TRANSFER PRICING AND CUSTOMS VALUE: THE CHALLENGE FOR CROSS-BORDER INTERCOMPANY TRANSACTIONS

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In order to properly reconcile transfer pricing adjustments with customs value, advance customs rulings should be used in order to share the TP policy with the Authorities concerned, as provided by the Trade Facilitation Agreement, and be allowed to neutralize any sanction, clear the delta value and be entitled to get back any potential refund of unduly paid duties.

Transfer pricing adjustments adopted "a posteriori" represent a potential issue when they refer to cross border sales and have direct impact with the customs value declared at the import, being that nowadays more than 60% of the transactions are intercompany sales.

Not even medium-sized enterprises restrict their business to the domestic market. Many enterprises root their interests in foreign countries through location savings.

A very common practice in the textile sector, regardless of the business size, offshoring occurs in almost all industrial and commercial sectors.

Indeed, relationships between manufacturers and distributors are sensitive to the issues of transfer pricing and, consequently, customs valuation. In fact, such transactions:

- imply the crossing of a border
- are between related companies.

In the past, the relationship between seller and buyer, as well as the crossing of a border, were almost always managed separately, not considering the customs relevance and regarded as a matter of direct taxation. Instead, the approach to customs impact has been relegated mainly to a matter of logistics.

Traditionally, income tax and customs rarely coincide in respect to valuation. Very often there is, on the one hand, proper and accurate transfer pricing policies and, on the other hand, over-estimated or under evaluated customs valuations, exposing businesses to sanctions, even of criminal nature.

In the same transaction, it might happen that whereas transfer pricing policies are regarded as adequate and acceptable, the customs valuation attracts criticism and claims. Revenue and Customs (where separate) might have different expectations on import transactions:

- For the Revenue authorities, costs borne by the buyer should be reasonably low, in order to prevent profits from being transferred to countries with preferential tax regimes and not to affect adversely the determination of the taxable base for the purposes of direct taxation.
- For the Customs authorities, the customs value should be reasonably high in order to determine a higher dutiable basis to which the relevant duty rate applies.

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In addition, from a mere customs point of view, in 2018 WCO[1] observed that "TP adjustments take place for different reasons, with different results. It is therefore necessary for Customs to gain an understanding of the different types of transfer pricing adjustment and then consider which may have an impact on the Customs value and how this should be dealt with. It can be argued that given that the effect of a transfer pricing adjustment is to achieve an arm's length price, in some cases - depending on the type of transfer pricing adjustment– the adjusted price will be closer to the 'un-influenced' price actually paid or payable for Customs valuation purposes. In other cases, such as tax-only transfer pricing adjustments, it may demonstrate that the price was in fact influenced by the relationship. Put another way, Customs may not be able to make a final decision on the question of price influence until any adjustments have been made (or quantified)."

In the global market, despite the recent WCO auspices, "Customs' treatment of transfer pricing adjustments remains inconsistent around the world"[2]. Some Customs administrations consider both upwards and downwards price adjustments and make corresponding duty adjustments where appropriate, others do not, or only consider upwards adjustments (with additional duty payment) but do not consider downwards adjustments (duty refund). This approach does not offer a symmetry in evaluating the circumstances surrounding the sale. If the transaction is eligible to pay an additional duty deriving by an upward TP adjustment, a refund must be given in case of downward ones.

Well, in any WCO member country, just because of the last WCO position, businesses now have the concrete opportunity to ask for symmetrical treatment, being allowed to report the upward and downward adjustments, taking the benefit of the solutions proposed by the ICC[3] to ease the customs review of the assessment.

In its "Policy statement", despite the inconsistency underlined by WCO, ICC (since 2012) suggested the recognition by the customs administration of post-transaction transfer pricing adjustments (upward or downward). This recognition should be applicable for adjustments made either as a result of a voluntary compensating adjustment – as agreed upon by the two related parties – or as a result of a tax audit.

Despite some reluctancy within some Customs Authorities worldwide, post-transactions adjustments are permitted by both the OECD Guidelines and WTO customs valuation rules. Post-transaction adjustments can be made for a variety of reasons, including voluntary adjustments, but also for year-end adjustments when trying to get within a pre-agreed range or price at the end of a year or period.

Thus, in order to be allowed to properly reconcile TP adjustments with customs value and to avoid being challenged for a misrepresentation of such value in case of audit executed prior to the official reconciliation, an advance agreement with Customs is always advisable. The agreement - to be finalized filing a specific customs ruling – is the way to disclose the TP policy earlier than the import/export declarations and let the authorities be aware of the potential changes which may be generated by the post-transaction adjustments, with the perspective of neutralizing any sanction and be entitled to ask any potential duty refund.

Well, WTO members concluded negotiations at the 2013 Bali Ministerial Conference on the landmark Trade Facilitation Agreement (TFA), which entered into force on 22 February 2017 following its ratification by two-thirds of the WTO membership. Among the relevant new provisions given by the TFA, this analysis must mentioned the tool of the advanced rulings, as per TFA art. 3. This means that, also (especially) in the field of transfer pricing and customs valuation, in each WTO member country, companies must be allowed to file advanced rulings with the perspective of defining - jointly with the competent authority – the best way to reconcile TP adjustments with customs value.

It must be noted that art. 3, par 9(b)(i), states that an advanced ruling may be used to identify the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts. In EU Customs Law, Art. 22 of the UCC (EU Reg. 952/2013) provides the right to submit request for Decisions relating to the application of the customs law.

1 WCO Guide to Customs Valuation and Transfer Pricing (2018).

2 WCO Guide to Customs Valuation and Transfer Pricing (2018), pag. 69.

3 See the "Policy Statement" on Transfer pricing and customs value, prepared by the ICC Commission on Taxation and the ICC Committee on Customs and Trade Regulations (Doc. No. 180/103-6-521, February 2012).