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CUSTOMS PROPOSES RULE TO ELIMINATE “FIRST SALE”

In the January 24, 2008 Federal Register, U.S. Customs & Border Protection will publish a proposed rule that would, if enacted, eliminate the significant duty benefits available under the “First Sale” rule.

The current “First Sale” rule involves multi-sale import transactions that, under certain conditions, permit an importer to use the “first sale” for Customs valuation purposes (frequently the sale from the manufacturer to a middleman) instead of the sales price to the importer in the United States – usually resulting in a significant duty savings.

The current “First Sale” rule emanates from a series of court cases including E.C. McAfee Co. v. United States, 842 F. 2d 314 (Fed Cir. 1988), and Nissho Iwai American Corp. v. United States, 982 F. 2d 505 (Fed. Cir. 1992), and Synergy Sport International, Ltd. v. United States, 17 C.I.T. 18 (1993), as well as the publication of Treasury Decision 96-87 (“T.D. 96-87”). According to the proposed rule to be issued tomorrow, Customs would revoke T.D. 96-87, and modify or revoke administrative rulings that have analyzed the series of sale issue using first sale criteria (including revocation of any first sale treatment previously accorded by Customs to substantially identical transactions). In addition, the proposed rule would limit the applicability of “First Sale” treatment in the court cases referenced above to the specific entries at issue in those cases.

Customs bases this extremely significant proposed change in its position on “First Sale” in light of an April 2007 Commentary of the World Trade Organization’s Technical Committee on Customs Valuation (“Commentary 22.1”). In essence, Commentary 22.1 interprets the term “Sold for Export to the Country of Importation” in a multi-sale situation to mean that the price paid or payable for the imported goods is the price paid in the last sale prior to import – or in the case of goods exported to the United States, transaction value would normally be determined on the basis of the price paid by the buyer in the U.S. (rather than the earlier or “First Sale”).

Interested parties may submit comments on the proposed rule on or before March 24, 2008. The complete text of the proposed rule will be available tomorrow by visiting our website at www.worldtradelawyers.com and clicking on the “News” link.

If you have any questions concerning the proposed rule, or would like our help in preparing and submitting comments to Customs, please contact Robert Pisani at (202) 466-0960 or Michael Roll at (310) 826-4410 or send an email to info@worldtradelawyers.com.

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