

Customs Flash

CJEU rules customs transaction value may not be based on transfer pricing adjustments

Introduction

The Court of Justice of the European Union (CJEU) issued a decision on 20 December 2017, concluding that the customs transaction value may not be based on a transfer price that was subject to a retroactive adjustment (Hamamatsu Photonics Deutschland GmbH).

Customs values are established by the price actually paid or payable for the goods when they are sold for export. Alternative valuation methods are available if that price cannot be established, and subsequent adjustments can be made in certain situations. However, in this case, the CJEU found that there was no general requirement to adjust transaction values by reference to transfer pricing adjustments; in other words, if the initial transfer price can be subject to a retroactive adjustment, it cannot be used for customs valuation purposes, so other customs valuation methods must be used.

The case

The case involved a German company that is part of a group that concluded an advance pricing agreement (APA) with the German tax authorities. The German company imported opto-electronic devices from its Japanese parent company for a price that was in line with the APA. Based on the transfer pricing method used (residual profit split method), each company within the group was allocated a fixed profit to ensure a minimum profit margin. After the margin range was established, the company's actual profit was compared to the margin, and the result was adjusted to the upper and or lower limit of the margin, giving rise to subsequent credit or debit charges (transfer pricing adjustments).

The customs value of the goods imported by the German firm was based on the transfer price. The German company's actual profit fell below the range for the margin prescribed in

the APA and, therefore, the transfer prices were adjusted downward, resulting in a credit for the German company. The customs declarations for the goods imported during the relevant period were based on the initial allocated profit. Due to the retroactive downward transfer pricing adjustment, the declared transaction value was too high and the German company requested a refund claim for overpaid customs duties.

The German customs authorities denied the refund because the price adjustments did not relate to individual goods but rather to the consolidated results of the parent company. The German company then appealed to the Munich Finance Court, when then referred the case to the CJEU.

The issue before the CJEU was whether retroactive price adjustments should be included in the customs value of goods.

The CJEU decision does not provide clear guidance on how to deal with similar cases. The court concluded that the German Customs Code does not require importer companies to request an adjustment of the transaction value 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 was not accepted at all.

What does this mean for you?

The CJEU decision creates potential compliance and administrative challenges for companies and the customs authorities on how to deal with intercompany transactions in which transfer pricing adjustments are possible, irrespective of how these adjustments are made. Companies whose imports are valued using a transfer price should consider a further review of the relevant customs valuations.

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