



21 June 2013

(13-3225)

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Committee on Customs Valuation

Original: English/French/Spanish

**VALUATION OF CARRIER MEDIA BEARING SOFTWARE
FOR DATA PROCESSING EQUIPMENT**

*Communication from the Chairman of the
Technical Committee on Customs Valuation (TCCV)*

The following communication, dated 17 May 2013, was received from the Chairman of the TCCV.

I have the pleasure of writing to you in my capacity as Chairman of the Technical Committee on Customs Valuation in order to inform you that, at its 36th Session, held in Brussels from 15 to 19 April 2013, the Technical Committee examined the question raised by Uruguay, "Application of WTO Decision 4.1 (Valuation of carrier media bearing software for data processing equipment) in those cases in which they are presented in "USB flash drives" or similar devices".

To illustrate the situation, I am attaching copies of the Technical Committee's documents where the issues had been discussed¹.

As such, I submit the subject for the purpose of consideration, and other purposes deemed to correspond, leaving the Technical Committee at your disposal.

¹ One of such documents is WCO document VT0875E1c "Report to the Customs Cooperation Council on the 35th Session of the Technical Committee on Customs Valuation", which was circulated as an Annex in WTO document G/VAL/W/225.

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

34th Session

VT0850E1a
(+ Annex)
O.Eng

Brussels, 20 March 2012

QUESTIONS RAISED DURING THE INTERSESSION

Application of WTO Decision 4.1 (Valuation of Carrier Media Bearing Software
for Data Processing Equipment) for Pen drives

(Item VI (a) on the Agenda)

SECRETARIAT COMMENTS

1. During the intersession Uruguay has proposed a question on the "Application of WTO Decision 4.1 (Valuation of Carrier Media bearing Software for data processing equipment) for Pen drives." The question is reproduced in the Annex to this document.
2. The Technical Committee is invited to examine the matter and determine whether it wishes to consider this issue as a Specific Technical Question at the 35th Session.

QUESTION BY URUGUAY

Application of Decision 4.1 of the Committee on Valuation of the World Trade Organization when Carrier Media are to be Found in the Form of "Pen Drives"

The issue

A company buys and imports, from a supplier from abroad, software programs that are to be found on carriers which are "Compact Discs or CDs".

The supplier from abroad issues the commercial invoice to his importing customer and distinguishes, in the total price of each software program, the cost of the physical carrier (CDs) from the software itself (its data and instructions).

The importing country has chosen to apply the second paragraph of Decision 4.1 of the WTO Valuation Committee. Consequently, the Customs value of these software programs is determined solely by the price of the corresponding CDs.

As of now, the supplier from abroad produces and sells the same software programs at the same price, but on another type of carrier: a "Pen Drive". The commercial invoice distinguishes in the same way between, on the one hand, the same price of the software (with the same data and instructions), and that of the physical carrier, which is now "Pen Drives".

Analysis

Application of the same Customs valuation criterion to this software on a new carrier is based on interpreting whether, given that these "Pen Drives" do contain "integrated circuits, semiconductors or similar devices", that characteristic precludes compliance with the condition laid down in the second paragraph of Decision 4.1.

In 1984, which is when the Decision was written, the requirement that the physical carrier not contain integrated circuits, semiconductors or similar devices was intended to ensure that the software was to be found in a temporary storage unit, with the sole purpose of being transported via that carrier to a subsequent data processing unit.

The technology has evolved significantly up to now and "Pen Drives" can easily be interpreted as clearly being temporary storage units, despite having "integrated circuits, semiconductors or similar devices" in their structure.

Nowadays, however, that composition can be interpreted as one where the characteristic of still being a temporary storage unit is maintained, thereby fully applying the second paragraph of Decision 4.1 of the WTO Valuation Committee.

Proposed outcome

That, prior to its study and analysis, the WCO Technical Committee on Customs Valuation issue an interpretative document on this matter for the entire global Customs community, perhaps in the form of a commentary or in whichever form is deemed most appropriate.

P.S.: The TCCV will be presented with samples of both products (the two items of software on their different physical carriers) so that they can be physically assessed.

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

VT0887E1a

36th Session

O.Eng

Brussels, 19 December 2012

APPLICATION OF WTO DECISION 4.1 (VALUATION OF CARRIER MEDIA BEARING SOFTWARE FOR
DATA PROCESSING EQUIPMENT) FOR USB FLASH DRIVES

(Item V (f) on the Agenda)

I. BACKGROUND

1. At the 35th Session, the Technical Committee conducted a preliminary examination of a case submitted by Uruguay concerning the "Application of WTO Decision 4.1 (Valuation of Carrier Media bearing Software for data processing equipment) for Pen drives." The question is reproduced in the Annex to Doc. VT0850E1a. The Technical Committee agreed that to be consistent with the terminology used in the Harmonized System, the devices in question will be referred to as "USB flash drives" for the purposes of the Technical Committee discussions.

II. SECRETARIAT COMMENTS

2. The Secretariat provided background information on WTO Decision 4.1 and the classification aspects to this case in Doc. VT0863E1a (paragraphs 2-8). At the 35th Session, the International Chamber of Commerce (ICC) offered to provide technical background relevant to this case. They have provided the following information describing the three main types of USB flash drives:

1. A blank flash drive, similar to a blank compact disc (CD) or digital versatile disc (DVD).
2. A flash drive with pre-loaded encryption or protection functionality which serves to protect the "content" software that is yet to be loaded.
3. A flash drive containing both encryption and pre-loaded "content" software or applications, (similar to a recorded CD or DVD). In some instances, the encryption software is not separate from the "content" software but rather built into the software itself. Thus, the operating system or other software is loaded along with its encryption component onto a blank flash drive.

The Secretariat will work further with the ICC to obtain supplementary relevant technical information.

3. Following discussions at the 35th Session, it was generally agreed that Decision 4.1 does not cover USB flash drives due to the presence of integrated circuitry which is explicitly excluded from the definition of carrier media given in the Decision. The question is therefore what further action, if any, the Technical Committee wishes to take regarding this apparent anomaly.

4. The Technical Committee discussed a proposal to refer the matter to the WTO Committee on Customs Valuation, with a view to seeking a review and possible amendment of Decision 4.1. Some delegates wished to consider this proposal further and the Secretariat agreed to clarify the appropriate procedure, should the Technical Committee decide to pursue this option. The procedure would be that the Chair of the Technical Committee would write to the Chair of the Committee on Customs Valuation, outlining the issue, providing information and possibly suggesting courses of action, based on the opinions expressed by the Technical Committee. That Committee could then decide whether it wanted to take further action and determine if it was appropriate to amend the relevant provisions of the Decision.

5. Some delegates favoured widening the scope of this case to include other devices which could be considered in this context. The Secretariat will continue to explore this aspect, together with the ICC, and report back accordingly.

6. The Secretariat would also like to draw Members' attention to written comments provided by Japan, Singapore, Uruguay and Venezuela prior to the 35th Session which can be found in the Annexes to Doc. VT0874E1a.

III. CONCLUSION

7. Members are invited to submit written comments to the Secretariat not later than **4 March 2013**, in particular indicating what course of action they think is appropriate for the Technical Committee to take. Comments received in response to this document will be published and circulated to Members of the Technical Committee for consideration at the 36th Session.

8. The Secretariat kindly requests Members to send their comments in electronic form where possible (Email address: valuation@wcoomd.org).

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

36th Session

VT0889E1a
(+ Annexes I to III)
O.Eng

Brussels, 21 March 2013

APPLICATION OF WTO DECISION 4.1 (VALUATION OF CARRIER MEDIA BEARING SOFTWARE FOR
DATA PROCESSING EQUIPMENT) FOR USB FLASH DRIVES

(Item V (f) on the Agenda)

I. BACKGROUND

1. At the 35th Session, the Technical Committee conducted a preliminary examination of a case submitted by Uruguay concerning the "Application of WTO Decision 4.1 (Valuation of Carrier Media bearing Software for data processing equipment) for Pen drives." The question is reproduced in the Annex to Doc. VT0850E1a. In Doc. VT0887E1a, further information was provided (supplied by the ICC) describing the three main types of USB flash drives.

II. MEMBERS COMMENTS

2. In response to Doc. VT0887E1a, written comments have been received from Canada and Uruguay. These comments are reproduced in the Annexes to this document. The Secretariat would also like to draw Members' attention to earlier written comments provided by Japan, Singapore, Uruguay and Venezuela prior to the 35th Session which can be found in the Annexes to Doc. VT0874E1a.

III. SECRETARIAT COMMENTS

3. Some delegates favoured widening the scope of this case to include other devices which could be considered in the context of this question. The Secretariat has explored this aspect further with the ICC. The ICC confirmed that there are a number of storage devices which incorporate some level of integrated circuitry in order to function. These devices include: Peripheral Component Interconnect (PCI) cards, memory or flash cards (for electronic flash memory data storage) and subscriber identity module (SIM) cards (removable smart cards and portable memory chips used in cell phones). However, normally these devices are not sold commercially with pre-loaded software. The Secretariat would like to thank the ICC for their assistance.

4. The Secretariat invites Members to consider the written comments and additional technical information in readiness for further discussion at the 36th Session.

Application of WTO Decision 4.1 for USB flash drives

Comments by Canada

1. The Administration of Canada thanks the Secretariat for having prepared the above-mentioned document and wishes to make the following comments.
2. The Administration of Canada is of the opinion that the Technical Committee should refer this matter to the World Trade Organization (WTO) Committee on Customs Valuation, with a view to seeking a review and possible amendment in order to include or not USB flash drives in Decision 4.1.

COMMENTS BY URUGUAY ON DOC. VT0887E1a

1. The Administration of Uruguay is grateful to the International Chamber of Commerce (ICC) and to the Secretariat for the work in preparing the text of Doc. VT0887, relating to WTO Decision 4.1.
2. Uruguay wishes to reiterate the need to have an updated version of the content and wording of that Decision as current production and marketing of software have changed from the previous form on physical carriers – on tapes, floppy disks, compact discs and DVDs – to the current USB flash drives and similar devices, giving rise to an unwanted effect when determining Customs value which is out of keeping with the spirit of the Decision.
3. Very instructive, furthermore, is the Statement made by the Chairman of the WTO Committee on Customs Valuation (CCV) at the meeting prior to the adoption of Decision 4.1, which is attached. Particular attention is drawn to its final paragraph.
4. In view of the above, Uruguay suggests that the Technical Committee (TCCV) draft and send a letter to the Chair of the WTO CCV, proposing an updated interpretation of the Decision, and to this end submits a draft of the letter to the Technical Committee for its consideration and analysis.
5. The Administration of Uruguay would flag that it may make additional comments at the 36th Session.

Annex III to Doc. VT0889E1a
(VT/36/Apr. 2013)

Statement made by the Chairman at the Meeting of the Committee on Customs Valuation of 24 September 1984 Prior to the Adoption of the Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment

"In the case of imported carrier media bearing data or instructions for use in data processing equipment (software), it is essentially the carrier media itself, e.g. the tape or the magnetic disc, which is liable to duty under the Customs tariff.

However, the importer is, in fact, interested in using the instructions or data; the carrier medium is incidental. Indeed, if the technical facilities are available to the Parties to the transaction, the software can be transmitted by wire or satellite, in which case the question of Customs duties does not arise. In addition, the carrier medium is usually a temporary means of storing the instructions or data; in order to use it, the buyer has to transfer or reproduce the data or instructions into the memory or data-base of his own system.

Under the international Customs valuation practices which were superseded by the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the Agreement), the value of the software was not, as a general rule, included when valuing the carrier medium. Following their adoption of the Agreement, those countries which followed the previous international practice have either changed their rules for valuing carrier media bearing computer software or have maintained their previous practice.

The proposed decision of the Committee on Customs Valuation on the valuation of carrier media bearing software for data processing equipment indicates that transaction value is the primary basis of valuation under the Agreement and that its application with regard to software recorded on carrier media for data processing equipment is fully consistent with the Agreement. It also would provide that given the "unique situation" regarding software just described and the fact that some Parties sought a different approach, it would also be consistent with the Agreement for those Parties which wish to do so to only take account of the cost or value of the carrier medium itself in determining the Customs value of imported carrier media bearing data or instructions.

In taking this decision on the valuation of carrier media bearing software for data processing equipment, it is understood that should any difficulties arise in the implementation and application of the decision, it would be useful for those difficulties to be considered by the Parties to the Agreement."

Annex III to Doc. VT0889E1a
(VT/36/Apr. 2013)

Draft letter to the Chair of the Committee on Customs Valuation

"Madam Chair of the Committee on Customs Valuation:

I have the pleasure of writing to you in my capacity as Chair of the Technical Committee on Customs Valuation in order to inform you that at its 36th Session, held in Brussels from 15 to 19 April 2013, the aforementioned Committee examined the question raised by Uruguay, "Application of WTO Decision 4.1 (Valuation of carrier media bearing software for data processing equipment) for USB flash drives" as it was found that, following technological advances, the Decision should be updated given that carrier media of the type "USB flash drives" or similar, which have been developed or are to be developed in future, are not properly covered.

For the analysis, one should bear in mind the instructive Statement made by your predecessor at the meeting of the Committee on Customs Valuation of 24 September 1984 prior to the adoption of this Decision and, in particular, the final paragraph.

In view of the provisions in paragraphs 1 and 2 of Annex II to the Agreement and of the precedents which exist on this matter (Procès-Verbal of Rectification of the term "*entretenimiento*" which is used in paragraph 3 (a) of the Interpretative Note to Article 1 – "*Price Actually Paid or Payable*" – as set out in document WT/Let/147, and Decisions on the word "*copyrights*" in the Interpretative Note to Article 8.1 (c), on the word "*undertaken*" used in Article 8.1 (b) (iv) and on the term "*creación y perfeccionamiento*" which is also in that Article), it was agreed by consensus to refer the matter to the Committee, which might adopt a new Decision. The following wording is suggested:

"At its XX meeting, held on XX, the Committee on Customs Valuation settled the question of updating the third subparagraph of paragraph 2 of WTO Decision 4.1 "Valuation of carrier media bearing software for data processing equipment" by inserting the following statement in the Minutes of the meeting, on the understanding that the original content and spirit of this provision will thereby be maintained, in particular, in view of the emergence of new types and versions of carrier media for temporary storage for software following advances in technology.

The Members of the Agreement considered that the wording of the third subparagraph should be expanded so that paragraph 2 properly covers carrier media which, although containing integrated circuits, semiconductors and similar devices, take the form solely of a means of temporary storage for software, for subsequent transfer to data processing equipment in order to be used.

Accordingly, the third subparagraph of paragraph 2 of this Decision should read as follows:

For the purpose of the Decision, the expression "carrier medium" shall not be taken to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices, with the exception of those which take the form solely of a means of temporary storage for software, for transfer to data processing equipment in order to be used; the expression "data or instructions" shall not be taken to include sound, cinematic or video recordings."

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

VT0863E1a

35th Session

O.Eng

Brussels, xx June 2012

APPLICATION OF WTO DECISION 4.1 (VALUATION OF CARRIER MEDIA BEARING SOFTWARE FOR
DATA PROCESSING EQUIPMENT) FOR USB FLASH DRIVES

(Item VI (f) on the Agenda)

I. BACKGROUND

1. At the 34th Session, the Technical Committee agreed to examine a case submitted by Uruguay concerning a question on the "Application of WTO Decision 4.1 (Valuation of Carrier Media bearing Software for data processing equipment) for Pen drives." The question is reproduced in the Annex to Doc. VT0850E1a. In order to be consistent with the terminology used in the Harmonized System, the devices in question are referred to in this document as "USB flash drives".

II. SECRETARIAT COMMENTS

2. WTO Decision 4.1 was adopted by the Committee on Customs Valuation (CCV) at its tenth meeting held on 24 September 1984. The Decision, (available in the WCO Valuation Compendium), gives WTO members the option to only take into account the cost or value of the carrier media itself in determining the Customs value of imported carrier media bearing data or instructions.

3. Decision 4.1 states that the expression "carrier medium" does not include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices. In GATT working documents detailing CCV discussions and Members' comments prior to the issue of Decision 4.1, an opinion was given that the Decision would not apply to data processing equipment which incorporates data or instructions. An example was given of a calculator containing an integrated circuit with the necessary programmes and data which should be valued inclusive of the value of its programming. This is an explanation why the Decision states that the expression "carrier medium" does not include integrated circuits, etc.

4. In the supporting statement from the Chairman of the CCV at the meeting of 24 September 1984, it was recognised that the carrier media is incidental in such transactions as the prime purpose for the importer is to gain access to the software and that the carrier media is a temporary means of storing the data or instructions. It is also noted that the software may be transferable via wire or satellite when the issue of Customs duties does not arise.

5. The Decision does not define types of carrier media, however, typically, it has been applied to compact discs (e.g. CDs, CD-ROMs and DVDs) and magnetic tapes.

6. Uruguay point out that a USB flash drive can be considered as a means of temporary storage for software. They note, however, that these devices contain "integrated circuits, semiconductors or similar devices" which are expressly excluded from this provision. This raises a contradiction in that, on the latter point alone, the Decision would not be applicable to such devices. Yet, it can be argued, a USB flash drive fulfils the description of being a temporary storage device.

7. For background, the extract below, taken from the Harmonized System, 2012, provides information on the classification of USB flash drives. It confirms that these devices are classified as semiconductor media. It is also noted that, unlike optical media (e.g. CDs), there is no distinction between recorded and unrecorded media.

Extract from Harmonized System 2012

85.23 - Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs, but excluding products of chapter 37.

- Magnetic media:

8523.21 - - Cards incorporating a magnetic stripe
8523.29 - - Other

- Optical media:

8523.41 - - Unrecorded
8523.49 - - Other

- Semiconductor media:

8523.51 - - Solid-state non-volatile storage devices
8523.52 - - "Smart cards"
8523.59 - - Other
8523.80 - Other

(C) Semiconductor Media

Products of this group contain one or more electronic integrated circuits.

Thus, this group includes:

- (1) **Solid-state, non-volatile data storage devices for recording data from an external source** (See Note 4 (a) to this chapter). These devices (also known as "flash memory cards" or "flash electronic storage cards") are used for recording data from an external source, or providing data to, devices such as navigation and global positioning systems, data collection terminals, portable scanners, medical monitoring appliances, audio recording apparatus, personal communicators, mobile phones, digital cameras and automatic data processing machines. Generally, the data are stored onto, and read from, the device once it has been connected to that particular appliance, but can also be uploaded onto or downloaded from an automatic data processing machine.

The media use only power supplied from the appliances to which they are connected, and require no battery.

These non-volatile data storage devices are comprised of, in the same housing, one or more flash memories ("FLASH E²PROM/EEPROM") in the form of integrated circuits mounted on a printed circuit board, and incorporate a connecting socket to a host appliance. They may include capacitors, resistors and a microcontroller in the form of an integrated circuit. Example of solid state non-volatile storage devices are USB flash drives.

8. The Secretariat notes that Decision 4.1 was issued over 28 years ago and that information technology has changed considerably over that period, in relation to both software and hardware and also the development of the internet for software transmission.

III. CONCLUSION

9. Members are invited to submit written comments to the Secretariat not later than **3 September 2012**. Comments received in response to this document will be published and circulated to Members of the Technical Committee for consideration at the 35th Session.

10. The Secretariat kindly requests Members to send their comments in electronic form where possible (Email address: valuation@wcoomd.org).