



THE PROBLEM ON CUSTOMS VALUATION  
CONCERNING ROYALTIES ON IMPORTED GOODS

BY  
MS. TULYAMANEE TRISUKON

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL  
FULFILLMENT OF THE REQUIREMENT FOR  
THE DEGREE OF MASTER OF LAWS  
(TAXATION LAW)

GRADUATE SCHOOL OF LAW  
ASSUMPTION UNIVERSITY

DECEMBER 2008

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Author : Ms. Tulyamanee Trisukon  
Major : Master of Laws (Taxation Law)  
Advisor : Mr. Prapas Kong-ied

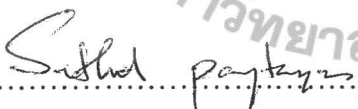
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Faculty of Law, Assumption University approves this Independent Study as the partial fulfillment of the requirement for the Degree of Master of Laws.

  
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### ABSTRACT

There are problems of collecting customs duty regarding royalties related to imported goods which provides in Article 8 and 9 of Ministerial Regulations No 132 under Customs Act. Royalties related to the imported goods as a condition of sale is still unclear due to the interpretation of Customs Regulation, though it should be a standard measures as it cause a direct effect to the taxpayer. In case of owner of royalty granted the right on trademarks to importer, the importer shall obtain the right to trade, distribution and manufacture of goods with such trademark in Thailand. For this reason, the importer can order a manufacturer to produce goods in a foreign country and import them to Thailand. Regarding royalties relate to the imported goods, once the royalties have been paid, it should clearly specify whether or not such royalty payment will be calculated as price value of imported goods for tax base under customs duty.

The cause of problem mainly comes from Customs Regulation, it defines that royalties related imported goods as a condition of sale, regardless it is the cost of seller or buyer. However, as Thailand is a contracting party of GATT, it is required to comply with the regulations provided by GATT including the determination of custom duty. The principle of GATT applies a condition of sale with cost or benefit of seller or exporter into imported country. The problem is appeared about collecting tax of Customs Department to cost of buyer and has an effect from royalties related to imported goods.

In order to solve these problems, Customs Department should review Customs Regulation regarding imported goods and royalty connection based on GATT and World Custom Organization to determine the customs valuation under a condition of sale. The purpose of Customs Valuation regarding the condition of sale is to show that



the price of imported goods can reflect the actual cost and profit of exporter or seller in foreign country. As a result, Customs Department should set and determine the customs value clearly in condition of sale and should issue rulings for Customs Regulation Code. Then, the problem of collecting customs duties concerning royalties related to imported goods will be solved.



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## Table of Content

	Pages
Abstract .....	iii
Acknowledgement .....	v
<b>Chapter 1 Introduction</b>	
A. Background and General Statement of the Problems .....	1
B. Hypothesis of the Research .....	2
C. Objectives of the Research .....	3
D. Scope of the Research .....	3
E. Scope of the Research .....	3
F. Expectations of the Research .....	4
<b>Chapter 2 The General Principle of Thai Tax Structure</b>	
A. Definition of Royalties .....	5
B. Thai Tax Structure on Customs .....	8
<b>Chapter 3 Customs valuation related to General Agreement on Tariffs and Trade and Canada</b>	
A. The General Agreement on Tariffs and Trade .....	18
B. Customs Act of Canada .....	26
<b>Chapter 4 Analysis of the Problem on Royalty Payment of Imported Goods</b>	
A. Analyzing the problem concerning royalties related to the imported goods .....	41
<b>Chapter 5 Conclusion and Recommendation</b>	
A. Conclusion .....	51
B. Recommendation .....	52
<b>Bibliographies .....</b>	<b>55</b>



# Chapter 1

## Introduction

### A. Background and General Statement of the Problems

When imported goods enter into Thailand, Importer shall normally be liable for Customs and Value Added Tax and some goods shall be liable to Excise Tax. In this regard, tax shall be based on importation of goods as follow:

$$\begin{aligned}\text{Customs} &= [\text{price(C.I.F)}^1] \times \text{Customs Rate} \\ \text{VAT} &= [\text{C.I.F} + \text{Customs} + \text{Excise}] \times \text{VAT Rate} \\ \text{Excise} &= [\text{C.I.F} + \text{Customs} + \text{Excise}] \times \text{Excise Rate}\end{aligned}$$

Among other things, the royalties related to the imported goods such as brands, trademarks, copyrights or other rights from foreign countries as a condition of sale. Moreover, the royalties shall be added to price value of imported goods for calculating of Customs duty. These royalties shall be a tax base for other taxes.

The importer paid royalties to the owner of royalty under a licensing agreement in consideration of the importer obtained the rights for importation, promotion, distribution and sale of goods under certain trademarks in Thailand. The importer hires manufacturer to produce goods which are produced bearing trademark on goods ordered and imports those goods into Thailand. Therefore, the importer shall be liable to pay Customs duty for imported goods but royalties were not added to the price value of imported goods for Customs duty.

The Competent Officer has assessed the amount of duty payable and guarantee notified to the importer by the Competent Officer who considered that those imported goods are not the customs price according to the Ministerial Regulations No 132 under the Customs Act B.C. 2469 concerning the rules, procedures and conditions of the application and specification of prices and determining the customs value. The imported goods have

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<sup>1</sup> C.I.F (Cost, Insurance and Freight) means that the seller must pay costs and freight necessary to bring the goods to the named port of destination. However, in C.I.F the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage.

not been included royalty payment which the importer paid to owner of the royalty in using trademark and trade name under the licensing agreement. In this regard, Competent Officer considered that royalty payment should be added to the price value of imported goods before calculating the customs duty.

However, the importer opposed such assessment because the determining of the customs value conflicts with the regulation according to the Ministerial Regulations No 132 which agreed to apply Article 7 of The General Agreement on Tariffs and Trade 1994 or GATT. GATT is an agreement provided by the World Trade Organization (WTO) and Article 7 of GATT provides the basis for custom value, as a contracting party, Thailand is required to follow the GATT's rule including the assessment of determining value in accordance with Article 7. From this reason, the importer appealed to the Customs Valuation Appeal Committee against the competent officials under the ground that the assessment of the competent officials was unfair.

The Customs Valuation Appeal Committee reviewed that the importer must add the royalty payment into price value of imported goods for calculating the Customs duty because the royalty payment is paid by the importer to the owner of royalty related to imported goods as a condition of sale. The committee rendered the decision based on article 9(1) of Ministerial Regulations No 132 which aims to reflect the actual price value of the imported goods by adding expenses or other incomes which are not price value of imported goods to calculate customs duty.

However, the importer disagreed with the review of The Customs Valuation Appeal Committee because the royalties which the importer paid to trademark owner is not royalties under article 9(1) of Ministerial Regulations No 132 and such decision conflicted with GATT's rule. Therefore, it is worth to discuss whether the measure of competent officer uses to determine the imported value is appropriate or not.

## **B. Hypothesis of the Research**

The importer imported goods into Thailand, the importer paid the royalties to owner of royalty pursuant to follow a licensing agreement in which the importer received the right to sell goods under certain trademarks in Thailand. Furthermore, importer hired manufacturer from foreign country to produce goods and bear the

trademarks on goods ordered and import them into Thailand. In this prospect, the royalty payment for trademarks should not be added to the price value of imported goods in the tax base for calculating the Customs duty.

### **C. Objectives of the Research**

1. To study the natures, concepts and principles of Ministerial Regulations No 132.
2. To study the natures, concepts and principles of Customs Valuation for GATT and Canada.
3. To study the natures, concepts and principles of Customs Regulation.
4. To study the problem arising from collecting royalty payment depending on royalties and license fees related to the imported goods.
5. To provide suitable solutions and recommendation for Customs Department, and to set up a guidelines for collecting Customs duty.

### **D. Research Methodology**

This research is based on documentary methodology; a study of the laws concerning Customs Acts, GATT, Canadian Acts, foreign Supreme Court decision and internet websites.

### **E. Scope of the Research**

This research shall place emphasis on the study of the natures, concepts and principles of customs value focused on collecting tax on royalties and license fees related to the imported goods under Thai laws and foreign laws. The problem of Customs Regulation which is collected by Thai tax authorities, solutions and recommendation for Thai tax authorities to collect tax in the event royalties and license fees related to the imported goods.



## **F. Expectations of the Research**

1. To acknowledge the natures, concepts and principles of customs value focused on royalties and license fees related to the imported goods.
2. To acknowledge the natures, concepts and principles of collecting Customs duty.
3. To acknowledge the natures, concepts and principles of Ministerial Regulations No 132.
4. To acknowledge the natures, concepts and principles of Customs Valuation for GATT and Canada.
5. To acknowledge the natures, concepts and principles of Customs Regulation.
6. To acknowledge and provide suitable solutions and recommendation for Thai tax authorities to collect tax in the event of royalties and license fees related to the imported goods.



## Chapter 2

### The General Principle of Thai Tax Structure

#### A. Definition of royalties

##### 1. Definition of royalties under Thai law

###### a. Copyrights<sup>2</sup>

In Copyrights Act B.E. 2537, copyrights mean exclusive right to undertake any activity that is related to works that an innovator has created. A copyright is a work that resulted from intellectuality, knowledge, and assiduousness to innovate the work. It is considered a type of intellectual property that has economic value. Therefore, an owner of a copyright should be protected under the law.

Innovative works that are considered copyright comprise of different types of works as follow:

1. Literary work, such as book, periodicals, article, publication, and computer program;
2. Choreographic work, such as cultural dance, dancing, posture or a performance that is composed in to a story, as well as pantomime;
3. Artistic work, such as painting, sculpture, graphic arts, architecture, photography, plan chart picture, applied art including photograph and diagram of the work;
4. Musical work, such as melody and lyrics or only melody including a well composed tones and chorus;
5. Audiovisual, such as video tape and laser disc;
6. Cinematography, such as movie and supporting sound of the movie (if available);
7. Sound recording, such as cassette tape and compact disc;
8. Sound and picture broadcast, such as radio broadcast, or sound and picture broadcast via a television station;

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<sup>2</sup> Copyrights, available at [http://www.ipthailand.org/ipthailand/index.php?option=com\\_content&task=section&id=21&Itemid=198](http://www.ipthailand.org/ipthailand/index.php?option=com_content&task=section&id=21&Itemid=198)., (last visited 10 August 2008).

9. Other works that are related to the literary, scientific, and art domains.

### **b.Trademark<sup>3</sup>**

Trademark means a mark, a symbol, or label used for a product or service as the following. Protection for a trademark is provided under the Trademark Act (No.2) B.E. 2543 (2000). The trademark law provides protection for 4 categories of trademarks as follows:

1.Trademark is a mark that is used in conjunction with goods to present that the goods is different from other goods that use other trademarks, such as BREEZE (detergent), Ma-Ma (instant noodle), and Red Bull.

2. Service Mark is a mark that is used in conjunction with service to present that the service is different from other services provided under other marks, such as service marks of an airline, a bank, and a hotel.

3. Certification Mark is a mark that the owner of a product or service uses in conjunction with the product or the service to ensure quality of the product or the service, such as Shell-Chuan-Chim (gourmet mark), Mae Choy Nang Ram (gourmet mark), and Halal Food (Muslim food).

4. Collective Mark is a trade mark or service mark used by a company or other associates ventures or members of an association or other organizations of public and private entities, such as the Siam Cement Group Co. Ltd

### **c. Patent**

Patent<sup>4</sup> is a type of intellectual property that is most familiar to everyone. It is possible to say that patent is related to everyone's daily life in that products that people use every day are the results of human inventions, such as the creation of detergent, which is now highly condensed and very effective in cleaning. Therefore, a patent has contributed to more conveniences and a better and safer living standard.

For an invention in respect of which the following conditions are satisfied

(1) the invention is new.

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<sup>3</sup> Trademark, available at [http://www.ipthailand.org.ipthailand/index.php?option=com\\_content&task=section&id=20&Itemid=197](http://www.ipthailand.org.ipthailand/index.php?option=com_content&task=section&id=20&Itemid=197)., (last visited 10 August 2008).

<sup>4</sup> Patent, available at [http://www.pthailand.org.pthailand/index.php?option=com\\_content&task=section&id=18&Itemid=195](http://www.pthailand.org.pthailand/index.php?option=com_content&task=section&id=18&Itemid=195)., (last visited 10 August 2008).



- (2) it involves an inventive step and.
- (3) it is capable of industrial application.

#### **d. Geographical Indication<sup>5</sup>**

Geographical Indication is a name or symbol or other indicators which represents the origin of a good and which conveys to the consumer the special quality or features of that good vis-à-vis goods that are produced elsewhere. For example, the name “Petchabun Sweet Tamarind”

#### **e. A layout-design<sup>6</sup>**

A layout-design is a created layout or a picture displayed by all means and forms in order to exhibit an arrangement that create an integrated circuit. From the definition, it is evident that an electrical circuit that was designed or called the layout design and the mask work, which is the template to build an integrated circuit, are also covered under the definition to received protection under the law.

#### **f. Trade secret<sup>7</sup>**

Trade secret is trade information that is not generally well-known or is not accessible by groups of people who normally are related to the information. The information can be used for trade benefits since the owner or the protector of the information has maintained the information secret by appropriate means. Normally trade secret is under protection as long as the information remains secret. Therefore, the right of the owner of the information is permanent as long as the information is not revealed to the public. Trade secret will receive protection without the requirement for registration. Accordingly, the owner of trade secret can choose to notify the trade secret by using the secret as collateral to guarantee a loan from a bank.

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<sup>5</sup> Geographical Indication, available at [http://www.ipthailand.org/ipthailand/index.php?option=com\\_content&task=section&id=24&Itemid=201](http://www.ipthailand.org/ipthailand/index.php?option=com_content&task=section&id=24&Itemid=201)., (last visited 10 August 2008).

<sup>6</sup> A layout-design, available at [http://www.ipthailand.org/ipthailand/index.php?option=com\\_content&task=section&id=22&Itemid=230](http://www.ipthailand.org/ipthailand/index.php?option=com_content&task=section&id=22&Itemid=230)., (last visited 10 August 2008).

<sup>7</sup> Trade secret, available at [http://www.ipthailand.org/ipthailand/index.php?option=com\\_content&task=section&id=23&Itemid=200](http://www.ipthailand.org/ipthailand/index.php?option=com_content&task=section&id=23&Itemid=200)., (last visited 12 August 2008).

## **2. Definition of royalty under Double Tax Agreement**

(1) Any copyright of literary, artistic or scientific work including cinematograph films and films, tapes or discs for radio or television broadcasting.

(2) Any patent, trade mark, design or model, computer program, plan, secret formula or process.

(3) Using equipment for information concerning industrial, commercial or scientific experience.

(4) Information concerning industrial, commercial or scientific experience.

## **B. Thai Tax Structure on Customs**

### **1. Customs Taxpayer**

“importer” includes and applies to the owner or other persons having a period of possession or interest in any goods as from the time of the importation until the completion of delivery from the time of importation thereof until the time that such goods are delivered out of the charge of the officers of Customs and export shall have the same application.

### **2. Customs Liability**

The liability to pay tax on imported goods is incurred at the time when the importation is completed.

If it shall be necessary for any purpose relating to the Customs to determine the precise time at which the importation of any goods shall be deemed to have brought to effect, such time shall be deemed to be the time at which the ship importing such goods actually came within the limits of the port of discharge or consignment.

### **Customs Liability for Duty-Exempted or Duty-Reduced Goods Customs under Tariff Decree**

Goods exempted from or granted reduction in duty for personal use by person so entitled or for any specifically provided purpose.

Transferred to person not entitled thereto or used in other purposes than the one provided or the privilege for exemption or reduction is ceased.

Such goods are subject to duty assessed on the nature and values and at the rates of duty at the time when the transfer, the use in other purposes or the cease of privilege is incurred.

The payment of duty or additional duty shall be the liability of the transferor of the goods, the person entitled to duty exemption or reduction or the person whose duty exemption or reduction privilege ceases.

### **3. Calculation & Payment of Duty**

1. The calculation of duty shall be in accordance with the nature and value of goods and corresponding customs tariff at the time when the liability to pay duty is incurred.

2. In the case of goods stored in a bonded warehouse, the calculation of duty shall be in accordance with the customs tariff in force at the time when such goods is withdrawn from the bonded warehouse, either in the same nature as imported or in the nature of having been produced, mixed or assembled as other goods

3. In the case of goods released from a duty free zone, the calculation of duty shall be in accordance with the customs tariff in force at the time when such goods is released from the duty free zone.

4. For nutritional articles in the container with liquid for storing, the weight of such liquid shall be included for the weight applied for calculating duty.

5. In the case of article for sales together with the parcel or container having mark or sign show the quantity, the Director- General shall hold such showing quantity to be the base of duty calculation

6. All weight, testing, estimation, etc., for the purpose of tax assessment or for any other official purpose shall be performed by the competent official of the Customs Department.

7. If there shall be a disagreement as to the customs value of any goods, the Director-General shall have the right to accept payment in kind or to purchase such goods, or any part or lot of one sort or the whole part or the whole lot, at their declared value enclosed by to and half percent; or if payment in kind or such purchase be not made the Director General and the owner of the goods shall each have the power to call in an equal number of arbitrators not exceeding two on each side to assist them in setting the dispute; or in the case of a person subject to the jurisdiction



of a foreign consular court the proper Consul and the Director-General shall appoint the arbitrators.

If no decision shall be made by such means, the aforesaid arbitrators shall appoint and umpire whose decision shall be final.

8. For article subject to advalorem duty, the Director- General shall occasionally declare the value of such article to specify as the price for calculating customs duty.

#### **4. Tax Base**

Value of imported goods use tax base for imported goods to determine the prices of imported goods as a base for calculating Customs duties. The definition of determining the customs or price according to section 2 paragraph 12 of Customs Act is

“Customs valuation” or “price” of any goods:

(2) In case of importation, meaning the price of goods for the purpose of collecting duty in accordance with one of the following prices:

- (a) The sale and purchase prices of imported goods;
- (b) The sale and purchase prices of identical goods;
- (c) The sale and purchase prices of similar goods;
- (d) The deducted price;
- (e) The calculated price;
- (f) The reversionary price”

But all these rules, procedures and conditions of the application and specification of prices in accordance with (a), (b), (c), (d), (e) and (f) shall be in accordance with the provisions prescribed in a Ministerial Regulation.

For rules, procedures and conditions using price and determining the customs, the use of section 2 paragraph 12 of Customs Act issue Ministerial Regulations No 132 (B.E.2543) issued under authority of the Customs Act B.E.2469 has been served.

#### **The Transaction Value of the Imported Goods**

Article 8. The transaction value of the imported goods shall be the price actually paid or payable for the imported goods when sold for export to the Kingdom.

Article 9. There shall be added to the transaction value of imported goods under Article 8 as follows:

(1) Royalties and license fees related to the imported goods, either directly or indirectly, as a condition of sale.

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(2) 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,

(3) The cost of insurance, the cost of transport of the imported goods to the port or place of importation, loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation.

Article 10. There shall be added to the price of the imported goods under Article 8 the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

- (1) Commissions and brokerage, except buying commissions,
- (2) The cost of containers which are treated as being one for customs purposes with the goods in question,
- (3) The cost of packing whether for labor or materials.

Article 11. There shall be added to the price of the imported goods under Article 8, the value apportioned as appropriate in accordance with the rules, procedures and conditions laid down by the Director-General, of the following 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 been included in the price actually paid or payable:

- (1) Materials, components, parts and similar items incorporated in the imported goods,
- (2) Tools, dies, moulds and similar items used in the production of the imported goods,
- (3) Materials consumed in the production of the imported goods,
- (4) Engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in Kingdom and necessary for the production of the imported goods.

Article 12. If it is clear that there are costs as follows added in the transaction value of the imported goods, such costs may be deducted from the transaction value of the imported goods:

- (1) Charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods,
- (2) The cost of transport after the completion of the importation,

(3) Duties and taxes associated with the importation.

Article 13. The cost, proceeds or value under Article 9 and Article 10 or the value of the materials, components or services under Article 11 to be included in the transaction value of the imported goods and the costs under Article 12 to be deducted from the market value of the imported goods shall be based on objective and quantifiable data.

Article 14. The customs value of the imported goods shall be the transaction value provided that

(1) There are no restrictions as to the description or use of the goods by the buyer other than restrictions which

(a) Are imposed or required by the public authorities;  
(b) Limit the geographical area in which the imported goods may be resold;

(c) Do not substantially affect the value of the imported goods;

(2) The sale or price is not subject to some condition or consideration for which a value cannot be determined;

(3) 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 Article 9 (2);

(4) The buyer and the seller are not related in accordance with Article 4, or where the buyer and the seller are related, that the transaction value of the imported goods is acceptable for customs purposes under the provisions of Article 15 or Article 16.

Article 15. If the Competent Officer has examined the circumstances surrounding the sale of the imported goods, the transaction value shall be accepted without demanding for more information from the importer provided that the relationship did not influence the price.

If the Competent Officer has grounds for considering that the relationship influenced the price, he shall communicate his ground to the importer and the importer shall be given reasonable opportunity to appeal. The importer shall clarify or provide in evidence to show to the Competent Officer to demonstrate such doubt.



Article 16. In a sale between related persons under Article 4, the transaction value shall be accepted by the Competent Officer whenever the importer demonstrates that such value closely approximates to one of the following:

- (1) The transaction value in sales to unrelated buyers of identical or similar goods for export to the Kingdom,
- (2) The deductive value of identical or similar goods as specified in Chapter 5,
- (3) The computed value of identical or similar goods as specified in Chapter 6.

The value under (1), (2), and (3) shall be the value at or the approximate time of the transaction value of the imported goods.

In applying the tests under paragraph one, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 9, Article 10 and Article 11 and costs incurred by the seller in sales in which the seller and the buyer are not related.

#### **The Transaction Value of Identical Goods**

Article 17. If the customs value of the imported goods cannot be determined under the transaction value of the imported goods, the customs value shall be the transaction value of identical goods.

Article 18. The transaction value of identical goods to be used in determining the customs value shall be the same in all respects, including physical characteristics, quality and reputation and produced in the same country of the imported goods. The cost of insurance, the cost of transportation of the imported goods to the port or place of importation, loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation shall be taken into consideration.

Article 19. The transaction value of identical goods under Article 18 shall be as follows:

- (1) The transaction value of identical goods sold for export to the Kingdom and exported at or the approximate time as the goods being valued,
- (2) The transaction value of imported goods that has already been accepted as the customs value,
- (3) The transaction value of identical goods at the same commercial level and in substantially the same quantity,

(4) Not the transaction value which includes the value of engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Kingdom and necessary for the production of the imported goods in the Kingdom.

Where no such sale under (3) is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, and has already been accepted as the customs value, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used provided that such adjustments can be made on the basis of demonstrated evidence by the importer that clearly establishes the reasonableness and accuracy of the adjustments.

Article 20. If more than one transaction value of identical goods is found, the lowest such value shall be used. Such value shall be from the same producer and the time of exportation, the commercial level, the quantities, the conditions of payment and delivery, and associated costs shall be close to those of the imported goods in accordance with the rules laid down by the Director-General.

#### **The Transaction Value of Similar Goods**

Article 21. If the customs value of imported goods cannot be determined by the transaction value of identical goods, the customs value shall be the transaction value of similar goods.

Article 22. The transaction value of similar goods, although not alike in all respects, shall have like characteristics, like component materials and produced in the same country, which enable them to perform the same functions and to be commercially interchangeable. The reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar.

Article 23. The rules, procedures and conditions of the transaction value of identical goods under Article 18, Article 19 and Article 20 shall be applied in determining the transaction value of similar goods, *mutatis mutandis*.

#### **The Deductive Value**

Article 24. If the customs value of the imported goods cannot be determined by using the transaction value of similar goods, the customs value shall be the deductive value, except when, at the request of the importer and subject to the agreement of the Competent Officer, the computed value shall be used.



Article 25. The deductive value to be used in the determination of the customs value of the imported goods shall be the unit price at which the imported goods or identical or similar imported goods are so sold in the Kingdom subject to deductions for the following:

(1) Either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in the Kingdom of imported goods of the same class or kind,

(2) The usual costs of transport and insurance and associated costs incurred within the Kingdom,

(3) The customs duties and other national taxes payable in the Kingdom by reason of the importation or sale of such goods.

If there is no unit price of the imported goods under paragraph one, the unit price at which the imported of identical goods or similar goods in the Kingdom subject to the deductions of (1), (2) and (3) shall be used as the case may be, respectively.

The unit price of the imported goods under paragraph one or the identical or similar goods under paragraph two shall be based on the unit price at which the imported goods are sold in the greatest aggregate quantity at or about the same time of the importation. If there is no such price at such time, the price at which the imported identical or similar goods, at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation, shall be used.

Article 26. In applying the deductive value under Article 25, the buyer and the seller shall not be related as specified in Article 4, and shall not be the supplier of materials, equipment or services as specified in Article 11 for the seller for exportation in the Kingdom.

Article 27. If there is no sale of the imported goods, or identical goods or similar goods under Article 25, at the request of the importer or as the Competent Officer deems proper, the unit price of the imported goods which are additionally processed shall be used. The additional process cost and the cost and charges under Article 25 paragraph one shall be deducted from the transaction value of such imported goods.



The unit price under paragraph one shall be the price sold at the highest quantity and the buyer and the seller are not related.

### **The Computed Value**

Article 28. If the customs value of the imported goods cannot be determined by using the deductive value or at the request of the importer that the computed value be used before the deductive value and subject to the agreement of the Competent Officer, the computed value shall be used.

Article 29. The computed value shall consist of the sum of:

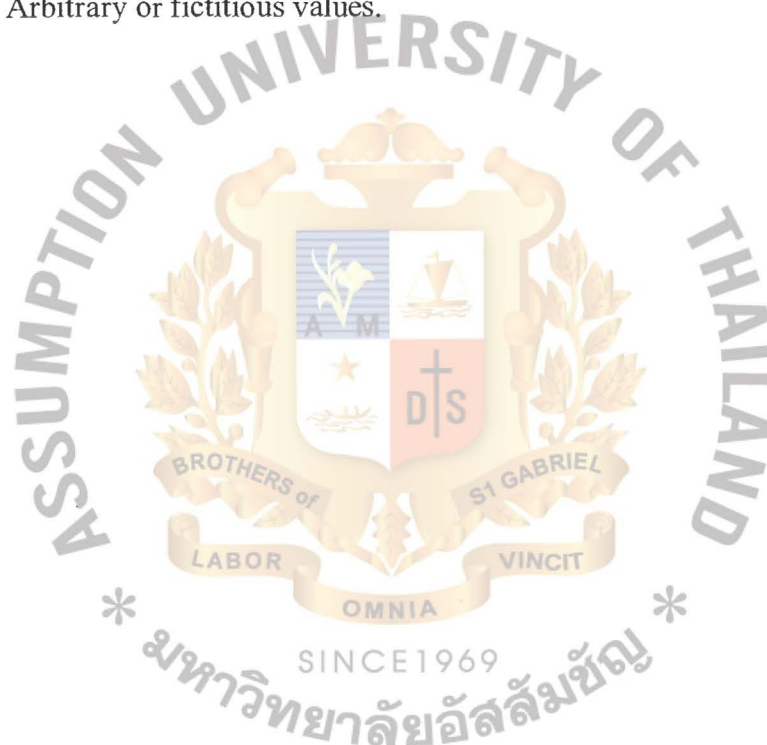
- (1) The cost or value of materials and fabrication or other processing employed in producing the imported goods,
- (2) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the Kingdom,
- (3) The cost of containers which are treated as being with the imported goods,
- (4) The cost of packing whether for labor or materials of the imported goods,
- (5) The cost of materials and components specified in Article 11 (1), (2), and (3)
- (6) the cost of insurance, cost of transport of the imported goods to the port or place of importation, loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation,
- (7) Engineering, development, artwork, design work, and plans and sketches undertaken in the Kingdom and necessary for the production of the imported goods and charged from the producers (if any).

### **The Fall-back value**

Article 30. If the customs value of the imported goods cannot be determined by using the value under the transaction value of the imported goods, transaction value of identical goods, the transaction value of similar goods, be the deductive value to the computed value. The customs value shall be the fall-back value.

Article 31. In determining the fall-back value, the rules, procedures and conditions of the use and determining the transaction value under Chapter II to Chapter VI shall be used sequentially but with a reasonable flexibility in the applications of such methods in accordance with the rules, procedures and conditions laid down by the Director-General. The fall-back value under paragraph one shall not be determined on the basis of:

- (1) The selling price of goods produced in the Kingdom,
- (2) A system which provides for the acceptance for customs purposes of the higher of two alternative values,
- (3) The price of goods on the domestic market of the country of exportation,
- (4) The cost of production other than computed values which has been determined for identical goods or similar goods in accordance with Article 29,
- (5) The price of the goods for export to a country other than the Kingdom,
- (6) Minimum customs value, or
- (7) Arbitrary or fictitious values.



## **Chapter 3**

### **Customs valuation related to General Agreement on Tariffs and Trade and Canada**

#### **A. The General Agreement on Tariffs and Trade 1994**

The WTO Valuation Agreement (the Agreement), formally known as the Agreement on Implementation of Article 7 of the General Agreement on Tariffs and Trade 1994 (GATT), replaced the GATT Valuation Code as a result of the Uruguay Round multilateral trade negotiations which created the WTO in 1994. The GATT Valuation Code was originally created in 1979 during the Tokyo Round of multilateral trade negotiations with a view to ensuring that the effect of tariff concessions would not be derogated by non-tariff barriers, one of them being arbitrary Customs valuation regimes which were prevalent at that time. The Agreement establishes a Customs valuation system that primarily bases the Customs value on the transaction value of the imported goods, which is the price actually paid or payable for the goods when sold for export to the country of importation, plus certain adjustments. Thailand is members already and applying the Agreement.<sup>8</sup>

The primary basis for customs value under this Agreement is "transaction value" as defined in Article 1.

#### **Transaction value**

Article 1 The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) That there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

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<sup>8</sup> The WTO Valuation Agreement, available at <http://www.thitruongnuocngoai.vn/images/Docs/Customs%20Valuation.pdf>, (last visited 12 August 2008).



(1) Are imposed or required by law or by the public authorities in the country of importation

(2) Limit the geographical area in which the goods may be resold; or

(3) Do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the 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; and

(d) 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.

(a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(1) The transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;

(2) The customs value of identical or similar goods as determined under the provisions of Article 5;

(3) The customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

Article 1 is to be read together with Article 8 which provides for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods.

Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money

Article 8, 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:

(a) The following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

- (1) Commissions and brokerage, except buying commissions;
- (2) The cost of containers which are treated as being one for customs purposes with the goods in question;

(3) The cost of packing whether for labor or materials;

(b) The value, apportioned as appropriate, of the following 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, to the extent that such value has not been included in the price actually paid or payable:

(1) Materials, components, parts and similar items incorporated in the imported goods;

(2) Tools, dies, moulds and similar items used in the production of the imported goods;

(3) Materials consumed in the production of the imported goods;

(4) 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;

(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, to the extent that such royalties and fees are not included in the price actually paid or payable;

(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.

In framing its legislation, each Member shall provide for the inclusion in or the 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.

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

No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur,

#### **Transaction value of Identical Goods.**

Article 2 (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods<sup>9</sup> sold for export to the same country of importation and exported at or about the same time as the goods being valued.

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<sup>9</sup> "Identical goods" means goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance



(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

#### **Value of similar Goods**

Article 3 (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods<sup>10</sup> sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being

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would not preclude goods otherwise conforming to the definition from being regarded as identical;

<sup>10</sup> "Similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar

valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

For example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.

Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests.

#### **Unit Price Subject To Specified Deductions**

Article 5 (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of



the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

(1) Either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;

(2) The usual costs of transport and insurance and associated costs incurred within the country of importation;

(3) Where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and

(4) The customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.



### **Computed Value**

Article 6 The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

(a) The cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) An amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;

(c) The cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.

No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.

### **Fall back Method.**

Article 7 If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

No customs value shall be determined under the provisions of this Article on the basis of:

(a) The selling price in the country of importation of goods produced in such country;

(b) A system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) The price of goods on the domestic market of the country of exportation;

(d) The cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) The price of the goods for export to a country other than the country of importation;

(f) Minimum customs values; or

(g) Arbitrary or fictitious values.

If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

## **B. Customs Act of Canada<sup>11</sup>**

### **Valuation for Duty**

Section 44. If duties, other than duties or taxes levied under the Excise Act, 2001 or the Excise Tax Act, are imposed on goods at a percentage rate, such duties shall be calculated by applying the rate to a value determined in accordance with sections 45 to 55.

### **Interpretation**

Section 45. (1) Definitions in this section and sections 46 to 55

“computed value” means, in respect of goods, the value of the goods determined in accordance with section 52;

“country of export” means, in respect of goods, the country from which the goods are shipped directly to Canada;

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<sup>11</sup> Customs Act of Canada, available at <http://laws.justice.gc.ca/en/showdoc/cs/C-52.6/bo ga:l I::boga:l II/20081124?command=home&caller= SI&fragment=Calculation %20duty&search type=all&day=24&month=11&year=2008&search domain=cs& showall =L&statuteyear=all&lengthannual=50&length=50&page=3.>, (last visited 23 November 2008).

“deductive value” means, in respect of goods, the value of the goods determined in accordance with subsection 51(2);

“goods of the same class or kind”, in relation to goods being appraised, means imported goods that

(a) are within a group or range of imported goods produced by a particular industry or industry sector that includes identical goods and similar goods in relation to the goods being appraised, and

(b) for the purposes of

(i) section 51, were produced in any country and exported from any country, and

(ii) section 52, were produced in and exported from the same country as the country in and from which the goods being appraised were produced and exported;

“identical goods”, in relation to goods being appraised, means imported goods that

(a) are the same in all respects, including physical characteristics, quality and reputation, as the goods being appraised, except for minor differences in appearance that do not affect the value of the goods,

(b) were produced in the same country as the country in which the goods being appraised were produced, and

(c) were produced by or on behalf of the person by or on behalf of whom the goods being appraised were produced,

but does not include imported goods where engineering, development work, art work, design work, plans or sketches undertaken in Canada were supplied, directly or indirectly, by the purchaser of those imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of those imported goods;

“price paid or payable”, in respect of the sale of goods for export to Canada, means the aggregate of all payments made or to be made, directly or indirectly, in respect of the goods by the purchaser to or for the benefit of the vendor;

“produce” includes grow, manufacture and mine;

“purchaser in Canada” has the meaning assigned by the regulations;



“similar goods”, in relation to goods being appraised, means imported goods that

(a) closely resemble the goods being appraised in respect of their component materials and characteristics,

(b) are capable of performing the same functions as, and of being commercially interchangeable with, the goods being appraised,

(c) were produced in the same country as the country in which the goods being appraised were produced, and

(d) were produced by or on behalf of the person by or on behalf of whom the goods being appraised were produced,

but does not include imported goods where engineering, development work, art work, design work, plans or sketches undertaken in Canada were supplied, directly or indirectly, by the purchaser of those imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of those imported goods;

“sufficient information”, in respect of the determination of any amount, difference or adjustment, means objective and quantifiable information that establishes the accuracy of the amount, difference or adjustment;

“transaction value”, in respect of goods, means the value of the goods determined in accordance with subsection 48(4).

**Goods deemed to be identical goods or similar goods**

(2) For the purposes of this section and sections 46 to 55, where there are no identical goods or similar goods, as the case may be, in relation to goods being appraised but there are goods that would be identical goods or similar goods, as the case may be, if they were produced by or on behalf of the person by or on behalf of whom the goods being appraised were produced, those goods shall be deemed to be identical goods or similar goods, as the case may be.

(3) For the purposes of sections 46 to 55, persons are related to each other if

(a) they are individuals connected by blood relationship, marriage, common-law partnership or adoption within the meaning of subsection 251(6) of the Income Tax Act;

(b) one is an officer or director of the other;

(c) each such person is an officer or director of the same two corporations, associations, partnerships or other organizations;

(d) they are partners;

(e) one is the employer of the other;

(f) they directly or indirectly control or are controlled by the same person;

(g) one directly or indirectly controls or is controlled by the other;

(h) any other person directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of each such person; or

(i) one directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of the other.

#### **Determination of value for duty**

Section 46. The value for duty of imported goods shall be determined in accordance with sections 47 to 55.

#### **Order of Consideration of Methods of Valuation**

##### **Primary basis of appraisal**

Section 47. (1) The value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.

##### **Subsidiary bases of appraisal**

(2) Where the value for duty of goods is not appraised in accordance with subsection (1), it shall be appraised on the basis of the first of the following values, considered in the order set out herein, that can be determined in respect of the goods and that can, under sections 49 to 52, be the basis on which the value for duty of the goods is appraised:

(a) the transaction value of identical goods that meets the requirements set out in section 49;

(b) the transaction value of similar goods that meets the requirements set out in section 50;

(c) the deductive value of the goods; and

(d) the computed value of the goods.

##### **Request of importer**

(3) Notwithstanding subsection (2), on the written request of the importer of any goods being appraised made prior to the commencement of the appraisal of those

goods, the order of consideration of the values referred to in paragraphs (2)(c) and (d) shall be reversed.

Residual basis of appraisal (4) Where the value for duty of goods is not appraised on the basis of any of the values referred to in paragraphs (2)(a) to (d), the value for duty of those goods shall be appraised under section 53.

### **Transaction Value of the Goods**

Transaction value as primary basis of appraisal

Section 48. (1) Subject to subsections (6) and (7), the value for duty of goods is the transaction value of the goods if the goods are sold for export to Canada to a purchaser in Canada and the price paid or payable for the goods can be determined and if

(a) there are no restrictions respecting the disposition or use of the goods by the purchaser thereof, other than restrictions that

- (i) are imposed by law,
- (ii) limit the geographical area in which the goods may be resold, or
- (iii) do not substantially affect the value of the goods;

(b) the sale of the goods by the vendor to the purchaser or the price paid or payable for the goods is not subject to some condition or consideration, with respect to the goods, in respect of which a value cannot be determined;

(c) where any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof is to accrue, directly or indirectly, to the vendor, the price paid or payable for the goods includes the value of that part of the proceeds or such price is adjusted in accordance with subparagraph (5)(a)(v); and

(d) the purchaser and the vendor of the goods are not related to each other at the time the goods are sold for export or, where the purchaser and the vendor are related to each other at that time,

(i) their relationship did not influence the price paid or payable for the goods, or

(ii) the importer of the goods demonstrates that the transaction value of the goods meets the requirement set out in subsection (3).



### **Procedure in application of paragraph (1)(d)(2)**

In the application of paragraph (1)(d), where the purchaser and the vendor of goods being appraised are related to each other at the time the goods are sold for export and the officer who is appraising the value for duty of the goods has grounds to believe that the requirement set out in subparagraph (1)(d)(i) is not met, the officer shall notify the importer of the goods of such grounds and, on the written request of the importer, the notification shall be in writing.

### **Requirement for accepting transaction value where purchaser and vendor related**

(3) For the purposes of subparagraph (1)(d)(ii), the transaction value of goods being appraised shall, taking into consideration any relevant factors including, without limiting the generality of the foregoing, such factors and differences as may be prescribed, closely approximate one of the following values that is in respect of identical goods or similar goods exported at the same or substantially the same time as the goods being appraised and is the value for duty of the goods to which it relates:

- (a) the transaction value of identical goods or similar goods in a sale of those goods for export to Canada between a vendor and purchaser who are not related to each other at the time of the sale;
- (b) the deductive value of identical goods or similar goods; or
- (c) the computed value of identical goods or similar goods.

### **Determination of transaction value**

(4) The transaction value of goods shall be determined by ascertaining the price paid or payable for the goods when the goods are sold for export to Canada and adjusting the price paid or payable in accordance with subsection (5).

### **Adjustment of price paid or payable**

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to

(i) commissions and brokerage in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale,

(ii) the packing costs and charges incurred by the purchaser in respect of the goods, including the cost of cartons, cases and other containers and coverings that are treated for customs purposes as being part of the imported goods and all expenses of packing incident to placing the goods in the condition in which they are shipped to Canada,

(iii) the value of any of the following goods and services, determined in the manner prescribed, that are supplied, directly or indirectly, by the purchaser of the goods free of charge or at a reduced cost for use in connection with the production and sale for export of the imported goods, apportioned to the imported goods in a reasonable manner and in accordance with generally accepted accounting principles:

(A) materials, components, parts and other goods incorporated in the imported goods,

(B) tools, dies, moulds and other goods utilized in the production of the imported goods,

(C) any materials consumed in the production of the imported goods, and

(D) engineering, development work, art work, design work, plans and sketches undertaken elsewhere than in Canada and necessary for the production of the imported goods,

(iv) royalties and licence fees, including payments for patents, trademarks and copyrights, in respect of the goods that the purchaser of the goods must pay, directly or indirectly, as a condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada,

(v) the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser thereof that accrues or is to accrue, directly or indirectly, to the vendor, and

(vi) the cost of transportation of, the loading, unloading and handling charges and other charges and expenses associated with the transportation of, and the cost of insurance relating to the transportation of, the goods to the place within the country of export from which the goods are shipped directly to Canada;

(b) by deducting therefrom amounts, to the extent that each such amount is included in the price paid or payable for the goods, equal to



(i) the cost of transportation of, the loading, unloading and handling charges and other charges and expenses associated with the transportation of, and the cost of insurance relating to the transportation of, the goods from the place within the country of export from which the goods are shipped directly to Canada, and

(ii) any of the following costs, charges or expenses if the cost, charge or expense is identified separately from the price paid or payable for the goods:

(A) any reasonable cost, charge or expense that is incurred for the construction, erection, assembly or maintenance of, or technical assistance provided in respect of, the goods after the goods are imported, and

(B) any duties and taxes paid or payable by reason of the importation of the goods or sale of the goods in Canada, including, without limiting the generality of the foregoing, any duties or taxes levied on the goods under the Customs Tariff, the Excise Act, 2001, the Excise Tax Act, the Special Import Measures Act or any other law relating to customs; and

(c) by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that is effected after the goods are imported.

#### **Effect of absence of sufficient information**

(6) Where there is not sufficient information to determine any of the amounts required to be added to the price paid or payable in respect of any goods being appraised, the value for duty of the goods shall not be appraised under this section.

#### **Where information inaccurate**

(7) Where an officer who is appraising the value for duty of goods believes on reasonable grounds that the information submitted in support of the transaction value of the goods as determined under subsection (4) is inaccurate, the officer shall determine, in accordance with the prescribed procedure, that the value for duty of the goods shall not be appraised under this section.

#### **Transaction Value of Identical Goods**

Transaction value of identical goods as value for duty

Section 49. (1) Subject to subsections (2) to (5), where the value for duty of goods is not appraised under section 48, the value for duty of the goods is, if it can be determined, the transaction value of identical goods, in a sale of those goods for export to Canada, if that transaction value is the value for duty of the identical goods and the identical goods were



exported at the same or substantially the same time as the goods being appraised and were sold under the following conditions:

(a) to a purchaser at the same or substantially the same trade level as the purchaser of the goods being appraised; and

(b) in the same or substantially the same quantities as the goods being appraised.

**Where identical goods sold under different conditions**

(2) Where the value for duty of goods being appraised cannot be determined under subsection (1) because identical goods were not sold under the conditions described in paragraphs (1)(a) and (b), there shall be substituted therefor, in the application of subsection (1), identical goods sold under any of the following conditions:

(a) to a purchaser at the same or substantially the same trade level as the purchaser of the goods being appraised but in quantities different from the quantities in which those goods were sold;

(b) to a purchaser at a trade level different from that of the purchaser of the goods being appraised but in the same or substantially the same quantities as the quantities in which those goods were sold; or

(c) to a purchaser at a trade level different from that of the purchaser of the goods being appraised and in quantities different from the quantities in which those goods were sold.

**Adjustment of transaction value of identical goods**

(3) For the purposes of determining the value for duty of goods being appraised under subsection (1), the transaction value of identical goods shall be adjusted by adding thereto or deducting therefrom, as the case may be, amounts to account for

(a) commercially significant differences between the costs, charges and expenses referred to in subparagraph 48(5)(a)(vi) in respect of the identical goods and those costs, charges and expenses in respect of the goods being appraised that are attributable to differences in distances and modes of transport; and

(b) where the transaction value is in respect of identical goods sold under the conditions described in any of paragraphs (2)(a) to (c), differences in the trade levels of the purchasers of the identical goods and the goods being appraised or the quantities in which the identical goods and the goods being appraised were sold or both, as the case may be.

### **Effect of absence of sufficient information**

(4) Where there is not sufficient information to determine any amount referred to in subsection (3) or the adjustment therefor in relation to the transaction value of identical goods, the value for duty of the goods being appraised shall not be appraised on the basis of that transaction value under this section.

### **Selection of lowest transaction value of identical goods**

(5) Where, in relation to goods being appraised, there are two or more transaction values of identical goods that meet all the requirements set out in subsections (1) and (3) or, where there is no such transaction value but there are two or more transaction values of identical goods sold under the conditions described in any of paragraphs (2)(a) to (c) that meet all the requirements set out in this section that are applicable by virtue of subsection (2), the value for duty of the goods being appraised shall be determined on the basis of the lowest such transaction value.

### **Transaction Value of Similar Goods**

Transaction value of similar goods as value for duty

Section 50. (1) Subject to subsections (2) and 49(2) to (5), where the value for duty of goods is not appraised under section 48 or 49, the value for duty of the goods is, if it can be determined, the transaction value of similar goods, in a sale of those goods for export to Canada, if that transaction value is the value for duty of the similar goods and the similar goods were exported at the same or substantially the same time as the goods being appraised and were sold under the following conditions:

- (a) to a purchaser at the same or substantially the same trade level as the purchaser of the goods being appraised; and
- (b) in the same or substantially the same quantities as the goods being appraised.

### **Application of section 49**

(2) Subsections 49(2) to (5) apply to this section in respect of similar goods and wherever in those subsections the expression “identical goods” is referred to, there shall be substituted therefor the expression “similar goods”.

### **Deductive Value**

Deductive value as value for duty



Section 51. (1) Subject to subsections (5) and 47(3), where the value for duty of goods is not appraised under sections 48 to 50, the value for duty of the goods is the deductive value of the goods if it can be determined.

**Determination of deductive value**

(2) The deductive value of goods being appraised is

(a) where the goods being appraised, identical goods or similar goods are sold in Canada in the condition in which they were imported at the same or substantially the same time as the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold;

(b) where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (a) but are sold in Canada in the condition in which they were imported before the expiration of ninety days after the time of importation of the goods being appraised, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised, identical goods or similar goods are so sold at the earliest date after the time of importation of the goods being appraised; or

(c) where the goods being appraised, identical goods or similar goods are not sold in Canada in the circumstances described in paragraph (a) or (b) but the goods being appraised, after being assembled, packaged or further processed in Canada, are sold in Canada before the expiration of one hundred and eighty days after the time of importation thereof and the importer of the goods being appraised requests that this paragraph be applied in the determination of the value for duty of those goods, the price per unit, determined in accordance with subsection (3) and adjusted in accordance with subsection (4), at which the greatest number of units of the goods being appraised are so sold.

**Price per unit**

(3) For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be determined by ascertaining



the unit price, in respect of sales of the goods at the first trade level after importation thereof to persons who

(a) are not related to the persons from whom they buy the goods at the time the goods are sold to them, and

(b) have not supplied, directly or indirectly, free of charge or at a reduced cost for use in connection with the production and sale for export of the goods any of the goods or services referred to in subparagraph 48(5)(a)(iii),

at which the greatest number of units of the goods is sold where, in the opinion of the Minister or any person authorized by him, a sufficient number of such sales have been made to permit a determination of the price per unit of the goods.

#### **Adjustment of price per unit**

(4) For the purposes of subsection (2), the price per unit, in respect of goods being appraised, identical goods or similar goods, shall be adjusted by deducting therefrom an amount equal to the aggregate of

(a) an amount, determined in the manner prescribed, equal to

(i) the amount of commission generally earned on a unit basis, or

(ii) the amount for profit and general expenses, including all costs of marketing the goods, considered together as a whole, that is generally reflected on a unit basis in connection with sales in Canada of goods of the same class or kind as those goods,

(b) the costs, charges and expenses in respect of the transportation and insurance of the goods within Canada and the costs, charges and expenses associated therewith that are generally incurred in connection with sales in Canada of the goods being appraised, identical goods or similar goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (a),

(c) the costs, charges and expenses referred to in subparagraph 48(5)(b)(i), incurred in respect of the goods, to the extent that an amount for such costs, charges and expenses is not deducted in respect of general expenses under paragraph (a),

(d) any duties and taxes referred to in clause 48(5)(b)(ii)(B) in respect of the goods, to the extent that an amount for such duties and taxes is not deducted in respect of general expenses under paragraph (a), and

(e) where paragraph (2)(c) applies, the amount of the value added to the goods that is attributable to the assembly, packaging or further processing in Canada of the goods.

### **Rejection of deductive value**

(5) Where there is not sufficient information to determine an amount referred to in paragraph (4)(e) in respect of any goods being appraised, the value for duty of the goods shall not be appraised under paragraph (2)(c).

### **Definition of “time of importation”**

(6) In this section, “time of importation” means

(a) in respect of goods other than those to which paragraph 32(2)(b) applies, the date on which an officer authorizes the release of the goods under this Act or the date on which their release is authorized by any prescribed means; and

(b) in respect of goods to which paragraph 32(2)(b) applies, the date on which the goods are received at the place of business of the importer, owner or consignee.

### **Computed Value**

Computed value as value for duty

Section 52. (1) Subject to subsection 47(3), where the value for duty of goods is not appraised under sections 48 to 51, the value for duty of the goods is the computed value of the goods if it can be determined.

### **Determination of computed value**

(2) The computed value of goods being appraised is the aggregate of amounts equal to

(a) subject to subsection (3), the costs, charges and expenses incurred in respect of, or the value of,

(i) materials employed in producing the goods being appraised, and

(ii) the production or other processing of the goods being appraised, determined in the manner prescribed; and

(b) the amount, determined in the manner prescribed, for profit and general expenses considered together as a whole, that is generally reflected in sales for export to Canada of goods of the same class or kind as the goods being appraised made by producers in the country of export.

### **Amounts included**

(3) Without limiting the generality of paragraph (2)(a), the costs, charges, expenses and value referred to in that paragraph include:

- (a) the costs, charges and expenses referred to in subparagraph 48(5)(a)(ii);
- (b) the value of any of the goods and services referred to in subparagraph 48(5)(a)(iii), determined and apportioned to the goods being appraised as referred to in that subparagraph, whether or not such goods and services have been supplied free of charge or at a reduced cost; and
- (c) the costs, charges and expenses incurred by the producer in respect of engineering, development work, art work, design work, plans or sketches undertaken in Canada that were supplied, directly or indirectly, by the purchaser of the goods being appraised for use in connection with the production and sale for export of those goods, apportioned to the goods being appraised as referred to in subparagraph 48(5)(a)(iii).

### **Definition of “general expenses”**

(4) For the purposes of this section, “general expenses” means the direct and indirect costs, charges and expenses of producing and selling goods for export, other than the costs, charges and expenses referred to in paragraph (2)(a) and subsection (3).

### **Residual Method**

Residual basis of appraisal

Section 53. Where the value for duty of goods is not appraised under sections 48 to 52, it shall be appraised on the basis of

- (a) a value derived from the method, from among the methods of valuation set out in sections 48 to 52, that, when applied in a flexible manner to the extent necessary to arrive at a value for duty of the goods, conforms closer to the requirements with respect to that method than any other method so applied; and
- (b) information available in Canada.

### **General**

Goods exported to Canada through another country

Section 54. For the purposes of sections 45 to 55, where goods are exported to Canada from any country but pass in transit through another country, the goods shall, subject



to such terms and conditions as may be prescribed, be deemed to be shipped directly to Canada from the first mentioned country.

**Value for duty in Canadian currency**

Section 55. The value for duty of imported goods shall be computed in Canadian currency in accordance with regulations made under the Currency Act.

**Informing importer of determination of value**

Section 56. The importer of any goods, on his written request, shall be informed in writing of the manner in which the value for duty of the goods was determined



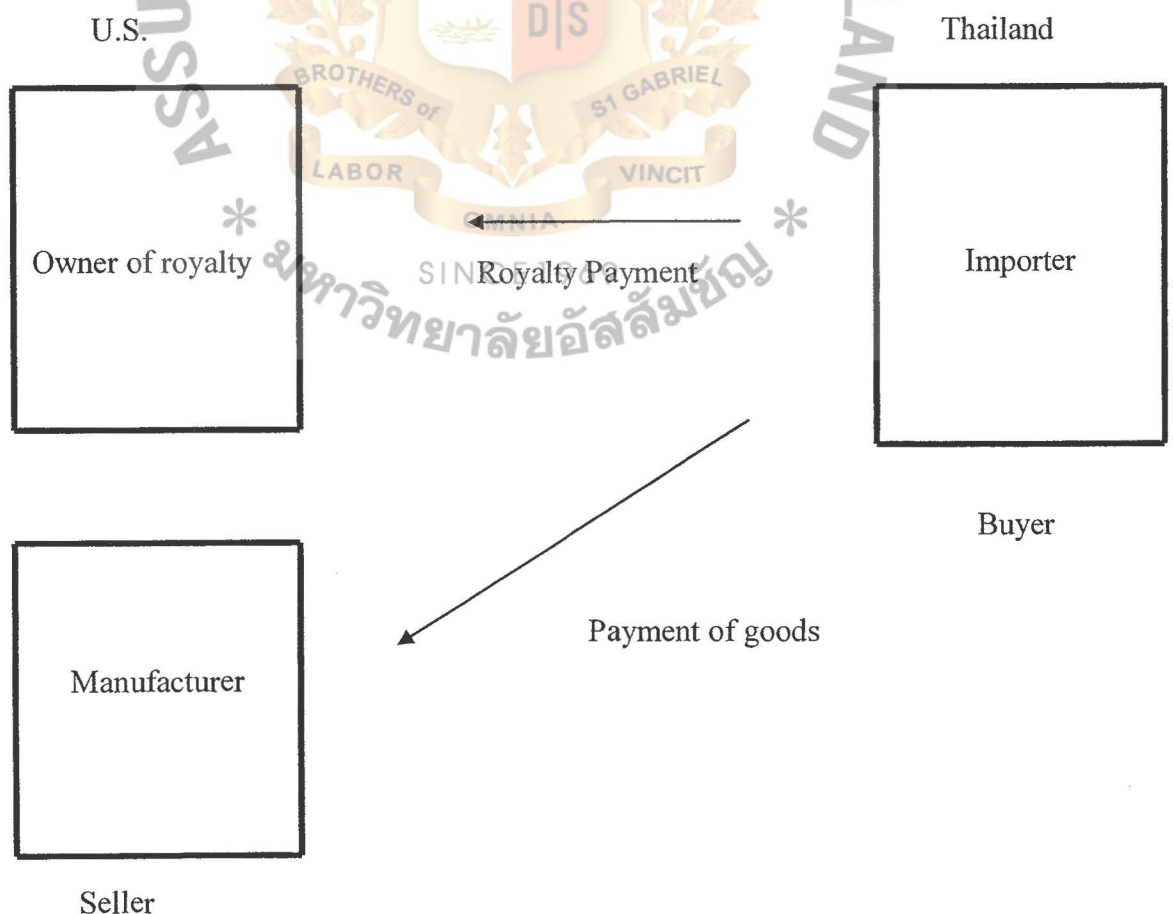
## Chapter 4

### Analysis of the Problem on Royalty Payment of Imported Goods

#### A. Analyzing the problem concerning royalties related to the imported goods

When goods are imported into Thailand, the importer is liable to pay incurred customs duties at the time when the importation is completed. Article 8 and 9 of Ministerial Regulations No 132 provided that the royalties and license fees related to these goods, either directly or indirectly, as a condition of sale, shall be added to the price value of imported goods for Customs duty.

#### Customs Regulation on imported goods and royalties



The owner of royalty is the owner of rights to use “Z” name and trademark in Thailand. Thus, the importer entered into a licensing agreement with the owner of royalty to use the trademark that it holds in connection with the manufacture, importation, promotion, distribution and sale of goods under the agreed trademark in Thailand. In consideration of the right to use the trademark, the importer agreed to pay owner of royalty.

The importer recognizes that although it has the right to manufacture licensed goods, the disputed goods tagged “Z” the trademark that was purchased from manufacturer located in America. Upon entry into Thailand, no royalties were added in the price value of imported the goods for Customs duty. However, Customs Regulation reviewed the price value of imported goods for Customs duty and considered that the royalty payment must be included.

The Customs Department issued this regulation under the ground that the importer shall be liable to pay royalties to owner of royalty when these royalties related to the imported goods, either directly or indirectly as a condition of sale and also a condition to use the trademark. As a result, this royalty payment related to the imported goods will be a part of price value and must be added to price of goods for Custom duty according to article 9 of Ministerial Regulations No. 132.

The royalty payment shall be added to the price actually paid or payable because royalty payment related to the imported goods. However, the importer did not pay it to manufacturer; importer still paid indirectly to owner of royalty. Royalty payment is cost which importer paid for goods bearing trademark. If importer does not pay royalty payment to owner of royalty, those imported goods may be considered as infringement of trademark and these goods can not be imported into Thailand. As a result, royalties actually paid related to imported goods and shall be added in the price value of imported goods for computing custom duty.

However, Canada is one member of the World Trade Organization and obliged to follow the regulations provided by GATT including Customs Valuation. Thus, there is a Supreme Court of Canada Decision in the Mattel Canada case<sup>12</sup> base on GATT.

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<sup>12</sup> Supreme Court of Canada, available at <http://csc.lexum.umontreal.ca/en/2001/2001scc36/2001scc36.html>, (last visited 22 November 2008).



### Facts

Mattel Canada has entered into a licensing agreement with the trademark licensor "Licensor X." to use the trademarks that it holds in connection with the manufacture, importation, promotion, distribution and sale in Canada. Under the agreement, Mattel Canada agreed to pay royalties to Licensor X based on a certain percentage of Mattel Canada's net invoiced billings for goods sold to Canadian customers. Mattel Canada ordered goods through a computer system that Mattel U.S. owns. The goods were manufactured in Hong Kong. The imported goods bear trademarks of Licensor X into Canada.

The Deputy Minister included the royalties in the value for duty of the imported goods pursuant to s. 48(5)(a)(iv)<sup>13</sup> of the Customs Act. Mattel Canada objected, arguing that even if the appropriate sale for export for Customs Act purposes was the one between Mattel U.S. and Mattel Canada, the agreement pursuant to which Mattel U.S. sold goods to Mattel Canada did not make the sale of goods conditional on the royalty payments being made to Licensor X. Accordingly, Mattel Canada argued, the royalties were not paid "as a condition of the sale of the goods for export to Canada", limiting language contained in s. 48(5)(a)(iv).

The Supreme Court of Canada makes a decision that the royalties paid by Mattel Canada to Licensor X are not royalties within the meaning of subparagraph 48(5)(a)(iv) of the Customs Act. The Court interpreted subparagraph 48(5)(a)(iv) to require that royalties and license fees be paid as a "condition of the sale of goods for export to Canada." The words "condition of sale" are clear and unambiguous. Unless a seller is entitled to refuse to

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<sup>13</sup> Customs Act of Canada in subparagraph 48(5)(a)(iv) of the Act provides as follows:

(5) The price paid or payable in the sale of goods for export to Canada shall be adjusted

(a) by adding thereto amounts, to the extent that each such amount is not already included in the price paid or payable for the goods, equal to

(iv) royalties and licence fees, including payments for patents, trade-marks and copyrights, in respect of the goods that the purchaser of the goods must pay, directly or indirectly, as a condition of the sale of the goods for export to Canada, exclusive of charges for the right to reproduce the goods in Canada.

sell licensed goods to the buyer or repudiate the contract of sale where the purchaser fails to pay the royalties or license fees, subparagraph 48(5)(a)(iv) is inapplicable. Here, the royalties were not paid as a condition of sale. If Mattel Canada refused to pay royalties to Licensor X, Mattel U.S. could not refuse to sell the licensed goods to Mattel Canada or repudiate the contract of sale. The sale contract and the royalties contract were separate agreements between different parties.

The Supreme Court of Canada has indicated in this decision that it is of more views as follows

1. The royalty payments are not caught by the words “paid or payable” because the royalty payments are not made for the benefit of Mattel U.S., the seller. The payments are made for the benefit of the recipient of the payments, Licensor X.

2. The royalty payments are not caught by s. 48(5)(a)(iv) merely because the subparagraph uses the words “directly or indirectly”. While the adverbs do modify the verb “pay”, and therefore indicate that royalties paid to third parties may be captured by s. 48(5)(a)(iv), adverbs cannot modify nouns like “condition”. Therefore, the words “directly or indirectly” do not modify the requirement that royalties must be paid “as a condition of the sale of the goods for export to Canada” to be dutiable.

In Thailand, the assessment of customs value and the determination of the customs valuation to collect customs duty are provided in the Ministerial Regulations No 132, under Customs Act B.E.2469. It states that the rule, proceeding and conditions of the application and specification of prices should be complied with article 7 of GATT because Thailand is also a member of the World Trade Organization. Therefore, it is necessary to comply with GATT. Customs value according to article 6 of the Ministerial Regulations No 132 states that the notes in Annex 1: Interpretative Notes, of the Agreement on Implementation of Article 7 of the General Agreement on Tariffs and Trade 1994 shall be read and applied in conjunction with the valuation of the customs value under these Ministerial Regulations. For this reason, these Ministerial Regulations has to be complied with the agreement provided by GATT.

Article 9 (1) of Ministerial Regulation No 132 provides that The royalty payment, which has to be added into the price value of imported goods to determine the customs value, must be royalties and license fees related to the imported goods, either directly or indirectly as a condition of sale. Particularly, article 8 and article 9 (1) of Ministerial



Regulation No 132 must follow the GATT's principle regarding the custom duty which provides in clause 1 and clause 8(1) (c) of article 7 of GATT.

According to the advisory opinions of the Technical Committee on Customs Valuation of World Customs Organization, it stated briefly in advisory opinions 4.8 that there are 2 agreements. The first is licensing agreement where the importer pays royalties to an owner of royalty pursuant to a licensing agreement and the importer shall have the rights to sell goods under specific trademark. Then, owner of royalty shall grant the right to the importer for manufacture and sell goods together with specific trademark. The second is a production agreement where the importer hired manufacturer to produce goods and provided the payment of goods to manufacturer pursuant to a production agreement. The disputed goods labeled the trademark and were exported to other countries. In this case, the manufacturer is not the owner of trademark and the importer has no duty to pay royalties fee to the manufacturer; therefore, such royalties is not related to manufacture of goods. As a result, there are separate contracts and royalty payment does not relate to production agreement as a condition of sale. The importer is not required to pay royalties for buying those goods. Thus, royalty payment should not be adjusted as price value of imported goods according to article 8(1) (c) of GATT<sup>14</sup>.

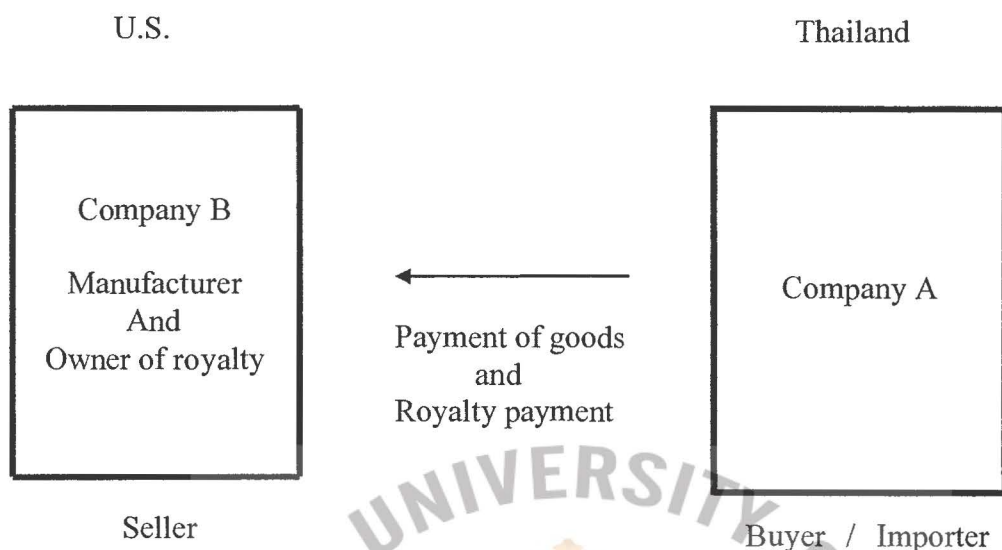
According to the Ministerial Regulations No 132 and the Advisory Opinions of World Custom Organization regarding royalty payment which related to the imported goods as a condition of sale, it means royalty payment is mostly connected with a condition of sale for imported good in Thailand expressly or impliedly. Seller shall accept to sell those goods and importer could import those goods into Thailand. Then, importer has duty to pay royalties for imported goods. Therefore, royalty payment which is condition of sale can be as following:

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<sup>14</sup> The Judgment of Central Tax Court No. 320/2549.



- Seller is owner of royalty

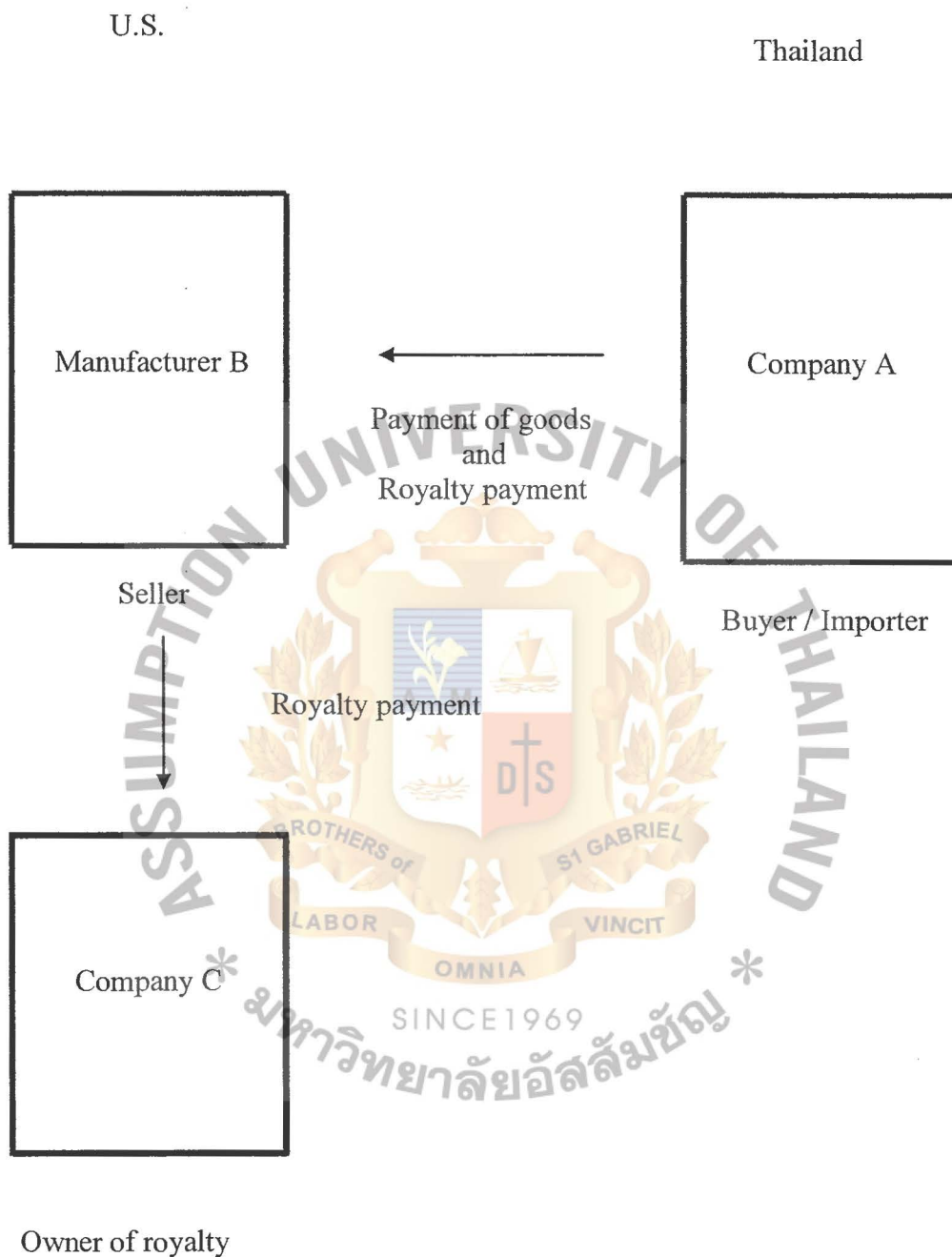


#### For example

Company A purchases toys from company B which is manufacturer and owner of trademark “Nana”. It can be seen that Company B, as manufacturer, is the owner of trademark “Nana” and bears the cost of production.

Therefore, royalty payment from trademark “Nana” related to the toys which are imported goods directly as a condition of sale. Royalty payment should be added to the price value of imported goods which shall be the price actually paid or payable for toys when sold for export U.S. to the Thailand.

- Seller has to pay royalties to the owner of royalty



### For example

Company A hires manufacturer B to produce toys, these toys are bearing the “Nana” trademark which company C is the owner of trademark. Manufacturer B receives payment of goods and royalty payment from company A although manufacturer B is not owner of royalty. However, Manufacturer B still has duty to pay royalties to company C pursuant to obligation between manufacturer B and

company C which allowed manufacturer B to produce goods bearing “Nana” trademark. As a result, the cost of goods sold of the manufacturer B shall include both cost of production and royalty payment. In this regard, though manufacturer B receives royalty payment from company A, manufacturer B still bears the duty to pay for company C under the obligation

It can be seen that royalty payment from trademark “Nana” related to the imported toys directly as a condition of sale. Therefore, royalty payment should be added to the price value of imported goods. The price value of the imported goods shall be the price actually paid or payable for toys when sold for export U.S. to the Thailand.

In both cases, it considered to be royalties relate to imported because it is cost of goods sold. Seller would include it into price of imported goods and sell them to importer. Therefore, this royalty payment should be added to price value of imported goods for purpose of determining the customs duty. On the other hand, the seller might not directly receive the royalty payment from importer but the importer has a duty to pay royalties fee directly to the owner of the royalty whom seller is obliged to pay the royalties fee. There could be further separate agreements according to the payment of goods and payment of royalty. In this case, royalty payment should also be added to the price value of imported goods for calculating the Customs duty.

#### **For example**

Company A hires manufacturer B to produce toys, these toys bear the “Nana” trademark which company C is the owner of such trademark. Manufacturer B receives payment of goods from company A but it does not include royalty payment. However, company A shall pay directly to company C under obligation between company B and company C which provides that Manufacturer B is obliged to pay royalties fee to company C. Therefore, Manufacturer B has the cost of goods sold both production of goods and royalty payment. However, company A pays royalties to company C instead of manufacturer B. This trademark related to goods as a condition of sale in which manufacturer B has the cost of sale.

In this regard, royalty payment from trademark “Nana” related indirectly to the toys which are imported as a condition of sale. Therefore, royalty payment should be added to the price value of imported goods and the price value of the imported



goods shall be the price actually paid or payable for toys when sold for export U.S. to the Thailand.

Under Customs Regulation of Thailand, the royalties paid to owner of royalty is not a royalty and license fee within the meaning of article 9 (1) of Ministerial Regulations No. 132. In my opinion, a royalty and license fee which shall be considered as “related to” imported goods must be a direct connection or relationship between royalties and the imported goods. General payment is no special impact to imported goods and would not be related to the imported goods. Particularly, royalties are a general payment which is normally included into the sale price of buyer, then the royalty payment is neither the actual cost of goods nor the value of the goods at the time of importation. These royalties are also not a payment in related to the goods because the rate of royalty payment does not vary according to the specific goods sold or cost of production. Therefore, Customs Regulation cannot consider that such royalty payment is related to imported goods.

In my opinion, the payment of the royalty is not a “condition of the sale” from any particular manufacturer to the importer for a number of reasons. The importer’s situation represents the traditional tripartite case where the importer pays a royalty to an owner of royalty pursuant to a licensing agreement, under the licensing agreement importer shall obtain the rights to sell goods under specific trademark in Thailand. The manufacturer of the goods is not related to either the buyer or the owner of royalty. According to the advisory opinions of the Technical Committee on Customs Valuation, these royalties should not be considered as dutiable.

The question of whether the importer is able to buy and import the goods without payment of a royalty should be posed from the perspective of the seller of these goods, it requires a consideration of the terms in the contract between this manufacturer and the importer. The agreement clearly shows that the payment of the royalty is not a condition of sale because the payment of the royalty is independent of the sourcing of these goods, as the importer is free to source the goods from any supplier it choose, providing the quality requirements for these goods are met. Moreover, the production agreement between the importer and the manufacturer also does not contain any requirement that royalties are paid before the manufacturer sells the goods to the importer.

In summary from facts and cases regarding royalty payment, the importer entered into a licensing agreement with owner of royalty which has rights to use the

trademarks that it holds in connection with the manufacture, importation, promotion, distribution and sale of goods in Thailand. In consideration of the right to use the specific trademarks, importer pays royalty to owner of royalty. While, the importer hires manufacturer to produce goods bearing this trademark and imports them into Thailand. Therefore, royalty payment should not be added to price value of imported goods for calculating Customs duty.



## Chapter 5

### Conclusion and Recommendation

#### A. Conclusion

The main purpose of Customs Valuation is to set up the prices of imported goods in Thailand by using the same standard provided by GATT which expecting all contracting parties including Thailand and Canada to follow its agreement. Thailand and Canada established the Customs Valuation in accordance with the GATT.

Importer entered into a licensing agreement with owner of royalty who has the exclusive rights to use the trademarks that it holds such as promotion, manufacture, importation, distribution and selling goods in Thailand. In consideration of the right to use such trademarks, importer pays royalties to owner of royalty. The importer hires manufacturer to produce goods bearing this trademark and imports them into Thailand. Once goods have been imported, the importer shall be liable to pay Customs duty.

Customs Regulation held that royalties are deemed to be related to the imported goods indirectly from the importer paid it to owner of royalty. Therefore, royalty payment shall be added to the price value of imported goods for calculating customs duty because royalty payment is the cost of the buyer.

On the other hand, there is a Supreme Court of Canada Decision in the Mattel Canada case. Mattel Canada has entered into a license agreement with "Licensor X." to use the trademarks that it holds in connection with the manufacture, importation, promotion, distribution and sale in Canada. Under the agreement, Mattel Canada agreed to pay royalties to Licensor X. After that Mattel Canada ordered goods through manufacturer in Hong Kong. Manufacturer would produce goods as ordered which bear trademark of Licensor X and import those goods into Canada.

Supreme Court of Canada has made a decision that the royalties was paid by the company to owner of royalty shall not be considered as royalties within the meaning of subparagraph 48(5)(a)(iv) of the Customs Act. The Court interpreted subparagraph 48(5)(a)(iv) to require that royalties and license fees should be paid as a "condition of the sale of goods for export to Canada." Therefore, the royalties shall be not adjusted to



the price value imported goods. In this circumstance, a decision made by the Supreme Court of Canada is similar to the principle of GATT, which states that the royalty payment related to the imported goods as a condition of sale of the goods shall be considered as the cost of the seller.

According to the studies and analyses, it can be concluded that the royalty payment shall be added to price value of imported goods for calculating Customs duty, subject to three requirements as following;

- (1) The amount must be a royalty and license fee.
- (2) The royalty and license fee are “related to the imported goods.”
- (3) The royalty and license fee are as a “condition of sale.”

In this Customs Regulation, the royalty paid to owner of royalty is not a royalty and license fee within the meaning of regulation because royalty is not paid either “related to” or as a “condition of the sale.” Royalty payment does not show price of imported goods or reflect real cost and profit of exporter or seller in foreign country. Therefore, royalty payment should not be added to price value of imported goods for calculating Customs duty.

## **B. Recommendations**

One of the important tasks of Customs Department is to determine the customs value in accordance with GATT’s rule. The relevant parties such as custom officer or importer should understand the determination of custom value in order to comply with the laws or regulations. If the dispute arises and goes to the process of appeal, it may cause the delay and impact to the trade.

Therefore, Customs Department of Thailand should review Customs Regulation on royalties related to the imported goods whether royalty payment should be added to price value of imported goods for calculating Customs duty based on GATT and the advisory opinions of the Technical Committee on Customs Valuation (advisory opinions 4.8) of World Customs Organization. As a result, Customs Department should issue rules for Customs Regulation Code as follows:

1. In case of the importer purchases goods bearing trademark from seller which is manufacturer and owner of trademark. Sellers bear the cost of goods sold both production of goods and own the trademark.

Therefore, royalties and license fees related to the imported goods directly as a condition of sale, which is the cost or benefit of exporter or seller, shall be added to the price value of imported goods which shall be the price actually paid or payable for goods when sold for export to Thailand.

2. In case of importer hires manufacturer to produce goods with bearing trademark. Manufacturer receives payment of goods and royalty payment from the importer although manufacturer is not owner of royalty. Then, manufacturer still has duty to pay royalties to owner of royalty pursuant to obligation between manufacturer and owner of royalty that allow manufacturer to produce goods bearing its trademark.

Therefore, royalties and license fee related to the imported goods directly which as a condition of sale, which is the cost or benefit of exporter or seller, shall be added to the price value of imported goods and shall be the price actually paid or payable for goods when sold for export to the Thailand.

3. In case of the importer hires manufacturer to produce goods with bearing trademark. Manufacturer receives payment of goods from the importer. However, the importer shall pay royalties fee directly to owner of royalty under the agreement between manufacturer and owner of royalty, providing that manufacturer is obliged to pay royalties to owner of royalty.

Therefore royalties and license fees are not deemed to be related to the goods which are imported indirectly as a condition of sale which is the cost or benefit of exporter or seller. Royalties and license fees shall be added to the price value of imported goods which shall be the actual price paid or payable for goods when sold as exports to Thailand.

4. In case of the importer entered into a licensing agreement with owner of royalty which has rights to use the trademarks that it holds in connection with the manufacture, importation, promotion, distribution and sale of goods in Thailand. In consideration of the right to use the trademarks, importer pays royalty to owner of royalty and the importer hires manufacturer to product goods bearing this trademark and imports them into Thailand.

Therefore, royalties and license fees are not deemed to be related to the goods which are imported either directly or indirectly as a condition of sale, which is the cost or benefit of exporter or seller. Royalties and license fees shall not be added to the price value of imported goods which shall be the actual price paid or payable for goods when sold as exports to Thailand.





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