

## **The impact of retroactive transfer pricing adjustments on EU customs valuation**

With its judgment of December 20, 2017 in the Hamamatsu Photonics Deutschland case (C-529/16), the Court of Justice of the European Union (CJEU) finally provided some clarity about the impact of retroactive transfer pricing adjustments on the customs value of goods imported into the European Union. In short, the CJEU ruled that if the initial transfer price could be subject to retroactive adjustments, it cannot be used for customs valuation purposes. As a result, the goods imported by companies applying a transfer price that allows for retroactive adjustments, cannot be based on the transaction value method. This judgement means that one of the other customs valuation methods must be used instead. However, these are widely considered to be much more cumbersome in their practical application. The CJEU judgment could thus have far-reaching consequences for EU importers. That said, the practical implications will likely vary significantly for each EU Member State.

The judgment starts by reiterating that the customs value must be based on a fair, uniform and neutral system excluding the use of arbitrary or fictitious values. It continues by stating that although adjustments to the transaction value may be made retroactively, such adjustments are limited to very specific situations (quality defects and damaged goods). However, according to the CJEU, EU customs legislation (applicable through to April 30, 2016) does not impose an obligation on importers to apply for an adjustment of the customs value if the transaction price is increased retroactively as a result of the transfer pricing policy applied. The CJEU continued by stating that EU customs legislation also does not contain a provision enabling the EU authorities to safeguard against the risk that importers will only apply for downward adjustments of their customs declarations. According to the CJEU, this means that EU customs legislation does not allow for retroactive transfer pricing adjustments to be taken into account and therefore the transaction value method cannot be used in situations where a transfer pricing policy permits such retroactive price adjustments.

The question now arises whether the CJEU judgment will also have an impact on the day-to-day operations of importers that are subject to TP policies allowing for retroactive adjustments. Although the CJEU judgment covers the EU legislation applying through to April 30, 2016, it seems reasonable to assume that the CJEU's conclusions also apply to the EU customs legislation currently in force.

Usually the rejection of the transaction value forces importers to use either the deductive valuation method or the computed value. Both valuation methods normally require an importer to submit incomplete customs declarations as the proceeds of the sale or the manufacturing costs of the goods are not yet fixed at the time of importation. With respect to customs valuation, currently applicable EU customs legislation assumes that such incomplete declarations (also known as 'simplified declarations') will be reconciled within three years of their submission. Although such reconciliation is comparable with the 'modus operandi' prior to the CJEU judgement (e.g. amendment of declarations retroactively) and will normally result in the same customs value, there seem to be some practical challenges ahead. Firstly, importers that have to submit incomplete declarations on a regular basis will require an authorization from the customs authorities which will trigger an AEO compliance requirement. Secondly, the use of the deductive valuation

method or computed value usually involves extensive negotiations with the respective customs authorities in order to specify which costs are to be taken into account and how these should be allocated. The CJEU judgment will therefore probably increase the compliance burden, while it is unlikely that the customs value of the goods imported will change significantly. That said, nowadays non-compliance with these type of formalities may lead to steep penalties and even criminal charges, especially for those importers with a significant amount of customs entries.

Meijburg & Co's customs lawyers have extensive experience with EU customs valuation matters. We are therefore well-placed to help your company evaluate the impact of this judgment and assist you with the implementation of a compliant customs valuation structure.

Meijburg & Co  
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