

## Appeal in “Hamamatsu” case rejected by German Federal Court

In its Judgment of 17 May 2022 (published on 29 September 2022), in Case VII R 2/19 "Hamamatsu", the German Federal Fiscal Court (Bundesfinanzhof, BFH) rejected the appeal filed on points of law (Revision) relating to an application for refund of customs duties; at the same time the Court made a number of fundamental determinations which could have a substantial impact on the future assessment under customs valuation law of transactions between affiliated group companies.



The case concerned the German subsidiary of a Japanese parent company; when declaring the customs value of imported goods, the German entity used the sales price for the definition of the transaction value. It was agreed between the group companies and with the German tax authorities (without the involvement of the customs administration) within the framework of an advance pricing agreement (APA) that the intragroup transfer price would be established on the basis of the "residual profit split method". Accordingly, at the end of each financial year, balancing payments were made which were either credited to or debited from the German company. The dispute was based on a situation in which the German subsidiary retroactively received flat-rate price reductions. These led to an application for the refunding of customs duties due to a retroactive reduction in the declared import customs values.

The refund was ultimately refused by the Fiscal Court (Finanzgericht) based on the Judgment of the European Court of Justice (ECJ) dated 20 December 2017 in Case C-529/16, which has attracted a great

deal of attention in the customs world. The Claimant filed an appeal on points of law (Revision) against the decision of the Fiscal Court, which has now also been rejected.

In this context, the following fundamental determinations by the German Federal Fiscal Court are highly noteworthy:

- » The **transaction value method**, i.e. determination of customs value based on invoice amount, is **precluded** in such cases in which the value of the imported goods cannot be determined at the time of importation, since such value consists of the invoice amount and a flat-rate adjustment, which cannot be determined at the time of importation. This position is based on the aforementioned ECJ Judgment and is thus not new, but in our view is no less noteworthy as a result.
- » The so-called **fall-back method for determining customs value** is in this instance **precluded** for the same reasons:

*"It follows from this that the verdict of the ECJ, in accordance with which the Customs Code does not permit an agreed transaction value to be used as a basis for calculating the customs value where such transaction value consists partly of an amount initially invoiced and reported and partially of a flat-rate adjustment following the end of the accounting period, without it being possible to tell whether, at the end of the accounting period, such adjustment will take place up or down, is in any event ultimately also definitive with regard to determining the customs value under the fall-back method pursuant to Article 31 of the Customs Code." (Judgment, para 49).*

- » According to the German Federal Fiscal Court, **retrospective price adjustments are irrelevant**

### as regards determination of customs value:

*"In any event, within the framework of all customs value determination methods, such a transfer pricing adjustment which, as an instrument for income tax purposes, serves the prevention of disputes and the reduction of transfer pricing risks (see Liebchen in Mössner et al., Steuerrecht international tätiger Unternehmen, 5th ed., marginal ref. 13.50; cf. also Drüen in Wassermeyer MA Art. 25 MK, marginal ref. 110), has no impact on the definitive customs value - due to the demonstrated goods-related and record-date-based nature of customs value determination." (Judgment, para. 59).*

- » The above determination relates not only to retrospective downward adjustments but, according to the German Federal Fiscal Court, expressly **also to upward adjustments**. As a result, retrospective price increases which would also entail an increase in customs value would also have to be disregarded.

It must be stressed that, of course, judgments by the German Federal Fiscal Court – unlike those of the European Court of Justice – do not have a direct effect as regards the entire European Union. Nevertheless, it will be very interesting to observe the future impact of these determinations, which relate to EU-wide customs valuation law (and, in terms of basic principles, indeed customs valuation law virtually around the world).

The Court took the general point of view that any retroactive price adjustments, i.e. even if effected outside implementation of an APA based on application of a transfer pricing mechanism with balancing payments, have "no influence on the definitive customs value"; this is due to the unclear effects in terms of amount and impact at the time of importation. This statement made by the Court could be potentially explosive since, consequently, this would also preclude retrospective levying of customs duties.

In the present case, at the time of importation the customs administration was not aware that price adjustments would retrospectively be applied. It remains to be seen whether this means that the assessment would be different if a prior arrangement were to be made with the customs administration. Since, however, also in the event of a prior arrangement to the effect that retroactive balancing will be undertaken,

the lack of clarity in terms of the amount of the balancing payment, and whether adjustment would be upwards or downwards, would remain, any differing assessment in such an instance must be considered unlikely.

The German Federal Fiscal Code and the European Court of Justice moreover criticised the fact that the Claimant and Appellant did not undertake a precise allocation of the balancing payment across the respective imported goods. In this regard too, we very much doubt that the assessment would be different if a more precise apportionment, for instance through an invoice correction, were possible, since it would remain the case that this would not be clear at the relevant time of importation.

It consequently remains to be seen how the German customs administration and those of the other EU Member States respond to this Judgment. We would advise companies in a comparable situation to appeal against any notices from the customs administration concerning retrospective levying of customs duties based on retroactive price adjustments. We would recommend those who have in the past regularly and proactively submitted corrective reports for the retroactive adjustment of customs values based on transfer pricing adjustments to get in touch with the customs administration and proactively clarify the impact of the Judgment. If the administration insists on a correction notification and then issues retrospective demands for payment of customs duty, again an appeal should be filed in order to prevent the notice taking legal effect until the matter has been definitively clarified.

Author \_\_\_\_\_



**Kay Masorsky**  
kay.masorsky@wts.de  
T +49 162 2444835

## About WTS Global

---

With representation in over 100 countries, WTS Global has already grown to a leadership position as a global tax practice offering the full range of tax services and aspires to become the preeminent non-audit tax practice worldwide. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

The member firms of WTS Global are carefully selected through stringent quality reviews. They are strong local players in their home market who are united by the ambition of building a truly global practice that develops the tax leaders of the future and anticipates the new digital tax world.

WTS Global effectively combines senior tax expertise from different cultures and backgrounds and offers world-class skills in advisory, in-house, regulatory and digital, coupled with the ability to think like experienced business people in a constantly changing world.

For more information please see: **wts.com**

## Imprint

---

WTS Global  
P.O. Box 19201 | 3001 BE Rotterdam  
Netherlands  
T +31 (10) 217 91 71 | F +31 (10) 217 91 70  
wts.com info@wts.de

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the author.