



Global Trade News Alert Belgium

Using transfer prices for customs valuation: update on CJEU Hamamatsu Judgment

On 20 December 2017, the Court of Justice of the European Union (CJEU) issued its judgment in the Hamamatsu Photonics Deutschland GmbH case (hereafter referred to as 'Hamamatsu') with respect to customs valuation in relation to transfer pricing adjustments.

Hamamatsu is part of a group of companies that have concluded an advance pricing agreement. Hamamatsu purchased imported goods from its parent company in accordance with said advance pricing agreement. Based on the transfer pricing method (Residual Profit Split Method), each company within the concern was allocated a profit to generate a minimum rate of return. Depending on whether the actual profit falls outside of the anticipated margin, the result is adjusted to the margin's upper and/or lower limit, resulting in subsequent credit or debit notes (so-called transfer pricing adjustments).

The customs value of imported goods for Hamamatsu was based on the transfer price. Ultimately, Hamamatsu's actual profit fell below the margin range. The transfer prices were therefore adjusted, which in turn resulted in a credit for Hamamatsu. The customs declarations for the goods imported during this period were based on the initial allocated profit. As a result of the retroactive transfer pricing adjustment, the declared transaction value was too high, according to Hamamatsu. The question raised before the CJEU was whether

retroactive price adjustments were to be included in the goods' customs value. In this particular case, this would lead to repayment of customs duties for the imported goods. German customs authorities and the German national court rejected this argument, as the retroactive price adjustments did not relate to individual goods but to Hamamatsu's consolidated result. The adjustments did not reflect the goods' real value or the price payable for the imported goods, but were instead considered to be fictitiously priced.

The CJEU issued a judgment which does not provide clear guidance as to how to deal with similar cases. The court concluded that the Customs Code does not impose the obligation for importers to apply the transaction value's adjustment where it is adjusted upwards, nor does it require the customs authorities to anticipate the risk of downward adjustments. However, it is still unclear whether this relates to the fact that the adjustment was consolidated and not allocated to individual goods, or whether the price adjustment system is not accepted at all. In short, it is still unclear whether the judgment entails either of the following :

- The reported customs value can be considered as the 'transaction value', and can be used for customs valuation purposes without subsequent TP adjustments being allowed
- The reported customs value based on the transfer price should be regarded as fictitious and therefore cannot be used as the transaction value for customs valuation purposes, leading to the use of customs valuation methods other than that of transaction value

What does this mean for you?

This decision creates challenges for both companies as well as customs authorities on how to deal with intercompany transactions related to inbound shipments into the EU's customs territory, whereby transfer pricing adjustments are applied, regardless of how these adjustments are completed.

If a company's import transactions are valued using a transfer price, and in order to assess the impact of this CJEU judgment, Deloitte recommends to review and assess the current transfer pricing and TP adjustment policies.

On 24 January 2018, the Belgian Customs authorities published a new Circular Letter (2018/C/9) on Customs valuation, including comments regarding the use of transfer prices. As this Belgian circular letter was likely finalised before the CJEU's judgment, it does not refer to said judgment. However, reference is made to the known practice of the transaction value's upward/downward adjustments when TP adjustments are concerned.

From a VAT perspective, this CJEU judgment is relevant, as the VAT taxable base upon import is generally derived from the imported goods' customs value.

Any required actions will depend on how national and EU Customs authorities will further interpret this judgment and /or on whether the referring national German Court will request additional clarification from the CJEU.

Deloitte will provide updates with respect to the viewpoints of a number of national Customs authorities and/or viewpoints at EU level on this particular matter.

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