WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES
ORGANIZACIÓN MUNDIAL DE ADUANAS

TECHNICAL COMMITTEE ON
CUSTOMS VALUATION

VT1157E1a
(+ Annexes)

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47th Session
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O. Eng.

Brussels, 2 October 2018.

SPECIFIC TECHNICAL QUESTIONS

ROYALTIES AND LICENCE FEES UNDER ARTICLE 8.1 (c) OF THE AGREEMENT

REQUEST BY URUGUAY

(Item V (d) on the Agenda)

Reference documents :

VT1109E1a (TCCV/45)
VT1117E1c (TCCV/45 - Report)
VT1128E1a (TCCV/46)
VT1137E1b (TCCV/46 – Draft Report)
VT1147E1a (TCCV/47)

I. BACKGROUND

1. At the 46th Session, the Technical Committee agreed that the question submitted by Uruguay on “royalties and licence fees under Article 8.1 (c) of the Agreement” should be examined as a Specific Technical Question at the 47th Session.

2. During the intersession, the Secretariat and Uruguay worked together to modify the draft Advisory Opinion taking into account comments made by Members. The revised draft Advisory Opinion is reproduced in Annex I to Doc VT1147E1a.

3. Members were invited to examine the revised draft Advisory Opinion and submit their written comments/observations to the Secretariat.

II. MEMBERS’ COMMENTS

4. Written comments were received from China, Japan and the United States. These comments are reproduced in Annexes I to III to this document.

5. The comments from the United States call for the draft Advisory Opinion to be amended to stipulate that the royalty payments are both related to the imported merchandise and paid as a condition of sale. If not, it believes that a complete analysis of the dutiability of

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the royalty payments must be conducted before addressing the issue of apportionment. China raises a question regarding the apportionment process and also questions whether an instrument should be developed on the quantitative aspects of royalties and licence fees. Japan raises a question concerning the essence of the final product in relation to the imported goods.

III. SECRETARIAT'S COMMENTS

6. The Secretariat wishes to point out that under the provisions of Article 8.1(c) of the Agreement, royalties and licence fees are to be added to the price actually paid or payable if they are related to the goods being valued and paid as a condition of sale of the goods being valued, unless already included in the price actually paid or payable. Royalties and licence fees may include payments in respect of patents, trademarks and copyrights.

7. In this question submitted by Uruguay, the relevant components of the royalties and licence fees are patents and trademarks. The precise amount paid for each component is not known.

8. When examining the question, the Technical Committee may consider paragraph 3 of Article 8 of the Agreement which provides that additions to be made to the price actually paid or payable should be based on objective and quantifiable data.

IV. CONCLUSION

9. The Technical Committee is invited to examine the question, taking into account the written comments by China, Japan and the United States.

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COMMENTS BY CHINA

1. China Customs Administration would like to thank the Secretariat and Uruguay Customs Administration for preparing the updated document concerning royalties and licence fees under Article 8.1(c) of the Agreement.

2. According to the draft Advisory Opinion, the license agreement involves two kinds of rights: the right to incorporate or use the patented concentrate and the right to use the trademark on the final product. It is quite clear that the patented technique is only related to the imported concentrate and the trademark is only related to the final product. We hereby think that the royalties and license fees paid by ICO shall be divided into two parts: one part corresponding to the patented technique used in imported concentrate and the other part corresponding to the trademark used on the final products. The part corresponding to the patented technique shall be included in the customs value of imported concentrate.

3. Based on the calculation process for the apportionment of license fees described in paragraph 9-14, the payment of license fee in this case seems to be related to all kinds of cost of the final product, which might suggest that the payment of license fee is not only related to imported concentrate, but also related to locally resourced ingredients and manufacturing process of the final products. However, according to paragraph 1-2, "*The locally sourced ingredients are unpatented and are not protected by any intellectual property rights.*" "*The final product is manufactured not using a patented process as it only involves the mixing of all the ingredients to form the final product.*" Therefore, the payment of the license fee is not related to locally resourced ingredients and manufacturing process of the final products. In light of above, we suggest Uruguay Customs clarify the apportionment logic in this case for the Committee to make a further review.

4. Furthermore, we notice that Advisory Opinions previously adopted by the Committee intend to clarify the qualitative aspect of valuation issues rather than the quantitative aspect. To our understanding, apportionment of royalties and licence fees involves quantitative aspects of Customs valuation. We suggest the Committee consider whether it's appropriate to adopt an Advisory Opinion in this regard.

5. China Customs Administration would like to thank the Secretariat and Uruguay Customs Administration again for preparing the new draft.

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COMMENTS BY JAPAN

Japan would like to thank the Secretariat and Uruguay for its work to prepare the revised document. Japan is pleased to submit the following question to understand the scenario more precisely for a discussion on this case.

The text states that the locally sourced ingredients are unpatented and are not protected by any intellectual property rights, and that the final product is manufactured not using a patented process as it only involves the mixing of all the ingredients to form the final product. Japan would like to clarify whether the final product keeps the essence of the imported goods (e.g. Advisory Opinion 4.4) or the processing operations in the country of importation make changes in the essence of the imported input.

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COMMENTS BY THE UNITED STATES

1. The United States would like to thank Uruguay for submitting this question for the Technical Committee's consideration, and to thank the Secretariat for its work on the case. The United States has the following comments concerning the draft advisory opinion.

2. During the 46th Session, the similarities between the facts of this case and those of Advisory Opinion 4.4 were noted. Although the facts of this advisory opinion are, in many ways, similar to those of Advisory Opinion 4.4., the United States wishes to note three differences. First, there is no indication in Advisory Opinion 4.4 that the royalty also included the right to use the trademark on the final product, as is the case here. Second, while the facts in Advisory Opinion 4.4 indicated that the importer purchased the patented concentrate directly from the manufacturer, in Uruguay's case the importer purchases the patented concentrate either from the licensor or from companies that are authorized by the licensor to manufacture the patented concentrate. Third, and finally, unlike in Advisory Opinion 4.4, the facts here do not indicate that the royalty payment is both related to the imported merchandise and a condition of sale of those goods.

3. Accordingly, it is the view of the United States that, unless the facts section of this advisory opinion is amended to stipulate that the royalty payments are both related to the imported merchandise and a condition of sale of those goods, a complete analysis of the dutiability of the royalty payments must be conducted before addressing the issue of apportionment. The United States also believes that a complete analysis of the dutiability of the royalty payments would require additional information such as the terms of the sales and license agreements.

4. Assuming that the royalty payments must be added to the price actually paid or payable under Article 8.1(c) of the Agreement, the United States disagrees with Uruguay's proposed apportionment of the royalties in accordance with "the percentage share that the patented concentrate contributed towards generating the final amount of the royalty or license fee to be paid on the processed product." Because both the text of Article 8.1(c) of the Agreement and the Interpretative Notes are silent on the issue of apportionment of royalties or license fees, it is the view of the United States that, if IXO is required to pay 15 c.u. to EXO as a royalty payment under the license agreement, and that royalty payment is dutiable under Article 8.1(c) of the Agreement, 15 c.u. must be added to the price actually paid or payable of the imported patented concentrate.

5. The U.S. Administration anticipates that it may have additional comments to make with respect to this matter at the 47th session of the Technical Committee on Customs Valuation.
