



KENYA REVENUE AUTHORITY

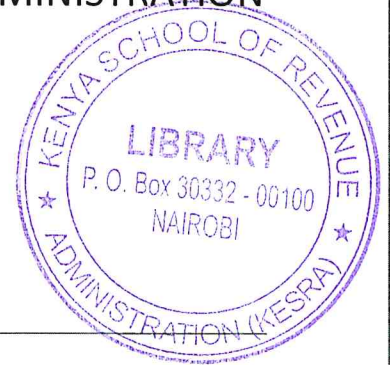
KENYA SCHOOL OF REVENUE ADMINISTRATION

NAIROBI

HIGHER NATIONAL DIPLOMA I CUSTOMS ADMINISTRATION

CUSTOMS VALUATION I

Prepared by Abakuk O Kasibo



COVERAGE

Lesson 01 Introduction to Customs Valuation

Lesson 02 Structure of the WTO Agreement on Customs Valuation

Lesson 03 Transaction Value Method: The Concept

Lesson 04 Transaction Value Method: Application

Lesson 05 Commissions and Brokerage; Costs of Containers and Packages (Articles 8.1(a)

Lesson 06 Assists (Adjustments under article 8.1(b)

Lesson 07 Royalties and Licence fees; Proceeds of subsequent Resale (Articles 8.1(c) and 8.1(d)

Lesson 08 Optional Adjustments and ICOTERMS

Lesson 09 Documentation in Customs Valuation

Lesson 10 Practical exercises based on Transaction Value Method

LESSON 01 INTRODUCTION TO CUSTOMS VALUATION

OBJECTIVES

By the end of the lesson, the participants should be able to: -

- a) Define key terms and concepts used in Customs Valuation
- b) Explain the history of Customs Valuation
- c) Outline the objectives and general principles of the agreement

CONTENT

Introduction

1. Key terms and concepts used in Customs Valuation
2. History of Customs Valuation
3. Objectives and general principles of the agreement

INTRODUCTION

Definition of Customs Value

Value may be defined as... worth, desirability; purchasing power; equivalent of a thing ... which may be substituted or exchanged for a thing

The essential ingredients which give a “good” or “thing” its value are desire; need; choice; access and means.

The value of a thing is reflected by its acquisition, that is, its purchase by way of a sale, lease/hire, loan, swap or, barter.

The term “customs value” also reflects that “worth” by the physical movement of goods from one country to another with the importer/buyer then making a “Customs value” declaration to the importing country’s Customs administration.

Customs value determinations (decisions) provide the basis on which Customs duties/taxes are calculated using an ad valorem rate.

Article 15.1(a) of the Agreement on Implementation of Article VII of GATT (1994) and Paragraph 1 of the 4th Schedule to East Africa Customs Management Act, 2004 describes customs value of imported goods as “... the value of goods for the purposes of levying ad valorem duties of Customs ...”.

Customs Value and Rates of Customs Duties

Customs duties are instruments of fiscal and trade policy. In addition to ad valorem duty rate, which is a percentage against the customs value, composite rates of duty are used in some countries. This type of duty rate is a combination of an ad valorem and a specific (or fixed) duty rate. A specific duty rate is a cost per unit, weight or any other measure of quantity. For example, 1 currency unit (c.u.) per kg.

The choice of duty rate type depends on a number of factors, such as the government's tariff policy which may be to raise (or protect) revenue; facilitate duty/revenue collection; protect domestic industry or, encourage/restrict the importation of certain goods.

To the greatest extent, specific duty rates tend to be easier to apply than ad valorem as they are based on unit, weight and quantity factors. Ad valorem duty rates require Customs administrations to be more efficient with greater level of specialisation.

With the start of the new century, the vast majority of Member countries apply ad valorem duty rates and, as such, it is appropriate that the supporting valuation system is relevant to and equipped for an ad valorem duty rate system.

Ad valorem duties are not a recently development. The system in fact dates back to the Middle Ages and beyond. History suggests that what seemed to be lacking at that time was the application of a precise standard method to establish a value for goods. Nor was it possible during those times to appeal against decisions before an impartial body. As a result, assessments tended to be unpredictable and arbitrary. There were indeed periods when ad valorem duties alternated with specific duty rate application.

The overall preference for ad valorem duty rates re-emerged as the world became more industrialised. It was then realised that the ad valorem system offered greater protection for governments, as it was more adaptable to deal with price fluctuations and quality valuation of imported goods.

As the world has progressed rapidly in the international trade arena, the application of different and arbitrary valuation systems became a major obstacle to the continued smooth transition to the globalisation and liberalisation of international trade. An additional burden was that such Tariff Agreements, as they were then, could not function efficiently because the valuation systems of the day enabled the act of duty assessment to be manipulated unilaterally by altering the valuation criteria.

As a result of these inadequacies, at the start of the 20th century, these affected trade and industry sectors undertook a number of studies with a view to replacing the arbitrary valuation systems that were in place, with an international system which would be fair and neutral in its application.

THE HISTORY OF CUSTOMS VALUATION

The League of Nations

Examined these values and trade related needs, but agreement on a set of general principles for Customs valuation was not reached until the United Nations Conference on Trade and Employment was held in Geneva in 1947.

The conclusions of this Conference were embodied in Article VII of the GATT. This set of principles however provided little guidance regarding their practical application.

The European Customs Study Group

The European Customs Study Group was formed in Brussels in 1947 with a series of tasks based on international co-operation in the area of Customs valuation. These tasks included the drafting of a definition of value for use within a Customs Union framework. The Group was also required to study methods and procedures within which a value definition could be applied.

The text of this definition was completed in mid - 1949 and it was based on the principles set out in Article VII of the GATT. The definition was incorporated in the Convention on the Valuation of Goods for Customs Purposes, which was signed in Brussels on 15 December 1950 and entered into effect on 28 July 1953. It became known as the Brussels Definition of Value (BDV).

The BDV was based on the notional concept of treating the customs value as the price at which, in assumed conditions, the goods to be valued would be sold. The essential elements of the BDV were price, time, place, quantity and, commercial level.

Tokyo Round

Between 1973 and 1979, a new phase in the history of customs value was taking place. The GATT multilateral trade negotiations known as the Tokyo Round took place in Geneva. This round of multilateral trade talks represented the most significant trade policy discussions for a long period of time.

The primary objective of the Tokyo Round was “to achieve the expansion and ever-greater liberalisation of world trade, inter alia, through the progressive dismantling of obstacles to trade”. One way in which to achieve this goal was the adoption of a common international valuation system which would be more widely accepted and result in a more uniform and positive valuation basis, one which would also be more acceptable.

As a result of the Tokyo Round, the Agreement on Implementation of Article VII of the GATT (known as the GATT Valuation Code) was adopted, establishing a positive system of Customs valuation based on the “price actually paid or payable” for imported goods.

The foundation of this Code was to provide a fair, uniform and neutral system for the valuation of imported goods for Customs purposes conforming to commercial reality and outlawing the use of arbitrary and fictitious customs values.

The reduction or elimination of restrictions on international trade was also a basis of this valuation discipline. Article VII of the GATT also promotes the facilitation of trade and is purposeful in its recognition of international requirements and principles. It also established an open and transparent foundation for customs value which should be based on competitive “actual value” rather than arbitrary and fictitious values.

The GATT Valuation Code, based on Article VII of the GATT came into effect on 1 January 1981 with 25 contracting parties. It is relevant to both FOB and CIF countries as opposed to the BDV which initially only accommodated CIF countries.

The Code remained in force unchanged until 1994 when the 8th Round of Multilateral Trade Negotiations, known as the Uruguay Round, were finalised and reported in the Marrakesh Declaration of 15 April 1994.

The Uruguay Round

The Uruguay Round in fact commenced in September 1986 and negotiations substantially concluded in December 1993. This Round was initiated by some countries who were concerned that there was a drifting by a number of countries back to a “protectionist” focus as a result of a downturn in the world economy.

If that was allowed to happen, the potential effect on some areas of the GATT meant that the Agreement would lose its effectiveness and relevance, or so it was thought at the time. A number of issues were put forward for review which included “... GATT Articles, provisions and disciplines as requested by interested contracting parties and, as appropriate, undertake negotiations”.

Some developing countries also expressed their concern that by signing the Agreement they would lose their ability to continue their fight against fraud.

The outcome of the Uruguay Round for Customs valuation purposes was to reinforce the intention and content of the Agreement on Implementation of Article VII of the GATT and specially to confirm the intention of Article 17 (Section **122(4)** of East African Customs Management Act); the role of sole traders, sole distributors and sole concessionaires; and, the phasing out requirements of minimum values and, the rights of developing countries in the application of Article 20.

With the ratification of the Uruguay Round, a number of recommendations including the following were adopted.

- Creation of the World Trade Organization which came into force on 1 January, 1995.
- The requirement that all signatories to the WTO will accept all GATT instruments, including the Valuation Agreement.
- Creation of one dispute settlement body.
- Replacement of the previous Protocol by Annex III (regarding technical assistance delivery by developed countries to developing countries).
- Adoption of decisions regarding burden of proof; minimum values and, sole agents, sole distributors and sole concessionaires.
- Presentation of the Valuation Code into Parts I; II; III and IV with 3 Annexes.
- Attached the title of WTO Valuation Agreement to the then Valuation Code.

As the final meeting of the Uruguay Round was held in Marrakesh in April 1994, it is known as the Marrakesh Agreement to which Members became signatories. The WTO Valuation Agreement (hereinafter **the Agreement**) remains based on the Agreement on Implementation of Article VII of the GATT (1994).

The Agreement recognises that Customs valuation should as far as possible be based on the actual price of the goods to be valued. This price is usually reflected in the commercial invoice but may be subject to certain adjustments. This is the transaction value.

The transaction value is the primary method of valuation and the majority of imported goods into signatory countries worldwide are valued using the transaction value method. As such, it is the most important method of valuation under the Agreement.

Five alternate methods are also provided in the Agreement when the transaction value cannot be applied. This may be due to a number of factors, for example, a restriction may apply to the imported goods which make it ineligible under the transaction value. However, the six methods of valuation must be considered in sequential order.

Annex III of the Agreement, which is deemed to be an integral part thereof, contains provisions concerning the needs of developing countries and provides those countries with some flexibility in applying the Agreement. The Agreement also refers to the expectation that developed country signatories will provide technical assistance to developing country signatories. These inclusions are for the purpose of making the Agreement equally beneficial to developing countries as well as developed.

THE GENERAL PRINCIPLES AND OBJECTIVES OF THE AGREEMENT

General Principles of the Agreement

The transaction value (Article 1) is the primary method of valuation which is based on the price actually paid or payable for imported goods, followed in sequential order by the alternate methods:

- Transaction value of identical goods (Article 2);

- Transaction value of similar goods (Article 3);
- Deductive value method (Article 5);
- Computed value method (Article 6);
- Fall-back method of valuation (Article 7).

Article 1 must be read together with Article 8. The Agreement is set out in a transparent and logical text and each method of valuation must be considered in strict sequential order.

During the valuation process, Customs does not work in isolation. The General Introductory Commentary states that "a process of consultation between the Customs administration and the importer will enable information to be exchanged, subject to requirements of commercial confidentiality" should occur.

Article 4 of the Agreement is not a valuation method but provides an option to reverse the order of application of Articles 5 and 6 at the **request of the importer**. If the importer elects to reverse the order, meaning that Article 6 will be considered before Article 5, then he/she has the right to do so. Customs will generally agree.

Given the criteria of Article 6, it can be taken that if an importer requests reversal of Articles 5 and 6, the importer is either a business partner of the exporter, a subsidiary or, a long-time client as under Article 6, it is necessary for Customs to have access to the exporter/producer's books.

The objectives of the Agreement

As a preamble to the rules on Customs valuation, the Commentary makes a statement on behalf of all Members recognizing a series of fundamental points which underpin the Agreement itself, as follows:

(1)"to further the objectives of GATT 1994 and to secure additional benefits for the international trade of developing countries".

Part III of the Agreement provides "Special and Differential Treatment" for developing countries when they become Members. For example, they may delay application of its provisions for up to five years and may defer application of some specific rules for an additional three-year period.

(2)" to provide greater uniformity and certainty ..."

An important objective of the Agreement is to establish a precise set of rules which will be applied in the same way by all Members so that importers can be confident they will receive the same treatment.

(3)"a fair, uniform and neutral system... that precludes the use of arbitrary or fictitious customs values"

The intention of precluding the use of arbitrary or fictitious customs values is to ensure that the valuation of goods is based on the actual circumstances relating to the transaction in question.

(4)" The basis for valuation ... should, to the greatest extent possible, be the transaction value of the goods being valued"

This makes clear that the transaction value method should be used wherever possible.

(5)"Customs value should be based on simple and equitable criteria consistent with commercial practices ..."

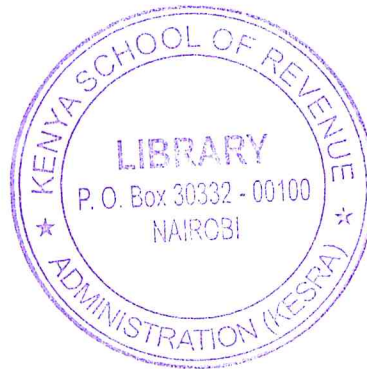
Whatever method is applied; the customs value should be determined on the basis of the examination of accurate commercial documentation in line with commercial practices.

(6)" Valuation procedures should be of general application without distinction between sources of supply"

This is another aspect of neutrality. Members are required to apply the provisions of the Agreement uniformly to importations from all countries without distinction between the goods and exporters.

(7)" Valuation procedures should not be used to combat dumping"

This means that if dumping is believed to be taking place, the Agreement should not be used as a counter-measure by seeking to increase the customs value of the goods in question. The correct procedure in this case is to consider application of the anti-dumping laws (Article VI of the GATT).



REFERENCES

- Concise Oxford Dictionary
- The WTO Valuation Agreement
- Article VII of the GATT 1994
- Convention on the Brussels Definition of Value
- Tokyo Round of Multilateral Trade Negotiations
- The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations
- Instruction manual developed by the trainer.

LESSON 02: STRUCTURE OF THE WTO AGREEMENT ON CUSTOMS VALUATION

OBJECTIVES

By the end of this lesson you should be able to:

- a) Explain the purpose of the introductory Commentary to the Agreement
- b) Outline the provisions relating to rules of Customs valuation
- c) Describe other provisions of the agreement
- d) Describe the annexes to the agreement

CONTENT

- a) Introductions
- b) Introductory Commentary to the Agreement
- c) Provisions relating to rules of Customs valuation
- d) Other provisions of the agreement
- e) Annexes to the agreement

INTRODUCTION

The full title of WTO Valuation Agreement is "Agreement on Implementation of Article VII GATT 1994" The Agreement can also be found in WCO Valuation Compendium along with further material to assist with the implementation and application of the Agreement.

The structure of the Agreement is as follows:

Part I Rules on Customs Valuation (Articles 1 - 17)

Part II Administration, Consultations and Dispute Settlement (Articles 18 -19)

Part III Special and Differential Treatment (Article 20)

Part IV Final Provisions (Articles 21 -24)

Annex I Interpretative Notes General Notes to Articles

Annex II Technical Committee on Customs Valuation

Annex III Miscellaneous

GENERAL INTRODUCTORY COMMENTARY

The Commentary gives a general introduction to the methods of valuation and their hierarchy of application. It also sets several principles which Members of the WTO agree to apply.

- The first paragraph of the introductory commentary states that the primary basis for customs value is the "**Transaction Value**". The starting point for the transaction value is the '**price actually paid or payable**' for the goods, adjusted to take into account certain additional costs incurred by the buyer which form part of the customs value, but which were not included in the basic price paid or payable.
- Article 8 gives details of these adjustments. Adjustments may also be required for certain elements which pass between buyer and seller but are not in the form of money. As such, the Commentary

informs us that together, Articles 1 and 8 of the Agreement form the basis for the determination of the transaction value.

- Articles 2 to 7 cover the methods of valuation to be used when it is not possible to determine a transaction value.
- The second paragraph states that if it has not been possible to determine a transaction value for the goods in question, Customs administration and the importer **should consult** to establish whether a customs value can be determined under the next two methods.
- The method described in Articles 2 and 3 are based on the customs value of identical and similar imported goods respectively. These are called **identical and similar goods method**
- The third paragraph Introduces Articles 5 and 6 which describe the methods to be used when the customs value cannot be determined under the first three Articles.
- The method described in Article 5 is derived based on the price at which the imported goods (or identical or similar) are sold after importation to an unrelated buyer. Certain post importation expenses and profit margin are deducted. This is **Deductive method**.
- The method described in Article 6 is based on a **“computed”** value, built up from the separate elements which would be incorporated into a normal selling price, for example, parts, materials, profits, overheads etc.
- It is acknowledged however that the use of these methods presents difficulties so for this reason Article 4 allows the importer to choose the order of application of these two methods in consultation with the Customs administration.

The fourth article refers to Article 7 of the Agreement which describes how to determine the customs value if the previous methods outlined above cannot be applied. This is Fallback

RULES OF CUSTOMS VALUATION

Methods of Valuation - Articles 1 - 8

The main criteria for determining customs value can be found in Articles 1 to 8.

Article 1

Should be read with Article 8 to determine the transaction value of the imported goods.

Article 2

Describes the method based on the transaction value of identical goods already valued under method 1.

Article 3

Describes the method based on the transaction value of similar goods already valued under method 1.

Article 4

Describes the application of Articles 5 and 6 where Articles 1 to 3 cannot be used and explains options for reversing the order of application of Articles 5 and 6

Article 5

Describes the method based on the price at which the imported goods (or identical or similar goods) are sold after importation to unrelated buyers. The Article also describes an option where the customs value can be based on the price at which the imported goods are sold after further processing in the country of importation.

Article 6

Describes the method based on a computed value, that is, a value built up from the cost of materials and manufacture and an amount for profit and general expenses.

Article 7

States that if the customs value cannot be determined under Articles 1 to 6, the value should then be determined, using reasonable means, in accordance with the principles and general provisions of the Agreement. This Article also lists certain bases under which a customs value should NOT be determined.

Article 8 provides a list of adjustments considered when applying Article 1

Other Rules of Customs Valuation: Articles 9 - 17

Article 9

Explains conversion from another currency to the importing country's national currency (where necessary) and the publication of approved rates of exchange.

Article 10

Deals with issues of confidentiality.

Article 11

Explains the obligations of Members to provide importers with the right to appeal against a customs value decision without penalty.

Article 12

Explains the obligations of Members to publish laws in conformity with Article X of the GATT 1994.

Article 13

Explains the obligations of Members to provide a guarantee system for the release of imported goods where there is a delay in determining the customs value.

Article 14

States that the Notes in Annexes I, II and III form an integral part of the Agreement.

Article 15

Defines certain words and terms used in the Agreement.

Article 16

Explains the right of importers to a written explanation as to how the customs value was determined.

Article 17

Explains the rights of Customs administrations to satisfy themselves regarding the truth and accuracy of any statement, document or declaration made to Customs.

OTHER PROVISIONS OF THE AGREEMENT

Administration, Consultations and Dispute Settlement

Article 18

Describes the basic constitution of the WTO Committee on Customs Valuation and the WCO Technical Committee on Customs Valuation.

Article 19

Describes the procedure to be followed for consultations and disputes.

Special and Differential Treatment

Article 20

Lists the special provisions available for developing countries.

Part IV Final Provisions

Article 21

States that reservation may not be entered without consent of the Members.

Article 22

Describes Members obligations regarding national legislation.

Article 23

States that the implementation and operation of the Agreement should be reviewed annually by the WTO Valuation Committee.

Article 24

Describes the responsibilities of the WTO and WCO Secretariats.

ANNEXES TO THE AGREEMENT

Annex I: The Interpretative Notes

The General Note contains two sections:

Sequential Application of Valuation Methods

Notes makes the important statement that the transaction value method defined in Article 1 is the primary method of valuation. It also describes the order in which the alternate methods of valuation should be considered.

Use of Generally Accepted Accounting Principles

Notes explain that when financial information is supplied by a company in relation to an importation, Customs should accept it in the format which corresponds to the conventions of the country in which the information is prepared. For example, where information relating to profit and general expenses is prepared in Country "X", the generally accepted accounting principles of Country "X" are relevant.

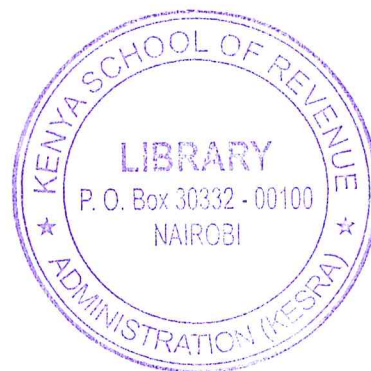
Notes to Articles These Notes supplement the text of Articles 1 to 3, 5 to 9, 11 and 15. In particular, they explain in details how the valuation methods are to be applied.

Annex II Technical Committee On Customs Valuation

This Annex describes the roles, responsibilities and working methods of the Technical Committee.

Annex III

Describes special dispensations available on request to developing countries when they become Members. Supplementary information is also given on the application of Article 17 and interpretation of the term "price actually paid or payable".



REFERENCES

- WTO Valuation Agreement
- WCO Customs Valuation Compendium on WTO Agreement and Texts of the
- Technical Committee on Customs Valuation
- Article VII of the GATT 1994
- Article X of the GATT 1994
- The Index of Reference Materials on Customs Valuation
- Instruction manual developed by the trainer.

LESSON 03 TRANSACTION VALUE METHOD

OBJECTIVES

At the end of this lesson you should be able to:

- a) Explain the concept of sale
- b) Discuss the concept of sale for except
- c) Explain the concepts of Price actually paid or payable
- d) Discuss other factors that may affect Customs Value

CONTENT

- a) Introduction
- b) Concept of Sale
- c) Concept of Sale for exports
- d) Price Actually Paid or payable
- e) Other factors that could influence Customs Value

GENERAL INTRODUCTION TO ARTICLE 1

The General Introductory Commentary to the Agreement states that the basis for customs value should be, wherever possible, the transaction value of the imported goods being valued. Hence the primary method for determining the customs value is the transaction value, i.e., "the price actually paid or payable for the goods when sold for export to the country of importation, adjusted in accordance with Article 8" provided the conditions of article 1 are met.

The Key Elements of Article 1

The following points are critical to the application of Transaction value method:

- (1) The sale
- (2) The sale for export to the country of importation
- (3) The price actually paid or payable

CONCEPT OF SALE

The Agreement is based on the price paid for the goods when sold for export. Hence, to determine the customs value in accordance with the transaction value method, the goods being valued must have been sold before importation.

If the imported goods are not sold, there can be no transaction value and therefore Article 1 of the Agreement cannot be used.

Absence of a definition of sale

The Agreement contains no definition of "sale". It merely indicates that a sale is a specific commercial operation satisfying certain requirements and conditions. It implies a transfer of ownership of the goods for some form of consideration.

Hence a sale necessarily requires an agreement between a seller, who agrees to transfer the ownership of the goods in exchange for a specified price, and a buyer, who agrees to purchase those goods for a specified price.

There is no international definition of “sale”, and every country is free to establish its own definition of what constitutes a sale in domestic law, by virtue of its legislation, Customs regulations or administrative practices.

Advisory Opinion 1.1

States that the term “sale” should be interpreted as widely as possible. Moreover, in the absence of a positive definition of “sale”, a list of situations has been drawn up in which the imported goods are deemed not to have been the subject of a sale.

Free of Charge Shipments

Where a transfer of goods is made free of charge, it cannot be regarded as a sale. This is the case, for example, with certain gifts, samples, prototypes and promotional items. In this case, an alternate method of valuation must be used.

Consignment sales

This refers to goods dispatched to the country of importation not as a result of a sale, but with the intention that they would be sold for the account of the supplier. The goods remain the property of the foreign supplier until after they are sold through a selling agent in the domestic market. Example: goods imported for sale by auction.

Goods imported by intermediaries, who do not purchase the goods and sell them after importation

This relates to imported goods which, at the time of Customs clearance, have not yet been sold but are delivered by the foreign supplier to his/her agent generally to be held in stock and then sold after importation for the account of, and at the risk of, the foreign supplier. Hence there is no transaction value for these goods at the time of importation.

This is not the case where agencies have purchased the goods for distribution purposes as in such cases a sale has taken place.

Goods imported by branches which are not separate legal entities

As a sale necessarily involves a transaction between two separate persons, the delivery of goods to a branch office which does not have a separate legal status, is merely a transfer of goods from one office to another of the same legal entity.

Whether a transaction leading to the importation of goods by the branch office qualifies as a sale for export depends on the role of the branch in the transaction.

If the main function of the branch is merely to find customers for the parent company, there is no sale between the parent company and the branch. As such, the branch simply has a logistical function and the sale to the end customer is made before the goods are released into home use. Consequently, valuation considerations will be based on the transaction value, under the usual conditions.

Example: Goods imported by branches which are not separate legal entities

Goods manufactured by company **XYZ** in a foreign country are imported through branch **XYZ-1** which does not have separate legal status from its parent company. **XYZ-I** obtain orders from unrelated buyers in the importing country, clears the imported goods, invoice them to clients and manage a limited stock resulting from any possible surplus. For accounting reasons, **XYZ** sends an invoice for these goods to its branch on the basis of a price representing the manufacturing costs. The sale of goods to customers in the country of importation takes place either before or after their clearance. The prices invoiced by **XYZ-1** to

customers differ from those mentioned on the invoice issued by XYZ, as they include a commercial profit margin, Customs duties and other costs.

Given that a sale necessarily involves a transaction between two separate persons, the delivery to XYZ-1 is merely a transfer of these goods from one office or section to another within the same legal entity.

Therefore, when the sale to unrelated buyers takes place before the goods are cleared by Customs; the customs value must be established on the basis of the price actually paid or payable by these buyers, in accordance with Article 1 of the Agreement, excluding the Customs duties, domestic transport costs and related charges.

However, as goods imported by XYZ-1 for stock purposes are not the subject of a sale, Article 1 does not apply and the customs value is to be determined using the alternate methods of valuation.

Goods imported under a hire or leasing contract

Hire and leasing contracts, even if they include an option to purchase the leased goods, do not constitute sales. Leasing contracts are for the purposes of the renting (or leasing), of, and for example, machinery and equipment for use in the country of importation without actually purchasing them from the exporter. The goods are valued using an alternate method and the leasing fees are generally taken to indicate the worth of the goods.

Even though the rights of the importer may extend to the future purchase of the leased goods, the leasing contract cannot be substituted for a sale.

Goods supplied on loan, which remain the property of the exporter

If the goods are loaned by the exporter to an importer, this does not constitute a sale and the alternate methods again will have to be considered.

Goods (waste or scrap) imported for destruction in the country of importation

Costs are usually incurred in connection with the importation of waste or scrap for destruction where the exporter pays the importer an amount for his/her services. As the importer does not pay for the imported goods but rather, on the contrary, is paid for accepting and destroying them, such an importation is not considered a sale. In such cases, the alternate methods will be used.

Goods which are the subject of barter or compensation

Barter deals constitute a specific case inasmuch as they are totally or partially expressed in non-monetary terms. They may involve an exchange of goods of approximately equal value or, expressed in monetary terms but not settled (or only partially settled) in monetary terms (e.g., merchandise barter which includes a payment to make up the balance). Hence it is necessary to examine, on a case by case basis, whether the arrangements can be considered a sale.

Characteristics of a sale

Place

The Agreement contains no specific provisions regarding the location of the seller and the buyer. However, the seller and buyer will usually be based in the country of exportation and the country of importation respectively. The buyer and the seller may also both be in the country of importation or in a third country.

Time

The Agreement does not make any reference to a time requirement when considering the price actually paid or payable necessary to determine the customs value of the imported goods under Article 1.

Transaction value is assessed without regard to when the contract was concluded or, if there were for example, any currency fluctuations after that date. The sale must merely take place before Customs clearance.

The expression "when sold for export" is not to be regarded as giving any indication of time parameters to be taken into account when considering whether a price is valid. It merely indicates the type of transaction involved, namely one in which the goods were sold for export to the country of importation.

CONCEPT OF SALE FOR EXPORT

The transaction for Customs valuation purposes must be the sale for export to the country of importation. There must therefore have actually been a transfer of ownership resulting in the exportation of the goods to the country of importation.

However, national regulations generally require the Customs declarant, i.e., the person who completes, dates and signs the declaration, to be in a position to produce all the commercial documents relating to the sale at any time, in support of the valuation details contained in the declaration.

Examples: (Advisory Opinion 14.1):

Example 1:

Seller **S** in the exporting country **X** enters into a contract to sell electric appliances to importer **A** in the importing country **I** at a price of 5.75 c.u. per piece. **S** concludes an agreement with manufacturer **M** also in country **X** to manufacture the goods. Manufacturer **M** on behalf of **S**, ships the goods to **A** in country **I**. **M**'s selling price to **S** is 5 c.u. per piece.

In this case, the transaction between **S** and **A** involves an actual international transfer of goods and constitutes a sale for export to the country of importation. As such, it would be a basis for valuation of the imported goods under Article 1 of the Agreement.

Example 2:

Buyer **B** in country of importation **I** purchases goods from seller **S** in the same country **I**. The goods are stored by **S** in country **X**. Necessary arrangements for shipment and export of the goods from country **X** are completed by **S** and the goods are imported by **B** into country **I**.

It is not necessary that the sale takes place in a specific country of exportation. Whether seller **S** is located in country **X** or **I** or a third country is not a relevant factor. The transaction between buyer **B** and seller **S** is a sale for export to the country of importation and would be the basis for valuation of the goods under Article 1.

CONCEPT OF THE PRICE ACTUALLY PAID OR PAYABLE

General

The customs value of imported goods is their transaction value, i.e., the price actually paid or payable for the goods when sold for export to the country of importation after adjustment in accordance with Article 8, if necessary.

The price actually paid or payable is the financial consideration for the goods. It represents the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. It includes all the payments made or to be made as a condition of sale, by the buyer to the seller or by the buyer to a third party to settle a debt owed by the seller.

The actual time of payment is not relevant. For example, when part of the payment is made in the form of a deposit prior to delivery of the goods and the balance is paid after delivery. Nor is the method of payment (cash, negotiable instruments, etc.,) relevant and payment for the imported goods may be made directly or indirectly.

As the price is the financial consideration for the goods, the payment must relate to the imported goods if it is to form part of the customs value. Thus, the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods will not form of the customs value.

It may well be that under the arrangements between the exporter and the importer, the importer will undertake certain activities on his/her own account in relation to the imported goods. These elements do not form part of the customs value of the imported goods. For example:

Treatment of warranties, Discounts and credits in relation to price actually paid or payable

Warranty costs

There are various types of warranty costs in many possible situations:

- When the seller assumes, directly or indirectly, the charges and risks associated with the warranty, he/she takes this into account when setting the price of the goods. The additional cost of the warranty is therefore included in the price of the goods and is paid as a condition of sale. In this case, neither Article 1 of the Agreement nor its Interpretative Note allow a deduction and the cost of the warranty will form part of the transaction value, even if it is invoiced separately from the goods.
- If the buyer assumes, directly or indirectly, the charges and risks associated with the warranty, he/she undertakes to bear these costs on his/her own account. No charge paid by the buyer for a guarantee will be part of the price actually paid or payable, as the activity is one undertaken by the buyer for his/her own account.
- In the case of warranty agreements, when the transaction is the subject of two separate contracts, one for the goods and the other for the warranty, the seller and buyer may tend to consider the payments made in connection with the warranty separately and make them subject to different legal provisions. In this case, the circumstances surrounding the sale of the goods and the warranty must be examined closely. The warranty agreement is linked to the contract of sale by the fact that the warranty applies to the imported goods. Even where a warranty agreement has been concluded separately, if the seller has imposed such an obligation on the buyer as a condition of purchase of the goods, the result is, a variation of the situation described in the first point above.

- Thus, if the seller requires the buyer to take out a warranty relating to the goods with a third party designated by the seller, the buyer will have to make payments both to the seller for the goods and to the third party to fulfil the obligation imposed by the seller. The two amounts should together be the price actually paid or payable.

Discounts

The price actually paid or payable is established after deducting any legitimate cash or quantity discounts.

Cash discounts:

These discounts are granted to buyers for payment in cash or payment made within a specified period (e.g., 5% for a payment made within 10 days of receipt of the invoice) and, for Customs purposes, the discounts must be freely available to all buyers.

Cash discounts can cause difficulties as they are usually actually received after importation has occurred. However, the transaction value method requires the use of the price actually paid or payable and legitimate cash discounts can therefore be accepted as a deduction as the discounted price is in fact, the price actually paid or payable.

Thus, if the goods have not been paid for at the time of determining a customs value for the imported goods, the amount that the importer will ultimately pay to acquire them will form the basis of the transaction value.

When the transaction involves a cash discount, the price payable may be determined in various ways. Thus, the invoice may include a statement specifying the conditions for granting a cash discount, or the importer will inform Customs, on request, that he/she has accepted the conditions entitling him/her to the discount and that the price payable is the discounted price.

Quantity discounts:

These are deductions from the price allowed according to the quantities purchased over a given period. Sellers often encourage buyers to purchase in bulk as their costs are proportionately reduced. For valuation purposes, it is the quantity which has determined the unit price of the goods being valued when they were sold for export to the country of importation that is relevant. For Customs purposes, the discounts must be freely available to all buyers. Quantity discounts can be established prior or subsequent to the importation of the goods:

Examples: The seller offers the following range of quantity discounts:

1 to 9 units: no discount
10 to 49 units: 5 % discount
Over 50 units: 8 % discount

First situation

Importer B purchases 27 units and is granted a 5 % quantity discount. Buyer C also purchases 27 units and is granted a 5 % quantity discount, but receives these units in three separate shipments each comprising 9 units. Can the 5 % discount be applied?

Answer: Yes, in both cases. The price actually paid or payable for the imported goods is reduced by the 5 % discount. The quantity purchased contributed to the setting of the price, not the delivery circumstances.

Second situation

B and C each purchase a further 42 units from the same supplier. They each receive an 8 % quantity discount on the shipment of 42 units as the manufacturer grants the discount on the cumulative purchase of over 50 units. Can the 8 % quantity discount be applied?

Answer: Yes. Once again the quantity purchased contributed to the setting of the purchase price and therefore established the price actually paid or payable.

Third situation

In addition to the quantity discounts of 5 % and 8 % granted before Customs clearance, a further quantity discount of 3 % on the first shipment of 27 units is granted retrospectively. Can this additional discount be applied to the second shipment?

Answer: No. The additional quantity discount of 3 % granted retrospectively should not be allowed for the second importation as it did not contribute to the setting of the unit price of the 42 units being valued, but relates to the 27 units previously imported. To establish whether or not the 3 % “credit” should be allowed for the first shipment, it is necessary to begin by examining the question of credits.

Credits:

With regard to the treatment of credits in respect of earlier transactions, Advisory Opinion 8.1 of the Technical Committee states that the amount of the credit represents an amount that has already been paid to the seller and is therefore part of the price actually paid or payable.

The decision on whether or not to apply the credit to the previous shipment must be taken independently of the shipment being valued. Any adjustment made to the value of the previous shipment will depend on national legislation.

Example:

Importer I receives a shipment of televisions at an invoiced price of 10,000 c.u. However, the invoice mentions a credit of 1,000 c.u. which brings the final invoice price down to 9,000 c.u. The importer informs Customs that the credit was granted because 10 of the television sets in the previous shipment were damaged. The seller therefore granted a credit on the present shipment to compensate for the losses. Can this credit be applied to the shipment currently being valued?

Answer: No. The credit is part of the price actually paid or payable for the shipment being valued. This shipment is therefore valued at 10,000 c.u. The credit may or may not be allowed for the earlier shipment, depending on the appropriate national legislation.

OTHER FACTORS PRICE ACTUALLY PAID OR PAYABLE

Split shipments

“Split shipments” refers to goods which, though forming the subject of one transaction between a buyer and a seller, are not presented for clearance in a single shipment for reasons connected with delivery, transportation, payment or the like and are imported in partial or successive shipments and declared, either at the one Customs office or a different office.

Most of the goods being imported in split shipments will fall into one of the following categories:

1. Splitting up of industrial installations or plants

This type of case concerns the importation of certain groups of goods and whole installations which, on account of their size, have to be imported in several shipments.

The customs value of each shipment will be based on the price actually paid or payable, i.e., an appropriate proportion of the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods, as reflected in the transaction agreed by the parties.

If the partial shipment has been the subject of a separate invoice, it will be necessary to add to invoice price any adjustments determined under Article 8.

If the partial shipment has not been the subject of a separate invoice, in determining the customs value, apportionment of the total value of the transaction could be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.

2. Shipments split for reasons of quantity

An example of this situation could be that the transaction involves a quantity of goods consisting of identical units or sets sold at an agreed price. The delivery dates may have been fixed in advance or left to the convenience of the parties.

Since for the purposes of applying Article 1 neither the time at which the sale contract was concluded nor market fluctuations after the date when the contract was concluded have to be taken into account, the determination of the customs value of the goods will be based on the price actually paid or payable.

However, if importations in split shipments do not occur within a reasonable time reflecting the normal commercial practice in the trade concerned, the Customs administration may consider it necessary to make enquiries concerning the price actually paid or payable, verifying especially whether there is a complementary agreement which modifies the original price.

The Interpretative Note to Article 1.1(b) cites as an example of such a condition, the case where the seller establishes the price of the imported goods on condition that the buyer also acquires a certain quantity of other goods, and therefore lays down a principle relating to other goods, not to the same goods involved in a single transaction.

3. Shipments split for reasons of geographical distribution

This situation is in fact a normal practice in international trade. The buyer agrees to buy from a seller in a single transaction a quantity of goods to be sent in separate shipments to two or more ports of one country of importation or, two or more countries of importation. The customs value of the transaction has to be determined under Article 1 on the basis of the price actually paid or payable.

The transaction value method can therefore be applied to split shipments, provided the requirements of Article 1 can be met.

REFERENCES:

- EAC Customs Management Act, 2004
- Kenya Customs Kenya Customs and Excise Act, 1996
- WTO Agreement on Customs Valuation
- WCO-JICA Handbook on Customs Valuation
- EAC Guidelines on Customs Valuation
- EAC Customs Management Act, 2004
- Instruments of the Technical Committee and the Committee of Customs Valuation
 - Advisory Opinion 1.1, 2.1 and 8.1
 - Advisory Opinion 14.1 and 15.1
 - Advisory Opinions 5.1 to 5.3, 6.1;
 - Commentary 2.1, 6.1;
 - Explanatory Note 3.1;
 - Study 2.1; Case Study 4.1.

LESSON 04 THE APPLICATION OF TRANSACTION VALUE UNDER ARTICLE 1

OBJECTIVES

At the end of this lesson, you should be able to:

- a) Apply the interpretative notes to article 1
- b) Discuss the restrictions, conditions and limitations of Transaction value.
- c) Explain the treatment of goods not in accordance with the contract and damaged goods.

CONTENT

- a) Introduction
- b) Interpretative notes to article 1
- c) Restrictions, conditions and limitations of Transaction
- d) Goods not in accordance of the contract and damaged goods

INTRODUCTION

In the previous lesson we spent a generous amount of time discussing the concepts behind the transaction value method. However, our ultimate goal is to apply the concepts to arrive at the Customs value. This depends on two factors. The first is the interpretation of the key terms used in the concepts. This is done through the interpretative notes to article 1. The second is the analysis of the express conditions states in article 1. In this lesson, we shall look at both

INTERPRETATIVE NOTE TO ARTICLE 1

The agreement is extremely specific in regard to the application of Article 1, the transaction value. The Article and its Interpretative Notes provide the considerations to be taken into account in respect of the cost elements relevant to the customs value of imported goods. These include:

Direct and Indirect Payments:

Paragraph 1 of the Interpretative Note to Article 1 refers to the fact that payment for the imported goods may be paid by the buyer directly or indirectly to the seller. That is a matter for the trading arrangements between the buyer and the seller. The form of payment may also be made in various ways, for example, letter of credit or negotiated instruments.

An example of an indirect payment could be where the price actually paid or payable is reduced by the seller to offset a debt owed to the buyer. The total price actually paid or payable for customs value purposes will be the sum of both direct and indirect payments.

A further indirect payment example is where the buyer settles a debt of the seller with a third party and the invoice price has been reduced by that amount. The price actually paid or payable is the sum of the direct and indirect payments.

An indirect payment could also be by way of drawing a credit against a previous import transaction between the parties to the transaction. Such a "payment" must be included in the customs value considerations of the imported goods being dealt with, even if such "credit" is not shown on the invoice. Bearing in mind the need for Customs administrations to ensure the balance of trade facilitation and their own control requirements, many of these indirect payments may not be identified until a post clearance audit occurs. Importers however are obliged to ensure that all details regarding their import transactions are correctly declared to Customs.

In fact, any payment made by the buyer to the benefit of the seller in regard to the imported goods, whether direct or indirect, will form part of the customs value of the imported goods.

If, however, other “conditions” or “considerations” under Article 1.1(b) are identified when considering indirect payments in regard to the imported goods, this would lead to rejection of the transaction value under Article 1.

Documentation must be made available by the importer or sought by the Customs administration to verify indirect payments in order to determine the correct price actually paid or payable for the imported goods.

Activities Undertaken by the Buyer on his/her own Account:

Paragraph 2 of the Interpretative Note to Article 1 states that activities undertaken by the buyer on his/her own account (other than those for which an adjustment can be made under Article 8), are not considered to be an indirect payment to the seller even though the seller may be regarded as having gained some benefit. As such, the cost of such activities will not form part of the customs value of the imported goods. Very simply, the phrase “undertaken by the buyer on his own account” means expenses incurred and paid for by the buyer.

Advertising

For example, under an agreed co-operative advertising plan, when the seller reimburses the buyer for part of the advertising costs incurred on the buyer’s own account, it might be generally considered that the buyer is receiving a rebate or refund for those costs incurred. In all cases however, where the initial cost is incurred by the buyer on his/her own account, those costs will not form part of the customs value of the imported goods.

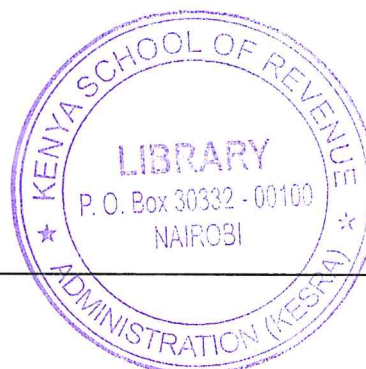
In the case of advertising in international trade today, the advertising may be global or product specific. Global advertising in fact refers to products which are advertised in many countries and each importer of such goods in all importing countries contribute percentage amounts on the basis of the size of their individual purchase levels (usually reflects that country’s global market position and percentage) from the exporter.

These payments, whether direct or indirect, must be able to be related to the imported goods being valued. Where the costs are not based on the number of units imported, and are generally taken to be overall “global” payments, they should (generally) not be considered to be an indirect payment and therefore not form part of the customs value of the imported goods.

Product specific advertising is as it states and therefore will usually be a condition of the sale and refer to the goods being imported and, whether a direct or indirect payment, that cost will form part of the customs value of the imported goods.

Warranty

Warranty payments require specific care regarding their status in regard to the customs value of the imported goods. Warranty payments may be provided to the importer by the exporter and in many cases, the warranty cost will be included in the selling price of the imported goods. Where this is the case, the warranty cost as part of the price actually paid or payable, will form part of the customs value of the imported goods.



Most warranties in international trade today are covered by separate warranty agreements. It is, therefore, important to confirm that the “price” for the imported goods has not been de-bundled (or split) and also, examine each of these circumstances on a case by case basis, as many of these cases will require the warranty payment to be included in the customs value of the imported goods.

However, the terms “maintenance” and “warranty” should not be confused. The Technical Committee on Customs Valuation has issued an instrument to ensure that this does not happen. Explanatory Note 6.1 refers and Commentary 20.1 is also especially helpful regarding warranty payments.

Some other examples of activities which may be undertaken by the importer on his/her own account are:

- Advertising the goods/brand or trademark under which the goods are going to be sold;
- Market studies and research;
- Participation in trade fairs and exhibitions;
- Preparation of showrooms;
- Testing.

Legal Deductions

Paragraph 3 of the Interpretative Note to Article 1 refers to those cost elements that can be legitimately deducted from the customs value of imported goods, provided that those costs can be distinguished from the price actually paid or payable for the imported goods. These are generally referred to as “post import costs/charges”. These are:

- Charges for construction, erection, assembly, maintenance or technical assistance undertaken after importation, on imported goods such as industrial plant, machinery or equipment;
- cost of transport after importation;
- Duties and taxes of the country of importation.

The Agreement allows for these costs, even if included in the agreed price of the imported goods, to be deducted so long as they are able to be distinguished in the pricing structure. It is taken for the purposes of the term “legal deductions”, that as these costs were accrued in the country of importation, they are not relevant to the goods as imported, when considering their customs value.

It is only necessary for these costs to be “distinguished from the price”, in these instances it is when they are included in the price of the goods. Such costs, when included in the price for the goods will generally have some form of commercial documentation in support of the cost. For example, a receipt for carriage of the goods in the country of importation.

These costs of course become critical when the level of sale of the imported goods is beyond the level that governments have placed on the customs value determination levels for their countries, that is, FOB or CIF. Therefore, if imported goods are negotiated between the importer and exporter at a DDP level (Delivered Duty Paid) it follows that the Customs administration must have the details of such costs to make the correct deductions to accommodate the correct determination of the customs value.

Interest

In regard to interest charges for deferred payments, while paragraph 3 of the Interpretative Note to Article 1 does not refer to “interest” payments as a legal deduction from the price actually paid or payable for imported goods, it is generally accepted within the Agreement and confirmed by Decision 3.1 (1980) of the then GATT Valuation Committee (now the WTO Valuation Committee), that interest paid for a deferred payment facility, will not form part of the customs value of the imported goods.

However, Decision 3.1 requires that for interest payments to not form part of the customs value:

- The charges must be distinguished from the price actually paid or payable;
- The financing arrangements must be in writing;
- Where required, the importer (buyer) can demonstrate that:
 - Such goods are actually sold at the price declared as the price actually paid or payable;
 - The interest rate claimed does not exceed the level for such transactions prevailing in the country of export while, and at the time when the finance was provided.

Those requirements are necessary regardless of who provided the finance. For example, the exporter or bank. It is generally taken that interest for deferred payments relates specifically to the finance and not for the payment of the imported goods.

In most cases Customs administrations will accept commercial invoice annotations regarding interest charges as in many cases today in international trade, there may be no formal written finance agreement. It may be that where an importer and exporter have a long term trading history, deferred payment and associated interest charges are so common place that a formal contract is not used. Customs administrations will have to deal with these on a case by case basis. Again, many of these declarations will be identified during post clearance audit activity. It must be remembered however that Decision 3.1 requires that a formal contract regarding the financing arrangements be provided on request. Customs administrations will have to deal with this accordingly.

RESTRICTIONS, CONDITIONS AND RELATED PARTIES

Legal Reference

You have learnt that wherever possible the customs value should be the transaction value of the goods being valued. That is, the price actually paid or payable for the goods when sold for export to the country of import, adjusted in accordance with the provisions of Article 8.

However, the transaction value will only be acceptable if four conditions listed in Article 1.1 are satisfied. These conditions seek answers to the following questions:

- Are there **restrictions** on the disposition or use of the goods by the buyer?
- Is the sale or price subject to any **condition or consideration**?
- Are there **proceeds** from the resale of the goods which accrue to the seller?
- Are the buyer and seller **related**?

Note:

A positive answer to these questions does not automatically mean that the transaction value method should be rejected. In fact, based on the experience of countries applying the Agreement, rejection of the transaction value method under Article 1.1 is rare.

Specific conditions, Restrictions and limitations in the use of Article 1

First Condition: Article 1.1 (a)

With certain exceptions, the transaction value cannot be used where there are restrictions that affect the disposition or use of the goods by the buyer. For example, where the buyer is not allowed to resell the goods.

In practice, the price of those goods may already take account of the restriction.

There are three exceptions to this rule which are considered to have no effect on the value. In other words, when they apply there are no grounds for rejecting the transaction value method. They are:

Article 1.1 (a) (I) Restrictions which are imposed or required by law or by the public authorities in the country of importation.

Examples

- Requirement to obtain a license or permit prior to any resale or use;
- Requirement for certain types of labeling or packaging;
- Requirement for testing or inspection before release.

Article 1.1(a) (ii) Restrictions which limit the geographical area in which the goods may be resold.

Example

The seller imposes a territorial restriction, i.e. regional distributorships, allowing resale only in a specified area (e.g., country, group of countries, region).

Article 1.1(a)(iii) Restrictions which do not substantially affect the value of the goods

This exception is more difficult to interpret and apply than the previous two. There are a number of factors which may be taken into consideration to determine whether it should apply, such as:

- The nature of the restriction;
- The nature of the goods;
- The nature of the industry and its commercial practices;
- Whether the monetary effect is commercially significant.

There is no precise definition of the term "substantially" in the context of this condition so it must be decided on a case by case basis. For example, a small effect on the value in a case involving one type of good may be treated as substantial while a much greater change in the value of another type may not be treated as substantial. See also Commentary 12.1.

Examples

- The seller requires the buyer of cars not to sell or exhibit them prior to a fixed date that represents the beginning of that model year. This would not be a restriction as it does not substantially affect the price;

- The seller requires that the imported product be sold to consumers exclusively through individual sales representatives who use a house-by-house sales technique. This would not be a restriction as it does not substantially affect the price;
- On the other hand, an example of a restriction which could have a substantial effect on the value would be where a machine is sold at a nominal price on condition that the buyer uses it only for charitable purposes.

Second Condition: Article 1.1 (b)

“... the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the imported goods”.

Bearing in mind that the transaction value should be used wherever possible it is important to consider all possible options to calculate a value for the consideration or condition in question. Where an appropriate value can be calculated, it is to be considered as part of the total payment made, or to be made, by the buyer to the seller for the goods. The transaction value method can still therefore be used.

The second condition is illustrated in paragraph 1(b) of the Interpretative Notes by the following three situations:

- (1) The seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities.

Example

Manufacturer F in country of export E sells leather goods to buyer X in country I at a unit price of 50 c.u. on the condition that X also purchases a shipment of shoes at a unit price of 30 c.u.

On the other hand, if it can be demonstrated that by buying the shoes at 30 c.u., the buyer saves 10 c.u. on the purchase of the leather goods, the leather goods could still be valued under the transaction value method at 60 c.u. (50 + 10 c.u.)

- (2) The price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods.

Example

Manufacturer F in country of export E has an agreement with importer X in country of import I to supply specialized equipment designed by F at a unit price of 10,000 c.u. on condition that importer X supplies F with certain relays used in the production of the equipment, at a unit price of 150 c.u.

- (3) (3) The price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that he will receive a specified quantity of the finished goods.

Example

An importer buys lumber from a foreign seller. He uses the lumber to produce a desk. The price at which he buys the lumber is dependent on the buyer supplying a certain number of finished desks to the seller free of charge.

Barter (also known as “counter trade”)

There are many different types of barter. Generally, it involves the exchange of goods and/or services which are considered by the two parties to be of equal value. In some cases, this may involve a monetary payment by one party in addition to the exchange of goods or services.

Example

Manufacturer **F** in country of importation **I** has the opportunity to sell electrical equipment in country **E** provided an equivalent value of goods produced in country **E** is bought and exported from that country. After reaching an arrangement with **F**, importer **X**, also located in country **I**, imports a quantity of plywood from country **E** into country **I**. Manufacturer **F** then exports his electrical equipment into country **E**, and invoices it at 100,000 c.u.

The invoice presented by **X** on importation of the plywood also shows a value of 100,000 c.u. although there is no settlement between **X** and the country of export **E**.

In any situation where a transaction has occurred which involves bartering, you should consider whether it is still possible to calculate the price paid or payable. Can a value be established for the goods/services provided in exchange or partial exchange, for the imported goods? If so, the transaction value method could still be applied.

Further comment on the second condition

The Interpretative Note to Article 1, paragraph 1(b), provides that conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of transaction value under Article 1.

For example, the fact that the buyer provides the seller with engineering plans and sketches etc., undertaken in the country of importation, and therefore not to be added as an assist under Article 8.1(b)(iv), would not result in rejection of the transaction value.

Similarly, if the buyer undertakes activities on his/her own account relating to the marketing of the imported goods, (even with the agreement of the seller), the value of those activities will not form part of the customs value. Nor would such activities necessarily result in the rejection of transaction value.

Third Condition: Article 1.1 (c)

Article 1.1(c) states: “... that no part of the proceeds of any subsequent resale, disposal or use of the imported goods by the buyer will accrue directly or indirectly to the seller unless an appropriate adjustment can be made in accordance with the provisions of Article 8”.

The subject of proceeds will be discussed in detail in Lesson 11.

Fourth Condition: Article 1.1(d) and Article 1.2(a) Related persons/parties:

Article 1.1(d) states:

“... that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for Customs purposes under the provisions of paragraph 2 [of this Article].”

To understand whether this condition applies, two basic questions need to be answered:

- What is the definition of the word “related”?
- Where the parties are related, how do we determine whether the transaction value is “acceptable”?

The answer to the first question can be found in Article 15.4 of the Agreement which lists the situations where persons are deemed to be related. For example, the buyer and seller are legally recognized partners in business. Note that the term “persons” includes both legal persons and individuals.

Most of the situations are self-explanatory but note the following two points:

- Article 15.4 refers to direct and indirect control of another party. Sub-paragraph (e) explains that the term “control” means that one person is legally or operationally in a position to exercise restraint or direction over another.
- Article 15.4 (h) states that members of the same family are related for the purposes of the Agreement but does not define “family”. As such, the word should be used in its generally accepted form.

Sole traders

Article 15.5 makes a special reference to persons who are associated in business where one of the parties is the sole agent, sole distributor or sole concessionaire of the other. It states that in these circumstances the parties shall only be considered related if they fall within the criteria of paragraph 4. In other words, if a party is acting as the sole agent etc. of another, this fact alone does not create a relationship within the meaning of the Agreement.

In regard to the second question, that is, where the parties are related, how do we determine whether the transaction value is ‘acceptable’, we should look first at Article 1.2(a) which tells us that if “... the buyer and seller are related within the meaning of Article 15 “... that is ...”not enough in itself ... grounds for regarding the transaction value as unacceptable”. The Agreement tells us that in these cases the circumstances surrounding the sale should be examined to determine whether the relationship actually **influenced** the price.

If it can be demonstrated that there is no price influence, then the price can be said to be “**arm’s length**”. This phrase is described in the Organization for Economic Co-operation and Development (**OECD**) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. It refers to a transaction between related parties where it has been established that the relationship did not affect the price. In other words, the buyer was not offered a more favourable price because of his/her relationship with the seller.

If, on the other hand, after examining the information provided by the importer, the Customs administration considers that the relationship did influence the price they are obliged under Article 1.2(a) to give their reasons to the importer (in writing if the importer so requests). The importer is then to be given a reasonable opportunity to respond.

TREATMENT OF OTHER FACTORS THAT CAN AFFECT THE PRICE

Treatment Case of a price below market price:

Advisory Opinion 2.1 states that the mere fact that a price is lower than prevailing market prices for identical goods should not cause that price to be rejected for purposes of Article 1.

Treatment of Goods subject to export subsidies or bounties:

This is not:

- a case for rejecting the transaction value, or,
- a cost element to be added under Article 8, or,
- an amount to be added to the price (as it has not been paid to or for the benefit of the seller).

Treatment Goods sold at dumped prices:

As well as a separate WTO Agreement, the Agreement on Implementation of Article VI of the GATT 1994 on anti-dumping, there are national laws and procedures regarding dumped goods in importing countries. This must remain totally separate from the valuation procedures. Thus, the fact that a good is sold at a dumped price to an importer is not a reason for rejecting the transaction value.

Treatment of Goods not in accordance with the contract:

Where imported goods are delivered to the importer that do not conform to the contract specifications of the transaction but, the importer agrees to take delivery of the goods, the exporter may fix a new price to be paid for the goods actually received. The price would then be the basis for determining the customs value under Article 1. Where the importer does not take delivery of the goods however, they may be re-exported or, abandoned, in accordance with the national customs law.

Treatment Damaged goods

The valuation treatment to be applied to damaged or defective goods is a matter for national legislation. These goods may nevertheless have to be valued and will therefore fall within the scope of the Agreement.

If all goods in the shipment are damaged, the transaction value does not apply as the price actually paid or payable does not relate to the damaged goods.

If only part of the shipment is damaged, the transaction value can be applied to the undamaged goods and the appropriate alternate valuation method should be applied to the balance of the shipment.

REFERENCES:

- EAC Customs Management Act, 2004
 - Kenya Customs Kenya Customs and Excise Act, 1996
 - WTO Agreement on Customs Valuation
 - WCO-JICA Handbook on Customs Valuation
 - EAC Guidelines on Customs Valuation
 - EAC Customs Management Act, 2004
 - Instruments of the Technical Committee and the Committee of Customs Valuation
-
- Decision 3.1 and Commentary 20.1
 - Explanatory Note 6.1
 - Sherman S.L. & Glashoff H., Customs Valuation
 - Commentary on the GATT Customs Valuation Code,1988, ICC Publishing SA
 - Instruction manual developed by the trainer
 - Advisory Opinion 3.1;
 - Commentary 9.1, 16.1;
 - Case Study 6.1, 7.1

LESSON 05 COMMISSIONS & BROKERAGE; COSTS OF CONTAINERS AND PACKAGES (ARTICLES 8.1(A))

OBJECTIVES

At the end of this lesson, you should be able to:

- a) Describe the Categories of Adjustments
- b) Explain the role of agents and brokers in determination of Customs valuation
- c) Discuss the treatment of Commissions and Brokerage;
- d) Explain the treatment Cost of containers and packaging

CONTENT

- a) Introduction
- b) Categories of Adjustments
- c) Role of agents and brokers in determination of Customs valuation
- d) Commissions and Brokerage;
- e) Cost of containers and packaging

INTRODUCTION

In the previous two lessons we discussed the key concepts of transaction value as well as the application of article 1. The text of article imply that article must be read and applied together with article 8.

Article 8 is dedicated to the price actually paid or payable, that is the payment made to the seller. Article 8 on the other hand explain the treatment payments to other parts involved in the delivery of the goods to the country of importation, and are component of the Customs Value.

In this lesson we shall look at the adjustments in general in terms of categories and general requirements before adjustments are made. We shall then look at first group of compulsory adjustment described under article 8.1(a)

CATEGORIES OF ADJUSTMENTS

In determining transaction value, Article 1 is to be read together with Article 8.

Article 8.1 lists a number of adjustments which must be added to the price actually paid or payable for the imported goods where they are incurred by the buyer but are not included in the price actually paid or payable. If the appropriate criteria are met it is compulsory to add the sum in question to the price actually paid or payable.

The **compulsory** adjustments are:

- (a) (i) Commissions and brokerage, except buying commissions".
 - (ii) Cost of containers.
 - (iii) Cost of packing whether for labour or materials".
- (b) The value, apportioned as appropriate, of (certain) goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods.
- (c) Royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued.
- (d) The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller".

Article 8.2 lists a number of cost elements that Members may choose, in whole or in part, to include in or exclude from the customs value. The choice made should be reflected in national legislation.

The **optional** adjustments are:

- a) Cost of transport of the imported goods to the port or place of importation;
- b) Loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and
- c) Cost of insurance.

ROLE OF AGENTS AND BROKERS IN DETERMINATION OF CUSTOMS VALUATION

To determine whether commissions or brokerage fees are to be added to the price actually paid or payable you need to establish a definition of these terms.

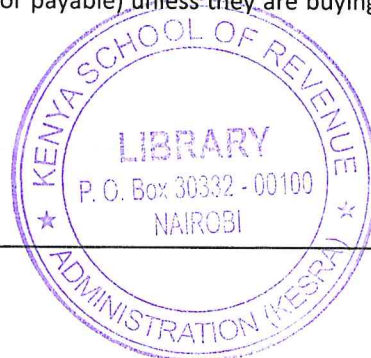
Commissions and brokerage fees are payments made to parties acting as intermediaries in a transaction. The two main groups are agents (who are paid a "commission" for their services) and brokers (who are paid a "brokerage").

Agents and Commissions

In general, an agent is an individual or firm who buys and/or sells goods for the account of a principal and may carry out other services relevant to buying and/or selling.

The agent's fee is called a commission and is often expressed as a percentage of the total price of the goods. Agents who work on behalf of the buyer are called buying agents and those who work for the seller are called selling agents. Their fees are referred to respectively as buying and selling commissions.

Article 8.1 (a)(i) tells us that commissions are to be added to the customs value (when incurred by the buyer and not already included in the price actually paid or payable), unless they are buying commissions. The two must be distinguished.



Role of a selling agent

A selling agent is an individual or firm who works on behalf of the seller.

- seeking customers for the seller's goods;
- taking orders for sales from buyers and transmitting to the seller;
- showing samples/demonstrating products to potential buyers;
- assisting in the arrangements for insurance, transport, storage and delivery;
- assisting in the preparation of export documentation, including invoices.

The commission charged by the selling agent and paid by the seller is often shown on the commercial invoice. It may not necessarily indicate whether it is a buying or a selling commission and may simply be referred to as a "commission". As these commissions are to be included in the customs value, there is no need to separately identify the selling commission. However, if it is separately identified on the commercial invoice, or separately invoiced, it must still be included.

In some cases, a selling commission paid by the seller may not be charged to the buyer. There is no justification within the Agreement to include such payments in the customs value in these circumstances.

Role of a buying agent

The term buying commission is defined in the Interpretative Note to Article 8 as follows: "Fees paid by an importer to his agent for the services of representing him abroad in the purchase of the goods being valued".

The functions undertaken by a buying agent include:

- Finding suppliers of the goods wanted by the buyer;
- Helping to negotiate the best prices;
- Informing the seller of the buyer's requirements;
- Obtaining samples for the buyer's inspection;
- Inspecting the goods;
- Assisting in arranging insurance, transport, storage and delivery;
- Consolidating shipments from different sources;
- Preparation of invoices.

Brokers and brokerage

These terms are similar to agents and commissions and tend to be used more in some parts of the world rather than the terms "agent" and "commission". The term "broker" usually refers to an intermediary who does not act on his/her own account. The broker can act for both buyer and seller and can arrange to put both parties in touch with each other. His/her fee is known as a brokerage.

In order to determine whether a brokerage should be added to the price actually paid or payable it is necessary to look at what services were provided in return for the fee. If those services match those provided by a selling agent, then they are to be added. If they match the services provided by a buying agent, then they will not be added. In some cases, it may be determined that the brokerage fee is partly incurred by the buyer (representing a buying commission) and partly by the seller (representing a selling commission). The appropriate amount will then be included in the customs value.

Supporting Documentary Evidence

The treatment of commissions and brokerage for Customs valuation purposes depends upon the exact nature of the services provided by the intermediary. If the intermediary is acting on his/her own account and/or if they have a proprietary interest in the goods, they cannot be considered to be a buying agent.

The nature of services rendered by agents and brokers are often not apparent from the commercial documents presented with the Customs declaration. It may therefore be necessary to look at further documentation to establish the precise nature of a particular payment and determine whether it is to be included in the customs value under this provision.

In cases of doubt, further evidence may be requested, for example:

- The seller's contract of sale showing the price of the goods. This may make reference to the involvement of a selling agent;
- The contract between the buyer and his/her agent;
- Letters of credit;
- Purchase orders;
- General correspondence.

Where an agency relationship cannot be confirmed, Customs may conclude that the fees paid do not represent a buying commission and that the amount in question should be included in the customs value.

It is important to be aware of the possibility that a payment may be incorrectly declared as a buying commission in order to reduce the customs value. A buying commission is normally separately identified from the price paid or payable for the goods, either on the commercial invoice or on a separate commission invoice. If it is not, it cannot be excluded from the customs value.

In some cases, it may be appropriate to ask whether the so-called buying agent assumes any risk or performs additional services not normally carried out by a buying agent. For example, where the party concerned uses his/her own funds for the payment of the imported goods he/she is taking a commercial risk, i.e., may sustain a loss or make a profit from the transaction rather than simply receiving an agreed fee for services. In this situation, all the circumstances of the agency agreement should be examined to verify the statements made.

If the agent is related to the seller or to a person related to the seller, despite the existence of an agency contract, you must examine all the circumstances to determine whether the agent is, in fact, acting on his/her own account.

In some transactions the agent may re-invoice the importer, distinguishing the price of the goods and his/her fee. The mere act of re-invoicing does not make him/her the seller of the goods. However, since the price paid to the supplier for the imported goods is the basis for the transaction value under the Agreement, Customs may require the declarant to produce the invoice issued by the supplier and any other document to substantiate the declared value.

Export houses, or so-called independent agents who carry out similar activities but, unlike buying agents, have a proprietary interest in the goods and exercise control over the transaction or over the price paid by the importer, cannot be considered to be buying agents.

See also Commentary 17.1 and Explanatory Note 2.1.

COST OF CONTAINERS AND PACKAGING

Legal Reference

Article 8 provides for both compulsory and optional adjustments to Article 1, the transaction value.

The compulsory adjustments are to be found in Article 8.1(a)(i) (with the exception of buying commissions); 8.1(a)(ii) and (iii); 8.1(b); 8.1(c); and, 8.1(d).

The optional adjustment is found in Article 8.2 and (generally) reflects CIF and FOB status.

Article 8.1(a)(ii) and (iii) provide for the addition of the **cost** of containers which are treated as one with the imported goods for Customs purposes and the **cost** of packing whether for labour and/or materials.

However, Article 8 adjustments can only be made to the extent that they are:

- incurred by the buyer;
- that they are not already included in the price actually paid or payable and,
- based on objective and quantifiable data.

Definition of Containers

In the case of Article 8.1(a)(ii) and (iii), the Agreement very specifically refers to the “cost” of the containers and packing and not the “value”. As such, it must be the actual cost incurred that Customs will use. Customs will not appraise or place a “value” on the cost of packing (and its labour/materials) but will accept the actual costs demonstrated by the buyer. This is to bring about a more uniform and transparent application of the Agreement and to assist in eliminating the degree of “discretion” that may have been exercised by Customs under previous valuation systems.

In referring to “containers”, the Agreement is not referring to the commercial shipping containers commonly used for long distance transport. The term “container” is of the type which is considered to be as one with the goods. For example,

- Perfume bottle containing perfume in a presentation box;
- Wristwatch in a presentation box.

Nature of containers and packaging

This type of container can generally be taken to be non-reusable and for protection, handling in transit, and “retail” packing. They are however for the purposes of classification under the Harmonized System, taken to be as one with the goods and classified under the same heading with the goods. That is, for example, as perfumery or as a wristwatch.

For the purposes of taking into account all costs relating to the provision of packing and containers, such types are various and include:

- a) **Interior packing boxes and cartons** (referred to as “retail” packing such as bags; boxes; blister packs; plastic wrappers; cardboard boxes etc.);
- b) **Exterior packing boxes and cartons** (also referred to as “export” packing and may include cardboard boxes; wooden crates; metal boxes etc.);
- c) **Packing materials** (such as cardboard inserts; bubble wrap; hay; straw; shredded paper; foam chips etc.);

- d) **Labour costs** involved in placing and securing the goods in their containers (such as packing and sealing the boxes or cartons; coopering; vacuum packing; environmental conditioning; placing on hangers or racks etc.).

All costs incurred by the buyer for containers and packing will be added to the price actually paid or payable to the extent that those costs are not already included. These additions must be the **actual** costs and not a notional cost that might be charged by the seller.

The only containers, whose costs would not form part of the customs value of imported goods, are those that under national legislation are required to be separately declared in their own right.

These containers could be those of domestic (importing country) origin or, those that receive special tariff treatment under General Rules for the Interpretation of the Harmonized System, Explanatory Notes 5(a) and 5(b), such as:

- (a) Containers which give the whole its essential character;
- (b) Usual type of shipping or packing containers which are capable of re-use;
- (c) Containers imported empty.

Generally, the application of Article 8.1(a)(ii) and (iii) is straightforward but decision-makers must remember, that when in doubt, to seek further objective and quantifiable data on which to base their valuation decision.

REFERENCES:

- EAC Customs Management Act, 2004
- Kenya Customs and Excise Act, 1996
- WTO Valuation Agreement
- Commentary 17.1
- Explanatory Note 2.1

LESSON 06: ASSISTS (ADJUSTMENTS UNDER ARTICLE 8.1(B))

OBJECTIVES

1. Describe the categories of Assists
2. Determine the valuation of Assists
3. Explain the apportionment of the value of Assists
4. Perform Practical exercises

CONTENT

1. Introduction
2. Categories and types of Assists
3. Explain the valuation of Assists
4. Explain the apportionment of the value of Assists
5. Practical exercises

INTRODUCTION

Legal Reference

Article 8.1 (b) states that you should add to the price actually paid or payable for the imported goods the cost or value, (“apportioned as appropriate”), of certain “... goods and services supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not already been included in the price actually paid or payable.” (These are known as ‘assists’)

Common Characteristics of Assists

- They have not already been included in the price actually paid or payable;
- They have been provided by the importer free of charge or at a reduced cost (if they have been invoiced by the exporter to the importer, then they will form part of the price actually paid or payable in accordance with Article 1);
- They have been provided directly or indirectly by the importer. For example, when an importer instructs a manufacturer/supplier located in another country to provide the exporter with a mould for manufacturing a product to be imported by him, the mould is said to be supplied indirectly;
- They are used at the time of production and sale for export of the imported products;
- They are based on objective and quantifiable data.

CATEGORIES AND TYPES OF “ASSISTS”

- (a) **Materials, components, parts and similar items incorporated in the imported goods - Article 8.1 (b) (i):** ‘Materials’ cover, for instance, wood, metals, plastics, or fabric. ‘Components and parts’ can be finished products (hooks, cables), electrical components, integrated circuits, etc.
- (b) **Tools, dies, moulds and similar items used in the production of the imported goods - Article 8.1 (b) (ii):** The word ‘tools’ must be interpreted broadly, for example, hand tools (drills) to large scale industrial machines. Dies and moulds are items which are used in shaping the product (casting moulds in foundries, moulds for rubber for making figurines).

Only tools used directly in the production of the imported goods can be taken into account. Therefore, office machines, which are not used in support of the production process (for example, a photocopier) of the imported goods, should not be taken into account.

(c) Materials consumed in the production of the imported goods – Article 8.1 (b) (iii): These are products used in the manufacturing process but which are not always identifiable in the finished product, for instance chemical catalysts used to induce a chemical reaction, and, for some countries, energy (gas, electricity, etc). Another example would be where petrol or oil is supplied free of charge by the buyer/importer to test the performance of a new high performance motor vehicle.

(d) Engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods - Article 8.1 (b) (iv):

This type of assist should only be added to the price actually paid or payable if it satisfies the following three conditions: it is carried out outside the country of importation;

- it is necessary for the manufacture of the imported goods;
- it does not constitute cost for construction, erection, assembly, maintenance or technical assistance, undertaken after importation ...”.

For example, photographs taken in your country, the country of subsequent importation, as arranged by the subsequent importer, are sent to the overseas manufacturer, free of charge by the importer, for incorporation in sets of table place mats. Under Article 8.1(b)(iv), the value of the photographs will not be added to the price actually paid or payable for the place mats as the work was undertaken in the country of importation.

Whereas, if scenic photographs taken in another country were sent to the manufacturer by the importer free of charge, for incorporation in the place mats to be imported, the value of those photographs will be added to the price actually paid or payable as they originated outside the country of importation.

In regard to research and development, many international companies use the services of in-house or external research and development centers. Care must be taken in identifying whether all or part of the research and development costs are “assists” of Article 8.1(b) or “royalties” of Article 8.1(c).

For example, the development of an ergonomic chair prototype. This will require research and development for plans and designs in order to develop a suitable prototype from which finished chairs will be manufactured and sold for export.

In regard to the research and development costs, objective and quantifiable data will be required so that any addition under this provision can be assessed. In particular, was all or part of the research and development provided free of charge to the manufacturer by the subsequent importer?

Generally speaking, research includes all work carried out in order to further technical knowledge. Development is the transposition of the results of this research, resulting in the creation of a new product or process or, the substantial improvement of an existing one.

DETERMINATION OF THE VALUE OF ASSISTS

Once it has been established that a cost element falls within Article 8.1(b) and will therefore be added to the price actually paid or payable, it must then be valued and, this value may also be apportioned, as appropriate, to the imported goods.

Key methods of determining the value of the assist

Assists acquired from third parties

If the assist has been acquired by the importer from a seller who is not related to him/her, the cost of acquisition is to be taken into consideration;

Assists produced by the importer or related party

If the assist was produced by the importer or by a related person or, if it was bought from a related person, the cost of production is to be taken into consideration. It should be possible to establish this cost from the records of the importer. The amount to be taken into consideration is limited to the costs of development and manufacturing, plus a share of the overhead costs, but excluding all elements relating to profit.

Additional points on valuation of assists:

- The value of the assist **includes transport costs** to the manufacturing site as well as non-reimbursed duties and taxes.
- If the assist has **already been used by the buyer**, the initial cost of acquisition or of its production must be adjusted to take the use into account when valuing assist.
- If the assist has been **repaired or modified** by the buyer, its value must take into account the cost of repairing or modifying it.

- If the assist has been **leased**, the addition would be the cost of the lease.
- If the assist **consists of engineering work, development, design work**, plans or sketches, it is possible to value them by consulting the buyer's commercial records.
- If the engineering work, development, design work, plans or sketches are **available in the public domain**, then only the cost of obtaining copies is to be taken into consideration.
- If the assist is **only partly used for the manufacture** of the imported goods, that level of use is taken into account. For instance, if a design centre is located outside the country of importation and if the company attributes all the costs of this centre to its overhead expenses without allocation to specific products, then the total costs of the design centre are apportioned over the entire production benefiting from these services. The costs are apportioned to the price of the imported goods and are adjusted according to the number of units produced.
- **Consider the interrelationship between the elements referred to in Article 8.1 (b) (ii) – moulds etc and those in Article 8.1 (b) (iv).** When engineering, development and design work are included in the value of the assists referred to in Article 8.1 (b) (ii), tools, dies, moulds and similar items, each category must stand on its own. Thus, the value of the cost elements mentioned in Article 8.1 (b) (ii) includes the value of the design work, development work, etc., even if this work was carried out in the country of importation, because it forms part of the cost of the acquisition or production of these elements.

METHODS OF APPORTIONING VALUE OF THE ASSISTS AGAINST THE IMPORTED GOODS

Usually, the apportioning method used is the one requested by the importer and agreed to by Customs. Thus, the value of the assist may be:

- Applied **entirely to the first shipment** if the importer wishes to pay duty on the entire value at one time;
- Apportioned over the number of units produced up to the time of the first shipment;
- Apportioned over the entire anticipated production where contracts or firm commitments exist for that production;
- Be apportioned over the assists' years of useful life; **provided that:**
 - It is in conformity with generally accepted accounting principles;
 - Documentary evidence is provided in support of the apportioning method used.

PRACTICAL EXAMPLES AND EXERCISES

Determining the value of the assist

Example 1:

- Company I sells high fashion men's garments to retailers in the country of importation.
- All garments are imported from one overseas supplier, X.
- X manufactures the garments using paper patterns supplied free of charge by L on behalf of I. L, which is located in a third country, specializes in designing high fashion men's garments.
- Company I has a license agreement with L under which I is granted an exclusive license to use the paper patterns produced by L and to distribute garments incorporating L's designs in the country of importation.
- In return, I pays L a license fee based on the turnover it achieves on the sales of the garments.

Determination of the customs value:

Customs administration must determine the exact nature of the license fee in order to establish whether or not it forms part of the customs value of the imported garments.

If the facts show that the payment referred to as a license fee relates to an element of Article 8.1 (b) (an assist), then Article 8.1 (b) would apply. Otherwise, Customs should examine whether the payment satisfies the conditions laid down in Article 8.1 (c) (royalties).

The paper patterns perform a similar function to a mould or die. The buyer sends the paper patterns free of charge through the licensor L and they are used in the production and sale for export of the imported goods. These patterns therefore constitute an assist under Article 8.1 (b) (ii) and their value, which also includes the cost of the designs, should be included in the price actually paid or payable for the imported goods.

As I and L are not related, the value of the paper patterns would be I's cost to acquire the patterns from L. I acquired the patterns through the license agreement with L and the cost of acquisition of the patterns is therefore the amount of the license fee to be paid.

Given that the license fee is to be included in the customs value of the imported garments under the terms of Article 8.1 (b), it is not necessary to consider its possible addition to the price actually paid or payable under the terms of Article 8.1 (c).

Example 2:

- I imported multiple copies of a video laser disc purchased from X.
- The discs, which incorporated a selection of copyright music video clips, were manufactured by X in the country of exportation.
- I obtained the right to use the music video clips incorporated on the discs under a separate license agreement with L in a third country. In return, I must pay a license fee to L.
- In accordance with its license agreement with I, L compiled a master tape of the selection of music video clips to be incorporated in the discs.
- I then supplied the master tape to X free of charge.
- Each disc is an identical reproduction of the master tape and X would not have been able to manufacture the discs without the master tape.

Determination of the customs value:

The compilation is part of the design and development phase for the imported video laser discs. As design and development was undertaken elsewhere than in the country of importation, it is to be added to the price actually paid or payable for the merchandise pursuant to Article 8.1 (b) (iv). The value of the assist is the license fee as this was the cost to I of obtaining the music video clips and master tape.

Given that the license fee is to be included in the customs value of the imported discs under the terms of Article 8.1 (b) (iv), it is not necessary to consider its possible addition to the price actually paid or payable under the terms of Article 8.1 (c).

In certain cases, the assist supplied by the buyer has been leased by the buyer. The value to be included will be the cost of the lease.

Example 3:

- Company I in the country of importation imports shirts made to order by company F located in a foreign country, using materials provided by company I.
- The contract states that company I must provide the materials to company F at 40 % of their cost of acquisition.
- The invoice F sends to I states an amount for 'the manufacture and supply of shirts'. This amount should be verified as required.
- The value of the materials therefore, for the purposes of Article 8.1(b)(i), is their total cost. It follows that that part of the cost not included in the price actually paid or payable of the imported goods represents 60 % of the total cost of the assist.
- Consequently, that part of the cost of the assist which is to be incorporated in the customs value of the shirts is 60 % as 40 % is already included.

Apportioning the value of the assists to the imported goods

Example 1:

- A buyer provides the producer with a mould to be used in the production of the goods to be imported and contracts with the producer to buy 10,000 units.
- By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units.
- The buyer may request the Customs authorities to apportion the value of the mould over 1,000, 4,000 or 10,000 units.

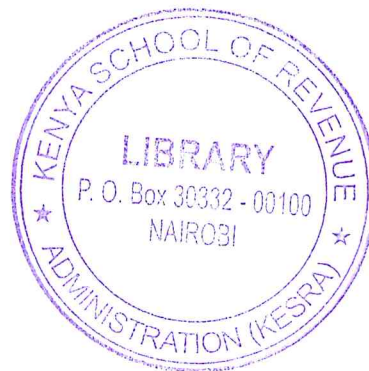
Example 2:

- Importer I in the country of importation presents for Customs clearance 10 armoured vehicles, which were the subject of an armouring operation by Company A in the country of export X.
- The basic unarmoured vehicles were purchased by Company I from Manufacturer M at a total price of 17,000,000 c.u.
- The basic vehicles were supplied free of charge to Company A, without them having ever been used.
- At the time of importation, Company I produces an invoice from A for the armouring operation for an amount of 43,000,000 c.u., and an invoice from manufacturer M for the basic vehicles invoicing Company I for an amount of 17,000,000 c.u.

Because Company A is providing armouring services, not selling armoured vehicles, the term 'sale' as it applies to the transaction between I and A, will be regarded in its widest sense as a sale of goods. In this case the cost of the basic vehicles should be added to the price actually paid or payable for the armouring operation. Thus, the transaction value of the armoured vehicles is 60,000,000 c.u. plus other deductions as required.

REFERENCES:

- EAC Customs Management Act, 2004
 - Kenya Customs Kenya Customs and Excise Act, 1996
 - WTO Agreement on Customs Valuation
 - WCO-JICA Handbook on Customs Valuation
 - EAC Guidelines on Customs Valuation
 - EAC Customs Management Act, 2004
 - Instruments of the Technical Committee and the Committee of Customs Valuation
-
- Case Study 8.1 and Case Study 8.2
 - Case Study 5.1
 - Compendium of Decisions of the E Community Customs Code Committee.
 - Instruction manual developed by the trainer
 - Decisions 2.1
 - Decisions 5.1
 - Commentary 18.1
 - Case Study 1.1
 - Case Study 5.2



LESSON 07: ROYALTIES AND LICENCE FEES; PROCEEDS OF SUBSEQUENT RESALE...

OBJECTIVES

At the end of this lesson, you should be able to:

- a) Describe Intellectual properties on which Royalty and licence fee may be due
- b) Explain the treatment of Royalties and licence in the determination of Customs Value
- c) Discuss the treatment of subsequent resale, disposal or usage

CONTENT

1. Introduction
2. Intellectual properties on which Royalty and licence fee may be due
3. Treatment of royalties and licence fees in the determination of Customs Value
4. Treatment of subsequent resale, disposal or usage

INTRODUCTION

Legal Reference

Article 8.1 (b) states that you should add to the price actually paid or payable for the imported goods the cost or value, Royalties and licence fees; Proceed of subsequent resale, disposal or usage.

This lesson looks at, in details, the last two components of the compulsory adjustments. We start at the Royalties and licence fees, which is a bit complex. Next, will shall discuss proceeds of subsequent resale, disposal or usage.

Requirements for inclusion in the Customs Value

The Agreement imposes certain requirements on whether a royalty will form part of the customs value. Article 8.1(c) requires that the royalty:

Must be related to the goods being valued.

That is, the royalty or licence fee must relate directly to the imported goods, either because the goods have a trademark or copyright applied to them or, they may contain a patented process or, because of some other protected right.

Must be a condition of sale and paid directly or indirectly by the buyer.

That is, the purchase of the imported goods must require the payment of a royalty or licence fee, or, the buyer must pay a royalty or licence fee in order to receive the goods. The royalty payment may be paid to a third party but, the payment must still be a condition of the sale of the goods.

Is not already included in the price actually paid or payable.

If the royalty payment is included in the price actually paid or payable, it will not be added again under Article 8.1(c). In fact, if the royalty payment already forms part of the “price” negotiated between the buyer and seller, Article 8 will not have to be considered at all in regard to royalties/licence fees.

If it is established that some form of royalty or licence fee is a consideration in regard to the imported goods, the Customs administration must satisfy itself as to the correct valuation treatment. That is, will it form part of the customs value or not?

The Interpretative Note to Article 8.1(c) provides additional guidelines in respect to the treatment of royalties and licence fees under the Agreement.

- Royalties and licence fees may include, among other things, payments in respect to patents, trademarks and copyrights;
- Charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable.
- Payments made by the buyer for the right to distribute or resell the goods will not be added to the price actually paid or payable provided that these payments are not a condition of the sale for export to the country of importation of the imported goods.

However, where the price actually paid or payable already includes a royalty/licence fee amount, there is no provision under the Agreement to deduct that amount. The legal deductions contained in the Interpretative Note to Article 1, paragraph 3, are specifically instructive in those deductions that can be made.

COMMON INTELLECTUAL PROPERTIES

Patent

A patent is a document or testimony, issued by a relevant government office, which describes an “invention” and authenticates that “invention” through legal registration making it illegal for anyone to then duplicate or exploit the registered patent which is the registered property of the patentee. It can only be used with the express approval of the patentee, which in effect, is a reserved right.

Trademark

A trademark is a marketing device which is generally in the form of a particular sign or “logo” which is affixed to the imported goods that conveys an inherent quality and reputation statement. Normally, protection of a trademark requires the mark to be registered with the appropriate government authority. The registration is taken out to protect the holder’s rights and to be able to prosecute others who might copy the mark.

Copyright

A copyright is a reserved right which protects the holder from unauthorized use of his/her work (usually artistic or literary) from reproduction, copying or translation. It is the exclusive right of the author, artist etc. This form of protection would cover examples of work such as:

- Literary work (novels, articles, papers etc.);
- Artistic works (paintings, drawings, sculptures etc.);
- Photography;
- Motion pictures;
- Technical drawings etc.

TREATMENT OF ROYALTIES AND LICENCE FEES

Legal Reference

Article 8.1(c) of the Agreement requires that, when determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

“royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued to the extent that such royalties and fees are not included in the price actually paid or payable”.

Definition of Royalties and Licence fees

The Agreement does not provide specific definitions for the terms “royalty” or “licence fee”. In general, however, the most accepted meaning is that they represent the right to use, produce or sell a licenced product. In fact, there are various kinds of intangible rights, including “names” and ideas/concepts, and, it is the payment for those associated “rights” which relate to the manufacture, sale, use or resale of imported goods, that may be captured as a royalty or licence fee under Article 8.1(c).

The Collins Dictionary and Thesaurus (1991) defines “royalty” as “a percentage of the revenue from the sale of a book, performance of a theatrical work, use of a patented invention ... paid to the author, inventor ...”

Rights associated with royalties and licence fees

In regard to the type of properties/rights to which royalties/licence fees do relate, the three types noted in sub-paragraph 1 of the Interpretative Note to Article 8.1(c) are worth looking at:

Right to Reproduce

Paragraph 1 of the Interpretative Note to Article 8.1(c) refers to the fact that no royalty payments for the reproduction of the licenced product in the country of importation will form part of the customs value of the imported product.

For example, a new cartoon character prototype/master model is imported into the country of importation with the intention to reproduce a large number in a local manufacturing plant. There will normally be at least two levels of royalty payments in such a case. There would be a royalty consideration attached to the prototype for importation which would form part of the customs value of the imported goods.

There will normally also be some form of royalty related to the reproduction of the goods and/or on retail sales in the market place of the country of importation. The royalty payments that relate to the reproduction of the prototype in the importing country’s market place will not form part of the customs value. In the case of a commercial shipment of a number of the toys, with a royalty payable on a percentage of retail sales, if the royalty is a condition of the sale of the imported goods, and relates to the goods being valued, it will form part of the customs value of the imported goods.

Distribution Rights

The Interpretative Note also states that in regard to the valuation considerations of Article 8.1(c), that “Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to

the price actually paid or payable for the imported goods if such payments are not a condition of sale". As such, careful consideration has to be had when identifying the sale. For example, are there supporting royalty/licence agreements as well as the contract of sale? If so, together, do they all form conditions of the sale? The contract of sale alone and/or the commercial invoice are not always the only relevant documents. These facts must be established before any decision regarding the royalty/licence fee is made.

However, where payments for the right to **distribute or resell are already included** in the price actually paid or payable, there is no authority to deduct them.

Treatment of Royalties

All decisions regarding the treatment of royalties/licence fees, must be **based on objective and quantifiable data**. Where it is determined that such data does not exist, an officer cannot make an arbitrary adjustment and, therefore, Article 1, the transaction value cannot be applied.

When Customs is of the firm opinion that a royalty is relevant to the imported goods and, the importer is unable to provide further information, if customs remains concerned regarding the appropriateness of Article 1, **the importer should be advised that the first alternate method** of valuation is to be considered and the reasons attached to that decision.

If the royalty payment is based partly on the imported goods and partly on other factors which do not relate to the goods as imported, it is also inappropriate to make an adjustment for the royalty on the imported goods. For example, where:

- The imported goods are mixed with domestic ingredients and are no longer identifiable;
- The royalty payment cannot be distinguished from the financial arrangements between the buyer and the seller.

Example

An importer buys cured tobacco in order to make cigarettes. In addition to the imported tobacco, the importer purchases domestic tobacco which is blended with the imported tobacco. There are no agreed set percentages of either tobacco type in the blending process. The importer then pays a royalty based on the resale of the finished cigarettes.

As the royalty is in fact relevant only to the imported tobacco and, as that tobacco had lost its identity in the finished goods, it is impossible to determine the royalty amount of the imported tobacco against the finished product. If, however the royalty payment was against a certain percentage of the imported tobacco being blended with a specific percentage of local tobacco, the royalty adjustment could be determined.

So, what facts must be established in order to determine whether payments are in fact royalties and whether they will form part of the customs value of the imported goods?

1. The payments **must be related to the imported goods being valued**, that is, the royalties/licence fees must be linked with the imported goods either because they involve the right to use a trademark or copyright, or, because the goods contain a patented process or, because of some other protected right.
2. That the buyer must pay the royalty/licence fee directly or indirectly **as a condition of the sale**. As such, it does not matter if the royalty payment is paid to a third party (e.g., the designer/licence holder), rather the fact that it is a condition of the sale.

3. It must be established that the royalty is **not already included in the price actually paid or payable**. So there are essentially three questions to be answered to ensure the treatment of the royalty payment for valuation purposes will be correct:

- Is it in fact a royalty?
- Is it part of the conditions of the sale?
- Does it relate to the goods being valued?

Identification of royalty/licence fee payments can be relatively simple. In most cases, there will be a formal written agreement spelling out the rights and obligations being conferred from one party to the other. Examination of these documents will normally establish what the payment is for.

A question that can help in determining the status of the royalty is, “could the goods have been imported without the payment of a royalty”? This is a good starting point.

Always base royalty/licence fee considerations on objective and quantifiable data. Ask questions of the importer as required. Before a final decision can be made, the decision-maker must be satisfied that the facts are correct and after appropriate Article 8.1(c) adjustment, a transaction value can be determined.

Where such data does not exist for whatever reason, or equally, you are not satisfied with data made available to you, you will be unable to use Article 1.

PROCEEDS OF SUBSEQUENT RESALE, DISPOSAL OR USAGE

Legal Reference

Under the terms of Article 8.1(d), there shall be added to the price actually paid or payable for the imported goods “the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller”.

This Article is directly linked to Article 1.1(c) of the Agreement, which states that the customs value of the goods is the transaction value, provided “that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer accrues directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8”.

Consequently, Article 1.1(c) will not apply and the transaction value will be accepted as a basis of valuation for the imported goods whenever an adjustment can be made under Article 8.

Definition

For the purposes of this Article, proceeds are any payments, excluding those relating to patents, trademarks or copyright, which, by contractual agreement, are paid either directly or indirectly to the seller of the goods being valued.

Proceeds must not be confused with transfers of dividends or other such payments made by the buyer to the seller. Neither must they be confused with royalties and licence fees which are payable on the re-sale price of the imported goods. Payments falling within the definition of royalties and licence fees must be examined solely within the context of Article 8.1 (c).

Where a royalty payment has been examined and found not to form part of the customs value of the imported goods under Article 8.1(c), it cannot then be considered again under the provisions of Article 8.1(d).

The Agreement does not define the scope of Article 8.1 (d), nor does the Agreement impose any conditions on how these payments are to be taken into account in the customs value. In particular, it does not require that such payments must constitute a condition of the sale of the imported goods. The mere existence of such proceeds requires an adjustment to be made to the price actually paid or payable for the imported goods.

However, the general requirement that any addition under Article 8 must be made on the basis of objective and quantifiable data still applies.

Examples (Case Study 2.2)

Corporation C of country X owns subsidiaries in different countries, all of which operate in accordance with corporate policies established by C. Some of these subsidiaries are manufacturing enterprises, others are wholesalers.

Importer I in country of importation Y, a subsidiary of C is a wholesaler of men's, women's and children's garments. The importer buys men's garments from manufacturer M, another subsidiary of corporation C also located in country X and, women's and children's garments from unrelated manufacturers located in a third country, as well as from local manufacturers.

Situation 1:

In accordance with C's corporate policy concerning sales between its subsidiaries, goods are sold at the price negotiated between the subsidiaries. However, at the end of the year, importer I will pay to manufacturer M 5 % of the total annual resale of the men's garments which the importer purchases from the manufacturer during that year as a further payment for the imported goods.

In this case, the payment in question is a proceed of the subsequent resale of the imported goods which is paid directly to the seller by the importer and that amount is to be added to the price paid or payable as an adjustment under Article 8.1(d).

Situation 2:

Importer I pays to service company A, another subsidiary of corporation C, 1 % of the importer's gross profit realised over the total annual sales of garments purchased from all sources. The importer produces evidence that this payment is not related to the subsequent resale, use or disposal of the imported goods but is a payment made in accordance with corporate policy to reimburse A for low interest loans and other financial services A provides for all subsidiaries of corporation C.

Service company A is related to the seller of the imported goods and thus the payment could be considered as an indirect payment to the seller. It is, however, payment for a financial service which is not related to the imported goods. Therefore, the payment would not be considered to be a proceed within the meaning of Article 8.1(d).

Situation 3:

At the end of the financial year, importer I remits to corporation C, 75 % of the importer's net profit realised over that year.

In this case the remittance by I to corporation C cannot be considered as proceeds since it represents a flow of dividends or other payments from the buyer to the seller which do not relate to the imported goods. Therefore, in accordance with the Interpretative Note to Article 1, it will not form part of customs value of the goods.

REFERENCES:

1. EAC Customs Management Act, 2004
2. Kenya Customs and Excise Act, 1996
3. WTO Valuation Agreement
4. Advisory opinions 4.1 to 4.13
5. Collins Dictionary and Thesaurus, 1991
6. Sherman, S.L. & Glashoff, H, Customs Valuation Commentary on the GATT Customs Valuation Code, 1988, ICC Publishing S.A.
7. Instruction manual developed by the trainer

LESSON 08 OPTIONAL ADJUSTMENTS; REQUIREMENTS OF ARTICLES 8.3 AND 8.4

OBJECTIVES

By the end of this lesson you should be able to:

- a) Explain the treatment of optional adjustments under articles 8.2
- b) Describe INCOTERMS and explain their relationship to article 8.2
- c) Explain the concept of Objective and Quantifiable Data; Other Provisions of article 8

CONTENT

1. Introduction
2. Treatment of optional adjustments under articles 8.2
3. INCOTERMS and relationship with article 8.2
4. Explain the concept of Objective and Quantifiable Data; Other Provisions of article 8

INTRODUCTION

Legal Reference

Unlike other adjustments required under Article 8 of the Agreement, the elements listed in Article 8.2 are not mandatory. Article 8.2 states that in framing its national legislation, each Member shall provide for the inclusion in or exclusion from the customs value, in whole or in part, of the following:

- a) the cost of transport of the imported goods to the port or place of importation;
- b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and
- c) the cost of insurance.

Nature of optional adjustments

Regardless of which option is chosen, it is important to understand what these costs and charges mean. Different risks are posed depending on the option chosen.

- It is also important to understand the various terms of sale used in international trade. These terms indicate the agreed responsibilities of the buyer and seller in a particular transaction in respect of the shipping arrangements and other associated charges in connection with the goods.
- The terms will generally be quoted on the commercial invoice and indicate which Article 8.2 costs or charges are included in the price of the goods. That is, the level of sale/trade at which the goods have been sold.
- Once the terms of sale have been established, it is then possible to determine what impact these costs will have on the customs value of the goods.
- Although it is possible to include only part of these elements in the customs value (for example, (a) and (b) only), in practice governments generally have made the decision to include all of them (i.e., (a), (b) and (c)) or, none of them.

- When they are all included, the level is referred to as the CIF basis of valuation, that is, the cost, insurance and freight. Where none of these costs/charges are included, this is known as the FOB basis of valuation, that is, free on board. The following two sections are based on these two choices.

Please refresh your memories on the INCOTERM definitions of “CIF” and “FOB”

TREATMENT OF ARTICLE 8.2

Legal Reference

Where, under national law, Article 8.2 (a), (b) and (c) are to be included in the customs value. (Commonly known as ‘CIF’)

Where the terms of sale are CIF then the sale price should already include either the price actually paid or payable for the goods plus the freight, insurance and associated handling and loading costs from the place of export to the place of import. This total amount then forms the basis of the customs value.

Where the terms of sale are FOB then the invoice price will not include the additional elements for freight etc. In this case, the importer or his/her representative is responsible for arranging and paying for the freight, insurance etc., from the place of export. They should therefore be in possession of invoices, contracts etc., that provide details of the actual amounts paid for these elements. These costs/charges should then be added to the price actually paid or payable for the goods.

Regardless of whether the terms of sale are CIF or FOB, documents relating to post-importation freight costs may also be included in the documents provided to Customs. The Interpretative Note to Article 1, paragraph 3(b) states that these costs must “not be included in the customs value provided that the amounts concerned are distinguished from the price actually paid or payable for the imported goods”.

Insurance

(i) Scope

The inclusion of insurance in the customs value is limited to insurance costs incurred for the transportation, loading, unloading and handling of the goods to the place of import.

(ii) Global/group insurance policies

Companies sometimes arrange for global or group policies to be set up rather than individual policies for each shipment. In this case, where objective and quantifiable data is not available for each individual import, the customs value cannot be determined using Article 1. Where insurance costs have been omitted from the declared value this may be because the importer has failed to advise his/her agent of the existence of such a policy.

In some cases, the sales contract requires the seller to procure insurance against the buyer’s risk of loss of or damage to the goods during carriage, but the buyer also decides to procure insurance. In other words, there is a ‘double’ insurance, however, in the event of loss or damage, legally only one claim can be made. Consequently, only the cost of the seller’s insurance is to be included in the customs value as that is the basis of CIF.

(iii) No insurance taken out

In some cases, the importer may state that neither he/she nor the seller insured the goods. If there is evidence to support this, then it is not necessary to include an amount for insurance under Article 8.2.

Where, under national law, Article 8.2 (a), (b) and (c) are not to be included in the customs value. (Commonly known as 'FOB').

If the terms of sale are CIF then the freight, insurance and associated handling and loading costs will be excluded from the customs value of the imported goods. It must be possible however to separately identify the amount of these charges in order for a deduction to be made under Article 1, paragraph 3 of the Interpretative Note.

If the terms of sale are FOB, then nothing further is to be added to the price actually paid or payable under Article 8.2.

Whereas under CIF, it is necessary to check that the correct amount for freight, insurance etc. has been included in the customs value, under FOB it is necessary to check that these charges have been excluded.

Storage costs

In accordance with Article 8.3, any adjustments for the costs or charges listed in Article 8.2 are to be made only on the basis of objective and quantifiable data. If such data is not available, then the transaction value method cannot be used.

In accordance with Article 8.4, no addition to the price actually paid or payable is to be made except those in Article 8.1 and Article 8.2 (a), (b) and (c).

Storage Costs

An area closely related to transport costs is storage costs. In the context of Article 8.2 it is necessary to consider whether or not the costs are in connection with the shipment of the goods.

Where the storage is not in connection with the shipment of the goods, Article 8.2 does not apply. Their inclusion in, or exclusion from, the price actually paid or payable will be in accordance with Article 1.

Where the storage is in connection with the shipment of the goods, then they are considered as part of the cost of transport and they will be included in or excluded from the value of the goods depending upon the treatment of Article 8.2 in national legislation.

The term "storage" does not include the cleaning, sorting or re-packing of the imported goods while in storage.

Example

An importer purchases goods at an ex-factory price from the seller in the country of exportation. Storage costs are incurred at the place of export pending the arrival of the goods.

In this case, the storage costs are incidental to the shipment of the goods and as such, should be regarded as charges associated with the transport of the goods. They are, therefore, to be treated in accordance with the provisions of Article 8.2(b) or, if the costs are incurred after importation, they must be treated in accordance with the provisions of Article 8.2(a).

Article 1 which states that post importation transport costs will not be included in the customs value provided those costs are distinguished from the price actually paid or payable for the imported goods.

See also Commentary 7.1, Advisory Opinion 13.1.

INCOTERMS AND INFLUENCE ON THE OPTIONAL ADJUSTMENTS

Definitions

The common terms of sale used in international trade can be found in a reference book titled "INCOTERMS", produced by the International Chamber of Commerce. The purpose of this reference book is to provide a set of guidelines for the interpretation of the most commonly used terms in international trade. The aim is to avoid or reduce the uncertainties of different interpretations of such terms in different countries.

Some of the most frequently used terms, relevant to the application of Article 8.2, are explained below:

Buyer	Bu	Bu	B	Bu	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Bu	B	Bu	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	B	Bu	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Bu	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Buyer	Buyer/Seller	Buyer/Seller	Seller	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Buyer	Buyer/Seller	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Seller	Buyer/Seller	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Seller	Buyer/Seller	Buyer/Seller	Seller	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Seller/Buyer	Seller	Buyer	Buyer	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Seller/Buyer	Seller	Seller	Seller	Buyer	Buyer	Buyer
Seller	Se	Sel	S	Se	Seller/Buyer	Seller	Seller	Seller	Seller	Seller	Seller

FOB (Free On Board) Level

"Free On Board" means that the seller's obligations cease when the goods are placed/loaded onto the means of transport at the place of export. This means that the buyer bears all costs and risks of loss or damage to the goods from that point. The FOB term requires the seller to Customs clear the goods for export.

The seller's obligations include:

- Delivering the goods on board the vessel named by the buyer at the place of export;
- Obtaining any required export licences;
- Bearing risks and costs relating to the goods until they are placed/loaded onto the means of transport at the place of export.

The buyer's obligations include:

- contracting at his/her own expense for the carriage of the goods from the place of export;

Customs Valuation I: For learning purposes only

- bearing risks and costs relating to the goods once they are placed/loaded onto the means of transport at the place of export;
- arranging all Customs formalities for importing the goods.

CIF (Cost, Insurance and Freight) Level

“Cost, Insurance and Freight” means that the seller’s obligations cease when the goods are unloaded from the means of transport in the place of importation.

The seller’s obligations include:

- contracting at his/her own expense for the carriage of the goods to their destination and pay all freight charges up to that point;
- obtaining at his/her own expense any required export licences;
- Obtaining at his/her own expense, freight insurance as agreed in the contract.

The buyer’s obligations include:

- bearing the cost of unloading the goods at the place of importation, unless already included in the freight bill paid by the seller;
- obtaining at his/her own expense any import licences and carry out all customs formalities (including payment of any customs duties) for the import of the goods to the place of importation.

CFR (Cost and Freight) Also known as (“C + F”) Level.

“Cost and Freight” means that the seller’s obligations cease when the goods are unloaded from the means of transport at the place of importation.

- the liabilities of the seller and buyer are the same as under C.I.F. except that neither party has an obligation to provide insurance. However, the buyer may then choose whether he/she obtains insurance cover.

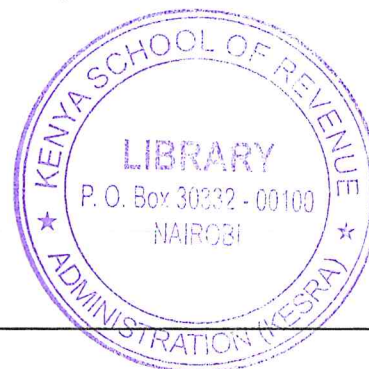
DDP (Delivered Duty Paid) previously referred to as F.I.S. - Free into Stores) Level

DDP means that the seller’s obligations cease when the Customs duties and taxes have been paid in the country of importation and the goods have been Customs cleared and delivered to the importer’s premises.

EXW (Ex Works) also known as (“Ex-factory”) Level

“Ex works” means that the seller’s obligations cease when the goods leave the works/factory premises.

This term represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods from the seller’s premises.



OTHER PROVISIONS OF ARTICLE 8

Objective and Quantifiable Data

Legal Reference

Article 8.3 "Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data".

This means that any adjustments that are to be made under Article 8, must be based on real facts and figures. Only facts based on the presentation of precise documentary information is objective and quantifiable data.

Purpose of requirement for objective and Quantifiable Data

This requirement is based on the need for uniform and transparent application of the Agreement and the **elimination of level of discretion** which may have been applied under previous valuation systems.

If there is no quantifiable data available to confirm the details of the addition, an **arbitrary (or notional) amount cannot be added**. In this case there can be no transaction value under Article 1.

The Interpretative Note to Article 8.3 provides a clear example of objective and quantifiable data relating to a royalty which is paid on the price in a sale in the importing country of a litre of a particular product that was originally imported by the kilogram and made up into a solution after importation.

If the royalty is based partly on the imported goods and partly on other factors which have nothing to do with the imported goods, (such as if the imported goods are mixed with domestic ingredients making them no longer separately identifiable, or, where the royalty cannot be distinguished from the overall special financial arrangements between the buyer and the seller), it would be difficult to attempt to make an adjustment for the royalty under Article 8.

In such a case, the transaction value under Article 1 could not be determined. However, if the royalty payment is based on the imported goods and can be distinguished in the final product sold and, can be quantified as being a condition of the sale and relates to the goods being valued, then the Article 8 addition can be made.

This provision of the Agreement does not mean that the Article has to be applied so rigidly that the transaction value has to be rejected in the majority of cases involving adjustments. Rather, it is placing a requirement on decision-makers that adjustments must not be made subjectively or on the basis of "best guess".

The Relationship between Article 8.3 and Article 17

The obligations under Article 8.3 relate to both the importer and Customs. Where Customs determine they have insufficient information to make a valuation decision under Article 1, Article 17 specifies they have the right to be satisfied regarding the truth or accuracy of any statement, document or declaration presented to them. As such, questions can be put to the importer regarding the need for further objective and quantifiable data to be provided in order for Customs to make a well-informed decision.

The obligation to provide that information is placed on the importer. In stating that "Nothing in this Agreement shall be construed as restricting or calling into question the rights of Customs administrations to satisfy themselves ...", Article 17 is firmly placing the obligation on Customs to be satisfied and on the

importer to comply as required. Customs has the right to satisfy themselves that everything presented by the importer is complete and correct.

There are a number of instruments of the Technical Committee on Customs Valuation, which reinforce the requirements of all parties under Article 17 and through its application, Article 8.3.

The Uruguay Round of Multilateral Trade Negotiations also reinforced the application of Article 17 of the Agreement in its "Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth and Accuracy of the Declared Value". While emphasising that Customs administrations should not prejudice legitimate trade, the Uruguay Round also recognised that Customs may have to deal with cases where there may be reason to doubt the truth or accuracy of particulars or of documents provided by importers in support of a declared value.

The Decision, *inter alia*, confirms that Customs has the right to verify any information relative to the customs value submitted to them. If there is a doubt regarding the truth or accuracy of such information, they may go back to the importer and request additional information. If the importer does not respond or, if further documentation is provided but Customs still has doubts, it may be deemed that the value cannot be determined under Article 1.

The Decision of the Uruguay Round also states that before making a final decision, Customs should notify the importer, in writing, regarding the reasons or grounds for doubting the truth or accuracy of the information and the importer should be given an opportunity to respond. The Decision also reinforces the provisions of Article 11 and the importers' right of appeal.

The Agreement clearly expresses the primacy of the transaction value to the greatest extent possible and therefore, the rejection of the transaction value must be clearly reasoned and defensible. Articles 8.3 and 17 cannot be used to conduct "fishing expeditions" to support a decision-maker's guesswork.

Provision of Article 8.4

This Article provides that "No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article". This provision is straightforward and unambiguous. The only cost elements that can be added to the price actually paid or payable are those listed in Article 8. No other additions are permitted.

However, there is a need to distinguish between additions to be made to the price actually paid or payable under Article 8 and those costs which form part of the total payment made or to be made by the buyer to the seller, for example, indirect payments.

There is a clear difference between those cost elements which form the total price actually paid or payable and those to be included under Article 8. The distinction is important because if there is a cost element which is not part of the price actually paid or payable and, it is not an adjustment under Article 8, there is no authority to include it in the transaction value under Article 1.

In regard to the additions to be made under Article 8, it is important to always remember that the adjustments are made to the extent that:

- (a) They are incurred by the buyer;
- (b) They are not already included in the price actually paid or payable;
- (c) They are based on objective and quantifiable data.

REFERENCES:

- EAC Customs Management Act, 2004
- Kenya Customs and Excise Act, 1996
- WTO Valuation Agreement
- ICC INCOTERMS 2000
- Advisory Opinion 13.1
- Commentary 7.1
- Commentary 21.1
- Instruction manual developed by the trainer

LESSON 09 DOCUMENTS AND DOCUMENTATION IN CUSTOMS VALUATION

OBJECTIVES

By the end of this Chapter you will be able to:

- a) Explain key terms and concepts
- b) Identify vital information provided by documents
- c) Explain the relationship between transaction value and documentation.
- d) Describe categories of documents used in trade and customs valuation
- e) Identify authentic and non-authentic documents

CONTENT

1. Introduction
2. Information provided by documents
3. Relationship between transaction value and documentation.
4. Categories and types of documents used in trade and customs valuation
5. Authenticity of documents

INTRODUCTION

General introduction

World Customs Organization (WCO) and World Trade Organization(WTO), have developed international standards, best practices and tools for trade documents, such as the Revised Kyoto conventions on simplification, harmonization, standardization and modernization of trade procedures that involves collecting, presenting, communicating and processing data required for the movement of goods in international trade.

Documentation plays an important role in the smooth movement of goods in International Trade. Facilitation of legitimate trade largely depends on proper documentation. It is therefore important for Customs and other interested parties to be conversant with International Trade Documentation because it imparts them with the skills to authenticate the relevant documents used in clearance of goods in international trade.

This Chapter aims at highlighting international documentation, their relevance to Customs valuation and valuation Information contained in these Documents.

Definitions and interpretation

Document; refers to the presentation of data in digital or any other form for purposes of exchanging information and communication.

Document check; This is the systematic analysis of all supporting documents to a customs declaration in order to facilitate proper valuation of imported goods.

Importance of Documents

Documents are useful for:

- Clearance of goods.
- Identification of origin
- Provision of data for Statistics,
- Post Clearance Audit (PCA),
- Intelligence analysis
- Serving as evidence in Commercial dispute settlement
- Collection of taxes and duties
- Protection of community and the environment
- Proof of ownership
- Facilitation of legitimate trade

VITAL INFORMATION CONTAINED IN DOCUMENTS

The following information runs through most documents involved in International Trade. Customs and other stakeholders should be conversant with them as they may play a role in customs valuation;

Document name – A document must have a name to help distinguish it from other documents e.g., a Commercial Invoice as opposed to a Proforma Invoice

Date & Serial Number – A proper Document must have a date and must also be serialized to help keep track while issuing these documents

Name of Supplier / Exporter – Clear and detailed particulars of the Supplier or Exporter must be there (particulars include the name, physical location, postal address, telephone contacts & email)

Name of Importer – Likewise clear and detailed particulars of the Importer must be indicated (name, physical location, postal address, telephone contacts & email)

Quantity & Description – The quantity supplied should be clearly indicated and proper description thereof

Gross & Net weight – This is vital information which points to the weight of the packaging and the actual products & this information is very useful not only at physical examination but also at valuation

Unit price & Total price – A proper Commercial invoice / Proforma Invoice should show the price per unit and also work through sub-totals and grand totals

Unit of Measure – The unit of measure upon which the price is based should also be indicated i.e. pieces, kilograms, liters, meters, square meters etc.

Terms of Delivery – Basically these are Incoterms which should also be very specific

Terms of Payment – these are the agreed upon terms on how the Importer will pay the supplier i.e. Telegraphic Transfer, cash, letters of Credit etc.

Time of shipment – is usually indicated on the Bill of lading and relates to terms agreed in the Contract

Pre-carriage information – this is also indicated on the Bill of lading and at times on the Commercial invoice / Proforma Invoice – and is very important for pre-carriage expenses

Port of loading - this is indicated on the Bill of lading and at times on the Commercial invoice / Proforma Invoice – and has a bearing on the Freight payable

Type of packaging – at a wider level we are looking at either 20ft or 40 ft container (which can be a risk management pointer to the total taxes payable); but also at a micro level it is important for the type of packing to be specified as either cartons, bales, bags, drums etc.

Marks & Numbers – these can be Container Numbers, seal numbers or serial numbers (in case of Machines) and they are useful in identification.

Vessel or Freight Number – usually found on the Bill of lading and is important in identifying the carrier

Country of Origin – This is important especially where preferential treatment is concerned, also origin has a bearing on the reputation of goods.

Harmonized System Code (HSC) – in some cases the supplier specifies the HS codes and it is usually important to compare it with what has been declared; this is at times indicated on the Bill of lading, Packing list and Commercial invoice.

Special remarks – especially on the Bill of lading should never be taken for granted – remarks like FCL/FCL, LCL/LCL, and RO/RO have special meaning and implication. (Note Meaning – FCL – full container load; LCL – low container load; RO/RO – Roll-on Roll-off)

RELATIONSHIP BETWEEN TRANSACTION VALUE AND DOCUMENTATION

It is important for customs officers to fully appreciate the definition and interpretation of Transaction Value and how the term relates to international trade documentation. Definition of Transaction Value embeds most of the documents involved in international trade.

As indicated in Article 1, Transaction Value is the price actually paid or payable for the goods when sold for export to the country of importation and adjusted in accordance with the provisions of Article 8.

When broken down into parts and critically analyzed, several Documents are implied in the key elements in this definition as follows:

Key elements of Transaction Value	Reference documents
Price actually Paid	Commercial invoice, Receipts, Sales contract, Telegraphic transfer, Form E
Price actually Payable	Purchase order, Proforma invoice, Price lists, Credit
For the goods	Sales contract, Packing list, Certificate of analysis, Specific permits
When sold	Sales contract, Sales confirmation
For export	Certificate of origin, Shipping bill or Export entry
To the country of importation adjusted in accordance with provisions of Article 8	Purchase order, Bill of lading, Inland transport documents

Illustration of work in a customs office

OVERVIEW OF INTERNATIONAL DOCUMENTS

Introduction

Documentation is an essential tool in conducting international trade and several documents are used in carrying out business transactions. These documents follow a clear sequence right from the time an importer makes an order up to the time the goods are cleared from the Customs territory. Most of these documents are mandatory for customs clearance purposes while others are optional depending on the nature of goods being cleared and the national legislation of country of Importation.

Analysis of Documents

All documents in international trade have unique features which distinguish them from the other. The information contained in each document should be well known by the customs officers and stakeholders, with particular reference to how the documents looks, the information it contains and its relationship with other documents.

Below are different categories of documents used in international trade emphasizing vital information.

Commercial documents

Purchase order

This is a Commercial document used by the buyer / Importer in placing an order with the supplier/seller. Important information on this document for customs purposes include the date when the order was placed, the company that ordered, the quantity ordered, suggested price to be paid or payable, signature and stamp of the ordering importer, preceding documents (e.g. Price quotation, catalogues, price list etc.).

However, it must be noted that different importers use different means of placing their orders; some have formal purchasing order forms, others order by telephone while others order by email. Therefore, it is important for customs to establish the method of ordering that the importer used.

Proforma Invoice

This is the document which the seller issues in response to the purchase order. It stipulates the terms and conditions upon which the seller will sell the goods to the buyer. Some of the important information contained in this document includes date of issue, preceding documents (if any), description of goods, unit price and total consignment price, the terms of payment, terms of delivery, Obligations of each party and signatures of contracting parties.

Sales Contract

This is a legal document that is enforceable by parties demonstrating that the buyer and seller agree on a sale of a particular good. It obliges the seller to supply goods to the buyer and ensure that the buyer acquires proprietary rights over the goods. Important information on this document for customs purposes include date of contract, terms of sale, description of goods, unit price and total contract price, terms of payments, seller's bank details, swift code and arbitration clause. Sometimes proforma invoice serve the same role as sales contract and the two may be used interchangeably.

Commercial Invoice

This is a commercial document prepared by a seller as indication of the final agreement on the sale of goods. It lists all items sold and presented to the buyer for payment. It contains the following information; date of issue, description of goods, quantity sold, the actual price paid or payable, terms of payment, terms of delivery, the serial number and the stamp of the issuing authority. This document is different from a pro-forma invoice in that whereas on the pro-forma invoice there is still room for negotiations and is subject to change, the commercial invoice is the final agreement between the parties

Receipt

This is a document that is issued in cases of cash transactions certifying receipt of payment by the seller. Vital information in this document include date of issue, serial number, payee, amount paid, means of payment (i.e. cash or cheque), balance due if any, signature and stamp of the seller.

Packing list

This is a document that accompanies goods from the exporting country and it gives a detailed breakdown of the way goods have been packed in the consignment to facilitate both the importer and customs authorities to easily verify the quantities and description of the consignment. Vital information to consider in this document includes, date and serial number, preceding document, goods description, weights, quantities and dimensions and signatures.

Transport Documents

Shipping Bill/ Export entry

This is a Customs document that is generated / issued by Customs of the exporting country. Vital information contained in this document includes the Customs reference number of the exporting country, the exporter, the consignee, the country of export, importing country, description of goods, Incoterms, carrier used, total export Customs Value, currency and preceding document (if any).

Bill of Lading / Airway Bill

This is an official document prepared by the carrier/ shipper duly accepting the goods for shipment and it contains the following information; the serial number, type of bill of lading / Airway Bill (master , House , combined transport , nonnegotiable), date and place of issue, date shipped on board, name of the shipping line, name of the consignee, name of the vessel, the items shipped, the quantity and weight of goods, port of loading, the point of destination, preceding documents (if any), pre carriage information, signatures and stamps.

Freight Invoice

This is a document issued by the shipper / carrier as acknowledgement on the agreed freight terms. It contains the following information; date of issue, serial number, name of carrier/ shipper, name of the importer, amount paid, balance due if any, signature and stamp.

Freight debit note

This is a document issued by the shipper/carrier in the event that freight amount is due. It contains the following information, date of issue, serial number, name of carrier/ shipper, name of the importer, amount to be paid and date due, signature and stamp.

Insurance certificate

This is a legal document certifying that goods or products are insured against certain risks before carriage. This can be marine insurance, marine and road insurance, or all risks cover. This certificate is issued as evidence that a certain insurance policy has been under taken to cover the goods. It is also contractual in nature meaning that it is a contract between the insurer and the insured. Vital information on this document includes; serial number; date of issued; the insurer, the insured, the insured amount, the insurance policy, signature and stamps.

Insurance Debit Note

This is the document issued by the insurance company in the event that insurance charges are due. It contains the following information, serial number; date of issue, the insurer, the insured, the insured amount, the insurance policy, signature and stamp.

Financial Document

Payment Documents

These are documents that provide evidence that the goods in question have been paid for or will be paid for depending on the agreed terms of payment. These documents include, Telegraphic Transfer (TT), letters of credit (LC), Documentary credits, Bank draft/ bill of exchange and credit agreement etc. Vital information on these documents varies depending on agreed terms of payment.

Accordingly, there are several means of payment used in settlement of amount owed to the supplier/exporter and this includes the following:

Telegraphic transfer:

This refers to the payment of money by transferring funds from the senders account to the beneficiary via an electric cable in form of an automated fund transfer system which uses coded messages that are safe and convenient.

Letter of Credit:

This is a formal document issued by financial institutions acting on behalf of the applicant by settling payments for a transaction to the beneficiary. These letters of credit are of different types, the most commonly used are;

- **Revocable letters of credit;**

this is a form of credit letter whose contents can be amended without the consent of the beneficiary at the request and on the instruction of the applicant.

- **Irrevocable letter of Credits;**

this form of credit letter cannot be amended or cancelled without the consent of the issuing agency if any or the beneficiary.

Illustration of how Letters of Credit operate

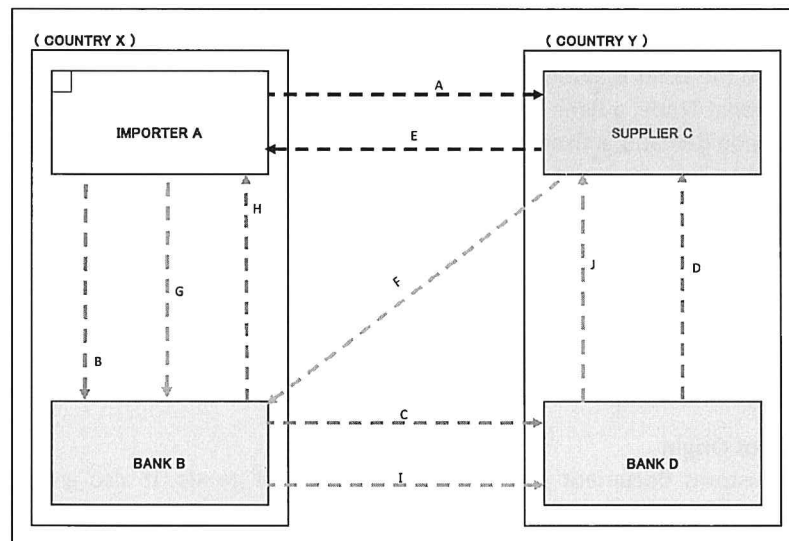


Illustration No 18

Step A	Importer A places order with Supplier C and both parties enter into a contract
Step B	Importer A negotiates / applies for Letter of credit with his Bank (Bank B)
Step C	Bank B issues letter of credit through inter-mediary Bank D who verifies authenticity compliance to the terms of the contract
Step D	Bank D advises Supplier C to ship goods and release documents to Bank B
Step E	Supplier C ships the goods
Step F	Supplier C Releases Documents to Bank B
Step G	Importer A pays contract amount on due date to Bank B or Bank B credits Importer Account with the amount owed
Step H	Bank B releases Documents to Importer A
Step I	Bank B remits funds to Bank D
Step J	Bank D remits funds to supplier C

Bank Guarantee;

This refers to a formal security that lending institutions ensures that the liabilities of a debtor are met when due on behalf of the applicant incase he/she fails to settle them.

A Bank guarantee and a Letter of credit are similar in many ways but they are two different things. Letters of credit ensure that a transaction proceeds as planned, while Bank guarantees reduce the loss if the transaction does not go as planned. A Bank guarantee is used to insure a buyer or seller from loss or damage due to nonperformance by the other party in the contract.

Bank overdraft;

Literally a Bank overdraft is when someone is able to spend more than what is actually in their bank account; obviously the money does not belong to them and will have to be paid back automatically once money goes onto their account.

It is a mutual agreement between the lending agencies to act on behalf of an applicant to settle his liabilities. It can be in form of a bond, cash or loan usually on a maximum limit beyond which the lending agency cannot exceed.

Bank draft;

This is a banker's cheque used as a negotiable instrument instructing a foreign bank to pay on demand a fixed amount of money to a named beneficiary. It is also known as "cashier's Cheque" and it applies when you need to pay somebody with guaranteed funds. Bank drafts are more secure for sellers because the funds are guaranteed by the bank that issued the draft. If a personal cheque is used there are possibilities of bouncing, however banks only issue bank Drafts after they have taken money from the applicant's account – so the seller is assured of being paid.

In International Trade, a Bank Draft is a negotiable instrument issued by a local bank instructing a foreign bank to pay on demand, a fixed sum of money to a named beneficiary.

Bill of exchange

This is an unconditional order issued by a person or Business when directing the recipient to pay a fixed sum of money to a third party at a future date. The future date may be either fixed or negotiable. A bill of exchange must be in writing and signed.

Regulatory Documents

Certificate of Origin

This is a customs document that certifies the origin of goods. It also gives the criteria for conferring origin. This criterion may be wholly obtained, value added, change in tariff heading. This certificate shows the preferential treatment of the goods being considered.

The Certificate of origin is usually issued either by the national chamber of commerce or by the export promotion boards and may be counter signed by Customs authority. Vital information on this document includes; date and serial numbers, preceding documents (especially the commercial invoice Number), description of goods, name of the exporter, name of the importer, criteria of the goods, issuing authority, signature and stamps of both the issuing authority and exporter.

Permit/certificate of analysis

This is a document issued by the manufacturer or bureau of standards in various countries certifying that the goods exported have under gone inspection and are certified to be consumed. This analysis is very crucial because apart from Customs collecting revenues they also protect the environment and human health. This certificate therefore recommends that goods to be consumed are safe to the environment or human health. Vital information on this document includes serial number, the name and address of the

certifying authority, name of inspector, the material compound of the item, the description of goods analyzed, the recommended life span of the goods, date, signature and stamps of issuing authority.

Fumigation Certificate

This is a document that certifies that goods imported or exported have been tested /inspected and treated to make them free from pests or fungus and qualify to be consumed or used.

Vital information on this document includes; name of fumigator, name of the exporter, descriptions of goods fumigated, date of fumigation, the methods and chemical components used in fumigation, stamp and signature of the authorized institute.

Phytosanitary Certificate

This is a document that certifies that livestock and plants imported or exported have been tested / inspected and vaccinated to make them free of infectious diseases. Vital information on this document includes; name of vaccinating authority, name of the exporter, details of livestock or plants vaccinated, date of vaccination, the methods and chemical components used in vaccination, stamp and signature of the authorized institute.

Transit documents

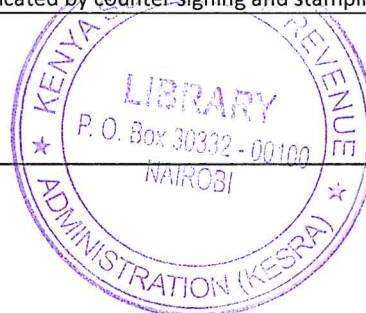
These are customs documents used to convey goods from point of entry into the Community to the final destination. Such documents include C17 which is usually issued in Mombasa, IM8 and T1 issued at The Ugandan and Tanzanian borders. Vital information on these documents include, customs reference number, name of the exporter, consignee name, description of goods, means of conveyance /Truck or wagon number, manifest number, Customs Value, signatures and stamps of Customs processing officers.

POINTERS TO AUTHENTICITY IN DOCUMENTS

Indicators of falsification of documents

Submission of the above documents to support an import declaration in itself is not enough to clear the goods under transaction value method, it is always important to verify if the availed documents are authentic and the table below gives us some of the Pointers that can be applied in this regard: -

SN	Major Point	Specific Aspects	Remarks
	VALUES	Exceptionally high or low values	Declaration of exceptionally high values can be an indicator of intention to evade Internal / Domestic taxes. On the other hand exceptionally low values are an indicator of a direct evasion of Customs taxes through under valuation
		High Insurance costs	If the terms of delivery is CIF (Kampala or Kigali) & the breakdown of inland insurance shows an exceptionally high figure – then there is a likely-hood of under declaration of the CIF Mombasa
		Disproportionate Transport cost	Likewise if the delivery terms is CIF (Kampala or Kigali) and the breakdown of inland freight shows an exceptionally high figure then there is a likelihood of under-declaration of the CIF Mombasa
2	FALSIFICATION ON	Erasers, rubbings, and white-was	If such alterations are done on a document, then it has to be authenticated by counter signing and stamping. Anything not



	DOCUMENTS		counter-signed should be an indicator of a problem & should be probed further
		Scanned Documents	Presentation of scanned Documents should be followed by a look at the original Documents, otherwise it is possible to change information on a document while scanning.
		Varying Font	Usually when a Document is tampered with, there is a possibility of the Fonts inserted not matching with the original Font and times even the formation of the numbers might be different – keen eye is able to detect such
3	Date & Serial Number Format	Date Format	There are two major date formats used in International Trade the British format which is day/month/year; and the American format which is year/month/date. And these formats were adopted by the colonies of these respective Countries – so a forger who is not keen enough will mix up these aspects
		Serial Numbers	Serial numbers can be either Manual or system generated, however it is always important to keep track of serial numbers major Suppliers by keeping copies of their invoices, since some forging might not be aware of the running serial number
4	Samples of previous Documents from Same Supplier	Invoice set-up, logo, & Color	Companies have brands that identify them from others and these are also reflected in their Documentation. By keeping copies of documents for Major Suppliers one is able to quickly recognize logos, company colors, and document formats of such Companies – so if someone presents a contrary document the difference is easily noticed
5	Arithmetic Accuracy	Unit price Versus Sub totals Versus Grand Totals	Rarely do Valuation Officers work through the computations of the presented Invoices / packing lists, however it is not uncommon to find inaccuracy in the Computations once one works through.
6	Consistency in Information	Weight	The weight quoted on the Packing list, proforma Invoice, Commercial Invoice, and Bill of lading – should always tally; any discrepancy is a pointer to an anomaly
		Goods Description	The Goods Description should be uniform on the Packing list, proforma invoice, Commercial invoice, and Sales Contract
		Value	The quoted value should be uniform on the Purchase Order, Proforma invoice, Commercial invoice, Sales Contract, and Financial Documents
		Ownership	The Ownership should be consistent on the Bill of lading, Transport Documents, Shipping Bill / Export Entry and the other support documents
7	Disproportionate Incoterms	FOB	Where the terms of Delivery are FOB it is always necessary to watch out for the quoted Freight & Insurance charges as they usually under declared.
		CIF	Where the terms of Delivery are CIF, it is always necessary to back-wards by deducting approximate Freight charges and

			insurance. The remaining FOB should give an indicator on the authenticity of the declaration
		Freight Collect Versus Freight paid	It is always necessary to cross-check the Freight terms quoted the Bill of lading against those on the Proforma invoice / Commercial invoice , sometimes there is a discrepancy
8	Unrealistic Terms of Payment	Cash Payments	Most Importers who declare terms of payment as cash should put under further scrutiny as they are not usually giving the w truth & cash payments are the hardest to prove since there is third party involved
		Unguaranteed Credit	Payment terms such as 'payment after 180 days or 360 days' which are not supported by guarantees should always be treated with suspicion. Likewise 'payment at sight of Documents' means that goods were dispatched before payment – so even in this there should be a guarantee.
9	Vague Information	Suppliers Name & Address, Importer Name & Address, Description of goods, Breakdown of packages or packing list,	If someone is giving vague or incomplete information in terms of addresses, weights, and description of goods it means they are holding back some information and such declarations should be scrutinized further.
10	Incomplete Documentation		At least all the Mandatory Documents as per the 'Check list' must be attached for a consignment to be comfortably passed under the Transaction value method; otherwise attaching only a Commercial Invoice is not enough to pass the entry under the Transaction value method
11	Signature & Stamp		If a Document has a provision for a signature & stamp then it should be signed and stamped – otherwise such a document cannot be accepted.

Grounds for doubting the truth or accuracy of the declared Value.

If Customs has reasons to doubt the truth or accuracy of the particulars of documents produced by traders in support of the declared value, then Customs should communicate such doubt in line with WTO **Decision 6.1** which recommends the following steps

The customs administration shall communicate in writing to the importer, via a specific form, their grounds for doubting the truth or accuracy of the particulars or documents produced and ask for further explanation, including documents or other evidences. A reasonable time frame should be given for a response.

If the importer fails to provide adequate documentation, or other evidences which supports his declaration, within the specified time frame. The Customs Administration communicates in writing their final decision to reject the transaction value, explaining the grounds for the decision. Relevant sections of the law should always be quoted to justify Customs rejection of a declared transaction value. **Decision 6.1** should be read together with Article 17. (refer to attachments on Legal Provisions on Documentation)

Documentation Legal Provisions

EAC CMA 200 SECTION	DETAILS	Related Article in ACV
Sec 122(1) Para 2 to 9	Where imported goods are liable to import duty ad <i>Valorem</i> , then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value.	Article 1 to 8
Sec 122(2)	Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the Customs Value of the importer's goods was determined	Article 16 Decision 6.1
Sec 122(3)	Where, in the course of determining the Customs Value of imported goods, it becomes necessary for the Customs to delay the final determination of such Customs Value, the delivery of the goods shall, at the request of the importer be made: Provided that before granting such permission the proper officer may require importer to provide sufficient guarantee in the form of a surety, a deposit or some other appropriate security as the proper officer may determine, to secure the ultimate payment of Customs duties for which the goods may be liable	Article 13
Sec 122(4)	Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth and accuracy of any statement, document or declaration presented for Customs Valuation purposes.	Article 17 Decision 6.1
Sec 235	(1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods- (a) to produce all books, records and documents relating in any way to the goods and (b) to answer any question in relation to the goods; and	
Sec 235(2)	(2) Where any owner fails to comply with any requirement made by the proper officer under this section, the proper officer may refuse entry or delivery, or prevent exportation or transfer, of the goods, or may allow the entry, delivery, exportation or transfer, upon the deposit of such sum, pending the production of the books and documents, as the proper officer may deem fit; and any deposit made shall be forfeited and paid into the Customs revenue if the documents are not produced within three months, or such further time as the proper officer may permit from the date of the deposit.	
Sec 236	The Commissioner shall have the powers to- (a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;	Article 17

Customs Valuation I: For learning purposes only

Customs Valuation Document Check List

SN	Document		Serial No	Date	Remarks / Analysis
1	Authority Letter	M			Requirement under Sec 146 of EAC CMA
2	Purchase Order	W/A			
3	Proforma Invoice	M			
4	Sales Contract	W/A			
5	Commercial Invoice	M			
6	Receipt	W/A			
7	Packing List	M			
8	Certificate of Origin	M			
9	Shipping Bill / Export Entry	W/A			
10	Form E	W/A			
11	Bill of lading/Airway Bill	M			
12	Freight Invoice	M			
13	Insurance Invoice/ Certificate	M			
14	TT Application	W/A			
15	TT Confirmation	W/A			
16	Fumigation Certificate	W/A			
17	Other Payment modes	W/A			
18	Phytosanitary Certificate	W/A			
19	Certificate of Analysis	W/A			
20	Other Relevant Permits	W/A			
21	Mombasa T810 / T812	M			
22	IM8 / T1	M			
23	IM7 (Warehousing Entry)	W/A			This is mandatory if the goods were warehoused, however does not apply if it is a direct C4

NOTE - M stands for Mandatory Documents

W/A stands for Documents that should be attached where applicable

LESSON 10 EXERCISES BASED ON TRANSACTION VALUE METHOD

Exercise 10.1

An importer of motor vehicles in commercial quantities in your country has received a new shipment.

The importer's commercial documents reveal that an arrangement had been made by the importer with the exporter for a **special waxing compound** to be applied to the vehicles prior to export to protect them from sea spray and the salt air.

The charge for this service is invoiced separately to the commercial invoice for the imported motor vehicles.

How would you treat the waxing compound for customs value purposes?

Exercise 10.2

XYZ Inc,

COMMERCIAL INVOICE

Sold to
PURCHASER: ACME Electronics
Importing Country

INVOICE NO: 46
DATE: May, 2---
ORDER NO: 73
ORDER RECEIVED: April, 2---

INVOICE TERMS: CIF

SHIPPED BY: H.V. ASIA Voy. 78

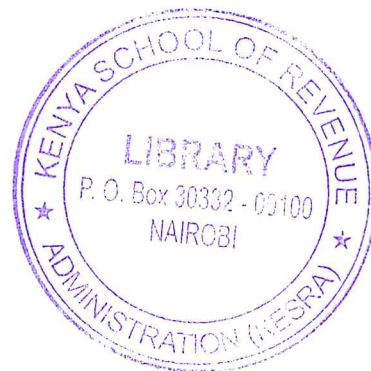
COUNTRY OF ORIGIN: Exporting
Country

ITEM NO.	QTY	DESCRIPTION	c.u. UNIT PRICE	AMOUNT c.u.
12	10	Colour televisions Model B455	1,000	10,000.00
		Credit for 2 faulty sets on invoice No.45		2,000.00
			Total	8,000.00

OVERSEAS FREIGHT: 250 c.u. included
MARINE INSURANCE: 500 c.u. included

What valuation considerations would you apply to this invoice?

On the basis of the information provided, what do you consider the customs value might be?



Exercise 10.3

GLISTER INSTRUMENTS LTD.
EXPORTING COUNTRY

COMMERCIAL INVOICE

Inv. : NO. FD-2677
Date : 02-11-2 - - -

Sold to :
SCALEX SA
IMPORTING COUNTRY

Shipped per : HANJIN NEW SKY
to Importing Country

from : Exporting Country
sailing on/about : 30-11-2 - - -

Marks & Nos	Quantity & Description of Goods	Unit Price	Amount
SCALEX IMPORTING COUNTRY C/NO. 1-200 MADE IN EXPORTING COUNTRY	1200 PCS ELECTRONIC SCALES XRB 802 WHITE TRAY	US\$ 12.50	FOB EXPORTING COUNTRY US\$ 15,000.00
		DISCOUNT 10 %	US\$ 1,500.00
TOTAL :			1200 PCS US\$ 13,500.00

Say total U.S. DOLLARS THIRTEEN THOUSAND FIVE HUNDRED ONLY
Terms of payments: By L/C NO. CIB13251643

For and behalf of
GLISTER INSTRUMENTS LTD.

X X X

.....
Authorised signature(s)

GLISTER®

What considerations would you apply to this transaction in order to determine a customs value?

Exercise 10.4

GLISTER INSTRUMENTS LTD.

EXPORTING COUNTRY

COMMERCIAL INVOICE

Inv.: NO. FD-2674

Date: 02-10-2 - - -

Sold to:
SCALEX SA
IMPORTING COUNTRY

Shipped per: HANJIN NEW SKY

from: Exporting Country

to Importing Country

sailing on/about: 30-10-2 - - -

Marks & Nos	Quantity & Description of Goods	Unit Price	Amount
SCALEX IMPORTING COUNTRY C/NO. 1-200 MADE IN EXPORTING COUNTRY	1200 PCS ELECTRONIC SCALES XRB 802 WHITE TRAY	US\$ 12.50 Less advance paid	FOB EXPORTING COUNTRY US\$ 15,000.00 US\$ 1,500.00
TOTAL:		1200 PCS	US\$ 13,500.00

Say total U.S. DOLLARS THIRTEEN THOUSAND FIVE HUNDRED ONLY
Terms of payments: By L/C NO. CIBI3251650

For and behalf of
GLISTER INSTRUMENTS LTD.

X X X

.....
Authorised signature(s)

GLISTER®

What considerations would you apply to this transaction in order to determine a customs value?

Exercise 10.5

XYZ Inc,

COMMERCIAL INVOICE

Sold to
PURCHASER: ACME Electronics
Importing Country

INVOICE NO: 49
DATE: June, 2---
ORDER NO: 75
ORDER RECEIVED: May, 2---

INVOICE TERMS: CIF

SHIPPED BY: M.V. ASIA Voy.85

COUNTRY OF ORIGIN: Exporting
Country

ITEM NO.	QTY	DESCRIPTION	c.u. UNIT PRICE	AMOUNT c.u.
12	10	Colour televisions Model B455	1,000	10,000.00
		Discount 10%		1,000.00
			Total	9,000.00

OVERSEAS FREIGHT: 250 c.u. included
MARINE INSURANCE: 500 c.u. included

What valuation considerations would you apply to this invoice?

On the basis of the information provided, what do you consider the customs value might be?

Exercise 10.6

XYZ Inc,

COMMERCIAL INVOICE

Sold to
PURCHASER: ACME Electronics
Importing Country

INVOICE NO: 53
DATE: August, 2---
ORDER NO: 80
ORDER RECEIVED: July, 2---

INVOICE TERMS: CIF
SHIPPED BY: H.V. ASIA Voy.105

PORT OF LOADING:
COUNTRY OF ORIGIN: Exporting
Country

ITEM NO.	QTY	DESCRIPTION	c.u. UNIT PRICE	AMOUNT c.u.
12	10	Colour televisions Model B455	1,000	10,000.00
			Total	10,000.00

OVERSEAS FREIGHT: 250 c.u. included
MARINE INSURANCE: 500 c.u. included

What valuation considerations would you apply to this invoice?

On the basis of the information provided, what do you consider the customs value might be?

Exercise 10.7

XYZ Inc,

COMMERCIAL INVOICE

Sold to
PURCHASER: ACME Electronics
Importing Country

INVOICE NO: 60
DATE: September, 2---
ORDER NO: 87
ORDER RECEIVED: August, 2---

INVOICE TERMS: CIF
SHIPPED BY: M.V. ASIA Voy.128

PORT OF LOADING:
COUNTRY OF ORIGIN: Exporting
Country

ITEM NO.	QTY	DESCRIPTION	c.u. UNIT PRICE	AMOUNT c.u.
12	10	Colour televisions Model B455	1,000	10,000.00
		End of model reduction 50%		5,000.00
			Total	5,000.00

OVERSEAS FREIGHT: 250 c.u. included
MARINE INSURANCE: 500 c.u. included

What valuation considerations would you apply to this invoice?

On the basis of the information provided, what do you consider the customs value might be?

Exercise 10.8

EXPORT COMMERCIAL INVOICE

ABC International, Exporting Country	Page: 1	DATE: June, 2----
	Invoice No. 10910064	
	Payment Terms FOB	
	Order No. 74	
	Country of Origin Exporting Country	
	Country of Destination Importing Country	
	Port of Loading XXX, Exporting Country	
	Port of Discharge XXX, Importing Country	
	Vessel/Flight Detail Sea Star Voy.21	
	ETA July, 2---	

DESCRIPTION OF GOODS	QTY	UNIT PRICE	AMOUNT
CTNS		USD	USD
<u>Magnetic Whiteboards</u>			
10 P-TC-Size 1	100	50.00	5,000.00
10 P-TC-Size 2	100	50.00	5,000.00
20 P-TC-Size 3	100	50.00	5,000.00
<u>Office Filing Cabinets</u>			
10 Model 72X 4 drawers, Grey	50	95.00	4,750.00
Total FOB			19,750.00
Overseas Freight			250.00
Overseas Insurance			500.00
Total CIF			20,500.00
Finance Fee			3,000.00
Total			23,500.00

WEIGHT/MEASUREMENT	CONTAINER NO	NAME	DESTINATION	SIGNATURE
XXX	XXX	XXX	XXXX Importing Country	XXX

CERTIFICATE OF ORIGIN

I, the undersigned, being duly authorised on behalf of the above Seller and having made the necessary enquiries, do HEREBY SOLEMNLY DECLARE that this invoice, including continuation sheets (if any), is correct in all respects and in accordance with our books. All of the goods in this consignment were grown, produced or manufactured in the stated Country of Origin as shown in this invoice.

What valuation considerations would you apply to this invoice?

