



Determination of customs value in the event of subsequent adjustment of transfer prices

04 | 2022

1 Background

Taxable persons who repeatedly purchase goods from third countries must deal with the impact of adjustments of the transfer prices subsequently made on the customs value of the imported goods. Following a request for a preliminary ruling addressed to the ECJ (judgment of 20 December 2017, C-529/16 - *Hamamatsu*), the Munich Fiscal Court, in its judgment of 15 November 2018 (14 K 2028/18), rejected the application for a refund of import duties in the case of subsequently reduced transfer prices (see KMLZ Customs Newsletter 01 | 2019). The Munich Fiscal Court nevertheless allowed the appeal to the German Federal Fiscal Court (BFH), as the ECJ had not provided detailed comments on all questions of the Fiscal Court. Allowing the appeal opened up the door for the BFH to address a new request for a preliminary ruling to the ECJ, if need be. Now, the BFH has finally ruled on the appeal (VII R 2/19 of 17 May 2022, published on 29 September 2022). However, the BFH did not consider a renewed referral to the ECJ to be necessary.

2 Facts

The plaintiff/appellant released goods from a Japanese affiliated company for free circulation and paid import duties on these goods. The plaintiff declared a customs value corresponding to the prices invoiced to it. On the basis of a transfer pricing agreement with the supplying affiliated company, the plaintiff received a credit at the end of the financial year and applied to the customs authorities for a pro rata refund of the import duties paid. In order to calculate the refund of the customs duties, the plaintiff first reduced the sum of all original customs values by the amount of the credit note. The plaintiff then applied an average rate of duty, rounded up by 1.02% on each of the original and adjusted customs values. The difference between the two values calculated in this way resulted in the requested refund amount. The plaintiff did not apportion the adjustment amount to the individual imported goods.



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3 German Federal Fiscal Court judgment

The BFH confirmed the decision of the Munich Fiscal Court and dismissed the appeal. The Union law customs valuation is intended to exclude the use of arbitrary or fictitious customs values. The customs value must reflect the real economic value of the imported goods. These general principles also apply - with an appropriate scope of flexibility - to the application of the so-called "fall back method" used for determining the customs value. However, the fall back method only comes into consideration if the priority methods, in particular the so-called transaction value method, are not applicable. The determination of the customs valuation is based on a commodity and cut-off date related determination of the value. It is based on the date on which the customs declaration is accepted. A subsequent adjustment of the customs value is only permitted in special cases, in order to prevent arbitrary or fictitious customs values. In the case in question, the agreed transaction value consisted partly of an amount initially invoiced and declared and partly of a flat-rate adjustment made after the end of the accounting period. In these sorts of cases, where it is impossible to know whether an adjustment is even ultimately required at the end of the accounting period, and whether this possible adjustment needs to be made up or down, a subsequent adjustment of the customs value is expressly excluded under customs legislation. This also applies in cases where the fall back method is used.

The BFH also justifies its result with a corresponding use of Art. 8 para. 3 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade of 1994. According to this, additions to the price actually paid or payable are only permissible on the basis of objective and quantifiable data at the time of acceptance of the customs declaration. Therefore, only such data may lead to additions to the price actually paid or payable. This regulation is to be applied accordingly to deductions from the price actually paid. The burden of proof that these conditions are met is to be borne by the economic operator seeking the repayment of import duties. Accordingly, the same would have to apply to customs authorities wishing to recover import duties. The BFH found this proof lacking in the dispute in question. The subsequent adjustment of the transfer prices, based on the transfer pricing agreement, was not suitable in the specific case to substantiate a lower customs value of the goods. Such an adjustment of the transfer pricing, which serves as an income tax instrument for avoiding disputes and reducing transfer pricing risks, has no influence on the relevant customs value, at least within the framework of all customs valuation methods - due to the goods and cut-off date related nature of the customs valuation.

4 Consequences for the practice

Flat-rate adjustments of transfer pricing may no longer influence a customs value once it has been declared. It is irrelevant whether the adjustment is a subsequent debit charge or a credit. The main customs offices would therefore have to change their practice regarding post-release recoveries in the case of subsequent debit charges. Companies concerned should object to post-clearance recovery assessments and, if need be, request that the execution be suspended. Suspended appeal proceedings against post-clearance recovery assessments can be resumed. On the other hand, repayments of import duties on the basis of subsequent transfer pricing agreements are practically ruled out, since at the time of acceptance of the customs declaration, increases or reductions in prices actually paid may only possibly arise anyway and are thus not quantifiable. However, it remains unclear whether these legal consequences would apply to every adjustment made to transfer pricing or if it will only apply to flat-rate adjustments. Is an adjustment of the customs value possible after all, if the adjustment is made via the individual commodity groups and values? What is the effect of turnover-based bonuses and rebates that are already fixed in amount at the time of acceptance of the customs declaration? The issue is far from being resolved.