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Tax Alert – Canada

Proposed regulations amending the valuation for duty rules for goods imported into Canada

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On 29 May 2023, the Canada Border Services Agency (CBSA) announced proposed changes to the *Valuation for Duty Regulations* (the Regulations), which were published in the Canada Gazette on 27 May 2023. Interested stakeholders are invited to make representations to the CBSA until 26 June 2023.¹

Specifically, and importantly, the CBSA provides a definition for the term “sold for export to Canada” that is different from how the term has been interpreted so far (in the absence of a definition in the Regulations) and amends the existing definition of the term “purchaser in Canada”; both of these terms are essential in the determination of the value for duty (VFD) of imported goods. Under the requirements to apply the transaction value method, which is the primary VFD method, the imported goods must indeed be sold for export to Canada to a purchaser in Canada.

The CBSA maintains that the amendments are necessary to “level the playing field” and close a regulatory “loophole” certain nonresident importers (NRIs) have successfully exploited when qualifying as “purchasers in Canada” without a permanent establishment and utilizing their purchase prices as the basis for the VFD of the goods (i.e., a price used in the earlier stages of the supply chain). The suggestion is that resident importers are paying elevated prices, declaring higher VFD and therefore paying more import duties than certain NRIs.

The CBSA also indicates that the amendments are necessary for Canada to meet its obligations under the World Trade Organization’s Customs Valuation Agreement and to Canada’s trading partners regarding the methods of calculating VFD.

¹ [Canada Gazette, Part 1, Volume 157, Number 21: Regulations Amending the Valuation for Duty Regulations.](#)

The proposed “sold for export to Canada” definition replaces the Supreme Court of Canada’s interpretation of a sale for export in *Mattel*,² as the sale by which title to the goods passes to the importer. CBSA’s interpretation is that valuation should be based on the “last sale” price where the distributor in Canada has agreed to sell goods prior to importation, or has an understanding or an arrangement to sell the goods to a customer in Canada prior to importation. The CBSA submits that the import value should be based on the agreement that caused the goods to be imported into Canada and not necessarily on an actual sale at law that occurs prior to importation.

The CBSA proposes to add the following text to the Regulations:

2.01(1) For the purposes of subsection 45(1) of the Act, *sold for export to Canada* means, in respect of goods, to be subject to an agreement, understanding or any other type of arrangement – regardless of its form – to be transferred, in exchange for payment, for the purpose of being exported to Canada, regardless of whether the transfer of ownership of the goods is completed before or after the goods are imported.

(2) If the goods are subject to two or more agreements, understandings or other types of arrangement described in subsection (1), the applicable agreement, understanding or arrangement for the purposes of that subsection is the one respecting the last transfer of the goods in the supply chain among the transfers under those agreements, understandings or arrangements, regardless of the order in which the agreements, understandings or arrangements were entered into.

The CBSA also proposes to repeal the current definition of “purchaser in Canada”. The residency and permanent establishment criteria have been deleted and the following text is proposed:

2.1 For the purposes of subsection 45(1) of the Act, *purchaser in Canada* means, in respect of goods that are the subject of an agreement, understanding or any other type of arrangement referred to in section 2.01, the person who, under that agreement, understanding or arrangement, purchases or will purchase the goods, regardless of whether the person is the importer of the goods or when the person makes payments in respect of the goods.

The proposed “purchaser in Canada” definition, together with the introduction of the “last sale” concept, fundamentally changes how the VFD of imported goods will be determined. While the amendments are presented as solutions to certain inequalities between NRIs and resident importers, the current draft regulations will affect NRIs and resident importers, not just NRIs.

² *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36.

As currently drafted, the proposed changes will significantly impact nonresident and resident importers who consider their purchase prices the transaction value when importing goods for resale in Canada. If the proposed rules are adopted, many businesses who import goods for resale will be required to base the VFD on their selling prices instead of their purchase prices – the “last sale” in the trade chain, a domestic sale, would become the transaction value when such businesses avail themselves of the transaction value method.

Transitioning to a “last sale” based valuation regime and losing the residency and fixed place of business qualifying criteria under the amended “purchaser in Canada” definition will significantly impact importers who import goods for resale in Canada, whether they are strictly e-commerce retailers or multi-channel businesses who sell to retailers and whole sellers as well. Increased VFD will increase amounts of import duties and import Goods and Services Tax affected importers will pay. In fact, the CBSA notes in its discussion of the proposed amendments that it expects to generate significant revenues in import duties over the next 10 years as a result of these proposed changes.³

The government has not confirmed when the amendments will be implemented, but they are proposed to come into force at the same time as the yet-to-be-announced entry into force of the *Customs Act* amendment enacted in the *Budget Implementation Act, 2021, No. 1* (S.C. 2021, c. 23) that specifies that the term “sold for export to Canada” will be defined by regulation. However, if the regulatory amendments are registered at a later date than the coming-into-force date of the *Customs Act* amendment, they will come into force on the day they are registered.

The CBSA has specified that the amendments will not be retroactive in nature.

The CBSA is accepting comments from the public regarding the proposed regulatory amendments until 26 June 2023. We recommend that any interested stakeholders make representations to the CBSA before the deadline.

³ The CBSA estimates that over the next 10 years, the Government of Canada would receive increased revenues starting with \$181.8 million in duties in 2023, rising to \$273.2 million by 2031, an average of \$224.7 million per year in nominal terms. [Canada Gazette, Part 1, Volume 157, Number 21: Regulations Amending the Valuation for Duty Regulations.](#)

Learn more

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