

SPC&B Update

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EU Intends to Eliminate First Sale -- Act Now to Take Advantage of Grace Period



EU Intends to Eliminate First Sale Valuation Effective May 1, 2016

Contracts Entered Into Before January 18, 2016
May Continue Using First Sale Until December 31, 2017

This is to advise that the European Union (EU) has just adopted regulations which will change the way imported merchandise will be valued for duty purposes. Under the EU's Community Customs Code ("CCC") Article 29, the transaction value of imported goods is the price actually paid or payable for the goods when **sold for export** to the customs territory of the EU. Currently, the EU's enforcement of this provision under Implementing Regulation Article 147.1 allows for the use of several possible sales for valuation purposes including, any sale that can be demonstrated as having been "for export to the customs territory in question." This represented the codification, in the EU of the so-called first sale rule which permits importers to base their valuations on sales further up their supply chain, thus saving them significant amounts of money in customs duties.

The EU has now changed this policy, and, on December 29, 2015, published regulations implementing the new Union Commercial Code ("UCC"). These regulations will go into effect May 1, 2016, and will eliminate the first sale option in the EU. They specify that transaction value "shall be determined at the time of acceptance of the customs declaration **on the basis of the sale occurring immediately before** the goods were brought into that customs territory." This means that the final sale that occurs in the supply chain prior to the submission of the customs declaration will form the basis of transaction value, even if that sale is between the EU importer of record and a subsequent EU buyer.

Please note, however, that the implementing regulations included a "transitional provision," to give importers a grace period while they alter their supply chains in response to the new rules. Article 347 provides that importers may continue to use the old CCC first sale valuation provided that "the person on whose behalf the declaration is lodged is bound by a contract concluded prior to 18 January 2016." This transitional provision will continue to apply through the end of 2017.

While the UCC implementing regulations are directly binding on the member states, it remains unclear how customs authorities in the member states will apply the transitional provision because it is unknown what evidence may be required (e.g., the extent to which the contract must state specifics in terms of price, quantity, timing, etc.; whether a prior agreement is required from the customs authorities in question). For example, the UK's HM Revenue & Customs has stated the contract must be "in place" before January 18, 2016 and must specify a start date, but need not specify the value of each expected shipment or consignment. Furthermore, while no prior agreement with the HMRC is required, it may require evidence either prior to importation or afterward to support the importer's use of the transitional provision. The fact that the HMRC has issued such a guidance suggests that other interpretations by other member state customs authorities might result.

We strongly advise companies planning to use the transitional provision to conclude their contracts before January 18 and to make those contracts as specific as possible regarding the sale of goods for export to the EU.

The changes to the EU valuation principles discussed herein will also impact royalty and license agreements. We will send a separate mailing on the specifics in the coming days and will keep you apprised of any further developments.

For more information on shipping to the EU or other areas, please contact Gail T. Cumins at gcumins@spcblaw.com, Alli Baron at abaron@spcblaw.com, or Donna Shira at dshira@spcblaw.com, or call us at 212-425-0055.

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