

## **Determination of Customs Value - Provisional Price**

On 23 January 2025, the Advocate General of the European Court of Justice (hereinafter, ECJ) presented his conclusions in relation to Case C-782/23.

In this case, the discussion was focused on whether it was appropriate to pay delay interests on import VAT quotas revealed after an increase of the customs value originally declared, based on a provisional value.

### **Facts**

From October 2015 to the end of April 2017, a series of imports of diesel and fuel were made, using pro-forma invoices that included a provision value for dispatch. Subsequently, these provisional values were adjusted after the importation of the goods, according to actual data. In this way, the final price was adjusted by means of addenda to the contracts that were initially signed, and the corresponding rectifying invoices were issued at that time.

After receiving the corrective invoices, the importer initiated a procedure for an application for adjustment of the customs value previously entered, which value was determined in accordance with the secondary method provided for in Article 74(3) UCC.

During the inspection proceedings, the auditors detected that there were 13 import declarations in respect of which the importer had not requested the corresponding adjustments. For this reason, the inspection proposed a regularization of the customs value initially declared, proposing a customs

value based on the transaction value method. As a result of this new value, both the customs value and the VAT taxable and, therefore, the VAT quotas, were increased. In addition, the auditors also regularized the delay interests accrued on the import VAT once regularized.



Dissatisfied with this resolution, the corresponding appeal was filed, which was dismissed. Notwithstanding the above, the importer filed a new appeal before the counterpart of the Supreme Court in Lithuania, who decided to stay the proceedings and refer the following questions to the CJEU for a preliminary ruling:

1. Is Article 70 of the UCC to be interpreted as meaning that Article 70(1) thereof does not apply to a situation in which, at the time of acceptance of the customs declaration and on the basis of the sale made immediately before the introduction of the goods into the customs territory, only the provisional price is known, which is subsequently adjusted in Function of circumstances beyond

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the control of the parties to the transaction and unknown at the time of filing the return?

2. Is Article 173(3) UCC to be interpreted as meaning that the declarant is not required to apply to the customs authorities for an adjustment of the customs value determined and declared in accordance with Article 74 UCC, where the price actually payable, as referred to in Article 70(1) UCC, that was not and could not have been known at the time of the presentation of the declaration, does it become apparent after those goods have been released for free circulation?

### **Opinion of the Advocate General**

#### ***The first question***

The Advocate General's opinion is clear in this regard: the valuation method that must prevail is that provided for in Article 70 of the UCC, called transaction value.

Thus, the price actually paid or payable is, generally, the basis for the calculation of the customs value, regardless of whether this price must be adjusted, provided that this price depends on conditions that are unknown at the time of importation.

In the AG's view, it is contradictory to customs legislation to allow the importer to "choose" the valuation method on which to calculate the customs value to be declared in each import transaction, given

that there is a hierarchy between the valuation methods expressly imposed by the regulations.

In the present case, the price paid or payable was provisional, the final value being conditioned by two factors that could only be known after importation.

This implies that, in the AG's view, the price paid or payable was perfectly determinable at the time of importation, regardless of whether that price might be subject to subsequent adjustments.

The AG goes on to point out that, only in those cases where the price paid or payable could not be determined at the time of importation, it will be possible to resort to any of the secondary valuation methods.

The possibility of considering this value as determinable is precisely the difference between the conclusions of this case and the so-called "*Hamamatsu Photonics Deutschland*" case, where a company purchased goods invoiced at intra-group prices from its parent company and the sum of the invoiced products was regularly verified and, where appropriate, corrected, through the so-called "*residual profit sharing*" method.

In the *Hamamatsu Photonics Deutschland case*, the AG submits that it is logical to state that the valuation conditions were more complicated and difficult for the customs authorities to verify, it is not possible, at the time of carrying out the import operation, to determine the price paid or payable based on the method of the transaction value.

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However, in the present case, on the contrary, the AG submits that it is clearly possible to determine the customs value on the basis of the transaction value method, irrespective of whether it is a provisional value, subject to subsequent adjustment, if and when necessary.



### ***Second question***

The substantive issue to be analysed is whether, in the present case, it is appropriate to request the rectification of the customs declaration in accordance with the provisions of Article 173 of the UCC, or whether, however, the procedure to be followed is based on the need to adjust the value on the basis that this value is provisional and, therefore, what is appropriate is an adjustment via articles 166 and 167 of the CAU.

After clarifying the mechanisms for adjusting the final price, the AG recalls that the UCC offers two different mechanisms.

On the one hand, the provisional declaration route and its subsequent complementary declaration, provided for in Articles 166 et seq. of the UCC; and on the other, the route of simplification of

value provided for in Article 73 of the UCC. Both systems require express authorization.

In the opinion of the AG and taking into account the facts of the case and its conclusions in the first question, insofar as the originally declared value was a transaction value, any subsequent adjustment to it had to be implemented by means of the simplified declaration procedure provided for in Article 166 of the UCC. Consequently, the AG concludes that the remedy provided for in Article 73 of the UCC is not applicable to the present case.

This interpretation would be in line with the criteria of the Customs and II.EE. Department of the AEAT, which, according to the Informative Note 01/2023 of 16 February, of the Director of the Customs and Excise Department, on simplified and complementary customs declarations, already clarified that the procedure provided for in Article 73 of the UCC was only applicable in those cases in which the data or documents do not exist or are unknown at the time of the declaration of the import transaction prevented the determination of the customs value based on the transaction value method. According to this criterion, only in these cases would it not be possible to determine the customs value following the general rules, which would make it possible to resort to the procedure provided for in Article 73 of the UCC.

We hope that these comments are useful.

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