



TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

-
43rd Session
-

VT1070E1a
(+ Annexes)

O. Eng.

Brussels, 22 September 2016.

SPECIFIC TECHNICAL QUESTIONS

EXAMINING THE CIRCUMSTANCES SURROUNDING THE SALES UNDER THE PROVISIONS OF ARTICLE 1.2(a) – GOODS PRODUCED IN DIFFERENT COUNTRIES – DRAFT CASE STUDY SUBMITTED BY ECUADOR

(Item V (c) on the Agenda)

Reference documents :

VT1019E1a (TCCV/41)
VT1046E1a (TCCV/42)
VT1060E1a

VT1033E1a (TCCV/42)
VT1051E1a (TCCV 42/Draft Report)

I. BACKGROUND

1. During the intersession, Ecuador worked with the Secretariat to produce an updated document reflecting the comments made by the delegates during the 42nd Session of the Technical Committee.
2. The updated document was published in the Annex to Doc. VT1060E1a.
3. Members were invited to examine the document and submit their written comments to the Secretariat.

II. SECRETARIAT COMMENTS

4. Written comments were received from Chile, China and the United States. These comments have been reproduced in Annex I, II and III respectively to this document.
5. In the dispute between Thailand and Philippines (cigarettes), the Panel set up under the provisions of the Dispute Settlement Understanding of the WTO explained the meaning of the term 'examined' in the context of Article 1.2(a) of the WTO Valuation Agreement (WTO document reference WT/DS371/R).

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6. An extract of the report of the Panel (paragraphs 7.158 and 7.159) explaining this term, which could be useful in the examination of this question, is reproduced below.

- a) Paragraph 7.158 –

Turning first to ordinary meaning, the term "examine" can be defined as "2 verb trans. Investigate the nature, condition, or qualities of (something) by close inspection or tests; inspect closely or critically...; scrutinize; ... 3 verb trans. Inquire into, investigate, (a subject); consider or discuss critically; try to ascertain (whether, how, etc.)". The dictionary definition of the term "examine" therefore indicates that to examine a given matter means to "inquire into, investigate or consider critically" that matter. The dictionary meaning of the term "examine" also suggests its link to the word "investigate", which in turn is defined as "1. verb trans. Search or inquire into; examine (a matter) systematically or in detail; make an (official) inquiry into.

- b) Paragraph 7.159 –

The ordinary meaning of the term "examine" signifies that the customs authorities must carefully consider, investigate and inquire into the information provided by importers concerning the circumstances of the transaction. We also consider that the principle under the Customs Valuation Agreement that the primary basis of valuation is the transaction value sheds light on the nature of examination to be conducted concerning the circumstances of sale in a related-party situation. Given that the transaction value should normally form the basis of a valuation, any situation giving rise to a reason(s) for questioning the transaction value would naturally demand the customs authorities' critical consideration of, inquiry into, and investigation of, the relevant situation."

III. CONCLUSION

7. The Technical Committee is invited to examine the question taking into account the written comments of Chile, China and the United States.

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COMMENTS BY CHILE

Examining the circumstances surrounding the sale under the provisions of Article 1.2(a)

1. The Chilean Customs Administration would like to thank the Secretariat and Ecuador for having submitted the draft Case Study on “Examining the circumstances surrounding the sales under the provisions of Article 1.2(a) - goods produced in different countries/sales for exportation to a country other than the country of importation”.
2. The case at hand deals with examining the circumstances surrounding the sale under the provisions of Article 1.2(a) for goods produced in different countries - sales for exportation to a country other than the country of importation.
3. The situation described begs the following questions :
 - whether or not the transactions in question can be considered comparable to unrelated transactions, even if the goods are from a **different country** to the goods being examined, and/or sold for exportation to a **country other than** the country of importation, as long as the differences **in origin and/or destination** do not affect the price of the goods, or if they do affect the price, the appropriate adjustments can be made reliably.
 - whether or not we can consider, for the purposes of analysis in this case, using the **example of the Comparable Uncontrolled Price Method**, from the 2010 OECD Guidelines (Chapter II, subparagraph 2.18), that provides the option of comparing related and unrelated transactions by looking at goods with the same characteristics, traded in similar conditions at the same stage in the supply chain and at a similar period in time, **but with a different origin**, as long this does not have an effect on the price, or, if it does have an effect on the price, that reliable adjustments can be made.
 - whether or not we could use **Technical Committee Commentary 23.1** on the use of a Transfer Pricing Study containing relevant information for examining the circumstances surrounding the sale in order to consider the potential compatibility between a Transfer Pricing Study for a case identical to the aforementioned example and the process to follow when examining the circumstances surrounding the sale as set out in Article 1.2(a) of the WTO Valuation Agreement.
4. Given the above and having examined the provisions of the WTO Valuation Agreement relevant to the present case, our Administration feels that, as Interpretative Note to paragraph 2 of Article 1 sets out in its third subparagraph, if a Customs Administration cannot accept the transaction value unless it receives further information, it must give the importer the opportunity to provide the additional, detailed information that may be necessary to examine the circumstances surrounding the sale. Since, in the present case, the importer does not import identical or similar goods from country I and

ICO produces a Transfer Pricing Study during the post-clearance audit to support the declared import price, this can be considered a good source of information, if it contains relevant details concerning the circumstances surrounding the sale. This is in line with what is indicated in Commentary 23.1 issued by the Technical Committee on Customs Valuation.

5. What's more, the Transfer Pricing Study produced by ICO falls within the provisions of Article 15 subparagraph 3 of the Agreement as it provides information necessary for carrying out a comparability study, since the term "goods of the same kind or class" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.
6. Furthermore, according to what is set out in the draft Case Study, the value declared for the imported goods (coffee beans) corresponds to the commercial invoice price and the commercial documents of country I indicate that there was no special arrangement or additional payment which would prevent the use of the transaction value. In our opinion, it would not therefore be necessary to apply the provisions of paragraph 8 of the Note to Article 6, which is applicable only to the computed value method when it stipulates that : "For the purposes of Article 6, "goods of the same class or kind" must be from the same country as the goods being valued".
7. Finally, the Chilean Customs Administration is of the view that, in cases where no identical or similar goods are imported to the country of the goods being examined, in order to decide on whether or not the declared transaction price can be accepted, Customs Administrations should be prepared to examine all aspects related to the value of the goods, including any comparability studies presented, as long as the origin and/or destination of the goods does not affect the price, or if it does affect the price, the appropriate adjustments can be made reliably.

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COMMENTS BY CHINA CUSTOMS ADMINISTRATION

Examining the circumstances surrounding the sale under the provisions of Article 1.2(a)

1. China Customs Administration would like to thank the Secretariat and Ecuador Customs Administration for preparing the updated document concerning examination of the circumstances of surrounding the sale under Article 1.2(a).
2. Based on discussions at the last session, we consider it's necessary to clarify the relationship between the "test value" method and "examination of the circumstances of sales" method when examining related party transactions. Where customs starts to examine the circumstances of the sales, it means the importers are unable to provide test values, so the test value method Article 1.2(b) could not be used. If no test value is available, it should be clarified whether or not we shall attempt to use price-comparing approach in the context of Article 1.2(a).
3. If price-comparing approach could be used in the context of Article 1.2(a), it should be clarified whether we could only use the prices of identical or similar goods within the meaning of the Agreement, or we could consider other prices such as "the price of goods originating from a country other than that of the goods under review" and "price of identical or similar goods sold for export to a country other than the country of importation" which are used as the comparable uncontrolled price (CUP) in the context of OECD guidelines.
4. If "the price of goods originating from a country other than that of the goods under review" and "price of identical or similar goods sold for export to a country other than the country of importation" could be used in examining the related party transactions and Customs determines that the relationship between the parties does not influence the price, it will in fact expand the scope of test values as prescribed in Article 1.2(b), then we will have 5 test values rather than 3 from practical point of view. So we suggest the Committee should be cautious taking into account the possible impact of TCCV's decision.
5. China Customs Administration would like to thank Ecuador Customs again for submitting the case and wishes to contribute to the discussion of this technical issue.

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COMMENTS BY THE UNITED STATES

Examining the circumstances surrounding the sale under the provisions of Article 1.2(a)

1. The United States would like to thank Ecuador for submitting the draft case study based on the examination of the circumstances surrounding the sale under the provisions of Article 1.2(a), for the Technical Committee's consideration. The United States has the following comments concerning the case study.
2. Paragraph 5 refers to Article 1.2. Reference to Article 1.2(a) would be more accurate.
3. Paragraph 6 states that the transfer pricing study at issue was prepared on the basis of the CUP method where the situation is identical to the example described in paragraph 2.18 of Chapter II of the OECD Guidelines. It may be more accurate to state that that the situation is similar to the example in paragraph 2.18 since the case at issue involves four parties, whereas the example in paragraph 2.18 involves three parties.
4. Paragraph 8 refers to the conclusion of the transfer pricing study that the relationship between the parties did not influence the price between ICO and XCO. We note that transfer pricing studies do not reach conclusions on whether the price between related parties is acceptable for customs valuation purposes.
5. The United States believes that it would be appropriate to analyze this case study under Article 1.2(a) of the Agreement and specifically under Paragraph 3 to the Note to Article 1 of the Agreement which states that in the context of examining the circumstances surrounding the sale under Article 1.2(a) of the agreement "the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced." This case study can be studied as an example of a situation where it can be shown that the buyer and the seller, although related, buy and sell to each other as if they were not related.

6. The U.S. Administration anticipates that it may have additional comments to make in respect of this matter at the 43rd Session of the Technical Committee on Customs Valuation.
