

First Sale Rule

In 1992, the United States Courts of Appeals upheld the U.S. Court of International Trade's decision implementing the First Sale Rule in the *Nissho Iwai American Corp. v. United States* decision.¹ This rule applies when goods are imported into the United State through a multi-tiered transaction, i.e., a transaction in which a middleman is involved in the sale of a good. When this occurs, and the elements are met, the importer may choose the lower value sale between the manufacturer and the middleman as the valuation price for the good. The rule requires (1) a bona fide sale, (2) goods that are clearly destined for the United States, (3) an arm's length transaction, and (4) the transaction must be absent any distortive nonmarket influences. Over the years, the fourth element has been overlooked when applying the First Sale Rule. Many importers have even relied on the First Sale Rule for goods coming out of China in order to minimize duties.

Recently, however, the U.S. Court of International Trade ("CIT") has questioned the use of the First Sale Rule on goods coming from China and other non-market economies. On March 1, 2021, in the *Meyer Corporation v. United States* decision, the Court undertook a thorough examination of the documentation that Meyer Corporation provided to satisfy the fourth element of the *Nissho Iwai* test.² The CIT ultimately stated that the records provided were not sufficient to show that the transaction was absent of any distortive nonmarket influences. The CIT went into detail about the three factors that could prove the absence of *de jure* and *de facto* state control. Ultimately, Meyer Corporation failed to meet its burden.

At the end of the opinion, most notably, the Court emphasized "doubts over the extent to which, if any, the First Sale Rule of *Nissho Iwai* was intended to be applied to transactions involving non-market economy participants or inputs."³ The CIT added that in this regard, "the Court of Appeals for the Federal Circuit could provide clarification." CBP has yet to provide an update on the policy. Meyer Corporation can appeal this decision, which would compel the Federal Circuit to decide the use of this rule. So far, no appeal has been filed and the effects to the First Sale Rule remain unclear.

Gabriela Heizer, Intern, Law Offices of Tammie Krauskopf, March 11, 2021

¹ *Nissho Iwai America Corp. v. United States*, 982 F.2d 505 (Fed.Cir. 1992)

² *Meyer Corporation v. United States*, No. 13-00154, 2021 WL 777788 (Ct. Int'l Trade Mar. 1, 2021).

³ *Id.* at 120.