

# **What's wrong with Hamamatsu's case law.**

## **Details from German Case law**

# Legal proceedings

## Facts

- „Hamamatsu Phonics Germany Ltd.“
  - based in Germany
  - is part of a global group from Japan
- 2009: Advance Pricing Agreement (APA)
  - Both the German and Japanese tax authorities agreed
  - The German customs administration was not involved
- From 2009 to 2010: The Hamamatsu imported more than 1.000 consignments from the Japanese group parent company
  - As customs values, Hamamatsu declared the prices invoiced to it by the group parent company during the year (which formed part of the agreed transfer price).

# Legal proceedings


## Facts

- Since the return on sales of Hamamatsu calculated in this way was below the specified target range of return on sales, the transfer prices were adjusted after the end of the accounting period for 2010 by way of a credit from the group parent company.
- The imported goods were actually cheaper than declared in the customs declaration!
- As a result, in 2012 Hamamatsu applied to the main customs office in Munich for the reimbursement of customs duties for the imported shipments due to the subsequent transfer price adjustments.
  - The main customs office rejected the reimbursement request.

# Legal proceedings

## Practical handling of the German customs administration

- In the event of a subsequent charge, the German customs administration will subsequently levy the import duties.

→ Post-collection of import duties 

- BUT: In the case of a subsequent credit - as with Hamamatsu - the German customs administration does not reimburse any import duties.

→ Reimbursement of import taxes 

# Legal proceedings

## Proceedings at the Munich Finance Court (Part 1)

- FG Munich, decision of September 15, 2016, 14 K 1974/15
- The Munich Finance Court indicated that it was inclined to take into account the subsequent credit issued to the plaintiff by its parent company in order to reduce customs duties and thus to recognize the transfer price agreed in the mutual agreement procedure.
- The proceedings were suspended and submitted to the ECJ for a preliminary ruling.

# Legal proceedings

## Preliminary ruling by the ECJ

- The first question

„By its first question, the referring court asks essentially whether Articles 28 to 31 of the Customs Code must be interpreted as meaning that they permit the adoption, as the customs value, of an agreed transaction value which consists partly of an amount initially invoiced and declared and partly of a flat-rate adjustment made after the end of the accounting period, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.“

*- paragraph 23 of the Hamamatsu judgment*

# Legal proceedings

## Preliminary ruling by the ECJ

- The ECJ stated that, according to previous case law, a subsequent correction of the transaction value had only been permitted in special cases, e.g. if the goods were defective or defects were found after they were released for free circulation (- paragraph 30 of the judgment).
- The EC Customs Code does not impose an obligation on an importing company to request a correction of the transaction value if this has been subsequently adjusted upwards. Furthermore, there is no provision in the EC Customs Code that would enable the customs authorities to protect themselves against the risk that these companies only apply for downward adjustments (- paragraph 33 of the judgment).

# Legal proceedings

## Preliminary ruling by the ECJ

- The ECJ also stated that the EC Customs Code does not allow a subsequent adjustment of the transaction value to be taken into account, as in the case like this.(- Paragraph 34 of the judgment).



# Legal proceedings

## Preliminary ruling by the ECJ

„Therefore, the answer to the first question is that **Articles 28 to 31 of the Customs Code**, in the version in force, must be interpreted as meaning that they do not permit an agreed **transaction value**, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down.“ - paragraph 35 of the judgment



# Criticism of the judgment

## Open questions

- It is unclear how this is to be understood.
- The mentioned articles of the customs code (articles 28 to 31) regulate not only the transaction value method but also all subordinate methods. It is therefore unclear whether the ECJ means all customs value methods or only the transaction value method.

# Criticism of the judgment

## Open questions

- As a result, many were discussed in German literature.
  - The prevailing opinion in the German-language literature assumes that the ECJ case law provides for the application of the fall back-method (article 31 Customs Code)

# Legal proceedings

## Proceedings at the Munich Finance Court (Part 2)

- By decision of November 15, 2018, the Munich Finance Court rejected Hamamatsu's lawsuit as unfounded.
  - Because the ECJ did not follow the view presented by the Munich Finance Court
  - According to the assessment submitted by the ECJ, the transfer price registered by Hamamatsu during the year forms the customs value and subsequent adjustments in the form of credits to the transfer price registered during the year are not taken into account.

# Legal proceedings

## Proceedings at the Munich Finance Court (Part 2)

- The court also rejects the fall back method (article 31 Customs Code) proposed in the legal literature for determining the customs value.
- Since the ECJ did not say anything about this detailed proposal in its decision, it can be assumed that the ECJ will reject such adjustments.

# Legal proceedings

## Open procedure at the Federal Fiscal Court

- Hamamtsu appealed against the decision of the Munich Finance Court.
- The proceedings at the Federal Fiscal Court are currently still open.

# Current situation

## Practical problems

- The German customs administration has not yet adjusted its practice.
  - Subsequent credits due to transfer price adjustments - as in the case of Hamamatsu - are not considered to reduce customs duties and do not lead to any reimbursement of import duties.
  - Subsequent charges due to transfer price adjustments will continue to be offset against the customs value and levied as import duties.

# Current situation

## Practical problems

- In Germany, companies have been submitting reimbursement applications and appeals in order to keep comparable procedures open.
  - However, this multitude of proceedings is suspended until the decision by the Federal Fiscal Court.
- It is still completely unclear how the Federal Fiscal Court will decide. However, the use of the fall back method appears to be possible in this regard.
- Another submission of the question to the ECJ is also conceivable. This would likely drag out this legal uncertainty for years.



**There is still a lot to discuss....**

**Thank you for your attention!**