Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

20 December 2017*

(Reference for a preliminary ruling — Common Customs Tariff — Customs Code — Article 29 — Determination of the customs value — Cross-border transactions between related companies — Advance transfer pricing arrangement — Agreed transfer price composed of an amount initially invoiced and a flat-rate adjustment made after the end of the accounting period)

In Case C-529/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht München (Finance Court, Munich, Germany), made by decision of 15 September 2016, received at the Court on 17 October 2016, in the proceedings

Hamamatsu Photonics Deutschland GmbH

v

Hauptzollamt München,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2017,

after considering the observations submitted on behalf of:

– Hamamatsu Photonics Deutschland GmbH, by G. Eder and J. Dehn, Rechtsanwälte,

– the Hauptzollamt München, by G. Rittenauer and M. Uhl and by G. Haubner, acting as Agents,

– the European Commission, by M. Wasmeier and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 28 to 31 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1) ('the Customs Code').

2 The request has been made in proceedings between Hamamatsu Photonics Deutschland GmbH ('Hamamatsu') and the Hauptzollamt München (Principal Customs Office, Munich, Germany), following the refusal of the latter to partially refund customs duties declared and paid by Hamamatsu.

Legal context

EU law

The Customs Code

3 Article 28 of the Customs Code provides that the provisions of Chapter 3 of that code 'determine the customs value for the purposes of applying the Customs Tariff of the European Communities and non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods'.

4 Article 29(1) of the Customs Code provides:

'The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

(a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

– are imposed or required by a law or by the public authorities in the Community,

– limit the geographical area in which the goods may be resold,

or

– do not substantially affect the value of the goods;

(b) the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 32;

and

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.'

5 Article 29(2) of that code provides:

‘(a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price.

… (b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:
(i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to the Community;
(ii) the customs value of identical or similar goods, as determined under Article 30(2)(c);
(iii) the customs value of identical or similar goods, as determined under Article 30(2)(d).

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 32 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related.

(c) The tests set forth in subparagraph (b) are to be used at the initiative of the declarant and only for comparison purposes. Substitute values may not be established under the said subparagraph.’

6 Under Article 29(3)(a) of the code:

‘The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments and may be made directly or indirectly.’

7 Article 30(1) of the Customs Code states:

‘Where the customs value cannot be determined under Article 29, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined, subject to the proviso that the order of application of subparagraphs (c) and (d) shall be reversed if the declarant so requests; it is only when such value cannot be determined under a particular subparagraph that the provisions of the next subparagraph in a sequence established by virtue of this paragraph can be applied.

…’

8 Article 31(1) of the Customs Code provides:

‘Where the customs value of imported goods cannot be determined under Articles 29 or 30, it shall be determined, on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of:

– the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade,

– Article VII of the General Agreement on Tariffs and Trade of 1994,

and

– the provisions of this chapter.'

9 Article 32 of that code provides:

'1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
  (i) commissions and brokerage, except buying commissions,
  (ii) the cost of containers which are treated as being one, for customs purposes, with the goods in question,
  (iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
  (i) materials, components, parts and similar items incorporated in the imported goods,
  (ii) tools, dies, moulds and similar items used in the production of the imported goods,
  (iii) materials consumed in the production of the imported goods,
  (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller;

(e) (i) the cost of transport and insurance of the imported goods, and

and(ii) loading and handling charges associated with the transport of the imported goods

to the place of introduction into the customs territory of the Community.

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

…'

10 Article 33 of the Customs Code states:

'Provided that they are shown separately from the price actually paid or payable, the following shall not be included in the customs value:

(a) charges for the transport of goods after their arrival at the place of introduction into the customs territory of the Community;

(b) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation of imported goods such as industrial plant, machinery or equipment;

(c) charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods, irrespective of whether the finance is provided by the seller or another person, provided that the financing arrangement has been made in writing and where required, the buyer can demonstrate that:

– such goods are actually sold at the price declared as the price actually paid or payable, and

– the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided;

(d) charges for the right to reproduce imported goods in the Community;

(e) buying commissions;

(f) import duties or other charges payable in the Community by reason of the importation or sale of the goods.'

11 Under Article 78 of that code:

'1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

The implementing regulation

12 Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 881/2003 of 21 May 2003 (OJ 2003 L 134, p. 1) ('the implementing regulation'), lays down, in Section 1 of Chapter 2, entitled 'Declarations for release for free circulation' of Title IX, entitled 'Simplified procedures', the provisions applicable to incomplete declarations. Article 256(1) of the implementing regulation thus provides:

'The period allowed by the customs authorities to the declarant for the communication of particulars or production of documents missing at the time when the declaration was accepted may not exceed one month from the date of such acceptance.

In the case of a document required for the application of a reduced or zero rate of import duty, where the customs authorities have good reason to believe that the goods covered by the incomplete declaration may qualify for such reduced or zero rate of duty, a period longer than that provided for in the first subparagraph may, at the declarant's request, be granted for the production of the document, if justified in the circumstances. That period may not exceed four months from the date of acceptance of the declaration. It cannot be extended.

Where the missing particulars to be communicated or documents to be supplied concern customs value, the customs authorities may, where this proves absolutely necessary, set a longer time limit or extend the period previously set. The total period allowed shall take account of the prescribed periods in force.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Hamamatsu, a company established in Germany, which belongs to a group of companies active globally whose parent company, Hamamatsu Photonics, is established in Japan. Hamamatsu distributes, inter alia, optoelectronic devices, systems and accessories.

14 Hamamatsu purchased imported goods from its parent company which charged it for those goods intra-group prices in accordance with the advance pricing agreement concluded between that group of companies and the German tax authorities. The total of the amounts charged to the applicant in the main proceedings by the parent company were regularly checked and, if necessary, adjusted, in order to ensure the conformity of the sale price with the 'arms-length' principle laid down in the guidelines of the Organisation for Economic Co-operation and Development (OECD) applicable to transfer pricing for multinational undertakings and the tax authorities ('the OECD Guidelines').

15 The referring court, the Finanzgericht München (Finance Court, Munich, Germany) explains that those checks are carried out in a number of stages, based on the method called the 'Residual Profit Split Method', which is consistent with the OECD Guidelines. In the first stage, each participant is allocated a sufficient profit to produce a minimum rate of return. The residual profit was allocated proportionally in accordance with specific factors. In the second stage, Hamamatsu's operating margin range is established. If the profit actually generated falls outside that margin, the result is adjusted to the upper or lower limit of the margin and credits or subsequent debit charges are made.

16 Between 7 October 2009 and 30 September 2010, the applicant in the main proceedings released for free circulation various goods from more than 1 000 consignments from the parent company, declaring a customs value corresponding to the price charged. A rate of between 1.4% and 6.7% was levied on the taxable goods.

17 Because, during that period, the operating margin of the applicant in the main proceedings fell below the range for the operating margin, the transfer prices were adjusted as a result. The applicant in the main proceedings thus received a credit of EUR 3 858 345.46.

18 Having regard to the adjustment of the transfer pricings subsequently made, by letter of 10 December 2012, the applicant in the main proceedings applied for the repayment of the customs duties for the imported goods of EUR 42 942.14. There was no allocation of the adjustment amount to the individual imported goods.

19 The Principal Customs Office, Munich rejected that application on the ground that the method adopted by the applicant in the main proceedings was incompatible with Article 29(1) of the Customs Code which refers to the transaction value of individual goods, not that of mixed consignments.

20 The applicant in the main proceedings lodged an appeal against that decision in the referring court.

21 The referring court considers that the final annual amount constitutes the final transfer pricing, established in accordance with the arms-length principle provided for by the OECD Guidelines. There was thus no point in basing the transfer pricing exclusively on the provisional pricing in the context of an advance transfer pricing agreement concluded with the tax authorities which does not reflect the real value of the goods. Thus, the price declared to the customs authority was only a fictitious pricing and not the price payable for the imported goods pursuant to Article 29 of the Customs Code.

22 In those circumstances, the Finanzgericht München (Finance Court, Munich) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Article 28 et seq. of [the Customs Code] permit an agreed transfer price, which is composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, using an allocation key, regardless of whether a subsequent debit charge or credit is made to the declarant at the end of the accounting period?

(2) If so:

May the customs value be reviewed and/or determined using simplified approaches where the effects of subsequent transfer pricing adjustments (both upward and downward) can be recognised?'

Consideration of the questions referred

The first question

23 By its first question, the referring court asks essentially whether Articles 28 to 31 of the Customs Code must be interpreted as meaning that they permit the adoption, as the customs value, of an agreed transaction value which consists partly of an amount initially invoiced and declared and partly of a flat-rate adjustment made after the end of the accounting period, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

24 At the outset, it should be borne in mind that, according to settled case-law of the Court, the objective of EU law on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. The customs value must thus reflect the real economic value of an imported good and take into account all of the elements of that good that have economic value (see, to that effect, judgments of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716, paragraph 30; of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraphs 23 and 26; and of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, paragraph 30).

25 By virtue of Article 29 of the Customs Code, the customs value of imported goods is the transaction value, that is to say, the price actually paid or payable for the goods when they are sold for export to the customs territory of the European Union, adjusted, where necessary, in accordance with Articles 32 and 33 thereof (see, to that effect, judgments of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 38, and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 24).

26 Furthermore, the Court has already stated that the customs value had to be determined primarily according to the 'transaction value' method under Article 29 of the Customs Code. It is only if the price actually paid or payable for the goods when they are sold for export cannot be determined that it is appropriate to use the alternative methods laid down in Articles 30 and 31 thereof (see, in

particular, judgments of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraphs 38, 41, 42 and 44, and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraphs 24 and 27 to 30).

27 The Court has also stated that, if as a general rule the price actually paid or payable for the goods forms the basis for calculating the customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value (see, to that effect, judgments of 12 June 1986, *Repenning*, 183/85, EU:C:1986:247, paragraph 16; of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 24; of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 39; and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 25).

28 The transaction value must reflect the real economic value of imported goods and take into account all the elements of those goods that have economic value (judgments of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraph 40, and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 26).

29 Article 78 of the Customs code permits the customs authorities, on their own initiative or at the request of the declarant, to amend the declaration.

30 However, it must be recalled that the cases in which the Court has allowed a subsequent adjustment of the transaction value is limited to specific situations relating, inter alia, to quality defects or faulty workmanship in the goods discovered after their release for free circulation.

31 The Court has, in particular, already held that it had to be accepted that, where the goods to be valued were bought free of defects but were damaged before their release for free circulation, the price actually paid or payable was to be reduced in proportion to the damage suffered, since it was an unforeseeable reduction in the commercial value of the goods (judgment of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 25 and the case-law cited).

32 Similarly, the Court has acknowledged that the price actually paid or payable could be reduced in proportion to the reduction in the commercial value of the goods owing to a hidden defect which it was shown to be present before their release into free circulation and gave rise to subsequent repayments under a warranty obligation which, as a result, might result in a subsequent reduction in the customs value of those goods (judgment of 19 March 2009, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 26 and the case-law cited).

33 Finally, it must be stated that, in the version in force, the Customs Code does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is adjusted subsequently upwards and it does not contain any provision enabling the customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments.

34 In those circumstances, it must be held that the Customs Code, in the version in force, does not allow account to be taken of a subsequent adjustment of the transaction value, such as that at issue in the main proceedings.

35 Therefore, the answer to the first question is that Articles 28 to 31 of the Customs Code, in the version in force, must be interpreted as meaning that they do not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

The second question

36 As the second question expressly applies only if the first question is answered in the affirmative, there is no need to answer it.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 28 to 31 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, must be interpreted as meaning that they do not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.

[Signatures]