



ECJ on the determination of the customs value in the case of subsequent adjustment of transfer prices

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1 Background

If affiliated companies render supplies of goods to each other, transfer prices are applied. The initially invoiced amounts are often adjusted at the end of an accounting period based on transfer pricing agreements. This is done to ensure that the prices can satisfy the arm's length principle, which is necessary due to tax law provisions. Therefore, the final price is rarely fixed at the time of import. Corrections in the form of credits or subsequent debit charges are usually made on a flat-rate basis, without reference to individual products or import consignments. Basically, a transfer price can also represent the customs value of goods. However, the effect of the subsequent adjustment of these prices on the previously declared customs value and thus on import duties has, to date, been unclear. The practice of the main customs offices has been to recover import duties in the event of subsequent debit charges, but not to recognize credits as a reduction in the customs value.

2 Question referred to the ECJ and judgment

In the decided case, the Plaintiff released the goods of a Japanese affiliate for free circulation against payment of import duties. After the end of the accounting period, it received a credit note from the supplying affiliate on the basis of a transfer price agreement. The Plaintiff requested the customs authorities to refund the import duties paid, on a pro-rata basis. The repayment was calculated by deducting the credited amount from the amount of the original customs value, and subsequently applying an average duty rate to the original or adjusted customs value. The difference between the two values represented the amount of the requested refund. The main customs office rejected the claim for repayment. In the



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subsequent legal dispute before the Tax Court in Munich, the court referred the question to the ECJ as to whether the customs provisions allow for a subsequently adjusted transfer price to be accepted as the correct customs value. This should be answered irrespective of whether this value was higher or lower than the price initially declared. If the answer to this question was in the affirmative, the court also wanted to know from the ECJ whether this value could be determined on a flat-rate basis by means of an apportionment key. The Tax Court in Munich essentially wanted it confirmed that the customs value in such cases can be determined using the so-called "fall back method". The final transfer price should be the determining factor. However, in its judgment (C-529/16 of 20.12.2017), the ECJ refused to accept a (transaction) value consisting of an amount initially invoiced and a subsequent flat-rate adjustment, as customs value. This applies, in any case, where it is unclear whether an upward or downward adjustment will be made at the conclusion of the accounting period. The ECJ failed to provide any understandable justification for this.

3 Judgment of the Tax Court in Munich of 15.11.2018

The Tax Court in Munich (14 K 2028 of 15.11.2018) was therefore left to decide that the transfer price, which was declared during the year, represented the transaction value of the goods and therefore qualified as the customs value. Subsequent flat-rate adjustments, in the form of credits, were not considered by the court. A refund of customs duties and import duties based on these credits was therefore excluded. In its decision, the Tax Court in Munich clarified that it considered itself obliged to make this decision solely on the basis of the ECJ judgment. The judges also remarked that this judgment was in contradiction of previous ECJ case law. This reference was to case law, according to which, no arbitrary or fictitious value may be taken as a basis for determining the relevant customs value. In the judges' opinion, such an arbitrary value would be equivalent to a transfer price assumed during the year, which is still to be corrected. Not least for this reason did the court permit an appeal to the Federal Fiscal Court. This is not usual in cases where the ECJ has already made a decision that leaves no room for a contrary judgment. If the Federal Fiscal Court wants to deviate from this ECJ ruling, it will have to, once again, refer the question to the ECJ. This would also have been possible for the tax court. However, during the course of the oral hearing the judges explained that they did not expect the ECJ to provide helpful explanations if they referred the same question a second time.

4 Consequences for the practice

The judgment applies to all companies purchasing goods from third countries for which a transfer price agreement is in place, which allows for subsequent adjustments. Although the judgment was based on the old customs code, it is fully applicable to the new law in accordance with the UCC. According to the ECJ judgment, flat-rate transfer price agreements may no longer affect a pre-existing declared customs value. In this case, whether the issue concerns a subsequent debit charge or a credit, should not be taken into consideration. However, it is not foreseeable whether the main customs offices will change their post-clearance recovery practice in the event of subsequent debit charges. The Tax Court Munich's decision concerned the case of a credit. In this respect, the customs authorities were entitled not to grant a reimbursement in such a case.

The scope of the ECJ judgment is still unclear, even after the ruling of the Tax Court Munich. The appeal procedure (VII R 2/19) and the answer to a possible second referral to the ECJ will hopefully ultimately yield more information. In any case, the companies concerned should lodge an appeal against the post-clearance recovery assessments and request that the procedure be suspended.