WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES
ORGANIZACIÓN MUNDIAL DE ADUANAS

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION
-
43rd Session
-

VT1071E1a
(+ Annexes I to V)

O. Fr.

Brussels, 26 September 2016.

SPECIFIC TECHNICAL QUESTIONS

INTERNATIONAL MARKETING FEE

(Item V (d) on the Agenda)

Reference documents :

VT1011E1b (TCCV/41 – Draft Report)
VT1020E1a (TCCV/41)
VT1034E1a (TCCV/42)
VT1047E1a (TCCV/42)
VT1051E1b (TCCV/42 – Draft Report)
VT1061E1a (TCCV/43)

I. BACKGROUND

1. During the intersession, the Secretariat issued Doc. VT1061E1a inviting Members to give consideration to the question of the International Marketing Fee (IMF) submitted by Colombia and send their written comments in response to the improved text of the question, as set out in the Annex to the above-mentioned document.

II. COMMENTS BY MEMBERS

2. In response, the Customs Administrations of Canada, Chile, China and Uruguay sent written comments; these are set out in Annexes I to IV, respectively, to this document.

3. Colombia sent the Secretariat a new text on the question under consideration. It is set out in Annex V to this document. As suggested by Uruguay and China, this new text does not cover the related sub-question of marketing activities undertaken by the licensee in the country of importation, as required by the licensor. The Technical Committee is therefore invited to focus on the issue of the valuation treatment of the IMF.

III. CONCLUSION

4. Members are invited to continue the examination of this question on the basis of the new text submitted by Colombia and taking account of the written comments by the above-mentioned Customs administrations.

* * *

I. Comments by Canada

1. Canada would like to thank Colombia for the revised text. Canada has reviewed Doc. VT1061E1a and has the following comments : Canada recognizes that marketing and promotional operations are often conducted on a global basis by Multi-National Enterprises. If the actual costs are then billed back to the purchaser of the goods on a prorated basis, this payment would be excluded from the customs value. However, the purchaser of the goods will be required to substantiate the receipt of justified services relevant to the payments and that the costs have been allocated in an equitable manner. Failure to do so would result as an addition to the price actually paid or payable.

2. Based on the facts presented by Colombia, the licensor has no obligation to provide details to the licensee as to actual marketing activities and expenses. Consequently, without the actual costs for marketing activities incurred by the licensor, Canada supports Colombia that these payments are proceeds of any subsequent resale, disposal or use of the imported goods, and should be added to the price actually paid or payable as per Article 8.1 (d) of the WTO Customs Valuation Agreement.

* * *

II. Comments by Chile

1. The Customs Administration of Chile is grateful to the Secretariat and to the Customs Administration of Colombia for preparing the improved working document concerning examination of the International Marketing Fee (IMF).

2. Among other things agreed by Members at the 42nd Session was the statement that, in this case, the relationship between the licensor and the licensee had not influenced the price paid or payable for the imported goods. This notwithstanding, and in accordance with the provisions in Article 8 of the WTO Valuation Agreement, it is possible for Customs administrations to adjust the declared transaction value.

3. Generally speaking, this Administration is of the opinion that the requirements for use of the transaction value method are met in the present case. We therefore consider that the analysis should focus on the possibility of making adjustments under the provisions of Article 8 of the WTO Valuation Agreement.

4. In this regard, it should be noted that Article 8.1 (d) of the WTO Valuation Agreement states that there shall be added to the price actually paid or payable : "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". Accordingly, upon payment by the licensee of the IMF, part of the profit gained from the sale of the licensed products accrues, meaning that this payment is directly related to the resale of the products, and not to the company's global profits.

5. In addition, the case points out that payment of the IMF is a condition of sale, and failure to pay is grounds for termination of the contract. These circumstances would be in keeping with Commentary 25.1 of the TCCV and with paragraph 2 of the Interpretative Note to Article 8.1 (c), which states in the same vein that "Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods".

6. Finally, Article 8.3 of the Agreement provides that additions to the price actually paid or payable shall be made only on the basis of objective and quantifiable data, and this particular case refers to 4 % of net sales (objective and quantifiable item of data); consequently, in our opinion, this element should be added to the price actually paid or payable for the imports made by the licensee.

* * *

III. Comments by China

1. China Customs Administration would like to thank Colombia for preparing the new draft of the case concerning the International Marketing Fee (IMF). Our thanks also go to the Secretariat for its efforts with regard to this case.

2. When examining a payment under a licence agreement, it should firstly be determined whether the payment of relevant fees is related to the imported goods. Since the facts given in this case fail to provide any description of the imported goods, it is unlikely to determine if the imported goods are related to the IMF corresponding to 4 % of net sales of the products and authorized products. Meanwhile, it seems that the text does not make any reference to the sales contracts of imported goods. It could be speculated that the IMFs paid under the royalty and licence fee contract may relate to trade in services and are not associated with the transactions of imported goods, and such payment may not constitute the condition of sale of imported goods.

3. Given the above, it is suggested that Colombian Customs further clarify the facts of the case, in particular by illustrating the following concepts such as the “finished and imported licensed products”, “finished and imported products” and “authorized products and products” that appear in the draft text and indicate the differences. Only based on the clarification, will the Committee be able to analyse whether the payment of IMF under the royalty and licence fee contract is related to the imported goods.

4. If it is confirmed that “imported goods” are resold directly (without any further processing) as “authorized products and products” in the importing country, then comes the question “Should the International Marketing Fee payment be added to the price actually paid or payable as part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller pursuant to Article 8.1 (d) of the Agreement?” Regarding this question, it should be noted that Article 8.1 (d) of the Agreement together with its interpretative note only establish some principles on “proceeds”, without any specific provisions and interpretations. Whether the IMF falls within the context of “proceeds” needs to be discussed. It is recommended that, in this case, the IMF be examined under Article 1 and paragraph 7 of Annex III to the Agreement, with the focus on whether the payment constitutes part of “the price actually paid or payable” of the imported goods.

5. As for the payment of fees associated with the marketing activities undertaken by the licensee in the country of importation, it is similar to the technical issue submitted by Uruguay (“Treatment of Advertising and Promotion Costs”) which has been put into Part III of the Conspectus as per the decision of the Committee. No consensuses have been achieved yet. We suggest this question be excluded from the text of the current version so that the Committee can focus on the discussion of the IMF.

6. China Customs would like thank Colombia again for submitting this case and wishes to make additional comments at the forthcoming session.

* * *

IV. Comments by Uruguay

1. Uruguay would like to thank Colombia and the Secretariat for the work presented in Doc. VT1061.

2. Our position on this case was already presented to the Technical Committee during the last session and is set out in Annex II to Doc. VT1047E1a. In order to reduce the Secretariat's workload, on this occasion, we will refer back to our previously-stated position.

3. We would just like to propose that for this session the following part of the text proposed by Colombia be deleted : "Marketing activities undertaken by the licensee as required by the licensor". This topic was already looked into by the Technical Committee during the last session as part of example four set out in Annex II to Doc. VT1030E1a and after lengthy discussions with a number of delegations, it proved impossible to reach a consensus.

4. Uruguay would like to point out that it may make further comments during the next session, with a view to participating in and contributing to the debates on the present case.

* * *

V. New text submitted by Colombia

1. Parent company "X" (**licensor**), holder of the ownership rights to a trademark, domiciled abroad, enters into a licence agreement with importing company "I" (**licensee**) domiciled in the country of importation. The **licensor** and the **licensee** are related within the meaning of Article 15.4 of the WTO Valuation Agreement. Although the parties are related, the Customs of the country of importation was able to verify the circumstances surrounding the sale using a post-clearance audit, finding that this relationship did not influence the price paid or payable; the requirements for use of the transaction value method and corresponding adjustments under Article 8 were thereby met.

2. Under the above agreement, the **licensor** grants the **licensee**, among others, the exclusive distribution rights within the country of importation of the products imported under this licence agreement.

3. The imported products are delivered and invoiced to the **licensee** by any affiliate of the **licensor** Group and from any country, in accordance with the provisions in the agreement.

.

4. Under the same agreement, the **licensee** must pay the **licensor** an International Marketing Fee (IMF) corresponding to 4 % of **net sales** of the trademarked products, as remuneration for the **marketing benefits** gained under the agreement from the advertising and promotional strategy for the trademark, implemented globally by the **licensor** on behalf of the entire Group and its **licensees**. This fee covers the following activities performed by the **licensor** at global level in support of the trademark :

   (i) Signing and managing contracts with regionally or globally renowned athletes, teams and sports federations whose reputation may be advantageously exploited within the country of importation in promoting local sales and distribution, and supplying materials (for example, advertising) and opportunities (for example, appearances/events) featuring the athletes, teams and federations for the promotion and sale of the products, and

   (ii) Signing and managing event sponsorship contracts including, but not limited to, the Olympic Games, Football World Cups, the European Champions Cup and other regional championships, the Football Champions League or any marketing vehicle which the **licensor** considers to be of similar value and whose reputation may be advantageously exploited within the territory, and supplying materials and opportunities arising at events through the promotion and sale of the products.

   These activities are all at the sole discretion of the **licensor**, which is not obliged to provide any details to the **licensee** as to the expenditure described above.

5. Net sales is taken to mean gross income arising from the products' total sales made by the licensee or its subsidiaries to independent customers, less sales taxes, returns and trade discounts.

6. If the **licensee** fails to make the due payments on the specified dates, the **licensor** will terminate the agreement, all the rights granted must immediately revert to the **licensor** from the **licensee**, and the latter must desist from using the trademark.

7. Payment of the IMF relates to the imported products and is a condition of sale, since failure to pay is grounds for termination of the agreement and all the rights granted to the **licensee** must revert to the **licensor**, thereby precluding the sale or distribution of the trademarked products.

8. Given these circumstances, it is clear that these payments made by the buyer to the seller for the resale of the imported goods should be added to the price actually paid or payable as they have been found to constitute subsequently accrued proceeds, as provided for in Article 8.1 (d) of the Agreement.

Queries for submission to the Committee

1. Should the International Marketing Fee payment by the **licensee** to the **licensor** as profit for marketing the trademark globally be added to the price actually paid or payable as part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller?

2. If so, should that adjustment be made under Article 8.1 (d) of the WTO Valuation Agreement?

Position of Colombia

The International Marketing Fee payment to the licensor should be added to the price actually paid or payable because :

1. In determining the Customs value under Article 8 of the WTO Valuation Agreement, there shall be added to the price actually paid or payable for the imported goods :

   (…)

   (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.

   (…)

   This payment must not be confused with net dividends or profits made over the financial year (Case Study 2.2).

2. Finally, Colombia considers that, in keeping with the facts described, the International Marketing Fee payment by the **licensee** to the **licensor** is a payment which is subsequent to importation and which is required under the provisions of the licence agreement, and must be treated as part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues to the seller under Article 8.1 (d) of the WTO Valuation Agreement. The **licensee/importer** and the **licensor/seller** and other related sellers are part of the same Corporate Group, and are controlled directly by the parent company : the aforementioned payment is calculated on net sales of the imported goods in the country of importation, and not on actual advertising and marketing expenditure met by the **licensor** on behalf of the entire Group.