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The CJEU confirmed that (i) TP adjustments are not relevant for declaring import taxable base of goods (Case C-529/16 *Hamamatsu Photonics Deutschland GmbH*) and that (ii) general presumptions of fraud and abuse are not compatible with the Parent Subsidiary Directive and the freedom of establishment (Joined cases C-504/16 *Deister Holding* and C-613/16 *Juhler Holding*)

Case C-529/16 *Hamamatsu Photonics Deutschland GmbH*

The CJEU issued today its judgment in case C-529/16 *Hamamatsu Photonics Deutschland GmbH* concerning the relationship between TP adjustments *a posteriori* and valuation method for customs purposes laid down by Regulation 2913/1992 (now replaced by Regulation 952/2013, the Union Customs Code).

Hamamatsu Photonics Deutschland GmbH (Hamamatsu) was a German subsidiary of the Japanese company Hamamatsu and it acted as distributor of optical devices purchased from the parent company. The TP Policy of the group, agreed upon with the German Tax Authorities under an APA, provided that the consideration paid by Hamamatsu to purchase the devices distributed was to be adjusted in order to allow the latter to realize a target operating margin.

The case referred to the CJEU concerns the relevance of such adjustments deriving from the importation of optical devices from Japan during 2009 and 2010. In those years Hamamatsu accounted an operating margin below the threshold agreed in the APA. As a consequence the Japanese parent company carried out a downward adjustment in order for Hamamatsu to achieve its target profitability. Hamamatsu considered that TP adjustment as relevant for the purpose of determining the customs taxable base of the goods and filed a refund claim for the higher customs duties paid on the price that was declared to the Customs Authorities at the time of importation. German Customs Authorities refused the refund claim arguing that the TP adjustment was not relevant for customs purposes as no allocation of the adjustment amounted to the individual imported goods was not made. The case was brought before the Munich Federal Court that referred the question to the CJEU seeking confirmation about the interpretation of the provisions governing the valuation of goods for customs purposes.

The CJUE has first recalled that art. 29 of Regulation 2913/1992 provided that the customs value for imported goods is the transaction value *i.e.* the price paid or payable for the goods when they are sold for being imported into the EU. It follows from the jurisprudence of the CJEU that the transaction method is the primary criterion for customs valuation that should be derogated only if the price actually paid or payable for the goods cannot be determined (CJEU case C-116/12, *Christodoulou and Others*). According to the CJEU, in particular, the transaction method reflects the real economic value of the imported goods and, in general, the price paid or payable could be adjusted where necessary in order to avoid the setting of arbitrary or fictitious customs value (CJEU case C-256/07, *Mitsui & Co.*).

The CJEU further emphasized that – according to its jurisprudence – a subsequent adjustment of transaction value is limited to specific cases such as, for instance, the presence of defected or damaged goods (CJEU case C-256/07, *Mitsui & Co.*).

On the basis of the above the CJEU concluded that Regulation 2913/1992 does not impose any obligation on importers to apply for adjustment of the transaction value on the basis of a TP adjustments. That conclusion should be applicable also under the new Union Customs Code even though the CJEU did not comment expressly on that.

Joined cases C-504/16 *Deister Holding* and C-613/16 *Juhler Holding*

The CJEU issued today its judgment in the joined cases C-504/16 *Deister Holding* and C-613/16 *Juhler Holding* concerning the compatibility of certain German anti-avoidance provisions with the Parent-Subsidiary Directive (PSD) and freedom of establishment. Pursuant to the German provisions, exemption from withholding tax under article 5 PSD is denied to the extent the parent company's shareholders would not be entitled to such exemption had they received the dividends. The parent company is, however, entitled to the exemption where it proves the following circumstances: (1) its interposition is justified by economic or other substantial reasons, (2) it earns more than 10% of its gross income from its own economic activities, (3) it took part in general economic commerce with a business establishment suitably equipped for its business purpose.

The Court followed its previous case law (in particular Case C-6/16 *Eqiom*) and stated that the German provisions are not covered by (old) Article 1(2) of the PSD, which allows Member States to deny the benefits of the Directive only on the basis of domestic norms aimed at counteracting wholly artificial arrangements not reflecting economic reality and purported to obtain illegitimate tax advantages. On the contrary, provisions establishing a general presumption of fraud and abuse go beyond what is necessary to achieve that result and conflict with the PSD (para. 60-62 and 74). The same arguments were applied by the Court to conclude that the German provisions infringed the freedom of establishment and were not justified by the objective of preventing fraud and abuses (para. 97).

Interestingly, the Court noted that the fact that the parent exclusively manages the assets of its subsidiaries or that its income derives solely from that management couldn't be regarded, of itself, as implying the existence a wholly artificial arrangement (para. 73).

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