

MEMORANDUM D13-1-3

Ottawa, April 9, 2001

SUBJECT

CUSTOMS VALUATION *PURCHASER IN CANADA REGULATIONS* (CUSTOMS ACT, SECTION 48)

This Memorandum explains the Canada Customs and Revenue Agency's (CCRA) interpretation and application of the phrase "sold for export to Canada to a 'purchaser in Canada'" when appraising the value of imported goods under the provisions of section 48 of the *Customs Act*, the transaction value method. For interpretation of the phrase "sold for export," reference should be made to Memorandum D13-4-2, *Customs Valuation: Sold for Export to Canada (Customs Act, Section 48)*. This Memorandum does not supersede Memorandum D13-4-2; rather, it provides additional guidance with respect to identifying the purchaser in a sale for export to Canada.

TABLE OF CONTENTS

	Page
Guidelines and General Information	2
Purchaser Located in Canada	3
Resident	3
Individuals	4
Business Entities (Incorporated and Unincorporated)	5
Carrying on Business in Canada	5
Management and Control in Canada	7
Permanent Establishments	9
Purchaser Located Outside Canada – "Non-Resident Importer"	9
Link Between Memorandum D13-1-3 (Purchaser in Canada) and Memorandum D13-4-2 (Sale for Export)	11
Appendix A – <i>Valuation for Duty Regulations</i>	
Appendix B – Summary	

GUIDELINES AND GENERAL INFORMATION

1. As a result of the legislative amendment to subsection 48(1) of the *Customs Act*, effective September 17, 1997, this subsection now explicitly establishes four requirements that must be met in order to apply the transaction value method (assuming that the importer has complied with the remaining provisions of section 48). These requirements are that:

- (a) the imported goods were sold;

- (b) the sale was “for export to Canada”;
- (c) the purchaser in the sale for export is the “**purchaser in Canada**”; and
- (d) the price paid or payable for the goods can be determined.

Note: Subsection 48(1) was amended to add the phrase “to a purchaser in Canada.” Concurrently, subsection 45(1) was amended to state that the definition of “purchaser in Canada” has the meaning assigned by the Regulations. You will also find in the “Summary” (see Appendix B), a list of questions you can use to determine whether an individual or business entity is the “purchaser in Canada.”

2. In order to establish if a sale for export to Canada has occurred, the provisions of Memorandum D13-4-2 should be consulted. The amendment to the *Valuation for Duty Regulations* reflects current administrative policy as outlined in Memorandum D13-4-2. Imported goods continue to be considered sold for export to Canada if:

- (a) the vendor, in consideration of a price, has transferred or has agreed to transfer, title of the subject goods to a “purchaser in Canada”; and
- (b) it can be clearly demonstrated that, as a condition of the sale agreement, the subject goods were destined for Canada without possibility of diversion.

3. Once a sale for export transaction has been identified, it must be determined whether the purchaser in the transaction is the “purchaser in Canada” for the purposes of determining the value for duty. The purchaser in a sale for export to Canada may be located in, or, in certain circumstances, may be located outside Canada.

Note: In certain circumstances, where a purchaser located outside Canada purchases goods for export to Canada and has not entered into a prior agreement to sell these goods to a resident in Canada, the purchaser located outside Canada will continue to be considered the “purchaser in Canada” for customs purposes, as provided for in paragraphs 9 and 10 of Memorandum D13-4-2. Refer also to paragraphs 18 to 22 of this Memorandum for further details.

4. To be considered a “purchaser in Canada,” the individual or business entity must meet the criteria specified in section 2.1 of the *Valuation for Duty Regulations*. The individual or business entity may qualify as a “purchaser in Canada” under the provisions of paragraph 2.1(a), (b), **or** (c) subject to the definitions contained in section 2. Section 2 of the Regulations is reproduced in Appendix A.

PURCHASER LOCATED IN CANADA

Resident

5. Paragraph 2.1(a) of the Regulations is the first criterion that must be examined in order to determine if an **individual** or **business entity** is a “purchaser in Canada.” This paragraph addresses, in the first instance, purchases made by residents. With respect to individuals, a resident is defined in section 2 of the Regulations as an individual who “ordinarily resides” in Canada. With respect to both incorporated and unincorporated business entities, residency is defined in section 2 of the Regulations and requires that the entity carry on business in Canada and is managed and controlled in Canada.

Individuals

6. The question of whether an individual is resident or not resident in Canada is essentially a question of fact. An individual “ordinarily resides” in the place where, in the general routine of their life, they regularly, normally, or customarily live. In circumstances where no other factor is decisive in determining whether an individual is resident in Canada, any connections that the individual might have with Canada or outside of Canada will be considered. Some of the factors that should be considered are:

- (a) location of the individual’s residential ties, including location of dwelling place(s);

- (b) location of spouse and dependants;
- (c) location of personal property (bank accounts, furniture, clothing, etc.);
- (d) social ties (club memberships, etc.); and
- (e) where the individual regularly leaves Canada, the length and purpose of stays abroad may also be relevant.

7. Any one of these factors are not of great importance on an isolated basis; however, considered collectively as a whole, they can be determinative. Each situation must be examined on its own particular circumstances and merits. Generally, the issue of residency, with respect to individuals, will not normally be difficult to determine and does not usually present a problem for the purposes of establishing a transaction value. Thus, the primary focus of this Memorandum is to address the intricacies of determining the “purchaser in Canada” for commercially imported goods, the sale of which often involves a number of participants at various trade levels, located in a variety of places.

Business Entities (Incorporated and Unincorporated)

8. As stated in paragraph 5, in order for an incorporated or unincorporated business entity to meet the residency requirement of section 2.1 of the Regulations, it must be carrying on business in Canada **and** the management and control of the business entity must be maintained in Canada. The mere fact that a business entity is incorporated in Canada is not sufficient to meet the residency definition.

9. Therefore, in order to determine if a business entity is a resident in Canada, the two following concepts must be closely examined:

- (a) whether it is carrying on business in Canada (see the Note below and paragraphs 10 to 13); and
- (b) whether it is managed and controlled in Canada (see paragraphs 14 and 15).

Note: A business entity considered to be a resident, carrying on business, or maintaining a permanent establishment in Canada for GST or income tax purposes may not necessarily be considered to be a resident, carrying on business, or maintaining a permanent establishment in Canada for purposes of section 48 of the *Customs Act*. Equally, where it is determined that a business entity is a resident, carrying on business, or maintaining a permanent establishment in Canada for valuation purposes, this, in itself, in no way establishes that the entity would be considered to be a resident, carrying on business, or maintaining a permanent establishment in Canada for purposes of the *Income Tax Act* or the *Excise Tax Act*.

Carrying on Business in Canada

10. Generally, determining whether or not a business entity is carrying on business in Canada involves weighing a number of factors which indicate that the business entity has a significant presence in Canada.

11. In reviewing the business entity’s activities undertaken in Canada, the business entity must be able to demonstrate that these activities include the authority to buy and sell goods and services, to support the day-to-day regular and continuous operation of the business entity in Canada. The business entity must be able to demonstrate that one or more employees in Canada have been granted the general authority to contract on behalf of the business entity, without the approval of another person outside of Canada.

12. It is not possible to develop an exhaustive list of the factors which will be considered, as business practices do vary; however, the list below is meant to illustrate the level of responsibility expected of the employees with the general authority to contract on behalf of the business entity, in Canada. The business entity must be able to show that the employees in Canada have the authority to, for instance:

- (a) negotiate the resale terms of the goods sold in the Canadian market (selling price, trade volume discounts, delivery conditions, etc.), without seeking the confirmation from another person outside of Canada;

- (b) contract purchases of goods and services inside and outside Canada, including sales for export to Canada (supplies, office equipment, goods for resale market, inputs for assembly or production, lease agreements, retaining accountants, lawyers, etc.);
- (c) negotiate human resource issues for the business entity in Canada; and
- (d) make necessary withdrawals, issue cheques, and other such activities to process payment of goods and services acquired or used by the business entity in Canada.

13. In addition to demonstrating that the business entity's activities in Canada include the authority to buy and sell goods and services, other factors, such as those listed below, will be analyzed collectively to determine the extent to which the business entity's activities and functions are conducted in Canada. The following will be of interest:

- (a) whether payment for the goods is made in Canada;
- (b) whether purchase orders are solicited in Canada;
- (c) whether inventory (if applicable) is maintained in Canada;
- (d) whether the Canadian operation is responsible for the provision and costs of after-sale services, repairs, and/or warranties;
- (e) whether the business entity in Canada files Canadian income tax returns;
- (f) whether there exists a branch or office located in Canada; and
- (g) whether bank accounts for the business entity are maintained in Canada.

Management and Control in Canada

14. In establishing whether or not a business entity is a resident in Canada for customs valuation purposes, the extent of management and control exercised by the business entity over its business affairs, or day-to-day operations, is to be considered. The extent of management and control will vary from one business entity to another and therefore must be determined on a case by case basis. Generally, for customs valuation purposes, management and control pertain to the Canadian business entity's ability to make decisions and issue instructions necessary to run its business.

Note: It is necessarily implied under paragraph 2.1(a) of the Regulations that a business entity which is found to be managed, controlled, and carrying on business in Canada, is operated through a permanent establishment in Canada.

15. The history of the business entity's entire activities must be examined and a thorough analysis of all facts must be performed before a conclusion can be reached as to the degree of management and control that exists in Canada. It must be noted that no one factor is determinative. Nor will it be concluded that management and control do not exist simply because one or several factors are not present in a particular case. Factors will be reviewed on a case by case basis and must always be reviewed in their entirety. The following are some of the factors that will be examined and considered to establish whether management and control are, in fact, exercised by the Canadian business entity:

- (a) the Canadian business entity has the general authority to conduct business in Canada beyond that of simply finding buyers for imported goods and collecting payment on behalf of another party;
- (b) the Canadian business entity has a board of directors that meets and exercises its authority in Canada;
- (c) the Canadian business entity is not influenced or controlled by another party located outside Canada (i.e., the control over the day-to-day activities and functions of the Canadian business entity remains with the Canadian entity), for instance:
 - (1) the Canadian business entity exercises control over day-to-day functions necessary to maintain the continuous operation of the Canadian business entity;

- (2) the Canadian business entity makes decisions on the allocation of profits earned in Canada;
- (3) the Canadian business entity maintains control over its bank accounts (i.e., signing authorities will be examined and questioned); and
- (d) the Canadian business entity maintains separate books and records in relation to the Canadian business operations, and prepares separate financial statements.

Permanent Establishments

16. In respect of a person, section 2 of the Regulations defines a “permanent establishment” as:

- (a) a fixed place of business (i.e., place of management, branch, office, factory, workshop);
- (b) through which business is carried on.

Note: “Person” is assigned the meaning contained in section 2 of the *Customs Act*.

17. Paragraph 2.1(b) of the Regulations will apply to business entities which carry on business through a permanent establishment, but whose day-to-day operations are not wholly managed and controlled in Canada, due to their corporate structure (e.g., branch operations) or the management policies of a foreign parent. The Canadian business entity may qualify as the “purchaser in Canada,” in a sale for export to Canada, provided it carries on business, as set out in the Note preceding paragraph 10 and in paragraphs 10 to 13, through a permanent establishment in Canada, as in paragraph 16. Refer also to paragraph 12 of Memorandum D13-4-2, for further details.

Note: It is important to note that, in the specific case of foreign business entities with branch operations in Canada, the branch cannot be considered the “purchaser in Canada” for transactions between the branch and the foreign business entity, as the branch is not a separate legal entity. Therefore, only when branch operations purchase goods in a sale for export to Canada, from third parties, will the issue of “purchaser in Canada” need to be addressed.

PURCHASER LOCATED OUTSIDE CANADA – “NON-RESIDENT IMPORTER”

18. There are certain situations where a person is not physically located in Canada, but may be considered to be a purchaser in Canada. Such persons are commonly referred to as “**non-resident importers.**”

Note: A non-resident importer is typically a business entity (or individual) who, for customs purposes, will account for the imported goods, and is responsible for the payment of any applicable duties and taxes. A non-resident importer may be the producer of the imported goods (no sale has taken place prior to importation), the vendor of the imported goods (when the goods are sold to a resident in Canada), or the purchaser of the imported goods. For the purposes of the transaction value method and this Memorandum, only those situations where the non-resident importer acts as a purchaser may be considered, under subsection 2.1(c) of the *Valuation for Duty Regulations*.

19. A non-resident importer will not qualify as a purchaser in Canada under the resident requirement 2.1(a), because management and control of this type of business entity exists outside Canada; nor will a non-resident importer qualify as a purchaser in Canada under the requirement of 2.1(b), as these business entities have no permanent establishment in Canada. In situations where the person is not resident in Canada and does not maintain a permanent establishment in Canada, subsection 2.1(c) of the Regulations should be examined, for purposes of determining if the person is a purchaser in Canada.

20. Essentially, subsection 2.1(c) applies to non-resident importers having no presence in Canada and who purchase goods either for their own consumption or use, under 2.1(c)(i), or who purchase goods on speculation for the Canadian market, under 2.1(c)(ii) (i.e., the non-resident importer has not entered into an agreement to sell the goods to a purchaser in Canada, prior to assuming ownership in the goods, from the foreign vendor).

21. To determine if an agreement to sell to a resident exists prior to the non-resident importer assuming ownership of the goods and to determine when the ownership in the goods transfers, documentation such as contracts, distribution and other similar agreements, invoices, purchase orders, bills of lading, freight invoices, and proofs of payment are to be examined. Additionally, correspondence between the parties and company reports or brochures may assist in ascertaining which party possesses title and risk of loss for the goods at a given time.

22. If, for the importations under review, the non-resident importer does not meet the criteria set out in this Memorandum, the individual or business entity will not be considered a “purchaser in Canada.” In this case, either:

(a) an agreement to sell or a sale to a purchaser in Canada exists, prior to the purchase of the goods by the non-resident importer, and the price of the goods may form the basis of the transaction value method (see Memorandum D13-4-2 for details); or

(b) there is no “purchaser in Canada”; therefore, the transaction value method is not applicable and a subsequent valuation method must be used.

LINK BETWEEN MEMORANDUM D13-1-3 (PURCHASER IN CANADA) AND MEMORANDUM D13-4-2 (SALE FOR EXPORT)

23. As stated in paragraph 1 of this Memorandum, having established that an individual or a business entity is the “purchaser in Canada,” in accordance with the provisions of the *Valuation for Duty Regulations*, it will be necessary to demonstrate that the remaining three requirements of the transaction value method have also been met, i.e., that the goods:

(a) were sold;

(b) for export to Canada; and

(c) the price paid or payable can be determined.

Note: Memorandum D13-4-3, *Customs Valuation: Price Paid or Payable (Customs Act, Section 48)*, and Memorandum D13-4-2 provide further guidance on making these determinations.

24. Since the “purchaser in Canada” requirement will have been met at this point, it follows that the requirement for a “sale” will also have been met.

25. It remains to be established whether the sale transaction is “for export to Canada.” To determine whether the goods were destined for Canada when they were purchased, without the possibility of diversion, the following information and documentation are to be given consideration:

(a) details on the transportation arrangements and delivery terms made by the “purchaser in Canada” (i.e., as a condition of the sale, prior to the goods beginning their direct and continuous journey) indicating that the goods were destined for Canada;

(b) goods have been manufactured in accordance with Canadian specifications (e.g., the specifications of the Canadian Standards Association or bilingual labeling requirements); and

(c) documentation (refer to paragraph 21) supporting the commitment of the non-resident purchaser to import the goods into Canada with evidence that the sale by the foreign supplier was for export to Canada. The non-resident importer must be at risk of loss in the transaction. Unsubstantiated statements as to the intention of the non-resident purchaser would **not** be sufficient to demonstrate that the goods were destined for Canada.

26. The amendment to the *Valuation for Duty Regulations* codifies the long standing administrative policy with respect to “purchasers outside Canada,” outlined in paragraphs 9 and 10 of Memorandum D13-4-2. A non-resident importer will be considered the “purchaser in Canada” in the sale for export to Canada, when all the following criteria are met:

- (a) at the time of ordering the goods, the non- resident importer has directed that the goods be sent to Canada for his/her own account and risk, and has agreed to pay, or has paid, a price for the goods;
- (b) the non-resident importer has not entered into an agreement to sell the goods to a resident in Canada, prior to assuming ownership of the goods; and
- (c) at the time the non-resident importer purchased (assumed ownership in) the specific goods identified in the contract of sale, it is clear that the goods were destined for Canada, without possibility of diversion.

27. Where all of the above criteria are met, the transaction between the non-resident importer and the foreign supplier can be considered a sale for export to Canada to a “purchaser in Canada,” and the price paid or payable by the non-resident importer may be used as the basis for determining the transaction value, provided all other requirements for use of that method are met.

APPENDIX A

VALUATION FOR DUTY REGULATIONS

Interpretation

Section 2 of the *Valuation for Duty Regulations* is replaced by the following:

2. The definitions in this section apply in these Regulations.

“Act” means the *Customs Act. (Loi)*

“permanent establishment”, in respect of a person, means a fixed place of business of the person and includes a place of management, a branch, an office, a factory or a workshop through which the person carries on business. (*établissement stable*)

“resident” means

(a) an individual who ordinarily resides in Canada;

(b) a corporation that carries on business in Canada and of which the management and control is in Canada; and

(c) a partnership or other unincorporated organization that carries on business in Canada, if the member that has the management and control of the partnership or organization, or a majority of such members, resides in Canada. (*résident*)

Meaning of “Purchaser in Canada”

2.1 For the purposes of subsection 45(1) of the Act, “purchaser in Canada” means:

(a) a resident;

(b) a person who is not a resident in Canada but who has a permanent establishment in Canada; or

(c) a person who neither is a resident in Canada nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,

(i) for consumption, use or enjoyment by the person in Canada, but not for sale, or

(ii) for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

APPENDIX B

SUMMARY

1. This Memorandum addresses one of the requirements to be met in order to apply the transaction value method of valuation. The purpose of this Memorandum is to determine which party, in a sale transaction, is the “purchaser in Canada.”

2. Any “purchaser in Canada” should be prepared to substantiate, by way of documentation, that they, in fact, qualify as a “purchaser in Canada,” have purchased goods in a sale for export to Canada, and that the price paid or payable can be determined.

3. In considering whether an individual or business entity is the “purchaser in Canada,” the following questions and answers may prove helpful:

Q1. Is the person an (1) individual **or** (2) an incorporated/unincorporated business entity which carries on business in Canada **and** of which the day-to-day management and control is in Canada?

A1. If yes, the person qualifies as the “purchaser in Canada,” under paragraph 2.1(a) as a resident (refer to paragraphs 5 to 15). If no, see the following question.

Q2. Is the person an unincorporated business entity which carries on business in Canada, through a permanent establishment in Canada, but of which the management and control are exercised outside of Canada?

A2. If yes, the person may qualify as a “purchaser in Canada,” under paragraph 2.1(b), provided there is a substantive presence in Canada, and the goods are purchased from a third party (refer to paragraphs 8 to 13, and 16). If no, see the following question.

Q3. Is the person an individual or incorporated/ unincorporated business entity which is not resident (i.e., does not carry on business in Canada or the management and control of which are not in Canada) and does not have a permanent establishment in Canada (through which it carries on business in Canada)?

A3. If so, one of the following sets of circumstances will likely apply:

(a) If, prior to assuming ownership, the non- resident importer had not agreed to sell the goods to a resident in Canada, the non-resident importer would be considered the “purchaser in Canada,” under the provisions of subparagraph 2.1(c)(ii) of the Regulations (refer to paragraphs 18 to 22);

(b) If, prior to assuming ownership, the non- resident importer had agreed to sell the goods to a resident in Canada, the non-resident importer will not be considered the “purchaser in Canada,” but rather the vendor of the imported goods. The “purchaser in Canada” would be the business entity which purchased the goods from the non-resident importer; or

(c) Where the non-resident importer produced the goods or acquired them on consignment, and the goods are not subject to a prior sale or agreement to sell to a “purchaser in Canada,” the transaction value method will not apply and an alternate method of valuation will be used to determine the value for duty of the imported goods.

REFERENCES

ISSUING OFFICE –

Origin and Valuation Policy Division
Trade Policy and Interpretation Directorate

LEGISLATIVE REFERENCES –

Customs Act, sections 45 to 55
Valuation for Duty Regulations

HEADQUARTERS FILE –

N/A

SUPERSEDED MEMORANDA “D” –

D13-1-3, December 11, 1998

OTHER REFERENCES –

D13-4-2, D13-4-3

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