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Indirect Tax Alert

Global Trade - no. 53

New EU Guidance on Customs Valuation



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Executive summary

On 25 September 2020, the European Commission published a new version of its Guidance document on customs valuation.¹ While not legally binding, the Guidance is considered as an important interpretation of the EU customs legislation and applied by most customs authorities in the EU. The most important changes relate to the removal of the domestic sale principle from the guidance document and the incorporation of new examples.² The removal of the domestic sale principle has as a consequence that a sale between two EU residing parties can be regarded as a sale for export and thus could be used as the basis to determine the customs value of imported goods in the European Union if it is the last sale. In many supply chains this results in the situation that a later sale in the supply chain, which usually represents a higher value, is elected as the relevant sale for export. This may lead to an increase of import duties payable.

This Alert summarizes the background of this new guidance and how it can be of impact for importers with regard to determining the relevant sale for export.

Detailed discussion

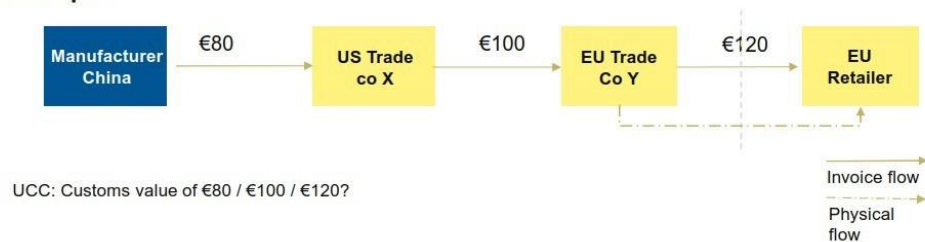
Removal of the domestic sale

The customs value is one of the three elements to determine a customs debt besides the origin and classification of the imported goods. In case of a series of sales, it should be determined what the relevant sale for export is. In the European Union, the last-sale principle applies, meaning that the relevant sale for export is the sale occurring immediately before the goods were brought into the customs territory of the European Union.

Situation under the old Guidance document on customs valuation

On 28 April 2016 the European Commission published a Guidance Document on Customs Valuation.³ This legally non-binding document provided further guidelines to apply the last-sale principle and at the same time introduced the 'domestic sale' principle. The European Commission held that a domestic sale cannot constitute a sale for export. A transaction qualifies as 'domestic sale' if the sale is concluded between two EU residing parties.

Example



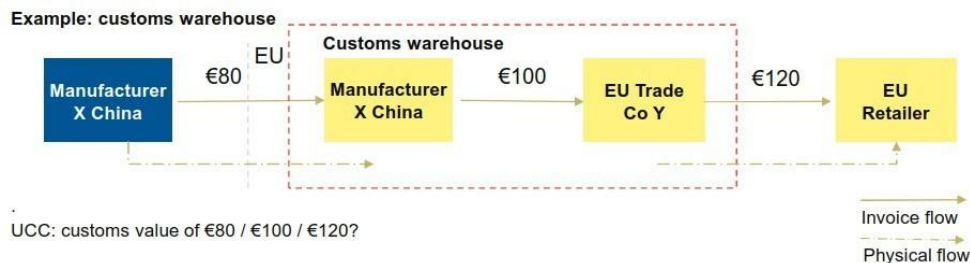
In the above example the sale occurring immediately before the introduction of the goods into the customs territory of the European Union - the last-sale - is the sale between EU Trade Company Y and the EU Retailer (€ 120). However, this sale was, based on the old Guidance Document on Customs Valuation, to be treated as domestic sale. Hence, this sale could not constitute a sale for export and subsequently the customs value should be based on the transaction between

¹ European Commission, 17 Sept. 2020, Guidance Document on Customs Valuation Implementing Act Arts 128 and 136 UCC IA, and Art. 347 UCC IA, 17 Sept. 2020, TAXUD/2623395rev2/2020.

² The intention to remove the domestic sale from the Guidance document on customs valuation was already announced in 2018, see our alert: https://www.ey.com/en_gl/tax-alerts/european-commission-deletes-domestic-sale-principle-from-guidance-document-on-customs-valuation.

³ European Commission, 28 Apr. 2016, Guidance Document on Customs Valuation Implementing Act Arts 128 and 136 UCC IA, and Art. 347 UCC IA, 28 Apr. 2016, Taxud B4/ (2016) 808781 revision 2.

the US Trade Company X and EU Trade Company Y, provided of course that this transaction qualifies as a sale for export to the customs territory of the European Union.



This same domestic sale principle applied to the situation that the goods were sold for export in a customs warehouse in the European Union, where there was no sale which covered the goods on arrival into the European Union. In those situations the customs value should have been based on a transaction value of a sale “taking place in / from the custom warehouse”⁴ within the customs territory of the European Union provided that such sale(s) do(es) not qualify as domestic sale. Following that principle, in the above example, the customs value should be based on the transaction between the Manufacturer X China and EU Trade Company Y (€ 100).

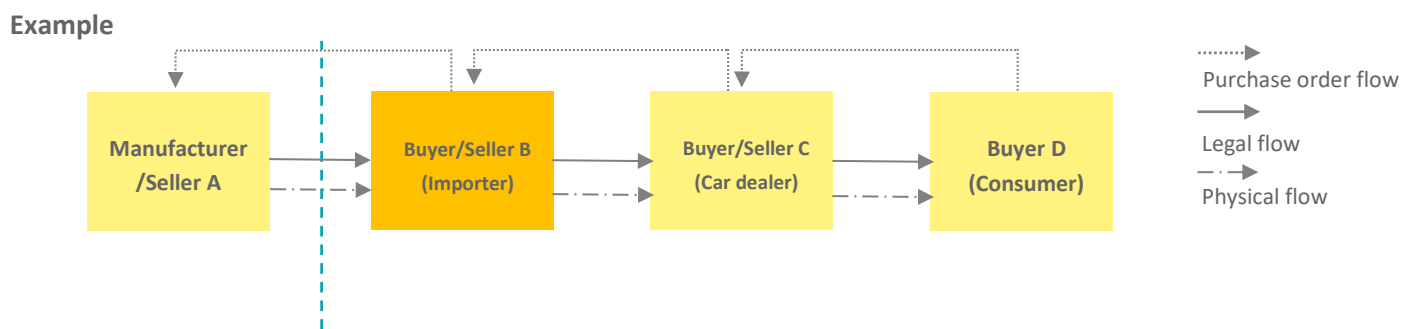
Situation under the new Guidance document on customs valuation

In the new Guidance document on customs valuation all references to domestic sales (a concept that does not exist in the customs legislation) have been deleted. For the first example described above this would mean that the customs value should be based on the transaction between the EU Trade Company Y and EU Retailer (€ 120) provided that this transaction constitutes a sale for export. For the second example, the customs value should be determined, according to the European Commission, on the sale that took place closest to the moment of the introduction of the goods into the customs territory of the Union. This would be the sale between Manufacturer X and EU Trade Company Y (€ 100). If the importer in this example does not have possession over the invoices relating to the relevant sale for export, the customs value should be determined on an alternative valuation method.

Purchase orders

In practice we experience that since the introduction of the Union Customs Code on 1 May 2016, some customs authorities took the view that a purchase order (an official offer submitted to a potential buyer by a potential seller) can constitute a sale for export. In the new version of the Guidance document on customs valuation, however, it is made very clear that a purchase order cannot serve as the basis for the determination of the customs value for the imported goods. Only when the future seller confirms (e.g. accepts) the purchase order, a sale agreement is deemed to be concluded between the buyer and the seller.

Example 5 of the new Guidance document on customs valuation illustrates how the customs value should be determined in a back-to-back ordering situation.



⁴ European Commission, 28 Apr. 2016, Guidance Document on Customs Valuation Implementing Act Arts 128 and 136 UCC IA, and Art. 347 UCC IA, 28 Apr. 2016, Taxud B4/ (2016) 808781 revision 2, page 9.

In the above example a succession of purchase orders takes place with respect to the acquisition of a car (successively the purchase orders are issued from D to C, C to B and from B to A). The purchase order flow is followed by corresponding acceptance of such orders, which leads to a succession of sales. Irrespective of the fact that the purchase orders have been placed before the physical arrival of the goods in the customs territory of the European Union, it is the sales transaction between A and B that constitutes the relevant sale for export as this is the last sale occurring immediately before the goods were brought into the customs territory of the Union. In other words, the customs value of the imported car is based on the sales transaction between A and B.

Impact on businesses

The customs valuation position of companies are under scrutiny in the European Union because of the publication of this new Guidance document on customs valuation, as well as recent case law of the European Court of Justice on the inclusion of royalty payments in the customs value of imported non-licensed semi-finished products (Curtis Balkan⁵) and the inclusion of the value of free of charge supplied software (BMW⁶).

It is highly recommendable to evaluate your supply chain to ascertain if determining the customs value of your goods being imported in the customs territory of the European Union is impacted as a result of the deletion of the domestic sale principle. Especially in the event that currently a transaction between two EU residing parties in your companies' supply chain qualifies as a 'last-sale-for-export', it should be considered whether the removal of the domestic sale principle has an impact. This could, for example, mean that going forward the customs value should be determined on a later sale within the supply chain. Needless to say, using a later sale will result in higher customs duties being payable upon import by a party subject to such duties. Additionally, it is recommendable to carefully access your companies' purchase/sales ordering process (e.g. timing of acceptance of the purchase orders) to prevent that a later sale is regarded as the relevant sale for export.

EY can be of assistance in evaluating the impact of the deletion of the domestic sale and assist in restructuring your companies' supply chains to mitigate the impact. For further information regarding this alert or assistance, please feel free to contact one of your EY advisors or one of the members of the Global Trade Team mentioned below.

⁵ EY's Global Tax Alert on this court case: https://www.ey.com/en_gl/tax-alerts/european-court-of-justice-rules-royalty-paid-for-know-how-required-for-manufacture-of-finished-products-in-the-eu-may-need-to-be-added-to-customs-value-of-imported-semi-finished-products.

⁶ EY's Global Tax Alert on this court case: https://www.ey.com/en_gl/tax-alerts/european-court-of-justice-rules-value-of-free-of-charge-supplied-software-should-be-added-to-customs-value.

The above is based on our interpretation of current tax legislation and case law published to date. This Indirect Tax Alert provides general information with no pretence of completeness, and it is not a tax advice.

Information

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