

FIRST SALE RULE

On March 1, 2021, the U.S. Court of International Trade (CIT) issued a decision with important ramifications for any company that uses “first sale” to reduce customs duty liability for goods imported into the United States. The CIT’s ruling in *Meyer Corp., U.S. v. United States* calls into question the continued viability of first sale for suppliers located in non-market economies. This development has meaningfully altered the risk profile associated with using first sale for transactions in China and Vietnam. All companies relying on first sale should review their first sale programs to evaluate the impact of this ruling and take adequate precautions.

The first sale rule permits importers to declare a lower customs value—and by extension, to lower the customs duty liability—for certain types of qualifying importations. To be eligible, an importation must involve a multi-tiered transaction (i.e., there must be three or more parties involved in the sequence of sales leading to the importer). Under U.S. law, the earliest sale in such a sequence of transactions may be declared as the customs value provided that the goods are clearly destined for the United States at the time of such sale and the first sale value otherwise satisfies the requirements applicable to any transaction value (i.e., it must be a bona fide sale that has been conducted at arm’s length).

First sale is thus commonly described as having “three elements”: the first sale in a multi-tiered transaction may be used as a customs value provided (1) it is a bona fide sale, (2) the goods are clearly destined for the United States at the time of the transaction, and (3) the value is an arm’s length price.

The CIT’s decision in *Meyer* hinges on additional language from the seminal 30-year-old case that established first sale as a viable basis for customs valuation—language that has frequently been quoted, but seldom, if ever, scrutinized for meaning. The CIT interpreted that language to impose an overlooked requirement, namely that any legitimate first sale must be (4) absent any distortive non-market influences. While the first three requirements for the use of first sale are frequently assessed and litigated, the fourth requirement, the CIT notes, “has generally been neglected.”

In *Meyer*, the plaintiff failed to establish that it was entitled to use the “first sale” transaction value because it failed to produce sufficient evidence to satisfy both the (well-established) arm’s length and (newly in focus) distortive non-market influence requirements. The importer’s failure to produce sufficient information on these elements was decisive.

Significantly, the CIT also expressed doubt that the first sale rule was ever intended to be applied to transactions involving non-market economy participants and inputs, inviting the U.S. Court of Appeals for the Federal Circuit to provide further clarification.

While Meyer is not directly binding on other importers or fact patterns, and does not invalidate the use of first sale in all cases, the opinion does increase the risk associated with using first sale with suppliers in non-market economies (e.g., China and Vietnam). While it remains to be seen whether the importer in Meyer will appeal the final decision of the CIT, the Meyer decision creates a clear path for U.S. Customs and Border Protection to begin dismantling the use of first sale in transactions involving non-market economies, should it choose to do so.

courtesy of Whitmer & Worrall