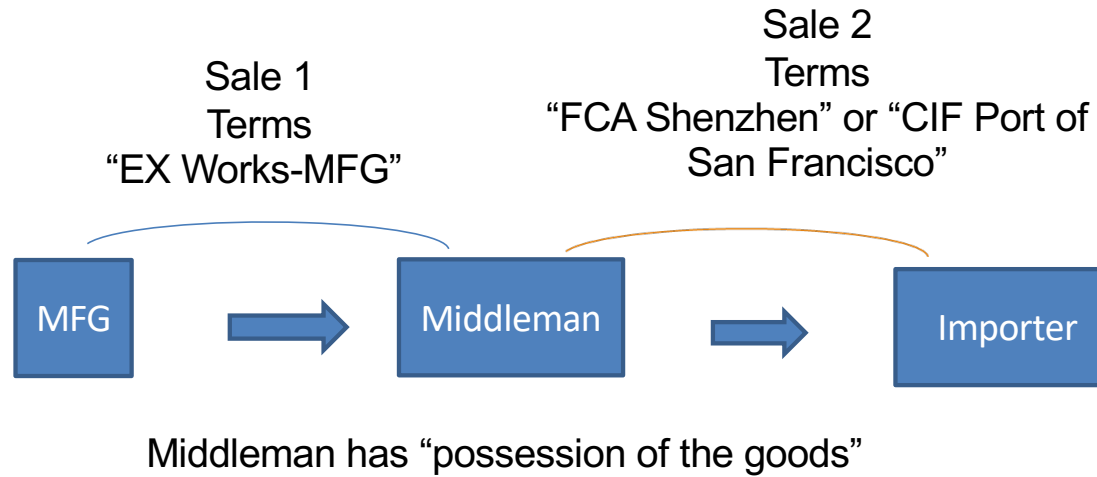
- In a shipment contract, when seller completes physical delivery to the carrier
 - Ex works
 - F-terms (FCA, FAS, FOB, etc.)
 - C-terms (CIF, C & F, etc.)
- In a destination contract, when goods are physically delivered to the location required
 - D-Terms (i.e., DDU and DDP)

Simultaneous or Flash Transfer of Title



Middleman does not have "possession of goods"

Consecutive Transfers of Title





“First Sale” for Customs Valuation

- Information and Documentation Requirements -- HQ H246429, January 7, 2014; Treasury Decision (T.D.) 96-87, dated January 2, 1997:
 - Importer must be able to describe
 - Roles of all parties and furnish relevant documents pertaining to each transaction that was involved in the exportation of the merchandise to the United States.
 - Provide relevant documents including:
 - purchase orders, invoices, proof of payment, contracts and any additional documents (e.g. correspondence), demonstrating how the parties dealt with one another and which support the claim that the merchandise was clearly destined to the United States
 - CBP looking for complete paper trail of the imported merchandise showing the structure of the entire transaction
 - Importer must also inform CBP of any statutory additions and their amounts
 - Invoice Presentation Issues



Is middleman an “Agent”?



When is the intermediary a selling agent?

- An agent is a person who performs actions on behalf of the principal.
- In a buying agency, the principal is the buyer and in a selling agency, the principal is the seller.
- The fees the agent receives for its services are referred to as commissions.
- Typically, the commission is equal to an agreed upon percentage of the price of the goods.

- A **Selling agent** acts under the control of the “seller” or manufacturer of the goods.
- Examples of the services which are characteristic of a selling agent include:
 - Seeks customers for the seller’s goods, processes orders, assists in preparing export documents and arranging for insurance, transport and storage. Receiving and processing payments on behalf of the seller.
- A **Buying agent** acts under the control of the Buyer/importer of the goods.
- Examples of services which are characteristic of a buying agent:
 - collecting market information, gathering samples, translating, informing the seller of the desires of the buyer, locating suppliers, placing orders based on the buyer’s instructions, procuring the merchandise, assisting in factory negotiation, inspecting and packing merchandise, and arranging for shipment and payment. This is not an exhaustive list



What are attributes of an Agent vs. Seller?

- Factors which go to the main issue of “control”:
 - which party bears the risk of loss for lost or damaged merchandise? (generally, a buying agent does not bear the risk of loss);
 - who absorbs the cost of shipping and handling? (buying agents generally do not absorb such costs);
 - which party controls the manner of payment for the goods? (generally, a buying agent would not control how and when the seller is paid);
 - could the buyer purchase from the manufacturers without using the services of the agent (if the answer is no, the agent may be a selling agent);



What are attributes of an Agent vs. Seller?

- was the intermediary operating an independent business primarily for its own benefit? (if the answer is yes, it is possible that the intermediary is not an agent but an independent seller);
- is the intermediary financially detached from the manufacturer or seller? (if not, it is possible that the intermediary may not be acting on behalf of the buyer, but on behalf of the seller);
- what do the commercial documents show? (e.g., how are the parties referred to in the commercial documents; is there a buying agency agreement; is there a purchase agreement and if so, who are the parties thereto).

Middleman: Agent vs. Seller?

- A selling commission earned by the middleman is a statutory addition to value and part of the price paid if paid separately by the Buyer/ importer.
- A buying commission earned by the middleman is **not** statutory addition to value and **not** a part of the price paid if paid **separately** by the Buyer/ importer to the middleman/agent.
- If the buying commission is not separately identified on the invoice or separately presented, the buying commission is a part of the price paid.
- Invoice Presentation issues
- Buying Agency Agreements. Not required but helpful to establish the existence of the relationship and control.



George Tuttle III
Attorney
geo@tuttlelaw.com

Questions