

May 29, 2008

UPDATE ON FIRST SALE RULE

In January 2008, U.S. Customs published a notice in the Federal Register announcing its intention to prohibit the use of the "First Sale" rule for the valuation of merchandise imported into the U.S. Action by Customs, however, has been overruled by a new law.

As you may know, both houses of the U.S. Congress passed the Farm Bill of 2008 over President Bush's veto.

An important import trade-related part of the new law deals with the "First Sale" rule, whereby the price paid by the middleman to the manufacturer is taken as the sale for export to the United States. Section 15422 of the Farm Bill effectively postpones any action by U.S. Customs to prohibit use of the price paid by the middleman and require the price paid by the U.S. importer to be used as the dutiable value for at least a year and three months from now. Congress wants U.S. Customs to know that it is "the sense of Congress" that the rule should be allowed to continue in effect until at least January 1, 2011.

Companies using the price paid by the middleman (plus the statutory additions: costs of assists, selling commissions, dutiable royalties and additional payments to the seller) as the dutiable value can continue to do so unless and until Customs meets all of the requirements imposed by Congress which precede the prohibition of the use of the "First Sale" rule.

Pursuant to instructions from Congress, at the time of entry Customs will be requiring importers to state whether or not they are using the "First Sale" rule to value their merchandise for duty purposes. This requirement will be put in place in approximately three months, and will continue for at least a year thereafter.

Importers who are using the "First Sale" rule, whether under a ruling issued by Customs or otherwise, should be aware that Customs may very well audit the use of that method of valuation in connection with the report that Congress has required Customs to submit next year.

As a result of such audits, the use of the rule may be disallowed for particular audited importers, and additional duties may be assessed on the higher value paid by the importer for the goods, as Customs can be expected to look very closely at the importer's substantiation of the use of the "First Sale" rule. Although it has always been important to have the proper support for the value of imported merchandise, it may be even more important now, given the expressed intention of Customs to eliminate the "First Sale" rule in the Federal Register notice in January 2008 which precipitated the response by Congress in the Farm Bill.

If you have any questions, please call partner Chris Kane at extension 230.

Thank you.

Note: This material is not, nor is it intended to be, legal advice, which can only be provided by Simon Gluck & Kane LLP to its clients on a case by case basis.