

## **Transfer Pricing and Customs Valuation**

### **Two worlds to tax as one**

#### **Chapter 1: Introduction**

1. Introduction
2. The Search for Comparison
3. Why seek integration of customs and transfer pricing?
4. Some key differences between customs and transfer pricing
5. Some key similarities between customs and transfer pricing
6. Developments at the joint WCO-OECD conferences
7. Tentative Conclusions

#### **Chapter 2: Transfer Pricing – OECD**

- 1.1 Introduction: the arm's length principle: objectives
- 1.2 Transfer pricing: scope
  - 1.2.1 Associated enterprises and permanent establishments
    - 1.2.1.1 Associated enterprises
    - 1.2.1.2 Permanent establishments ("PEs")
  - 1.2.2 Cross-border transactions and dealings
  - 1.2.3 Associated enterprises
  - 1.2.4 Commercial or financial transactions
- 1.3 Valuation of transactions between associated enterprises: the role of comparability analysis for transfer pricing purposes. Taking account of the functions, assets and risks involved in a transaction (Para. 1.15 to 1.35 of the OECD Guidelines)
- 1.4 Valuation of transactions between associated enterprises: transfer pricing methods
  - 1.4.1 The three traditional transaction methods
    - 1.4.1.1 Comparable Uncontrolled Price ("CUP") method (Para. 2.6 to 2.13 of the OECD Guidelines)
    - 1.4.1.2 Resale price method (Para. 2.14 to 2.31 of the OECD Guidelines)

- 1.4.1.3 Cost plus method (Para. 2.32 to 2.48 of the OECD Guidelines)
- 1.4.1.4 Example
- 1.4.2 The transactional profit methods
  - 1.4.2.1 Transactional net margin method (“TNMM”) (Para. 3.26 to 3.48 of the OECD Guidelines)
  - 1.4.2.2 Transactional profit split (Para. 3.5 to 3.25 of the OECD Guidelines)
- 1.4.3 Other methods (Para. 1.68 of the OECD Guidelines)
- 1.4.4 Choice of the transfer pricing method (Para. 1.68 to 1.70, 2.49 and 3.1 to 3.4 of the OECD Guidelines)
- 1.4.5 Use of more than one method (Para. 1.69 of the OECD Guidelines)
- 1.4.6 Conclusion on methods
  
- 1.5 A few practical issues in relation to transfer pricing valuation that can affect customs valuation
  - 1.5.1 Evaluation of separate and combined transactions (Para. 1.42 to 1.44 of the OECD Guidelines)
  - 1.5.2 Use of an arm's length range (Para. 1.45 to 1.48 of the OECD Guidelines)
  - 1.5.3 Intangibles and services
  
- 1.6 Timing of assessment and post-transaction adjustments for transfer pricing and customs purposes
  - 1.6.1 Year-end compensating adjustments upon filing of the tax return
  - 1.6.2 Primary adjustments (Commentary on Article 25 of the OECD Model)
  - 1.6.3 Corresponding adjustments (Para. 4.32 to 4.39 of the OECD Guidelines)
  
- 1.7 Dispute resolution (Art. 25 of the OECD Model and Commentary thereon)
  
- 1.8 Dispute prevention: Advance Pricing Arrangements (“APA”) (Para. 4.124 to 4.166 of the OECD Guidelines and Annex of October 1999: Guidelines for conducting APAs under the Mutual Agreement Procedure)
  
- 1.9 Other administrative aspects
  
- 1.10 Conclusion

### **Chapter 3: Customs Value**

- 1. Introduction
  - 1.1 What is customs valuation?

- 1.2 Why is customs valuation relevant to transfer pricing?
- 1.3 Structure of chapter
  
- 2. Work of the International Valuation Committees:
  - 2.1 The WTO Valuation Committee
  - 2.2 The WCO Technical Committee on Customs Valuation
  - 2.3 WCO Compendium on Customs Valuation
  - 2.4 Decision 6.1 of the WTO Valuation Committee
  
- 3. The WTO Valuation Agreement
  - 3.1 Scope and application of the Agreement
  - 3.2 History
    - 3.2.1 Article VII GATT
    - 3.2.2 Brussels Definition of Value (BDV)
    - 3.2.3 The Agreement on implementation of Article VII of the GATT
  - 3.3 Objectives and Principles
  - 3.4 Structure
    - 3.4.1 General Introductory Commentary
    - 3.4.2 Part I: Rules on customs valuation (Articles 1-17)
    - 3.4.3 Part II: Administration, Consultations and Dispute Settlement (Articles 18 and 19)
    - 3.4.4 Part III: Special and Differential Treatment (Article 20)
    - 3.4.5 Part IV Final Provisions (Articles 21-24)
    - 3.4.6 Annex I: Interpretative Notes (General Note and Notes to Articles)
    - 3.4.7 Annex II: Technical Committee on Customs Valuation
    - 3.4.8 Annex III: Miscellaneous (Special Provisions for Developing Countries)
  - 3.5 Valuation Methodology
  - 3.6 Transaction Value Method (Article 1)
    - 3.6.1 Sale
      - 3.6.2 Sale for export to the country of importation
      - 3.6.3 Four particular conditions
      - 3.6.4 Related party transactions
        - 3.6.4.1 General background
        - 3.6.4.2 Circumstances surrounding the sale
        - 3.6.4.3 Test Values
        - 3.6.4.4 Definition of related parties
      - 3.6.5 Price Actually Paid or Payable
        - 3.6.5.1 Indirect payment
        - 3.6.5.2 Activities undertaken by the buyer on his own account
        - 3.6.5.3 Post-importation costs
        - 3.6.5.4 Flow of dividends
        - 3.6.5.5 Discounts
  - 3.7 Adjustments to the Price Actually Paid or Payable (Article 8)
    - 3.7.1 Commissions and brokerage (Article 8.1 (a))
    - 3.7.2 Containers and packing (Article 8.1 (a))
    - 3.7.3 Assists (Article 8.1 (b))

- 3.7.4 Royalties and license fees (Article 8.1 (c))
- 3.7.5 Proceeds (Article 8.1 (d))
- 3.7.6 Cost of transportation, loading, insurance, etc. (Article 8.2)
- 3.8 Transaction Value of Identical Goods Method (Article 2)
- 3.9 Transaction Value of Similar Goods Method (Article 3)
- 3.10 Option to reverse the order of application (Article 4)
- 3.11 Deductive Value Method (Article 5)
- 3.12 Computed Value Method (Article 6)
- 3.13 Fallback Method (Article 7)
  
- 4. Technical issues and Valuation Control
  - 4.1 Goods or services?
  - 4.2 Transaction-based or periodic return?
  - 4.3 Documentation
  - 4.4 Time Constraints and Valuation Controls
  - 4.5 Use of Advance Valuation Decisions/Rulings
  - 4.6 Price Review Clauses/ Profit adjustments.
  
- 5.1 Ongoing/recent activities in this area
  - 5.1.1 Joint WCO/OECD Conferences and Transfer Pricing Focus Group
  - 5.1.2 Conclusion

#### **Chapter 4: Customs Valuation - EU**

- 1. Determining the value of goods
  - 1.1. The transaction value
  - 1.2. The significance of «relationships» between buyer and seller
- 2. Alternative measures of value
- 3. Additions to the transaction value
- 4. Exclusions from the transaction value
- 5. Case study: referring to the CCC only
- 6. First sale price
- 7. Declaration of particulars relating to customs value (D.V.1 form)
- 8. Case study: how royalties related to imported goods affect vat and customs duties
- 9. Case study: royalties and first sale price in the transactions between associated entities

10. Customs value and transfer pricing
  - 10.1 Two sides of the same coin
  - 10.2. A new trend: the holistic approach
  - 10.3. Arm's length principle: a shared principle?
  - 10.4. Controls of transactions: an operational convergence
  - 10.5. How to reconcile the methods for determining the customs value and the transfer pricing

## **Chapter 5: Other Regions**

1. Introduction
2. North Americas – NAFTA
  - 2.1 Introduction
  - 2.2. Specific NAFTA Agreement Articles
  - 2.3 Specific Country Information
    - 2.3.1 United States
      - 2.3.1.1 Legislation: General Overview
      - 2.3.1.2 Supporting Guidance
      - 2.3.1.3 Documentation requirements
      - 2.3.1.4 Rulings and Case Law
    - 2.3.2 Canada
      - 2.3.2.1 Legislation: General Overview
      - 2.3.2.2 Supporting Guidance
      - 2.3.2.3 Documentation requirements
      - 2.3.2.4 Rulings and Case Law
3. Asia Pacific – ASEAN
  - 3.1 Introduction
  - 3.2 Specific ASEAN Agreement Articles
  - 3.3 Specific Country Information
    - 3.3.1 Vietnam
      - 3.3.1.1 Legislation: General Overview
      - 3.3.1.2 Supporting Guidance
      - 3.3.1.3 Documentation requirements
      - 3.3.1.4 Rulings and case law
    - 3.3.2 Philippines
      - 3.3.2.1 Legislation: general overview
      - 3.3.2.2 Supporting Guidance
      - 3.3.2.3 Documentation requirements
      - 3.3.2.4 Rulings and Case Law
4. Africa – COMESA
  - 4.1 Introduction
  - 4.2 Specific COMESA Treaty Articles

- 4.3 Specific Country Information
  - 4.3.1 Kenya
    - 4.3.1.1 Legislation: General Overview
    - 4.3.1.2 Supporting Guidance
    - 4.3.1.3 Documentation requirements
    - 4.3.1.4 Rulings and Case Law
  - 4.3.2 Zambia
    - 4.3.2.1 Legislation: General Overview
    - 4.3.2.2 Supporting Guidance
    - 4.3.2.3 Documentation requirements
    - 4.3.2.4 Rulings and Case Law

## **Chapter 6: Comparison between Customs Valuation and OECD Transfer Pricing Guidelines**

1. General Remarks – Transfer pricing from a customs and tax perspective.
2. The examples of the interpretative note to Article 1.2(a) and the methods of the OECD Guidelines.
3. Consistency in the decisions of tax and customs administrations on transfer pricing cases
4. Frequent mistakes when examining transfer pricing from a customs perspective
5. Timing problems
6. Aggregation of transactions

## **Chapter 7: Value Added Tax**

1. Introduction
2. VAT Transfer Pricing Rules
  - 2.1 Preliminary remarks on taxable transactions under VAT
  - 2.2 Taxable amount under VAT/GST
  - 2.3 Transfer Pricing: VAT v. Income tax
    - 2.3.1 The scope of transfer pricing rules as to the transactions covered
    - 2.3.2 The definition of “related parties”
    - 2.3.3 Valuation principle and methodology
3. Interaction between transfer pricing adjustments and VAT
  - 3.1 General remarks

- 3.2 Compensating adjustments
- 3.3 Primary adjustments
- 3.4 Secondary adjustments
- 3.5 Corresponding adjustments
  
- 4. VAT aspects of supply chain structures
  
- 5. Conclusions

## **Chapter 8: Administrative Issues**

- 1. Introduction
  
- 2. Exchange of Information
  
- 3. Advance Pricing Agreements
  - 3.1 Introduction
  - 3.2 APA Basics
  - 3.3 APA Process
  - 3.4 Operation of APA
  - 3.5 Interplay of APAs and customs valuations
  - 3.6 Korean advance customs valuation arrangements
  
- 4. Resolution of disputes
  - 4.1 Transfer pricing
  - 4.2 Customs
  
- 5. Acceptance of adjustments
  - 5.1 Transfer pricing
  - 5.2 Customs
  
- 6. Conclusion

## **Chapters 9 – 21: Country Surveys (incl. 2 case studies)**

Includes chapters on: Australia, Brazil, Canada, China, France, Germany, India, Japan, Mexico, Netherlands, South Africa, United Kingdom, United States

Where possible country coverage includes:

- 1. Transfer Pricing Rules and Methods in the United States
  - 1.1 Statutory Language
  - 1.2 Methods of Determining Arm's Length Ranges
    - 1.2.1 Tangible Property Transfers

- 1.2.1.1 The Comparable Profit Split method
- 1.2.1.2 The Residual Profit Split method
- 1.2.2 Intangible Property Transfers
- 1.3 Transfer pricing and services
  - 1.3.1 In General
  - 1.3.2 Transfer Pricing Methods for Services
- 1.4 Cost Sharing Regulations
- 1.5 Marketing Intangibles
- 1.6 Section 1059 A
  - 1.6.1 Section 1059A – A Nexus between Tax and Customs
  
- 2. Customs valuation in the United States
  - 2.1 General introductory comments
  - 2.2 The Basics of Customs Valuation – an Introduction to the U.S. Statute
  - 2.3 Hierarchy of Valuation Methods
    - 2.3.1 Transaction value of identical or similar merchandise
    - 2.3.2 Deductive value
    - 2.3.3 Computed value
    - 2.3.4 Residual value
  - 2.4 Transaction Value Defined
  - 2.5 When is Transaction Value Not the Proper Method?
  
- 3. Interaction between transfer pricing and customs valuation
  - 3.1.1 In General
  - 3.1.2 Transaction Value and Transfer Pricing – The Legal Standard
  - 3.1.3 Customs Valuation Issues Specific to Transfer Pricing
  - 3.1.4 Transaction Value and the “Arm’s Length” Standard
  - 3.1.5 Indirect Payments and Intangibles
  - 3.1.6 Retroactive Price Adjustments and the Importance of Reconciliation
  
- 4. Conclusion

## **Chapter 22: Conclusion**