EFS Erasmus
EUROPESE FISCALE STUDIES

Customs valuation;
a practical case

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1. Abbreviations

CCC	Council Regulation (EEC) No. 2913/92 of October 12, 1992 establishing the Community Customs Code
CIT Act	Wet op de Vennootschapsbelasting 1969
Dutch VAT code	Wet op de Omzetbelasting 1968
e.g.	for example
EU	European Union
EU VAT directive	Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax
GATT	General Agreement on Tariffs and Trade
i.e.	that is
Member State(s)	Countries which are member of the European Union
No.	Number
OECD	Organisation for Economic Co-operation and Development
OECD TPG	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
RCCC	Regulation (EEG) No. 2454/93 of July 2, 1993 laying down provisions for the implementation of Regulation (EEG) No. 2913/92 of the Council establishing the Community Customs Code
Resolution	Ministry of Finance, Resolution of March 30, 2001, nr. IFZ2001/295M, updated with Resolution of August 21, 2004, nr. IFZ2004/680M and updated with Resolution of November 14, 2013, nr. IFZ2013/184M
UCC	Regulation (EU) No. 952/2013 of the European Parliament and of the Council of October 9, 2013, laying down the Union Customs Code
VAT	Value Added Tax
WTO	World Trade Organization
WTO Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

2. Introduction and overview

2.1 Introduction

Formerly known as Vistaprint, Cimpress started its operations in France more than 20 years ago. The objective of the business was to offer professional, inexpensive and quick marketing products and services to small businesses. A big breakthrough came in 1999, as the online platform for design was introduced, and also new printing technologies were introduced which reduced the costs of printing significantly. In May 2000 a small business flagship site was launched.

Due to various acquisitions in the past years, Cimpress has grown into a global company that goes to the market with 19 different brands, operates localized websites and ships to countries in North America, Europe, Asia-Pacific and South-America. Combining the strengths of 19 different brands created a global network of production facilities and a highly efficient logistics operation to maintain a sustainable supply chain model.

2.2 Question of this thesis

The question I would like to analyse in this thesis will possibly be applicable in the (near) future within the company. Depending on the set up within an international operating company with multiple sales in a supply chain, it is possible that invoices are not issued at the same time. This can lead to different values when goods need to be imported into the European Union.

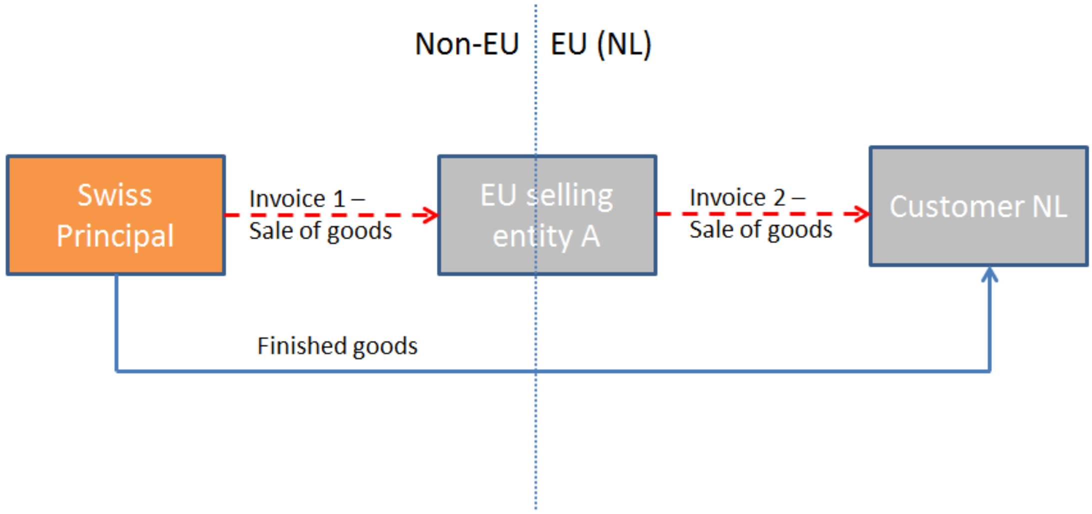
In this thesis I would like to answer the question which consequences arise when goods are being imported into the EU and the final invoice is not yet issued and how to solve this issue.

By writing this thesis I wanted to stay close to my daily work as a Senior Manager Indirect Tax within an international operating company. I am not responsible for Customs within the company, but would like to expand my knowledge as the company is growing fast and the supply chain with it.

The objective of this paper is to describe the practical consequences and solution of determining the customs value for goods being released into the EU when intercompany invoices are not available on the moment of importation and as such no customs value available. A company has to comply with the various (EU) laws to make sure it is compliant for all taxes. However, doing international business it is often shown that practice and the tax laws are not always in line.

In order to come to my conclusion in chapter 8, I will first describe how customs values are determined in chapter 3. The following two chapters will describe the OECD TPG and transfer pricing aspects with respect to customs valuation. Chapter 6 will describe the calculation of the customs debt on import followed by the calculation of import VAT in chapter 7.

In order to make this question more practical the following case will be used:



- A customer orders products at EU selling entity A for which invoice 2 is issued by EU selling entity A

- EU selling entity A is acting as a Limited Risk Distributor. As such when a customer places an order with EU selling entity A, this entity is selling the goods to the customer in its own name and for its own account

- EU selling entity A orders the goods at the Swiss principal for which invoice 1 is issued by the Swiss principal

- When EU selling entity A places an order with Swiss principal, Swiss principal is selling the goods to EU selling entity A in its own name and for its own account

- The goods are being manufactured in a non-EU country (e.g. Australia) and shipped to the European Union (e.g. the Netherlands)

- The goods are being imported by EU selling entity A into the Netherlands

- Invoice 2 is being issued at the moment the customer orders the goods (and directly also pays for the order)

- Invoice 1 is being issued at month end as a consolidated invoice for all sales by Swiss Principal to EU selling entity A for shipments from Australia to the Netherlands

(an addendum to invoice 1 shows all relevant information of the orders which are included in the consolidated invoice)

However, the goods are being shipped from Australia to the Netherlands during the month based on the orders placed by customers. This means that invoice 1 is in most cases not available during the time of import of the goods into the Netherlands. As such invoice 2 is being used for the importation of the goods. The value of invoice 1 is based on a transfer pricing agreement and as such has a lower value as invoice 2.

3. Determination of customs value

3.1 A short historical overview

Customs duties can be either a specific duty or a so-called “ad valorem duty”. A specific duty is a concrete sum charged for a quantitative description of the goods. The customs value does not need to be determined as the duty is based on other criteria as the value of the goods.

An ad valorem duty, on the other hand, means it is charged as a percentage of the value of the goods. As such the amount of customs duty to be paid depends on the customs value of the goods. A correct determination of the customs value is of high importance for businesses in order to avoid paying too much tax.

Article VII of the General Agreement on Tariffs and Trade (GATT) laid down the general principles for an international system of valuation. It requires that the value for customs purposes of imported goods should be based on the actual value of the imported goods on which duty is assessed - or of identical goods - and should not be based on the value of goods of national origin or on random or fictitious values. Although Article VII also contains a definition of “actual value”, it still permitted the use of widely differing methods of valuing goods.

In 1979 the Tokyo Round Valuation Code (Agreement on Implementation of Article VII of the GATT) created a Customs Valuation based on the price actually paid (or payable) for imported goods. With this transaction value it was planned to provide a fair, uniform and neutral system for the valuation of goods for customs purposes.

The Tokyo Round Code was replaced by the WTO Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, which forms the basis of the current rules for determining the valuation of imported goods. The Agreement itself has no direct effect and the EU Member States have implemented the Agreement in their local CCC and RCCC. With the recast of the CCC, the Union Customs Code was adopted on October 9, 2013 and applies as of May 1, 2016.

3.2 Basic principle

The basic principle – as described in article 1 in relationship to article 8 of the WTO Agreement and laid down in Article 77 of the Union Customs Code requires that the customs valuation must be based on the actual price of the goods which is generally shown on the invoice. The customs value of article 1 in accordance with the adjustments of article 8 comprises the transaction value.

Article 1 - 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 country of importation adjusted in accordance with the provisions of Article 8, …………………..

Article 8 - In determining the customs value under the provisions of Article 1, 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, plans and sketches, undertaken elsewhere than in the country of importation 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.

In case the transaction value is not available or cannot be used the Agreement mentions five other methods to determine the customs value[1]. These five methods must be used in hierarchical order.

1. Transaction value of identical goods
   - The transaction value is calculated in the same manner on identical goods if the goods are (1) the same in all respects including physical characteristics,

[1] Also article 74 and article 76 (c) of the UCC

quality and reputation, (2) produced in the same country as the goods being valued and (3) produced by the producer of the goods being valued

2. <u>Transaction value of similar goods</u>
    - The transaction value is calculated in the same manner on similar goods if (1) goods closely resembling the goods being valued in terms of component materials and characteristics, (2) goods which are capable of performing the same functions and are commercially interchangeable with the goods being valued, (3) goods which are produced in the same country as and by the producer of the goods being valued

3. <u>Deductive method</u>
    - If the customs value cannot be determined by the transaction value of the imported goods or identical or similar goods, it will be determined on the basis of the unit price at which the imported goods or identical or similar goods are sold to an unrelated party in the greatest aggregate quantity in the country of importation

4. <u>Computed method</u>
    - This method is rarely used and determines the customs value on the basis of the cost of production of the goods being valued, plus an amount for profit and general expenses usually reflected sales from the country of exportation to the country of importation of goods of the same class or kind

5. <u>Fall-back method</u>
    - If none of the before mentioned methods – including the transaction value – determines a customs value, the customs value can be determined using reasonable means consistent with the principles and general provisions of the WTO Agreement and of Article VII of GATT and on the basis of data available in the country of importation

3.3 Related parties

Article 15 of the WTO Agreement provides a definition of related parties in sub 4:

> *"For the purposes of this Agreement, persons shall be deemed to be related only if:*
> *(a) They are officers or directors of one another's businesses;*
> *(b) They are legally recognized partners in business;*
> *(c) They are employer and employee;*
> *(d) Any person directly or indirectly owns, controls or holds 5% or more of the outstanding voting stock or shares of both of them;*
> *(e) One of them directly or indirectly controls the other;*
> *(f) Both of them are directly or indirectly controlled by a third person;*
> *(g) Together they directly or indirectly control a third person; or*
> *(h) They are members of the same family"*

Within a supply chain of goods in most cases some parties involved are related parties. Of course these parties can sell goods to each other but the price paid or is payable must not be affected by the fact that parties (buyer and seller) are related. It must be clear that the buyer does not receive a preferential treatment under the intercompany pricing arrangements because of the relationship with the seller. A preferential treatment for the buyer such as a lower price will lead to a lower customs value which will lead to a lower payable customs duty. All of this can end up in distortions of competitiveness of businesses.

According to article 29 (2) (b)[2] of the CCC the transaction value between related parties must be accepted by the Customs Authorities if the declarant demonstrates that the value used closely approximates to one of the following:

i. The transaction value in sales of identical or similar goods for export to the Community between buyers and sellers who are not related;
ii. The customs value of identical or similar goods as determined under article 30 (2) (c) of the CCC
iii. The customs value of identical or similar goods as determined under article 30(2) (d) of the CCC

In the UCC no reference is made anymore to the transaction value between related parties with the exception of article 70 (3) (d) which makes indirect reference that if the buyer and seller are related the relationship did not influence the price.

In practice most companies make use of transfer prices which are prices at which companies sell goods (or services) to related parties. A transfer price can – also in the UCC - be used as a transaction value if it fulfils the criteria of 70 (3) (d) that buyer and seller can proof that the prices are not influenced by the relationship between the two parties.

As such customs valuation based on the transaction value method is based on documentary input from the declarant. This can for example be proof that the price paid by the buyer closely approximates the price paid by an unrelated party but also a report which determines the transfer price. However, the Customs Authorities have the right to "*satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes*"[3].

4. OECD Transfer Pricing Guidelines

Most OECD countries rely upon the OECD Transfer Pricing Guidelines that were originally released in 1995. Based on these Guidelines all OECD countries commit to the arm's length principle. In fact, the arm's length principle implies that transfer prices between related parties should be set as though the entities are operating at arm's length (i.e. as independent parties). The application of the arm's length principle is generally based on a comparison of all the relevant conditions in a controlled transaction with the conditions in an uncontrolled transaction (i.e. a transaction among independent parties).

Arm's Length Principle
According to article 9 of the OECD TPG, transfer prices that have been agreed or established between related companies should be based on the premise that transactions must take place on an arm's length basis. The arm's length principle is "the international transfer pricing standard that OECD Member countries have agreed, should be used for tax purposes by multinational enterprises and tax administrations" and is reflected in local country law.

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[2] Also article 74 (2) (a), (b), (c) of the UCC
[3] Article 17 WTO Agreement

In essence, the standard mandates that transactions between controlled or related parties take place under terms and conditions similar to those that would take place between uncontrolled parties participating in similar transactions.

In the Netherlands, article 8b (1) and (2) of the Dutch CIT Act formulates the arm's length principle the following way:

> *"1. If an entity, directly, or indirectly, participates in the management, control or capital of another entity and between these entities conditions are agreed upon or imposed (transfer prices) with respect to their mutual legal relations, which differ from the conditions that would have been agreed upon between independent parties, the profit of these entities is determined as if the latter conditions would have been agreed upon.*
>
> *2. The first paragraph also applies if the same person, directly or indirectly, participates in the management of or the control as to, or in the capital of the one and the other entities."*

Dutch Transfer Pricing Regulations
In the Netherlands, a resolution[4] of the Under-Secretary of Finance has been in effect since March 30, 2001, which explains the position of the Dutch tax authorities with respect to the application of the arm's length principle and the OECD Guidelines. As stated in the resolution, "in principle, the OECD Guidelines are […] directly applicable to the Netherlands…".

According to the resolution, on a number of issues, the OECD TPG leave room for interpretation or require clarification. The aim of the resolution is to provide insight in the Dutch tax authorities' position with respect to these issues. These issues include, among other items, clarification on the (practical) use of the transfer pricing methods, the process of applying for mutual agreement procedures between tax authorities, secondary adjustments, applying the arm's length principle in transactions involving intangible assets, intercompany corporate and financial services, cost contribution arrangements and allocation of profit to permanent establishments. The resolution provides the formal position of the Dutch tax authorities, and does not legally bind the taxpayer.

To avoid any discussions between businesses and tax authorities, specific transfer pricing rules – including the arm's length principle – are implemented in Member States. In addition to these rules, also transfer pricing documentation requirements are implemented. These requirements are meant to shift the burden of proof from the (Dutch) tax authorities to the taxpayer. The Dutch CIT Act formulates this requirement in article 8b (3):

> *"The entities mentioned in the first and second paragraph shall include information in their administration, which shows the manner in which the transfer prices that are referred to in the first paragraph were established, and from which it can be deduced if, in the market, the transfer prices that were established would have been agreed upon between independent parties".*

[4] Ministry of Finance, Resolution of March 30, 2001, nr. IFZ2001/295M, updated with Resolution of August 21, 2004, nr. IFZ2004/680M and updated with Resolution of November 14, 2013, nr. IFZ2013/184M

5. Transfer pricing

The primary transfer pricing methods recognized by the OECD for the purposes of determining the acceptable arm's length price are outlined in Chapter II of the OECD TPG. The transactions of related parties must be assessed under the conditions and restrictions of the methods to determine the customs value. As the OECD TPG mention, in assessing the transfer prices it should be considered, that determining transfer prices is not an exact science.

The OECD TPG encourage Tax Administrations to be flexible in their approach and not demand that the taxpayer determines its transfer prices with an accuracy that is unrealistic considering all the facts and circumstances. As mentioned in the resolution the Dutch tax administration will also observe these principles.

The OECD TPG indicate that where a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable. The methods described in this subsection include:

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method; and
- Transactional net margin method.

Traditional transaction methods
The traditional transaction methods include the Comparable uncontrolled price method, the Resale Price Method and the Cost Plus Method. Conceptually, the Comparable uncontrolled price method is applied to prices or rates between related legal entities, the Resale Price method is applied to the party performing distribution activities and the Cost Plus Method is applied to the party performing manufacturing activities or services.

Transactional profit methods
The OECD TPG endorse the use of two transactional profit methods: (i) the Profit split method; and (ii) the Transactional net margin method. These methods can be applied when the traditional transactional methods cannot be reliably used. These methods both typically examine the operating margin of the controlled entity or entities.

The key difference between the two methods is that the profit split method is applied to all parties to the controlled transaction, whereas the Transactional net margin method is applied to only one party.

Transactional Net Margin Method
The Transactional net margin method examines the profit that is earned by one of the parties to the transaction (as opposed to the profits of the transacting companies as a whole) to determine the transfer price. The "transactional net margin examines the net profit margin relative to an appropriate base (e.g., costs, sales, assets) that a taxpayer realizes from a controlled transaction … the net profit indicator of the taxpayer from the controlled transaction should ideally be established by reference to the net profit indicator that the same taxpayer earns in comparable uncontrolled transactions."[5]

[5] OECD TPG, paragraph 2.58.

If no similar transactions with third parties exist, the OECD TPG allow comparable transactions of an independent enterprise to serve as a guide. Where there are differences in the characteristics of the enterprises being compared that can have a material effect on net margins, adjustments should be made for such differences where applying the Transactional net margin method. The Transactional net margin method should be applied on a transactional basis as opposed to a company wide basis in accordance with the OECD TPG[6]. However, where transactions are so closely linked or continuous that they cannot be evaluated separately, it may be necessary to bundle transactions. When the comparable net margin from independent enterprises is obtained, the net margin should exclude the effect of other transactions that are not similar as well as any controlled transactions of the enterprise.

Unlike strict transactional methods, the Transactional net margin method relies on inexact comparables that perform substantially similar functions and bear substantially similar risks.

As mentioned in the resolution one of the five acceptable methods must be chosen by the taxpayer. As such paragraph 4.9 of the OECD TPG states that a tax administration must begin a transfer pricing audit from the perspective of the method as chosen by the taxpayer at the time of the transaction. This can be interpreted that the taxpayer is free to choose the transfer pricing method, provided the chosen method lead's to an arm's length outcome for the transaction. A combination of methods is possible. In the end it is important that the taxpayer can make his choice plausible.

6. Customs debt on import

Whenever goods are brought into the customs territory of the EU from a country outside the EU, the goods are subject to customs supervision and possible customs controls according to article 134 (1) of the UCC. In combination with article 135, 136, 137 and 139 of the UCC the goods being shipped from a non-EU country to an EU country must be conveyed by the route specified by the customs authorities and in accordance with their instructions to a customs office or to a free zone. In accordance with article 5 (16) of the UCC a customs approved treatment is chosen, like placing the goods under a customs procedure or a re-exportation outside the EU.

According to article 77 (1) of the UCC a customs debt on import shall be incurred through:
- (a) The release for free circulation, including under the end-use provisions; or
- (b) Temporary admission with partial relief from import duty.

If the goods are being released for free circulation the customs debt is incurred at the moment the customs declaration is accepted according to article 77 (2) of the UCC.

According to article 79 (1) of the UCC a customs debt also occurs if goods – liable for import duties - are unlawful removed from customs supervision. For example, goods – e.g. clothing - not yet imported and stolen from the place where they are stored e.g. truck, storage, etc.

The customs debt is payable by the declarant. According to article 5 (15) of the UCC the declarant means *the person making the customs declaration in his own name or the person in whose name a customs declaration is made.*

[6] OECD TPG, paragraph 2.78

7. Import VAT

Whenever goods are moved from a non-EU Member State to an EU Member State, not only Customs rules apply but also VAT rules. Most VAT rules with respect to the definition of importation of goods, place of import, timing of import and taxable amount are in line with the UCC.

Article 2 of the EU VAT directive mentions the various transactions which are taxable for VAT purposes:

1. Supply of goods for consideration within the territory of a Member State by a taxable person acting as such
2. Intracommunity acquisition of goods for consideration within the territory of a Member State
3. Supply of services for consideration within the territory of a Member State by a taxable person acting as such
4. Importation of goods

A description of importation of goods is mentioned in article 30 of the EU VAT Directive[7]:

> *""Importation of goods" shall mean the entry into the Community of goods which are not in free circulation within the meaning of article 24 of the Treaty[8].In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community, shall be regarded as importation of goods"*

The place of importation of the goods is explained in article 60 of the EU VAT directive[9]:

> *"The place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community"*

A derogation from article 60 of the EU VAT directive is mentioned in article 61 of the EU VAT directive where, upon entry into the Community, the goods which are not in free circulation are:

- Placed under one of the arrangements or situations as mentioned in article 156 of the EU VAT directive, or
- Placed under temporary importation agreements with total exemption from import duty, or
- Placed under external transit arrangements.

In these situations the place of importation of goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations.

Article 156 of the EU VAT directive mentions amongst others (1) goods which are presented to Customs and placed in temporary storage, (2) goods which are intended to be placed in a free zone or free warehouse and (3) goods which are intended to be placed under customs warehousing arrangements or inward processing arrangements.

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[7] Also article 18 of the Dutch VAT Code
[8] Treaty of the European Union
[9] Also article 5, sub 2 of the Dutch VAT Code

Article 70 of the EU VAT Directive describes the timing of the chargeable event of importation of goods[10]:

> *"The chargeable event shall occur and VAT shall become chargeable when the goods are imported"*

The taxable amount to calculate the value of import VAT is in line with the UCC[11] and is determined by articles 85 and 86 of the EU VAT Directive[12].

> *"Article 85 - In respect of the importation of goods, the taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force"*

> *"Article 86 –*
> *(1) The taxable amount shall include the following factors, in so far as they are not already included:*

- *Taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied;*

- *Incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Community, if that other place is known when the chargeable event occurs*

> *(2) For the purposes of point (b) of paragraph 1, 'first place of destination' shall mean the place mentioned on the consignment note or on any other document under which the goods are imported into the Member State of importation. If no such mention is made, the first place of destination shall be deemed to be the place of the first transfer of cargo in the Member State of importation"*

8. Conclusion of the presented case

After the theoretical analysis in the previous chapters on how to determine the customs value and import VAT, I would like to discuss the implications and possible solution on the case as mentioned in chapter 2.

8.1 Who is the declarant at importation of the goods into the Netherlands?

All products sold within Cimpress are custom made as customers provide their own image they would like to be printed on the goods purchased. As such it is not possible to have a stock of finished goods available and production of finished goods takes place on demand of the customer.

[10] Also article 22 of the Dutch VAT Code
[11] Also Chapter 3 of the UCC
[12] Also article 19 of the Dutch VAT Code

At the moment the customer places an order, it is known to which country the finished goods will be shipped to and in which country the goods will be manufactured. In the past Cimpress used the method that customers needed to pay for import VAT and/or custom duties if applicable.

However, a lot of customer complaints were received as customers were surprised with additional import VAT and/or custom duties they were not aware of during the ordering process. As such the price of the ordered goods became too high for customers and customers would not come back for future orders.

To avoid these complaints Cimpress changed its model and is now the declarant for goods that are manufactured outside the EU and shipped to a country inside the EU. As such Cimpress pays for any import VAT and customs debt on import. In the above mentioned case the declarant is EU selling entity A.

8.2 Where is the customs debt on import due?

In this case the goods are being shipped from a non-EU country (Australia) to the Netherlands. Based on articles 37 – 40 of the UCC, the goods are being placed immediately under the customs procedure “release for free circulation” at the moment of entry into the Netherlands. As such the customs debt on import will be incurred by EU selling entity A in the Netherlands at the moment the Dutch customs authorities accept the customs declaration[13].

8.3 Customs value determination

8.3.1 Customs value used (“as is”)

EU selling entity A will be the declarant in the Netherlands if goods are being shipped from a non-EU country to the Netherlands. According to article 70 of the UCC the customs value must be based on the actual price of the goods which is generally shown on the invoice. This will be in principle the intercompany invoice which is being issued by Swiss Principal to EU selling entity A.

However, due to the way the process is set up internally, this intercompany invoice (invoice 1 in this case) is a consolidated invoice of all shipments from a specific manufacturing country (here: Australia) to the Netherlands and calculated at month end. The calculation of the final invoice value is based on the transfer pricing agreement between Swiss Principal and EU selling entity A. Due to this transfer pricing agreement the value of invoice 1 (invoice between Swiss Principal and EU selling entity A) is always lower as the invoice value of invoice 2 (invoice between EU selling entity A and the customer).

During the month goods are being ordered and shipped from e.g. Australia to the Netherlands. At the time the goods are being imported into the Netherlands – so during the month – the only invoice available is the invoice as issued by EU selling entity A to the customer. As this invoice has a higher invoice value (invoice value used without any VAT possibly charged), this invoice value is being declared as customs value on the customs documentation at the moment the goods are being imported into the Netherlands.

[13] Article 77 (1) and (2) of the UCC

8.3.2 Customs value to be used (‘to be”)

Swiss Principal and EU selling entity A are related parties according to the WTO Agreement. As such EU selling entity A must clearly state and proof that the price it pays for its purchases is not based on a preferential treatment due to its relationship with Swiss Principal. If EU selling entity can provide this proof the transaction value can be used as customs value for the imported goods to determine the customs debt at import.

Like most multinational enterprises transfer prices are being used in the intercompany relationship between Swiss Principal and EU selling entity A. This transfer price has been analyzed, determined and documented in a transfer pricing documentation and fulfils the criteria of article 70 of the UCC.

As such the transfer price between Swiss Principal and EU selling entity A can be used as transaction value. This means that according to article 70 of the UCC the transaction value - invoice value between Swiss Principal and EU selling entity A – will be the customs value of imported goods.

8.4 Consequence of different customs value

Due to the (financial) process set up the customs value used by EU selling entity A is too high and as such too much customs duty is paid to the Dutch customs authorities. This is not in favor for the company but due to the process set up can also not easily changed.

Whenever a change in the customs value occurs due to a retroactive transfer pricing adjustment a company has a period of 3 years from the date of release of the imported goods to make additional duty payments or refunds[14]. The procedure to report changes to customs values resulting from retroactive transfer pricing adjustments is to contact the customs authorities to revise previous customs declarations.

As in this case an overpayment of customs debt occurs, EU selling entity A would be eligible for a refund. The use of an incorrect customs value (as the correct customs value is not yet available) is not the same as a retroactive transfer pricing adjustment. As such it is not recommendable to use the 3 years period to reclaim the overpaid customs debt without any discussion with the Dutch Customs authorities.

In this case the overpayment of customs debt will take place each month. Frequent adjustments may result in increased interest and investigations of the Dutch customs authorities. To avoid these investigations it would be the best option to contact the Dutch customs authorities, discuss the situation with them and agree on a procedure.

Preferably EU selling entity A and the Dutch customs authorities agree in a customs valuation ruling on a procedure to avoid noncompliance for future adjustments. If EU selling entity A would obtain a customs valuation ruling the calculation of the adjustment can be made in an aggregate adjustment. However, each adjustment must be linked to the specific transaction impacted during the month.

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[14] Article 9:6 Algemene Douanewet

8.5 Consequence of different customs value for VAT

At the moment the goods are imported into the Netherlands, the higher customs value is being used to not only determine the customs debt but also the import VAT amount due. With the higher customs value, the customs debt is too high but also the import VAT paid is too high. However, in this case EU selling entity A has the right to fully reclaim input VAT[15] and as a consequence the higher amount of import VAT paid has no effect for EU selling entity A[16].

In case the customs value is adjusted to the lower amount, EU selling entity will receive a refund of the customs debt that was paid too much (assuming the customs valuation ruling is approved). This means that also the import VAT is being recalculated and EU selling entity should repay the import VAT that it received too much.

To avoid the reclaim and repayment of import VAT each month, EU selling entity A could also request for a procedure with the Dutch VAT authorities. A practical solution could be to delay the reclaim of input VAT on importation of goods until the moment the customs value is determined and the correct value for customs debt and import VAT is known.

In the end the use of an incorrect customs value – due to a (financial) internal process – will lead to additional work for the Customs / VAT department to determine the amount of customs debt and import VAT that was paid too much. Of course, the best solution would be to change the (financial) internal process to determine the value of the intercompany invoice between Swiss Principal and EU selling entity A in a timely manner. However, by changing a (financial) process more departments are impacted and will not easily be changed. If it would be possible to change it, it would take time to have it changed.

9. Literature list

- OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing

- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

[15] Article 15 (1) (c), 1 Dutch VAT code
[16] With the use of an article 23 (Dutch VAT code) permit, EU selling entity A does not have to pre-finance the import VAT amount and the import VAT amount due is shifted to the Dutch VAT return of EU selling entity A

EFS Erasmus
EUROPESE FISCALE STUDIES

- Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax

- Ministry of Finance, Resolution of March 30, 2001, nr. IFZ2001/295M, updated with Resolution of August 21, 2004, nr. IFZ2004/680M and updated with Resolution of November 14, 2013, nr. IFZ2013/184M

- Council Regulation (EEC) No. 2913/92 of October 12, 1992 establishing the Community Customs Code

- Regulation (EU) No. 952/2013 of the European Parliament and of the Council of October 9, 2013, laying down the Union Customs Code

- Commission delegated regulation (EU) 2015/2446 of July 28, 2015, supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code

- Commission implementing regulation (EU) 2015/2447 of November 24, 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code

- Website of the World Trade Organization

- Website of the OECD

- Cimpress transfer pricing documentation