THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 5, 2021

Via email: cbsa.vfd_consultation-consultation_ved.asfc@cbsa-asfc.gc.ca

Edith Laflamme
Director, Trade and Policy Division
Trade and Anti-Dumping Programs Directorate
Canada Border Services agency
4th Floor, 222 Queen Street
Ottawa, ON K1A 0L8

Dear Ms. Laflamme:

Re: Valuation for Duty Regulations

The Commodity Tax, Customs and Trade Section of the Canadian Bar Association (CBA Section) is responding to the Canada Border Services Agency's Consultation on Potential Amendments to the Valuation for Duty Regulations (Consultation Notice).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section deals with law and practice related to commodity tax, customs and trade remedy matters.

General Concern with Approach

The CBA Section is concerned that the CBSA may use the Consultation Notice to justify an exemption from the normal pre-publication and consultation requirements for regulatory amendments that impact international trade. While pre-publication is normally required for regulatory initiatives, an exemption may be granted by the Treasury Board (or the relevant regulatory making authority) when there is no statutory requirement to pre-publish.

Given that the CBSA has refused to commit to the normal process of pre-publication and commentary from interested parties prior to implementing any regulation, we are reluctant to engage in the process and lend credibility to an exemption request to normal prepublication requirements should such an exemption be sought from the Treasury Board.

The Consultation Notice is bereft of detail, and many examples in the document raise more questions than they answer. The proposed changes will have far-reaching implications and will likely create major unintended consequences. Our limited understanding of the proposal suggests it would reverse a Supreme Court of Canada decision[1] on sale for export and reverse several Federal Court of Appeal and

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

Canadian International Trade Tribunal decisions[2] on customs valuation methods. It may also violate Canada's obligations under CUSMA, CETA, the CPTPP, and the WTO Customs Valuation Agreement.

The devil is in the details. Without being able to review any proposed regulatory text, it is impossible to properly comment on the implications of the proposal, other than stating it appears to signal a major policy shift in the treatment of imported goods that will impact Canadian workers, consumers, and businesses – and several Canadian government departments. As such, our comments are limited to identifying high level concerns and potential unintended consequences of the proposed policy changes. We reserve the right to give additional and targeted input once the draft regulations are ultimately released.

Change in Trade Policy

The combined effect of proposed changes to the definitions of "sale for export" and "purchaser in Canada" represent a fundamental shift in trade policy and have implications that go far beyond clarifying existing law.

WTO agreements aim to lower trade barriers such as customs duties and tariffs to encourage trade. To further this objective, Canada is a signatory to the WTO Customs Valuation Agreement. The WTO Agreement recognizes that "customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply."[3] The WTO Agreement provides that the customs value of imported goods shall be the transaction value, i.e., the price paid or payable for the good when sold for export to the country of importation with specific adjustments. It follows that the term "sold for export" is a critical element in determining the duty payable by importers.

In our view, the proposed changes to the definition of "sale for export" will be difficult to implement. They are also not consistent with commercial practices and would impose a Canadian residence requirement on importers wishing to use transaction value.

The Consultation Notice proposes to base the transaction value on the "sale that causes the goods to be exported to Canada", i.e., the last transaction in the commercial chain, irrespective of the chronological order of the sales. The term "sale" would be constructed in a broad sense to include any type of arrangement that cause the goods to be exported to Canada. Under the proposed changes, determining the person who holds title to the goods at the time of importation will not be determinative in identifying the relevant sale for export to Canada.

The determination of what arrangement causes goods to be exported to Canada for sale to a "purchaser in Canada" would result in the transaction value being determined in a manner that is inconsistent with Canada's largest trading partners. It is also fraught with uncertainty.

While there are differences between the U.S. and Europe on determining the relevant sale for export where there are a series of sales of goods irrevocably destined for shipment to Canada prior to the importation of the goods, the proposed changes would not look to "sales" (which is an internationally recognized term) but rather to "arrangements" (which is not).

The Consultation Notice also implies that a sale for export to Canada could involve a sale that occurs in Canada (e.g., sale by a non-resident importer to a Canadian retailer pursuant to a purchase order where the terms of sale are "delivered, duty paid"). With the proposed changes, the value for duty paid on the

---

2 *AAi.FosterGrant of Canada Co. v. Canada (Commissioner of the Canada Customs and Revenue Agency)* 2004 FCA 259 and *Ferragamo USA Inc. v. Canada Border Services Agency*, (CITT Appeal No. AP-2005-053).

3 Section 4, General Introductory Commentary, Agreement on Implementation of Article VII of the General Agreement on Tariffs sand Trade 1994

imported goods under this arrangement would be significantly higher than it is today. As a result, from a Canadian retailer's perspective, there would be a distinction between the sources of supply.

Unintended Consequences

Uncertainty

One of the primary tenets of taxation law and trade agreements is certainty. This is particularly important for businesses conducting thousands of transactions a day through multiple sales channels. The proposed policy does not consider the realities of evolving business structures and distribution channels and will create significant confusion and uncertainty for importers.

For instance, a company should not be treated differently merely because it has adopted technology and automated its ordering system rather than using a live person making orders by phone. However, various examples in the Consultation Notice suggest that how a company makes its orders will affect whether its purchase price can be used to determine the transaction value of the goods. Similarly, different outcomes based on the website server's location does not appear to make practical sense.

Arbitrary rules will cause significant confusion amongst importers and may have the perverse effect of discouraging business to innovate so they can fit within the revised policy.

Tax and Job Losses

The government should consider the *overall* revenue impact (including impact on income taxes, job loss, etc.) of any policy direction.

To illustrate, in example 7 of the Consultation Notice, a consumer places an order through a website hosted by a non-resident on behalf of its Canadian subsidiary, causing a sale by the non-resident company to its Canadian affiliate and then from the Canadian affiliate to the consumer. With the proposed change, the value for duty will be based on the sale price to the consumer. If the new policy is implemented, aside from the higher price consumers will pay for goods, foreign companies will no longer have any reason to make online sales through their Canadian affiliates.

If non-residents stop making sales through their Canadian subsidiaries, Canada will lose the income taxes from sales made through the Canadian subsidiaries. Further, Canadian subsidiaries may be wound up if they are no longer needed, costing Canadian jobs. Also, if goods are shipped directly from a U.S. or Mexican parent company through what will now be a U.S. or Mexican website, the U.S. or Mexican companies can have their customers act as the importer of record to take advantage of the new $150 *de minimus* rule recently agreed to by Canada.

In these circumstances, the Canadian government will not only lose the income taxes formerly paid by the Canadian subsidiaries, it will also lose the customs duties previously paid by the Canadian subsidiary on every purchase where the goods shipped directly to customers by the non-resident are valued at less than $150 (and in addition the GST/HST on importation for the goods valued at less than $40). All these negative impacts and costs need to be quantified to determine the true value of the proposed changes.

Protectionist Measure Complaints from Trading Partners

The Consultation Notice states that the purpose of the proposed changes is to "improve duty and tax collection, by ensuring that goods are valued in a fair and consistent manner by all importers as a means to level the playing field between domestic and foreign businesses."

However, in many cases, non-resident importers will be at a competitive disadvantage compared to domestic importers engaged in the exact same transactions. For example, while a domestic importer can enter into a "domestic sale" and subsequently source goods from a non-resident supplier at a lower

acquisition cost (unless possibly it is purchasing from a related non-resident, which depending on how the rules are drafted may cause a different result), the non-resident importer who receives an order from the same customer (by definition on a cross-border basis) would be required to use that transaction as the "sale for export to Canada". This may leave Canada open to complaints under various trade agreements.

The CBSA should consider Canada's obligations regarding valuation rules under the World Customs Organization (WCO), WTO, and other relevant trade agreements. Without actual draft legislation to review, it is impossible to determine if Canada would meet these obligations.

We urge the CBSA to reconsider its process and commit to effective consultations in accordance with the Cabinet Directive on Regulation.[4] Meaningful and broad consultations on these major proposals and actual regulatory text are essential and must include Canadian workers, consumers, businesses and all relevant government departments.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Gregory Kanargelidis)

Gregory Kanargelidis
Chair, CBA Commodity Tax, Customs and Trade Section

[4] See Cabinet Directive on Regulation, section 3, Guiding principles for federal regulatory policy emphasizing an open and transparent process with meaningful engagement of stakeholders.