

By PwC Deutschland | 15 February 2018

European Court of Justice: customs values and the recognition of transfer pricing adjustments

In its decision in Hamamatsu Photonics Deutschland (C-529/16) the European Court of Justice (ECJ) held that Articles 28 to 31 of the Customs Code (old version) must be interpreted as meaning that they do not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

Facts

The case involved a German resident subsidiary, which belonged to a multinational group whose ultimate parent company, was resident in Japan. The German company purchased imported goods from its parent company at prices calculated in accordance with the advance pricing agreement concluded between that group of companies and the German tax authorities. The total of the amounts charged to the German company by the parent company were regularly checked and, adjusted as necessary to ensure the conformity with the 'arms-length' principle laid down in the OECD Guidelines for transfer pricing.

The checks were carried out in a number of stages, based on the 'Residual Profit Split Method', which is consistent with the OECD Guidelines. In the first stage, each participant was allocated a sufficient profit to produce a minimum rate of return. The residual profit was allocated proportionally in accordance with specific factors. In the second stage, the operating margin range was established. If the profit actually generated fell outside that margin, the result was adjusted to the upper or lower limit of the margin and credit notes were issued or additional charges made.

In the year to 30 September 2010, the applicant released for free circulation various goods from more than 1000 consignments from the parent company, declaring a customs value corresponding to the price charged before adjustment.

Due to a fall of the operating margin below the range for the operating margin during the period, the transfer pricing was adjusted and the German company received a credit note from its parent. Accordingly it then applied for a repayment of the customs duties on the imported goods. There was no allocation of the adjustment claimed between the individual goods imported.

The Principal Customs Office, Munich rejected that application on the ground that the method adopted by the applicant in the main proceedings was incompatible with Article 29(1) of the Customs Code which refers to the transaction value of individual goods, and not that of mixed consignments.

The decision

The ECJ held that Articles 28 to 31 of the Customs Code, as amended, do not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

Conclusion

This judgment raises important questions for group companies, which determine the transaction value on the basis of a transfer pricing method, which may be adjusted retroactively.

It should be emphasized that the customs value is only to be determined by using the prescribed alternative methods where the transaction value method cannot be applied. It was specifically only the transaction

value method which was considered unacceptable in the judgment in question.

It should also be borne in mind that it is already current administrative practice for customs to allow price corrections after a transfer pricing adjustment in favour of domestic companies and, consequently, requires businesses to report a transfer pricing increase.

However, it is unclear what effect downward retroactive adjustments will have on the customs value.

As a result, it can be seen that this ECJ decision on customs value is not necessarily in conflict with previous administrative practice.

The extent to which this will actually have future implications on how customs values will be evaluated in practice, will depend heavily on the interpretation of the Munich tax court and that of the customs administration – the latter based in turn on the interpretation by the tax court. The decision of the Munich tax court of 15 September 2016 (14 K 1974/15) shows that the court is in favour of a refund in cases of downward transfer price adjustments. But it remains to be seen.

Keywords

customs, customs value, transfer pricing adjustment