

# MEMORANDUM D13-4-12

Ottawa, March 28, 2001

## SUBJECT

### COMMISSIONS AND BROKERAGE (CUSTOMS ACT, SECTION 48)

This Memorandum outlines and explains the treatment of commissions and brokerage to determine the value for duty of imported goods.

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## GUIDELINES AND GENERAL INFORMATION

### GENERAL DESCRIPTION

1. Subparagraph 48(5)(a)(i) of the *Customs Act* states that the price paid or payable in the sale of goods for export to Canada will be adjusted by adding amounts, to the extent that each amount is not already included in the price paid or payable for the goods, equal to commissions and brokerage for the goods incurred by purchasers, other than fees paid or payable by purchasers to their agents to represent purchasers abroad in respect of the sale.
2. An exception to the above-mentioned requirement is fees paid by a purchaser to an agent to represent the purchaser abroad in buying imported goods. These fees, usually referred to as **buying commissions**, need not be added to the price paid or payable for the imported goods in determining a value for duty if the fees are either invoiced or identified separately. However, if the invoiced price for the goods includes such fees, they cannot be deducted from the price paid or payable. For more details, see paragraphs 5, 12, 13, and 14.

## DEFINITIONS

### Agent

3. Agents are persons who buy or sell goods, possibly in their own name, but always for the account of a principal. The agent participates in the conclusion of a contract of sale, representing either the purchaser or the vendor. The agent's remuneration usually takes the form of a commission, generally expressed as a percentage of the price of the goods.
4. In determining whether the payment to an agent is not to be added to the price paid or payable, it is necessary to determine whether the agent is a **selling agent**, a **buying agent**, or a **broker**.

### Selling Agent

5. Selling agents are persons who act for the account of a vendor. The agents look for customers and collect orders and, in some cases, may arrange for storage and delivery of goods. The remuneration they receive for services rendered in the conclusion of a contract is usually called a **selling commission**. Goods sold through a selling agent cannot usually be bought without paying the selling agent's commission. These payments can be made in the following ways:
  - (a) Foreign suppliers who deliver their goods for orders placed through a selling agent usually pay for the latter's services themselves, and quote inclusive prices to their customers. In such cases, the invoice price is not to be adjusted to include these services.
  - (b) If the terms of the sale require the purchaser to pay, either directly or separately to the agent, a commission that is additional to the price invoiced for the goods, this commission must be added to the price paid or payable when determining the value for duty.

### Buying Agent

6. Buying agents are persons who act for the account of a purchaser and perform their functions out of funds given by that purchaser. The duties of a buying agent usually include finding suppliers, informing the vendor of the desires of the purchaser, placing orders, collecting samples, inspecting goods, and, in some cases, arranging for the insurance, transport, storage, or delivery of the goods. The buying agent's remuneration, which is usually called a **buying commission**, is paid by the purchaser to the agent, usually apart from the payment for the goods.

### Broker

7. Brokers are generally agents who do not act on their own account. They act for both vendor and purchaser and usually have no role other than to put both parties in touch with each other. The brokers' remuneration is called **brokerage**, and is usually calculated as a percentage of the business concluded as a result of their activities. The percentage received by brokers usually reflects their limited risks and responsibilities.
8. **Brokerage** does not mean charges by a customs broker for services rendered to clear goods through customs. Brokerage means payments made to intermediaries for their participation in concluding a contract of sale.
9. If the broker is paid by the vendor of the goods, the brokerage will usually be included in the invoice price. In such cases, no problem arises for valuation. In cases where the brokerage is paid by the vendor and charged separately to the purchaser, it must be added to the price paid or payable. On the other hand, the broker may be paid by either the purchaser alone, or each of the parties to the transaction may pay part of the total brokerage. In these cases, the brokerage must be added to the price paid or payable to the extent that it is paid by the purchaser and is not already included in the price.

## **BUYING COMMISSIONS**

10. To determine if an agent is a genuine buying agent, importers should use the questionnaire in the Appendix.

### **Fiduciary Responsibility of Agent to Purchaser**

11. The agent has a fiduciary responsibility to the purchaser. This responsibility means:

- (a) The agent must at all times act in the interest of the purchaser.
- (b) There must be no impediments to the agent acting in the interest of the principal.
- (c) The parties with whom the agent deals for the purchaser must be strangers to the agent-purchaser relationship. A person related to, who controls or is controlled by, the agent cannot be a stranger to the agent-purchaser relationship.
- (d) The purchaser is entitled to complete disclosure from the agent about any transactions done by the agent for the purchaser.

### **Documents to Prove the Buying Agent's Status**

12. The Canada Customs and Revenue Agency (CCRA) may want to examine such documents as contracts, invoices, letters of credit, and correspondence, which establish the nature of the arrangement between the purchaser and the agent. Such documents will be examined to determine whether the agent is acting for the purchaser and not for the vendor, or even on the agent's own account. See Memorandum D13-4-5, *Transaction Value Method for Related Persons (Customs Act, Section 48)*.

13. An agency agreement alone is not enough evidence to prove an agency relationship. In certain circumstances, rather than invoicing the purchaser separately for the commission and forwarding the original supplier's invoice to the purchaser, the buying agent may re-invoice the purchaser for the goods including the commission in the new invoice. In such cases, the CCRA will want to examine the commercial invoice from the supplier to the agent.

14. Failure by the importer to give the CCRA the commercial invoice from the supplier and other satisfactory evidence relating to the sale may prevent the CCRA from verifying the price paid or payable in the purported sale for export to Canada. This could prevent considering the sale as a genuine sale for export.

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**APPENDIX**

**QUESTIONNAIRE TO HELP  
DETERMINE THE DUTIABLE  
STATUS OF COMMISSIONS**

- |  | <b>Yes or No</b> |
|--|------------------|
| 1. Is the agent related to the seller?   | _____            |
| 2. For orders cancelled or amended by the purchaser, does the agent have to take a proprietary interest in the goods or necessarily assume the responsibility for reselling the goods? | _____            |
| 3. Where shipping and handling costs exceed or are less than the amount agreed to by the purchaser, does the agent absorb the excess or retain the difference?                         | _____            |
| 4. Does the agent at any time acquire, or is the agent liable to acquire, a proprietary interest, or assume risk of ownership, in the goods?   | _____            |
| 5. Does the agent assume, at any time, the risk for damaged or lost goods?   | _____            |
| 6. If the agent pays the vendor for the goods, does the agent get, for his own account, any discounts or rebates given by the vendor?  | _____            |

If the answer to any of questions 1 to 6 is "Yes," the agent is probably not acting as a genuine buying agent, and any fees paid by the purchaser would be added to the price paid or payable, if not already included therein. If the answer to all of questions 1 to 6 is "No," continue with questions 7 to 9.

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|--|-------|
| 7. Does the purchaser control the activities of the agent by specifying  | _____ |
| (a) the quantities to be bought;   | _____ |
| (b) the name(s) of the vendor(s);  | _____ |
| (c) the price to be paid;  | _____ |
| (d) the type and quality of the merchandise; and   | _____ |
| (e) the method and timing of the shipment?   | _____ |
| 8. Does the agent receive from the purchaser all necessary funds before being responsible for paying the vendor for the goods? | _____ |
| 9. Is the commission charged based on a percentage of the invoice price?   | _____ |

If the answer to all of questions 7 to 9 is "Yes," although all the circumstances surrounding the transaction should be considered, this would likely indicate that the agent is a bona fide buying agent.

## REFERENCES

### ISSUING OFFICE –

Origin and Valuation Policy Division  
Trade Policy and Interpretation Directorate

### LEGISLATIVE REFERENCES –

*Customs Act*, section 48

### HEADQUARTERS FILE –

7034-5-14

### SUPERSEDED MEMORANDA “D” –

D13-4-12, September 30, 1991

### OTHER REFERENCES –

D13-4-5

**Services provided by the Canada Customs and Revenue Agency are available in both official languages.**

**This Memorandum is issued under the authority of the Commissioner of Customs and Revenue.**