Determining Customs Value Of Fresh Produce

An Informed Compliance Publication

March 16, 2023

NOTICE:

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or "Mod" Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two new concepts that emerge from the Mod Act are "**informed compliance**" and "**shared responsibility**," which are premised on the idea that in order to maximize voluntary compliance with laws and regulations of CBP, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under CBP regulations and related laws. In addition, both the trade and CBP share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record's failure to exercise reasonable care could delay release of the merchandise and, in some cases, could result in the imposition of penalties or, in certain instances, referral for criminal enforcement.

The Office of Trade, Regulations and Rulings (RR) has been given a major role in meeting the informed compliance responsibilities of CBP. In order to provide information to the public, CBP has issued a series of informed compliance publications, on new or revised requirements, regulations or procedures, and a variety of classification and valuation issues.

This publication, prepared by the Valuation and Special Programs Branch, Commercial and Trade Facilitation Division, RR, is entitled *Determining Customs Value Of Fresh Produce*. It is part of a series of informed compliance publications regarding customs classification and valuation. It provides guidance on the valuation of fresh produce imported into the United States and references valuation decisions issued by the branch, which are available on the CBP website in the Customs Rulings Online Search System (CROSS) at https://rulings.cbp.gov/home. Over the years, such decisions were given a six-digit number, then they were preceded by the letter "W," and they are now preceded by the letter "H." In the search box in CROSS, one should type the exact decision number. We hope that this material, together with seminars and increased access to CBP rulings, will help the trade community to improve voluntary compliance with customs laws and to understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under CBP's Regulations, 19 CFR Part 177, or to obtain advice from an expert who specializes in customs matters, for example, a licensed customs broker, attorney or a customs consultant.

Comments and suggestions are welcomed and should be addressed to the Executive Director, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, D.C. 20229-1177.

Alice A. Kipel,
Executive Director, Regulations and Rulings
Office of Trade

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Introduction

All merchandise imported into the United States, including fresh produce, is subject to appraisement pursuant to the methods set out in the Trade Agreements Act of 1979 (the Act or TAA), codified at 19 U.S.C. 1401a, *et. seq*. Under 19 U.S.C. 1401a, the preferred method of appraisement is transaction value. Accordingly, transaction value should be used if it applies to the importation of fresh produce. If the shipment of fresh produce does not meet the requirements of transaction value (for example, there is no sale for exportation to the United States, as in the case of merchandise imported under consignment), then appraisement must be based on another method set forth in 19 U.S.C. 1401a, taken in sequential order. The remaining methods of appraisement set forth in 19 U.S.C. 1401a must be considered, in order of precedence: the transaction value of identical or similar merchandise (19 U.S.C. 1401a(c)), deductive value (19 U.S.C. 1401a(d)), computed value (19 U.S.C. 1401a(e)) (the importer may request the reversal of deductive value and computed value at the time the entry summary is filed), and appraisal based on a value derived from one of those methods, reasonably adjusted to the extent necessary to arrive at a value, known as the "fallback" valuation method, if other values cannot be determined (19 U.S.C. 1401a(f)). For further information on the bases of appraisement, see the CBP informed compliance publication entitled *Customs Value,* which is available online at https://www.cbp.gov/document/publications/customs-value, and the *Customs Valuation Encyclopedia (1980-2021), CBP Publication No. 1804-0622***,** available at https://www.cbp.gov/document/guidance/customs-valuation-encyclopedia-1980-2021, which provides summaries of valuation decisions issued by the Valuation and Special Programs Branch.

Transaction Value Applied to Fresh Produce

Transaction value is the price actually paid or payable for merchandise when sold for exportation to the United States, plus certain additions for packing costs and selling commissions incurred by the buyer, and assists, royalties or license fees, and proceeds of any subsequent resale that accrue to the seller. *See* 19 U.S.C. 1401a(b)(1). The price actually paid or payable for imported merchandise is the ***total*** payment, excluding international freight, insurance, and other cost, insurance and freight (C.I.F.) charges that the buyer makes to the seller.

In order for transaction value to be used as a method of appraisement, it is essential that a "sale" between the parties is available. In *VWP of Am., Inc. v. United States*, 175 F.3d 1327 (Fed. Cir. 1999), *citing J.L. Wood v. United States*, 505 F.2d 1400, 1406 (C.C.P.A. 1974), the U.S. Court of Appeals for the Federal Circuit found that the term "sold" for purposes of 19 U.S.C. 1401a(b)(1) meant a transfer of title from one party to another for consideration. No single factor is decisive in determining whether a *bona fide* (in good faith) sale has occurred and CBP makes each determination on a case-by-case basis. CBP considers such factors as whether the purported buyer assumed the risk of loss for, and acquired title to, the imported produce. Also, CBP may examine whether the purported buyer paid for the produce, and whether, in general, the roles of the parties and the circumstances of the transaction indicate that the parties are functioning as a buyer and a seller. The relationship between related buyers and sellers must not influence the price actually paid or payable for the imported produce.

For example, in Headquarters Ruling Letter (HQ) H023269, dated Oct. 27, 2010, an entity related to the U.S. importer (related entity seller) purchased bananas from unrelated South

American growers and resold them to a related international affiliate (middleman), which in turn resold the bananas to the U.S. importer. Three of the parties in the multi-tier transaction (the related entity seller, the middleman and the U.S. importer) were related parties. The unrelated growers were either self-represented or part of an association of growers. In support of its transaction value claim, the importer submitted copies of contracts between the various parties involved in the transactions, organizational charts, and a copy of an audit assist report and material provided to the CBP Office of Regulatory Audit (now Regulatory Audit and Agency Advisory Services).

The submitted documentation revealed that the sale between the related entity seller and unrelated banana growers met the requirements of a *bona fide* sale for export to the United States. Under the contracts with the growers, the related entity seller provided materials to identify and protect the banana stems, such as stem bags and colored ribbons, technical assistance and advice, and transportation from the packing plants to the refrigerated containers in which the bananas were shipped. In addition, the related entity seller harvested, cleaned and packed the bananas, either directly or through a third party. The middleman provided the packaging, fruit and box labels, and specific requirements for treating the fresh fruit to meet U.S. requirements. Title to the fresh produce transferred from the growers to the related entity seller when the produce was packaged, boxed and loaded into the refrigerated containers at the farms' packing plants or on the farm property. The refrigerated containers were at that point already specifically booked and designated for particular vessels. The containers were sealed after loading and remained sealed until the bananas were unloaded in the United States. Title passed from the related entity seller to the middleman free on board (F.O.B.) at the foreign port of export. After shipment of the fruit from the South American country, title passed from the middleman to the U.S. importer, one nautical mile outside the territorial waters of the United States.

Based on the requirements of the contract between the growers and the related entity seller, it was determined that the related entity seller acted more like an independent seller. The bananas had to be of first quality. The related entity seller had the right to reject or return bananas which did not meet the requirements set forth in the contract. The growers had no restrictions regarding the disposal of rejected fruit even though there were intellectual property restrictions. The contract with the growers also specified the amount of land planted with banana trees and the price to be paid for each 20-kilogram box of bananas. The contract did not specify a quantity to be supplied but provided for penalties if the grower failed to deliver the amounts requested in the terms set forth in the purchase order and if the grower sold bananas grown on its property to someone else.

In the contract between the related entity seller and the middleman, the seller agreed to sell all of the bananas purchased exclusively to the middleman and the middleman agreed to buy all of the bananas offered for sale by the related entity seller that met the middleman's quality specifications. The middleman had the option to purchase any or all of the bananas which did not meet the quality specifications and standards at a price agreed to by the related entity seller and the middleman. The middleman could inspect the bananas for acceptance or rejection at the time they were delivered to the shipping vessels. Payment was due at the time title passed to the middleman and the purchase price was determined by the parties.

In the contract between the middleman and the importer, the middleman agreed to sell all of the bananas it delivered to the United States exclusively to the importer and the importer agreed to buy all of the bananas offered for sale by the middleman that met the importer's quality specifications. The importer also had the right to inspect the fruit to assess grade specifications and quality standards agreed to by the parties. Payment by the importer for

the bananas was made monthly based upon a percentage of the total amount invoiced during the four-week accounting period to the importer's third-party buyers. The importer paid the middleman for any invoiced surcharges for ocean freight and fuel.

In this decision, the bananas were appraised based on transaction value by using the first sale price from the grower to the related party entity seller provided that the related party entity seller could document its packing costs. CBP was satisfied that a *bona fide* sale occurred between the independent growers and the related entity seller. The growers and related entity seller were unrelated parties and there was a presumption that they transacted business with each other at arm's length. To substantiate that a sale occurred between the banana growers and the related entity seller, documents such as Purchase Liquidation were submitted as proof of purchase and screen prints from the related entity seller's account records were provided to show the amounts owed and paid to the growers per the Purchase Liquidation documents. The bananas were clearly destined for shipment to the United States at the time title passed from the growers to the related entity seller.

As was evident in HQ H023269, where the contract specified the price to be paid, in order to be able to appraise fresh produce based on the transaction value method, the price paid or payable for the produce must exist at the time of exportation to the United States. The price actually paid or payable for the produce may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a pricing formula based on an objective standard over which neither the seller nor the buyer has any control. However, even when transaction value applies because a market price can be established from a reliable third-party source, or there is an actual price agreed upon prior to sale, adjustments to that value may still be required. Pre-payments for the produce by the seller, must be included in the reported transaction value.

For instance, no transaction value was applicable in HQ 546231, dated Feb. 10, 1997. The importer imported frozen broccoli/cauliflower and mushrooms in jars from its wholly-owned Mexican subsidiaries. In support of its transaction value claim, the importer submitted internal accounting records, including journal registers, invoices, proof of payment, and lists of suppliers indicating that the Mexican operations purchased the seeds, fertilizers, and insecticides. Amounts were pre-paid to the Mexican operation based on the product shipped and the transfer price reflected on the commercial invoice. After the exporter adjusted its prices on a quarterly basis and submitted them to the importer with final calculations of total value and costs computed at the close of the accounting period, the importer presented to CBP's predecessor, the U.S. Customs Service ("U.S. Customs"), a final valuation summary. The summary included actual production costs, values declared, pricing sheets, statement of earnings, declaration of assists and duties due. The importer effected payments via lump sum monthly transfers in response to the exporter's request for funds, without regard to specific entries and an aggregate average price, as opposed to an entry-specific price. Although such aggregate amounts were reconciled against the entry summaries on a yearly basis, it was not evident that the parties' export invoice pricing policy represented a formula or resulted in a "fixed" price for the merchandise. Further, no evidence was provided regarding the circumstances of sale between the related parties which would indicate that their relationship did not influence the price actually paid or payable or that the transaction value closely approximated certain test values. For these reasons, the imported products could not be appraised on the basis of transaction value.

Occasionally, a question arises whether customs fees collected upon arrival in the United States of a commercial truck containing produce should be included in the value of the imported produce where the terms of sale are C.I.F. U.S. purchaser's plant. In HQ 544215,

dated Aug. 11, 1988, growers of fresh okra in Mexico entered into contracts with U.S. freezing plants for the purchase of okra on a fixed price per pound basis. The contracts provided for a sale of fresh produce for consideration. The growers delivered the produce to the purchaser's facilities in the United States and were required to pay a customs processing fee upon the arrival of each truck at the U.S. port of entry. Since the terms of sale between the foreign growers and the U.S. purchasers for imported produce required that the growers incur all costs necessary to deliver the produce to the U.S. purchaser's plant (a C.I.F. U.S. delivered price), the commercial truck processing fee paid by the growers in connection with the imported produce was not dutiable as part of transaction value.

It should also be noted that certain amounts specified in the customs valuation statute must be added to transaction value if they are not already included in the sale price. For example, assists that are not already included in the price paid or payable for the fresh produce should be included. An assist is anything of value provided, directly or indirectly, by the buyer free or at a reduced cost and for use in the production or sale of the imported merchandise for export to the United States. For fresh produce, assists might include seeds, fertilizers, pesticides, and equipment provided to the grower. *See* 19 U.S.C. 1401a(h)(1)(a). Other additions include packing materials, commissions and proceeds of a subsequent resale.

The most relevant addition for produce is packing materials. Imported fresh fruit usually arrives in refrigerated containers or packed in ice to extend the shelf-life of the fruit. For instance, HQ 542491, dated June 9, 1981, and HQ 542566, dated Nov. 18, 1981, considered whether the cost of ice and icing charged on the imported cantaloupes and melons should be part of the transaction value. As transaction value is the total price paid to the seller, the costs for fruit, packing, ice and transportation were included. When charges for icing imported fruits are paid by the buyer directly to the seller as part of the price actually paid or payable for the produce, these charges are dutiable whether they are itemized separately on the invoice or paid to the seller under a separate invoice. Where the buyer pays someone other than the seller for the ice and icing, the charges are dutiable under 19 U.S.C. 1401a(b)(1)(A) as "packing costs incurred by the buyer with respect to the imported merchandise."

Transaction Value of Identical or Similar Merchandise

Often, transaction value is not an available basis for appraisement for fresh produce because the merchandise is delivered to the United States before a sale is completed. Importations that occur prior to sale are commonly known as "price after sale" or "consignments." Generally, in a consignment involving fresh produce, the sale typically only occurs after importation, usually after inspection and grading for quality, and the quantity suitable for sale has been determined. Because there is no sale for exportation, transaction value is not applicable.

Accordingly, the transaction value of identical or similar merchandise is the next available basis of appraisement. The transaction value of identical or similar merchandise is based on sales, at the same commercial level and in substantially the same quantity of merchandise exported to the United States "at or about" the same time as the good being appraised. If no such sales are found, sales of identical merchandise or similar merchandise at either a different commercial level or in different quantities, or both, shall be used, but adjusted to take account of any such difference. Any adjustment made under this paragraph shall be based on sufficient information.

In accordance with Treasury Decision (T.D.) 91-15, 25 Cust. Bull. 31 (1991), it must be demonstrated that the transaction value of the merchandise under consideration is fully acceptable under section 402(b) of the TAA to be applied as the transaction value of identical or similar goods under section 402(c) of the TAA. The determination concerning the acceptability of the transaction value may be based on information provided by the importer or already available to U.S. Customs. In other words, if the transaction value of the merchandise under consideration cannot be properly ascertained as previously accepted actual sales transactions for CBP to consider in determining whether there are sales of identical or similar merchandise, it cannot be used as the basis of appraisement under 19 U.S.C. 1401a(c).

CBP does not consider a difference in price for produce, in and of itself, as proof that produce is not similar or identical. In HQ 545755, dated May 18, 1995, asparagus was shipped on a consignment basis from Mexico to a U.S. importer. Several other brands from the same asparagus producer were exported to the United States "at or about" the same time. The transaction value of these importations was fully acceptable under section 402(b) of the TAA at the time of the appraisement of the asparagus. An agreement for the purchase and sale of the asparagus between the importer and the seller, invoices, and Customs Form 7501 were available for the appraising officer's consideration. The other asparagus was similar to the imported asparagus, meaning it was produced in the same country and by the same person as the produce being appraised. The produce appraised also had similar characteristics and was commercially interchangeable with the produce being appraised. The affidavits indicating that the asparagus might be resold to a few elite buyers in the United States did not establish, on their own, that the produce was dissimilar. Further, the cost differential of the packing process and materials of the asparagus did not demonstrate that the produce was dissimilar. Although, it was appropriate to make adjustments for packing only if necessary to account for different commercial levels. Finally, the fact that these importations could exceed the U.S. Department of Agriculture (USDA) price calculations did not serve as any indication that these importations and the subject asparagus were dissimilar.

If transaction value for identical merchandise or for similar merchandise is applicable and there are two or more such transaction values that are determined on the exact day of or day closest to exportation, then the imported merchandise shall be appraised on the basis of the lower or lowest value. *See* 19 U.S.C. 1401a(c)(2). In HQ 546999, dated Apr. 12, 1999, U.S. Customs used two importers' prices to appraise watermelon entries filed by a produce company based on the dates of exportation to the United States. Regarding the two importers, the watermelons were purchased based upon verbal agreements with the shipper and the price was agreed to before exportation. U.S. Customs interviewed each of the two importers to clarify their responses to the request for information (Form CF-28) and requested proof of payment information for their watermelon shipments to determine if a valid transaction value existed. Proof of payment was provided in the form of canceled checks and wire transfer deposit tickets. The invoices were in Mexican pesos with currency conversion rates annotated on the entry summaries. After U.S. Customs interviewed the importers who supported their declared values, a master list was prepared of the lowest transaction value for each day. The exportations from the two importers were exportations of identical or similar merchandise because they consisted of the same merchandise (fresh watermelons), from the same country, and shipped in substantially the same commercial quantities. U.S. Customs used these importers' transaction values to appraise the watermelons from the produce company because the importation dates were on the same day. Similarly, in HQ 546151, dated Dec. 6, 1995, fresh asparagus was appraised based on the transaction value of identical or similar merchandise using the lowest of the

acceptable transaction values. When the asparagus was imported, two importers of fresh asparagus had established transaction value pursuant to section 402(b).

In HQ W546217, dated Apr. 8, 1998, U.S. Customs considered whether the terms "at or about" included in the "at or about the time of exportation" language of section 402(c) should be applied in a hierarchical or collective fashion, and in what manner the language was interpreted. U.S. Customs determined that the word "at" meant exported the same day, and "about" meant "one week, i.e., seven calendar days, before or after the date of exportation of the instant merchandise being appraised, that is, a total of fourteen days." If no transaction value was available for produce exported on the exact date as the instant produce being appraised, transaction values for produce exported on the date closest to the date of export of the produce being appraised, followed by the next closest date to the date of exportation of the produce being appraised, and so forth, were considered. Thus, the correct price to select from the previous imports was the price from the export closest in time to the shipment of fresh asparagus. More specifically, when addressing how to define "at or about," U.S. Customs explained:

> … in the case of perishable produce, such as asparagus, prices may fluctuate seasonally, weekly, or even daily. Thus, we find a time period of one week, i.e., seven calendar days, before or after the date of exportation of the instant merchandise being appraised, that is, a total of fourteen days, to represent a time period "about" the time of exportation. Insofar as such merchandise is concerned, this time period reasonably represents a period of time as close to the date of exportation as possible yet within which commercial practices and market conditions which affect the price generally may remain the same. This presumptive time period is appropriate for such commodities, unless overcome by evidence of market or production conditions warranting a shorter or longer time period. Insofar as perishable produce is concerned, we do not find the entire summer season to represent a time period "about" the time of exportation. It is our position that the terms "at" or "about" included in the "at or about the time of exportation" language of § 402(c) are applied in a hierarchical fashion, with resort to values "at" and then "about" the time of exportation.

HQ W546217 was litigated in the U.S. Court of International Trade (CIT) in *Four Seasons Produce, Inc. v. United States*, 25 CIT 1395 (2001). The plaintiff argued that U.S. Customs' interpretation of the phrase "at or about the time" did not reflect the legislative intent that U.S. Customs consider valuations of all merchandise exported to the United States "about" the time of the exportation of plaintiff's merchandise. The CIT found that U.S. Customs' interpretation of the meaning of the phrase "at or about the time" was "persuasive." The court noted that U.S. Customs had considered the issue of the perishable nature and price fluctuations in the produce market in interpreting the statutory language "at or about the time" to arrive at the transaction value of identical or similar merchandise. The court agreed that, in the case of perishable products, the prices might fluctuate seasonally, weekly or even daily, and "at or about the time of exportation" should cover a time period as close to the date of exportation as possible to accommodate rapid price fluctuations. Therefore, frequent price fluctuations do not preclude the appraisement of fresh produce based on the transaction value of identical or similar merchandise.

Deductive Value

When the transaction value and transaction value of similar or identical merchandise are not available at the time of importation, deductive value is the next basis of appraisement unless the importer has requested the reversal of deductive value and computed value. Deductive value is, in summary, the price obtained for fresh produce when sold in the United States, less the importer's commission or usual profit and general expenses, international and domestic freight and insurance, brokerage fees, and duties, taxes and user fees. 19 U.S.C. 1401a(d). The base price to be relied upon for appraisement purposes is the price at which the produce is sold in the greatest aggregate quantity either "at or about" the date of importation or before the close of the 90th day after importation. The price in the greatest aggregate quantity is the unit price at which the merchandise is sold to an unrelated person at the first commercial level after importation in the highest quantity, compared to sales at other prices. For example, if there are 10 sales of watermelon with three at $2/pound, three at $2.50/pound and four at $1.75/pound, the price at which the highest aggregate quantity of watermelons is sold is $1.75/pound, the price at which the highest volume of sales occurred. *See* 19 U.S.C. 1401a(d)(2)(A)-(B).

Fresh produce imported on consignment is often appraised based on deductive value. In HQ W548391, dated Feb. 6, 2004, the importer purchased produce from a seller in Colombia. The seller and importer structured their deal based on a formula tied to the sale price obtained in the United States after importation. As transaction value could not be determined at the time of importation, and there was no information available regarding possible sales of identical or similar bananas, deductive value provided the correct basis for appraisement and was based upon the prices for the produce derived by the importer's sales after importation to unrelated persons in the greatest aggregate quantity.

The deduction made for profits and general expenses must be based upon the importer's profits and general expenses unless such profits and general expenses are inconsistent with those reflected in sales in the United States of imported produce of the same class or kind, pursuant to 19 U.S.C. 1401a(d)(3)(B). In HQ H007667, dated May 25, 2007, honeydew melons were entered into the United States pursuant to a consignment agreement and transaction value was not applicable. The importer expected to sell the melons within one week of entry into the United States and the price satisfied the "at or about the same date" criteria. CBP found it could be possible to appraise the merchandise based on the transaction value of similar or identical fruit if there were sales of identical or similar melons at the same commercial level and in substantially the same quantity exported to the United States "at or about" the same time as the fruit involved in this case. Otherwise, there would be a need to proceed to deductive value. Deductions for the profit and general expenses in connection with the sales in the United States of the melons, which included the costs and expenses for marketing and distribution of the produce, overhead charges (in HQ H007667 the overhead charges included both the actual costs of overhead and profit) as a percentage of the net sales price assuming the profit charged was the normal and usual profit in the industry, the costs of loading and unloading costs at the ports of destination in the United States, and for other actual shipping and landing costs of the inspection of the fruit incurred by the importer after the merchandise was released from Customs custody were proper under 19 CFR 152.105(d)(1). Deductions for the actual ocean freight, the insurance paid in connection with the ocean freight, inland freight in the United States, and foreign inland freight to the port of shipment were proper under 19 CFR 152.105(d)(2) and (3). A deduction was proper for customs duties, harbor taxes or merchandise processing fees paid by the U.S. vendor pursuant to 19 CFR 152.105(d)(4). A deduction for the cost of the phytosanitary certificate was not proper because the fee for the phytosanitary certificate was not a U.S.

federal tax for which vendors in the United States were liable.

In situations where produce is sold more than a week from the date of importation or price adjustments take time to be finalized, if prices and information are available for produce sales of particular sizes and weights, it may be appropriate to use the price at which the greatest aggregate quantity of the instant or identical produce is sold in its condition imported "at or about" the date of importation of the produce. In HQ 546602, dated Jan. 29, 1997, fresh asparagus was imported from Mexico on consignment. Under the agreement between the U.S. importer and the growers, the importer had the exclusive right to market and sell the asparagus, although the grower remained the owner of the crops and bore risk of loss until delivery to a third-party buyer. In return for the importer's marketing and other such services, the importer retained a service fee calculated as a percentage of the sales proceeds, with specified deductions. The grower was entitled to the remaining proceeds after deduction of the service fee and other costs specified in the agreement. The grower and the importer operated independent businesses, without rights or proprietary interests in each other's businesses, and each acted for its own individual account and profit. At the end of each growing season, the importer prepared a final accounting for each grower, including all pertinent revenue and expense figures maintained in accordance with generally accepted accounting principles (GAAP). The average price per pre-selected crate equivalent was used as the basis of the declared values for importations during the following season. At the end of that season, the actual price was determined again by accounting for all revenues and expenses. The season-end calculations were provided to U.S. Customs as the basis for liquidation of the importer's entries. Because there was no transaction value and no identical or similar merchandise was available for appraisement, U.S. Customs proceeded to deductive value. U.S. Customs observed that some of the shipments were not sold until beyond a week from the date of importation and the price adjustments could take up to a month to be finalized. Insofar as prices and information were available for sales of particular sizes and weights, it was appropriate to utilize the price at which the greatest aggregate quantity of the instant or identical merchandise was sold in its condition imported "at or about" the date of importation of the fresh produce.

Often produce is affected by season, weather, and highly volatile markets, and other factors beyond the control of the importer, which makes it difficult for importers to keep accurate records of sales to present to CBP. Further, some of the produce shipments may be commingled after importation, which makes them impossible to track. CBP is aware that individual importers are often incapable of providing reliable data on which to base the highest aggregate quantity for purposes of appraisal. In those cases, it may be appropriate to proceed to the next method of appraisement, which is the computed value method.

Computed Value

Computed value is determined by the sum of: 1) materials, fabrication, and other processing used in producing the imported merchandise; 2) profit and general expenses; 3) any assist, not already included; and 4) packing costs. *See* 19 U.S.C. 1401a(e). Where data is available, as may be the case where the grower is related to the buyer, computed value may be relied upon as the proper method of appraisement.

For example, in HQ 546057, dated Mar. 14, 1996, fresh asparagus produced in Mexico by the producer/seller was imported and entered by a related importer/buyer. Since the relationship of the parties influenced the price, the produce could not be appraised under the transaction value method. There was insufficient information to appraise the produce under the transaction value method of identical or similar merchandise. The importer/buyer

exercised its option to utilize the computed value method at the time the entry summary was filed. Thus, the asparagus was appraised under the computed value based on the cost of production, profit, and general expenses provided to U.S. Customs by the producer/seller. However, generally, the relationship between the unrelated importer and exporter is such that access to the above data is not available and so computed value is usually not available as a method of appraisement, and resort must be made to the next basis of appraisement.

Value If Other Values Cannot Be Determined ("Fallback")

Where none of the previous four value methods can be used to appraise the imported produce, then the merchandise must be appraised under the "fallback method." The "fallback" method allows for appraisement of the produce based on a value derived from one of the previous methods, "reasonably adjusted to the extent necessary to arrive at a value." 19 U.S.C. 1401a(f)(1). Certain limitations exist under this method. For example, merchandise may not be appraised based on the price in the domestic market of the country of export, minimum values, or arbitrary or fictitious values. *See* 19 U.S.C. 1401a(f)(2).

Under section 500 of the Tariff Act of 1930, as amended, which was codified in 19 U.S.C. 1500a, and constitutes CBP's general appraisement authority, the appraising officer needs to:

> [F]ix the final appraisement of merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power, any statement of cost or costs of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding[.]

In this regard, the Statement of Administrative Action (SAA), which forms part of the legislative history of the TAA, provides, in pertinent part:

> Section 500 is the general authority for Customs to appraise merchandise. It is not a separate basis of appraisement and cannot be used as such. Section 500 allows Customs to consider the best evidence available in appraising merchandise. It allows Customs to consider the contract between the buyer and seller, if available, when the information contained in the invoice is either deficient or is known to contain inaccurate figures or calculations.... Section 500 authorizes [sic] the appraising officer to weigh the nature of the evidence before him in appraising the imported merchandise. This could be the invoice, the contract between the parties, or even the recordkeeping of either of the parties to the contract.
>
> In those transactions where no accurate invoice or other documentation is available, and the importer is unable, or refuses, to provide such information, then reasonable ways and means will be used to determine the appropriate value, using whatever evidence is available, again within the constraints of section 402.

SAA, H.R. Doc. No. 153, 96 Cong., 1st Sess. Pt 2, reprinted in Department of the Treasury, *Customs Valuation under the Trade Agreements* Act of 1979 (Oct. 1981), at 67.

While CBP will not accept arbitrary prices, it will accept market prices it can verify if the parties to the sale have agreed that the published market prices will form the sale price or

be a factor in an objective formula for determining the sale price. In HQ H165361, dated Nov. 1, 2011, CBP declined to accept a value for perishable articles that was determined based on "an average of the prices of [the perishable articles] from the previous four weeks (per [article] and grade) of imported [perishable articles] sold in the United States, less a percentage for gross margin and international transportation." CBP found that averaging pricing as a methodology for appraisement did not meet the legal standard.

In the past, U.S. Customs found it was reasonable to appraise fresh produce based on Wholesale Produce Report prices. In HQ 545735, dated Jan. 31, 1995, a company imported fresh cilantro from Mexico. The Mexican exporter and the U.S. importer agreed the sale price for cilantro would be based upon the Dallas Wholesale Produce Report distributed to licensed customs brokers in the Laredo, Texas district. The original invoice showed that 401 crates were priced at $10 each but did not indicate the quantity of bunches imported per crate. The amended invoice, which was not submitted with Customs Form 7501, indicated a quantity of 30 bunches per crate. The Dallas Wholesale Produce Report valued 30 bunches of cilantro entered on July 7, 1993, at $3.90 per crate and 90 bunches per crate at $10.40 per crate. The cilantro was appraised at $10.40 per crate. The importer requested that the cilantro should be appraised at $3.90 per crate but did not demonstrate that U.S. Customs unreasonably ascertained the value of the imported produce. The appraised value of $10.40 per crate was consistent with the Dallas Wholesale Produce Report prices. Under the authority of section 500 of the TAA, the appraising officer appropriately considered all the evidence made available by the importer and used "all reasonable ways and means in his power" to appraise the fresh produce.

Since perishable commodities are typically shipped on consignment, actual sales price cannot be determined until they reach the U.S. market and are offered for sale. CBP explained in HQ W563483, dated Dec. 28, 2006, that the sales price of produce depends on multiple factors such as size, type, grade, color, quality, condition of the produce, market conditions in the United States, competition, economic patterns, place, and importation in bulk form (thereby requiring further packing and processing in the United States). Similarly, whether the produce is sold at the time of importation or placed in cold storage and sold later, often influences the ultimate price paid for that produce. For instance, in HQ W563483, fruit from the same shipment was sold at different times, from the time of arrival up to 30 days after arrival, at different prices due to market fluctuations.

Generally, in the fresh produce industry, as explained in HQ 546602, dated Jan. 29, 1997, the importer acts as the agent of the foreign grower, selling the grower's product in the United States for the best return possible based on the U.S. market conditions and the condition of the fresh produce at the time of arrival. In HQ 546602, the importer served as the grower's marketing and sales agent, and received a "service fee" calculated as a specific percentage of the sales proceeds. In exchange for acting as the grower's agent, the importer maintained an accounting of the U.S. sales. At the end of each growing season, the importer prepared a final accounting for each grower which incorporated the agreed upon costs chargeable by the importer to the grower such as duty/taxes/user fees, a seller's commission, marketing costs among other agreed upon costs, and deducted the agreed upon expenses, in accordance with GAAP. The grower passed risk of loss to the buyer relying on agreed upon Incoterms but retained title until such time as a sale was made.

This practice is recognized by the Perishable Agriculture Commodities Act of 1930 (PACA). *See* 7 U.S.C. 499a, *et seq*. and 7 CFR Part 46. As a result of PACA, foreign growers and packers frequently consign their produce to American brokers-importers who import produce without buying it. The importer then arranges for its sale to one or more U.S.-based

customers and remits the net proceeds to the foreign grower or packer. CBP may consider the importer's accounting records in appraising consigned fresh produce on the basis of the "fallback" method.

Lastly, the fallback method may be based on pricing data. For example, in HQ H303695, dated Sept. 12, 2019, the USDA Agricultural Marketing Service (AMS) issued daily and weekly price information and lists, and the imported Mexican produce was appraised on the basis of the AMS pricing data under fallback. The produce from Mexico was imported free of duty and merchandise processing fees, under the North American Free Trade Agreement (NAFTA), which has been replaced since July 1, 2020, by the United States-Canada-Mexico Agreement (USMCA). Prices reported by the AMS were set forth in a range from high to low, and accurately portrayed the prices at which the imported produce was sold in the United States. The AMS prices of produce were reported on a daily and weekly basis and were regularly reviewed by USDA for accuracy, and U.S. courts had previously used them in determining the price of fruits and vegetables. Therefore, in that instance, it was acceptable to use the AMS pricing data as the basis of appraisement for consigned produce.

Duty Allowance

Merchandise imported into the United States is appraised based on its condition at the time of importation. The SAA states that, "Where it is discovered subsequent to importation that the merchandise being appraised is defective, allowances will be made." The implementing regulations specifically addressing perishable merchandise are 19 CFR 158.11(b) and 19 CFR 158.14. Section 158.11(b) provides that an allowance in duties may be made in the liquidation of entries of perishable goods that are "completely worthless" at the time of importation, meaning the goods are "entirely without commercial value by reason of damage or deterioration." For that purpose, an application for an allowance in duties must be filed with the port director on Customs Form 4315, or its electronic equivalent, in duplicate, within 96 hours after the unlading of the merchandise and before any of the shipment has been removed from the pier or other permitted area under the entry permit. *See* 19 CFR 158.11(b)(1). A duty allowance can also be made when perishable merchandise has been condemned by health officers or other legally constituted authorities within 10 days after landing and the importer files with the port https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=7c601b527c4442fdda941ef606ab2fe6&term_occur=999&term_src=Title:19:Chapter:I:Part:158:Subpart:B:158.14director a written notice of the condemnation. *See* 19 U.S.C. 1506(b); 19 CFR 158.14.

Reconciliation

CBP strongly encourages importers of fresh produce who may be relying on any method of appraisement other than transaction value to use the Reconciliation Prototype Program in the Automated Commercial Environment (ACE). Participants in Reconciliation may flag an entry to indicate that the reported value is not yet final. For more information on Reconciliation, visit https://www.cbp.gov/trade/programs-administration/entry-summary/reconciliation.

In flagging value at time of entry and updating it later when reconciliation is filed, importers are reminded that the value declared at time of entry cannot be arbitrary, but rather must itself meet the reasonable care standard. Importers are free to choose how to determine that initial entered value, for example by reference to settlement amounts resulting from

crops sold in the prior season or year, a minimum price agreed upon between the parties, or some other formula or calculation which can be understood in terms of a dollar amount at time of importation. It is acknowledged that because the commodity is fresh produce, and reasonable care is used at the time of entry to estimate the actual return, there can be an unpredictable variance due to the quality and condition of the produce received or an unexpected spike or drop in market pricing. To validate those differences, CBP has the discretion to request supporting documents to verify the actual values.

Reasonable Care

Under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether other applicable legal requirements, if any, have been met. CBP is responsible for fixing the final value of the merchandise.

An importer of fresh produce must exercise reasonable care in reporting value to CBP. This requires that the importer understand all the facts of the relevant transaction, including whether there is, at the time of entry, a *bona fide* sale for export to support transaction value.

If the transaction value method is not applicable, the importer must exercise reasonable care in appraising the merchandise under the alternative methods of appraisement. For example, if the produce importer has access to the grower's costs of production, it should determine whether it could report computed value before moving on to fallback valuation. Sometimes, the importer is related to the grower, meaning that the elements of computed value will be available to the importer, though in most instances that is not the case.

If, at the time of entry an importer appraises the merchandise based on the fallback method, the importer must document the supporting facts and make that documentation available to CBP upon request. It is not enough to say because the goods are on consignment that the fallback method under 19 U.S.C. 1401a(f) automatically applies. Rather, the importer must document why no other appraisement method applies. As previously noted, this may be because of climate, quality, condition, packaging, product, place, quality, size, grade, color, organic versus conventional, price, promotion, market demand, product characteristics, competition, economic patterns or other factors, and so as part of any recordkeeping, importers should routinely document market conditions and other factors that influence the decision about how the value of a given shipment is determined, and keep those records so as to be able to satisfy any CBP inquiry and meet the recordkeeping requirements. *See* 19 U.S.C. 1509-1511.

Software programs may be used to settle accounts between importers and exporters/growers. Regardless of the software or accounting method used, for an importer to successfully rely on the fallback method of appraisement, the importer must be able to establish the price actually paid for the shipment and rely on U.S. GAAP in order to do so. Whether that is done by lot reports, sales accounting, account of sale or other order reconciliation documentation, that data, along with the proof of payment bank records, should be readily available to establish the price declared and paid.

The failure to produce the accounting between importer and exporter/grower by which the parties settle their accounts, whether on a lot level or based on some other time frame or quantification, will cause a claim under fallback to be denied. CBP will then appraise the

entry based upon the available data and rely on the method of appraisal it determines to be correct.

Additional Information

The Internet

The home page of CBP on the internet at https://www.cbp.gov provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information—which includes proposed regulations, news releases, publications and notices, etc.—that can be searched, read online, printed or downloaded to your personal computer. The website was established as a trade-friendly mechanism to assist the importing and exporting community. The website also links to the home pages of many other agencies whose importing or exporting regulations CBP helps to enforce. The website also contains a wealth of information of interest to a broader public than the trade community. For instance, the "Know Before You Go" publication and traveler awareness campaign at https://www.cbp.gov/travel/us-citizens/know-before-you-go are designed to help educate international travelers.

CBP Regulations

The current edition of CBP Regulations of the United States is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, via the internet, phone, fax, postal mail, or email. Internet: https://bookstore.gpo.gov. Phone: DC Metro Area: (202) 512-1800, Toll-Free: (866) 512-1800, Monday through Friday, 8 a.m. – 4:30 p.m. EST, Fax: (202) 512-2104. Mail: U.S. Government Printing Office, P.O. Box 979050, St. Louis, MO 63197-9000. Email: Contactcenter@gpo.gov. A bound edition of Title 19, Code of Federal Regulations, is also available for sale from the same address. An electronic version of the Code of Federal Regulations is available online at https://www.ecfr.gov/. All proposed and final regulations are published in the *Federal Register*, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about online access to the *Federal Register* may be obtained by calling (202) 512-1530 between 8 a.m. and 4:30 p.m. EST. The *Federal Register* is available online at https://www.govinfo.gov. These notices are also published in the weekly Customs Bulletin and Decisions (Customs Bulletin) described below.

Customs Bulletin

The Customs Bulletin is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. The Customs Bulletin is available online at https://www.cbp.gov/document/bulletins.

Importing Into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The current edition of **Importing into the United States** contains material explaining the requirements of the Customs Modernization Act. The Mod Act fundamentally altered the relationship between importers and CBP by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The current edition contains a section entitled “Informed Compliance.” A key component of informed compliance is the shared responsibility between CBP and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to the importation. An online version is available at https://www.cbp.gov/document/publications/importing-united-states.

Informed Compliance Publications

CBP has prepared a number of Informed Compliance publications in the "*What Every Member of the Trade Community Should Know About: …"* series. Check the website https://www.cbp.gov/trade/rulings/informed-compliance-publications for current publications.

> The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 CFR Part 177, or obtain advice from an expert (such as a licensed customs broker, an attorney or a customs consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from CBP’s ports of entry. Contact information for ports of entry can be found on the internet at https://www.cbp.gov/contact/ports, and for the Centers of Excellence and Expertise (CEEs) at https://www.cbp.gov/trade/centers-excellence-and-expertise-information/cee-directory.

“Your Comments are Important”

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of U.S. Customs and Border Protection, call 1-888-REG-FAIR (1-888-734-3247).

REPORT SMUGGLING 1-800-BE-ALERT

Visit our website: https://www.cbp.gov/

CBP Publication No. 3115-0323