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Customs Valuation Under the UCC: Further Guidance Needed?

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This article deals with the new rule on customs valuation included in Article 128 of the Union Customs Code Implementing Act which is aimed at abolishing the so-called first sale for export valuation rule. The article discusses how the new requirement, that the sale occurring immediately before the goods were brought into the customs territory of the EU is decisive, will work for determining which transaction must be used to apply the transaction value methodology for customs valuation purposes. In relation to this requirement it also discusses the introduction of the new concept of domestic sale by the European Commission in its Guidance on customs valuation of April 2016 and the many questions this concept raises.

As of 1 May 2016 the Union Customs Code (UCC),¹ its Implementing (UCC IA)² and Delegated (UCC DA)³ Acts have become applicable. The UCC brings about many changes to EU customs law, amongst others in the field of customs valuation. This article discusses changes to customs valuation under the UCC. Special attention will be paid to the Guidance regarding customs valuation published by the European Commission on 28 April 2016.⁴ The focus of this article will be on the transaction value method, the method given legal priority to determine the customs value and used for 95% or more of all imports into the EU.⁵ More specific this article discusses which transaction in a series of successive sales can or must be used to determine the transaction value, as the UCC IA introduces new rules regarding this issue and the Commission in its Guidance has given its interpretation of these new rules.

1 TRANSACTION VALUE UNDER THE UCC: INTRODUCTION

The UCC itself contains a concise set of rules regarding customs valuation. Looking at these rules one might wonder where the changes are. All the well-known rules such as the transaction value being the price paid or payable for goods sold for export to the EU are still there.⁶ So looking at the UCC itself nothing much seems to change. However, in the UCC IA very detailed rules are included regarding customs valuation.⁷ These new rules bring about important changes to the longstanding valuation rules of the Community Customs Code (hereafter: CCC).⁸

As mentioned above, although the definition of transaction value in the UCC has not changed, the UCC IA in Article 128 provides for the first major change and introduces a new rule to define *which* transaction should be used to determine transaction value. Article 128 (1) UCC IA states: ‘The transaction value of the goods sold for export to the customs territory of the Union shall be determined at the time of acceptance of the customs declaration *on the basis of the sale occurring immediately before the goods were brought into that customs territory.*’

Article 128 (1) UCC IA thus introduces a new requirement with regard to the use of transaction value, sometimes also called the ‘last sale for export’ rule. Before elaborating on this further, it should be noted that this new rule is aimed at ending the ‘first sale for export’ rule which was included in Article 147 of the CCC

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¹ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code (OJ L 269, 10 Oct. 2013, at 1–101).

² Commission Implementing Regulation (EU) 2015/2447 of 24 Nov. 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29 Dec. 2015, at 558–893).

³ Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29 Dec. 2015, at 1–557).

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.

⁵ The transaction value method is also frequently used in related party transactions where in certain cases transfer pricing studies and documentation are used to substantiate the price charged for goods sold between related parties.

⁶ Arts 69 to 76 of the UCC.

⁷ Arts 127 to 146 UCC IA.

⁸ Council Regulation (EEC) No 2913/92 of 12 Oct. 1992 establishing the Community Customs Code (OJ L 302, 19 Oct. 1992, at 1–50).

Implementing Regulation (hereafter CCC IR).^{9,10} Under this ‘first sale for export’ rule it was possible to use an earlier sale in the supply chain as the basis for the transaction value, when the import of goods into the EU was done in a series of sales.¹¹ For example, the sale preceding the sale leading to the actual import into the EU could be the basis to determine the customs value. Needless to say that this resulted in a lower customs value and could only be used in related party situations (after all the seller will not submit its purchase invoice to an unrelated buyer/importer of record as this would reveal his margin).

2 SALE FOR EXPORT

Before elaborating on what is to be understood as ‘the sale occurring immediately before the goods were brought into that customs territory’, in this section it is discussed what constitutes a ‘sale for export’. In that regard two elements are important: (1) *sale for export* and (2) the term *sale*. Below these are discussed in more detail.

In the first place there needs to be a *sale for export*, meaning that at the moment of sale it was agreed that the goods sold would be transported to or were destined for the EU.¹² This can follow from the fact that the goods are directly shipped to the EU by the manufacturer or from the fact that the goods meet specific EU product requirements.¹³ This is in conformity with the international interpretation of the term ‘sale for export’ as used in the WTO Customs Valuation Agreement which forms the basis for the transaction value method.¹⁴ WCO Advisory Opinion 14.1 in that regard states that ‘*only transactions involving an actual international transfer of goods may be used in valuing merchandise under the transaction value method*’.¹⁵

In the second place there must be a ‘sale’. If a transaction does not qualify as a sale, the transaction value method cannot be used and one of the secondary methods described in Article 74 UCC must be used to determine the customs value (these are: transaction value of identical goods, transaction value of similar goods, computed value and valuation by reasonable means). It should be noted that the term ‘sale’ is not further defined in the UCC or UCC IA. Also the WTO Customs Valuation Agreement does not contain a definition of the term ‘sale’. However, WCO Advisory Opinion 1.1 lists several situations which should not be regarded as a sale, *inter alia* free consignments (samples, gifts), goods imported on consignment, goods imported by intermediaries, goods imported by branch offices not being separate legal entities and goods imported under a lease contract.¹⁶

In its Guidance the Commission emphasizes that a transaction must have a buyer and a seller to qualify as a sale. From a legal and commercial perspective there must be sale in other words. This means *inter alia* that a transfer of goods by a company to its branch in the EU or goods imported on consignment do not qualify as such.

On the other hand the Commission refers to WCO Advisory Opinion 1.1 which states that the term ‘sale’ should be taken ‘in the widest sense’. This interpretation is confirmed by the CJEU in the *Christodoulou* case, where the CJEU comes to the conclusion that the term ‘sale’ should be interpreted broadly in the case where materials were provided by the importer to a processing company outside the EU and the end product after processing was imported in the EU.¹⁷

43 Consequently, it is clear, both from the wording of Articles 29 to 31 of the Customs Code and from the order in which the criteria for determining the customs value must be applied pursuant to those articles, that those provisions are subordinately linked to each other. Thus, when the customs value cannot be determined by applying a given provision, only then is it appropriate to refer to the provision which comes immediately after it in the established order.

44 Since, for the purposes of the customs valuation, priority is to be given to the transaction value in accordance with Article 29 of the Customs Code, that method of determining the customs value is assumed to be the most appropriate and the most frequently used.

45 In order to maintain that priority, it is necessary to interpret the term ‘sale’ in Article 29(1) broadly.

In other words, from the priority given to the transaction value method for determining the customs value, it follows that the term ‘sale’ should be interpreted broadly. The CJEU furthermore makes clear that that term is ‘a

⁹ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11 Oct. 1993, at 1–766), as amended by Commission Regulation (EC) No 1762/95 of 19 July 1995 (OJ L 171, 21 July 1995, at 8–35).

¹⁰ For criticism on the abolishment of first sale for export valuation, see L. Ruessmann & A. Willems, *Revisiting the First Sale for Export Rule: An Attempt to Remove Fairness in the Interest of Raising Revenues Without Improving Legal Certainty*, Volume 3(1) (2008) World Cust. J..

¹¹ Art. 347 UCC IA provides for a grandfathering clause extending the application of the first sale for export valuation rule until 31 Dec. 2017 for situations covered by contracts which already existed prior to 18 Jan. 2016.

¹² CJEU, 6 June 1990, *Unifert*, Case C-11/89, para. 11 and CJEU, 28 Feb. 2008, *Carboni e derivati*, Case C-263/06, para. 28.

¹³ See also s. 4 of Commentary No 7 of the Customs Code Committee (Customs Valuation Section) on the application of Art. 147 of Commission Regulation (EEC) No 2454/93 of 2 July 1993.

¹⁴ WTO Agreement on Implementation of Art. VII of the GATT 1994, better known as WTO (World Trade Organisation) Customs Valuation Agreement (WTO CVA).

¹⁵ WCO (World Customs Organisation), Advisory Opinion 14.1.

¹⁶ WCO, Advisory Opinion 1.1.

¹⁷ CJEU, 12 Dec. 2013, *Christodoulou*, Case C-116/12.

concept of European Union law' and should be interpreted in a uniform manner. The *Christodoulou* case shows that the concept of 'sale' does not necessarily involve a transfer of ownership. I do not expect that this judgment is set aside by the new rules in the UCC IA and the Commission's Guidance. After all, the main rules for determining the customs value in the UCC itself, the Articles 69 to 77 are virtually identical to the articles in the CCC on customs valuation which were the subject of the *Christodoulou* case.

However, the judgment raises the question what is then determining whether a 'sale' is present. After all, in the *Christodoulou* case there was no transfer of ownership. In this regard the *Hepp* case may shed some light on what is to be regarded normally as a sale. In the case which deals with the question whether a buying agent can perform a sale, the CJEU stated in paragraph 14 of its judgment.¹⁸

The fact that that transaction is carried out through the medium of a buying agent is irrelevant in this regard since the financial risk connected with the transaction is assumed by the importer.

Although the criterion of financial risk is not presented by the CJEU as a general criterion, it seems to me that it might well be useable in practice. For example in the *Christodoulou* case there was no transfer of ownership but the financial risk remained with the importer throughout the whole operation.

However, as we have seen above, the transfer of own goods does not qualify as a sale (for example a business in a non EU country transferring goods to a warehouse in the EU and afterwards selling those goods). In my opinion that is correct and should be seen as an exception to the criterion that a buyer must bear financial risks in order for a transaction to qualify as a sale. This leads me to a second observation, also in relation to the *Christodoulou* case. In that case there was no transfer of ownership, but according to the customs valuation rules there was an *objective* way of calculating the customs value. This is more or less also confirmed by the CJEU in its judgment, where the CJEU states that 'the objective of the European Union legislation on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values'.¹⁹ In the *Christodoulou* case the determination of the transaction value is done by making use of Article 32, paragraph 1(b)(i), CCC which demands that so-called 'assists' must be added to the transaction value.²⁰ As the CJEU states, this article requires 'the value of certain products supplied by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods to

be added to the price actually paid or payable in so far as that value has not been included in that price.' In short, the fee for the processing contract is the basis for the transaction value, while the value of the raw materials must be added to that value. By using this methodology an objective way to determine the transaction value is being achieved.

In the case of transfer of own goods, there is no (easy) objective way of determining the customs value. That seems to me the explanation why in that case no 'sale' is being assumed and the transaction value methodology cannot be used, despite the fact that the importer bears the financial risk to the goods at all times. Therefore in situations of transfer of own goods, in practice the computed value methodology is used, resulting in a cost-plus or resale minus approach.

3 IMMEDIATELY BEFORE THE GOODS WERE BROUGHT INTO THE CUSTOMS TERRITORY

Once it is established that a sale for export is being performed, the new requirement of Article 128 UCC IA still needs to be fulfilled to determine whether the sale qualifies for using the transaction value: that sale must occur immediately before the goods were brought into the customs territory of the EU. What this means according to the Commission is explained in further detail in its Guidance of 28 April 2016. The Guidance states in section 2.1. under 2: 'The relevant sale for goods brought into the Union is the sale when crossing the border, i.e., the ultimate sale taking place, in performance of the contract of sale, at that time.' This clarifies that crossing the border is the criterion to determine which transaction in a supply chain is relevant and thus which transaction value must be used. The Commission mentions the following example to illustrate the principle: 'B buys from A and B sells to C, and this latter sale (B to C) is the sale occurring before the goods arriving into the EU. The sale from B to C is therefore the sale which qualifies as the sale (immediately) occurring before introduction into the EU.'

The new approach under Article 128 UCC IA becomes clear when we adapt this example given by the Commission and assume B is the importer of record and that the goods were already sold by B to C before the goods physically enter the EU. It is clear in that case that the sale between B and C is the sale which occurs immediately before the goods were brought into the customs territory, even though B is the importer of record filing the import declaration. By contrast, under Article 147 of the CCC IR the sale between A and B could be the relevant sale for determining transaction value. This example thus shows the changes the UCC brings about in determining the relevant transaction. The example also makes clear that it will be even more important under the UCC than under the CCC to establish what exactly is a 'sale'.

As discussed above, the term 'sale' should be interpreted in a wide sense, but from the case law of the CJEU it also

¹⁸ CJEU, 25 July 1991, *Gebr. Hepp GmbH & Co*, Case C-299/90.

¹⁹ CJEU, 12 Dec. 2013, *Christodoulou*, Case C-116/12, para. 36.

²⁰ Art. 70, para. 1 (b) (i) UCC contains an identical rule.

follows that the buyer must have assumed 'financial risk' to the goods. While from the *Christodoulou* case it follows that a transfer of ownership is not strictly necessary, it seems to me that the requirement that the buyer assumes financial risks is an important limitation to the term 'sale'. It will for example not automatically include purchase orders where the financial risks are not directly assumed by the person placing the purchase order, but for example only after taking physical possession and ownership of the goods (comparable to the situation where goods are sold under consignment, a situation specifically mentioned by the Commission in its Guidance as not being a 'sale').

Another exception to the concept of 'sale for export' is being introduced by the Commission in its Guidance in section 2.1. under 9, where the domestic sale is mentioned as not qualifying as a 'sale for export' and therefore not to be used for determining the transaction value.²¹ The Commission explains that a domestic sale is a sale between a buyer and a seller in the EU. So, if in the example above B and C are both established in the EU, the sale between B and C cannot be seen as the sale occurring immediately before the goods were brought into the customs territory, although B as the importer already sold the goods to C before the goods arrived in the EU.

4 ISSUES WITH 'DOMESTIC SALE'

The introduction of the domestic sale creates several issues, which will be explored in this section. If we take the example of a four party supply chain consisting of parties A and B established outside the EU and parties C and D established in the EU in which D is the importer of record, these issues are best explained. Since C and D in the example are both established in the EU, the sale from C to D is a domestic sale and does not qualify as a sale for export in the sense of Article 128 (1) UCC IA. Instead the sale from B to C is the relevant sale for export and the transaction value should be based on this sale. Effectively the first sale for export valuation rule is being reintroduced for EU businesses with this. This may seem a blessing for EU businesses, but only in the situation where C and D are related parties, use can be made of this new opportunity. After all, C will have no problem in submitting his purchase invoice to D in such a situation, since they belong to the same group of companies. However, in Case C and D are non-related parties, C will not be prepared to submit the purchase invoice that he received from B, to party D, as D will become aware of C's margin.

The question then arises what methodology should D (being not related to C), being the importer of record,

²¹ See also s. 2.3 under 6 of the Commissions Guidance on customs valuation, where it is stated that 'domestic sales are not eligible for the purposes of the transaction value method'.

use to report the customs value? Should D use his own sales price to his customer as the customs value or is he allowed to use his purchase invoice (although it relates to domestic sale) as the basis for the customs value? The Commissions Guidance offers no clue and seems to assume that in practice it will always be possible to obtain the purchase invoice from the EU party selling to the importer. Already there are signals that this issue leads to differing views of customs authorities of the Member States.

In my view in such a situation the importer (D in the example) should still be allowed to use his purchase invoice (the invoice he received from C) as the basis for determining the customs value. After all, it makes no sense to oblige the EU established importer in reporting a higher customs value than in the situation where there is no domestic sale (i.e. where a non EU established company sells to an EU importer). An important argument for allowing this can also be found in the case law of the CJEU.

In the *Unifert* case it was argued that the place of establishment of the importer was a criterion for determining the sale for export within a series of sales ultimately leading to import into the EU. The CJEU held:²²

10 However, Unifert claims that only a sale made by a supplier resident in a non-member country may be regarded as a sale 'for export' and that, therefore, only the price stipulated for that sale can be the material price for the purposes of the transaction value.

11 That argument cannot be upheld. The criterion which emerges from the term 'sold for export' relates to the goods and not to the situation of the seller. Placed in its proper context, the term suggests that it is agreed, at the time of sale, that the goods originating in a non-member country will be transported into the customs territory of the Community. Therefore, there is nothing to prevent both parties to such a sale from being established in the Community.

The CJEU thus rejected that a sale between two parties established in the EU (at that time the Community) could not qualify as a sale for export. Although the *Unifert* case dealt with Article 3(1) of Regulation No 1224/80²³ (one of the predecessors of the CCC and UCC), the decision is still relevant. In the *Compaq* case the argument was again raised, but this time by the Commission itself. Advocate-General Stix-Hackl stated as follows:²⁴

30. In this regard, the Court decided in Unifert that the criterion which emerges from the term 'sold for export' relates to the

²² CJEU, 6 June 1990, *Unifert*, Case C-11/89.

²³ Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ L 134, 28 May 1980, at 1-9).

²⁴ Opinion of Advocate-General Stix-Hackl to CJEU, 16 Nov. 2006, *Compaq Computer International Corporation*, Case C-306/04.

goods and not to the place of establishment of the seller. The Court further held that the definition of transaction value ‘takes no account of the place of residence of the parties to the contract of sale’. Accordingly, neither the place of establishment of the seller nor that of the buyer has any bearing on the matter.

In conclusion, since the provisions on ‘sale for export’ do not refer to the place of establishment of the seller and buyer, the place of establishment cannot play a role in determining which transaction is relevant for transaction value. Since the UCC nor the UCC IA refer to the place of establishment as well (in fact the wording of the UCC provision is virtually identical to the provisions in CCC and its predecessors), it can be expected that the CJEU will not recognize the domestic sale as an exception to ‘sale for export’. Therefore in the example given, D as importer can invoke this case law and should be able to use his own purchase invoice to determine transaction value.

The mentioned case law of the CJEU may also cast a shadow on the application of the domestic sale principle in a more general way. Since the Guidance of the Commission has no legal status, i.e. it is not legally binding on Member States, it is not a given that all customs authorities in the EU will acknowledge the principle of domestic sale. As mentioned, the place of establishment of buyer and seller does not play a role in determining whether a sale is a sale for export or not. If customs authorities of certain Member States do not apply the principle of domestic sale, while others do, this will lead to legal uncertainty and would result in lack of uniformity, which was one of the major objectives of the UCC. Finally, the question is whether this issue can be solved by adapting Article 128 of the UCC IA. In my opinion that will not suffice, because Article 128 UCC IA would then still run contrary to Article 70 (1) of the UCC itself, which does not refer to the place of establishment. Therefore, if the Commission really wants to introduce the concept of domestic sale, it will have to change Article 70 (1) UCC.²⁵

5 SALE FOR EXPORT FROM A BONDED WAREHOUSE

The UCC IA in Article 128 (2) also introduces a new valuation rule for goods which after physically being brought into the EU are stored under suspension of customs duties. The article which is difficult to read, determines the following:

²⁵ In that regard see the recently decided case C-661/15, X B.V. That case deals with the question whether Art. 145 CCC IR runs contrary to Arts 29 (transaction value) and 236 (remission of customs duties) of the CCC. The CJEU noted that the Commission has a margin of discretion under its implementing powers. However, CJEU decided that the Commission went beyond its implementing powers, since the limitations brought about by Art. 145 CCC IR were not useful or necessary for the implementation of the Arts 29 and 236 CCC. See for an example outside customs law also: CJEU, 15 Oct. 2014, *European Parliament/European Commission*, Case C-65/13, para. 45.

Where the goods are sold for export to the customs territory of the Union not before they were brought into that customs territory but while in temporary storage or while placed under a special procedure other than internal transit, end-use or outward processing, the transaction value will be determined on the basis of that sale.

This article, which in earlier drafts caused a lot of confusion, allows the use of the transaction value of the sale which led to the introduction of the goods in temporary storage or another regime suspending customs duties, like customs warehousing. How this mechanism works is best explained with two examples: (1) A in a third country sells goods to B in the EU. B stores the goods temporarily in a customs warehouse in the EU. Afterwards, while in the warehouse, B sells the goods to C, and the goods are brought into free circulation. On the basis of Article 128 (2) UCC IA, the transaction value can then be determined on the transaction between A and B (i.e. the price paid by B to A). One could regard this as an exception to the rule that the goods must be destined for the EU at the moment when the sale between A and B was concluded. After all, B stores the goods in a customs warehouse, which could be taken as an indication that the final destination of the goods was uncertain and the goods therefor were not destined for the EU.

(2) If B transfers own goods from a third country to a customs warehouse in the EU and then sells the goods to C while in the customs warehouse, the latter transaction is used to determine the customs value. As there is no ‘sale’ (i.e. the goods are not sold for export as required by Article 128 (2) UCC IA) before the goods were brought into the customs territory of the EU, the sale between B and C becomes the basis for the transaction value.

In the latter example, things get complicated if B and C are both EU companies and the sale from B to C becomes a domestic sale. As mentioned earlier, according to the Commission such sale is ‘not eligible for the purposes of application of the transaction value method’. It is not clear how the customs value should then be determined, but I would assume that B must now avail himself of another valuation method and will probably have to use the computed value method resulting in a cost-plus or resale minus approach to account for the transfer of own goods. Or should B now use the sales price charged by C to its customers? The Commissions Guidance does not offer directions for these kind of situations and gives no guidance on which transaction is decisive or which (alternative) valuation method should be used. The concept of domestic sale thus also leads to uncertainties when applying Article 128 (2) UCC IA.

6 CONCLUSION

Article 128 UCC IA effectively was introduced to abolish first sale for export valuation. By introducing

the concept of domestic sale in its Guidance on customs valuation, the Commission effectively maintains the possibility of first sale valuation for EU companies. How sympathetic this concession may be, it only works when the EU parties in such transaction are related parties. In other situations the introduction of domestic sale leads to legal uncertainty and raises a lot of questions

for which the Guidance does not offer alternatives or solutions. Moreover, taking into account the case law of the CJEU, it is highly questionable whether the concept of domestic sale is admissible under UCC and UCC IA. The introduction of domestic sale needs more careful consideration and should be embedded in the UCC itself.