Transfer Pricing Forum

Transfer Pricing for the International Practitioner

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Japan

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1. In your jurisdiction, how do the tax and customs departments interact? Are they operating separately or collaborating, especially considering their potentially conflicting interests (e.g., higher import prices leading to higher import duties but lower local profits)?

In Japan, customs enforcement and taxation are handled by separate entities with distinct responsibilities. The Customs and Tariff Bureau (CTB), a part of the Ministry of Finance (MOF), is responsible for enforcing customs duties. The National Tax Agency (NTA) is responsible for the administration and collection of taxes, including transfer pricing. The NTA, while not directly part of the MOF, functions as a subordinate organization and an external bureau under the Ministry's jurisdiction. This arrangement is analogous to the relationship between the U.S. Department of the Treasury and the Internal Revenue Service.

Despite their connection through the MOF, each entity operates under its own legal framework. CTB and its regional customs offices focus on the appropriateness of transaction prices at the level of individual transactions and individual imported goods, while NTA and its regional bureaus are generally concerned with whether the parties to a transaction are making an appropriate level of profit on companywide basis, rather than on individual transactions basis. Currently nothing has been established in Japan to bridge customs and taxation; the two systems remain independent.

2. Please explain the interaction between transfer pricing methods (e.g., as outlined in the OECD Transfer Pricing Guidelines) and customs valuation methods (e.g., as described in the WTO Valuation Agreement) in your jurisdiction.

Per the Customs Tariff Law (CTL), the customs value of imported goods is calculated based on the method of the transaction value of the imported goods (the "Primary Method"). Under the Primary Method, the customs value is calculated by the price actually paid (or payable) for the imported goods by the buyer to the seller in an import transaction, plus the amount of freight charges, etc. to the extent these are not included in the price actually paid.

If an exporter and an importer have a "special relationship", meaning one party has control over the other, and it cannot be proven that the special relationship has no effect on the transaction price, the Primary Method cannot be applied. The CTL defines a special relationship more broadly than transfer pricing tax regulations. CTL considers a 5% or more share ownership ratio as indicative of a special relationship. In contrast, transfer pricing regulations set a higher threshold, deeming a special relationship to exist when the share ownership ratio is 50% or more.

If the Primary Method cannot be applied, alternative methods are applied in the following sequential order:

i. The Identical or similar goods value method (Article 4-2 of CTL): This method is roughly equivalent to the Comparable Uncontrolled Price Method ("CUP Method") under the transfer pricing regulations.

ii. The Deductive value method (Paragraph 1, Article 4-3 of CTL)

iii. The Computed value method (Paragraph 2, Article 4-3 of CTL): This method takes precedence over the Deductive value method, if manufacturing costs of the imported goods can be identified (i.e., the exporter is a manufacturer) and if an importer requests this method to be applied.

iv. The Fall-back value method (Article 4-4 of CTL): The price is calculated using reasonable adjustments under the related regulations.

The Deductive value method requires subtracting normal fees or profits and general expenses (the profit portion) from the domestic sales price and is roughly equivalent to the Resale Price Method under the transfer pricing regulations. The Computed value method requires adding the profit portion to the cost of production and is roughly equivalent to the Cost Plus Method under the transfer pricing regulations.

However, customs regulations are vague on how to calculate the profit portion under the Deductive value method or the Computed value method. Section 4-3-1 of the CTL's Basic Circular ("CTL Circular") provides that the profit portion should be based on information supplied by or on behalf of the importer. However, if this information appears to deviate significantly from normal profit and overhead costs for similar goods, other appropriate information should be used in the calculation.

Furthermore, Section 4-8-1(3) of the CTL Circular specifies different accounting standards for these calculations. For the Deductive value method, the profit portion should be calculated according to the generally accepted accounting principles (GAAP) of Japan. For the Computed value method, the calculation should follow the GAAP of the country where the imported goods originate.

In contrast, in the realm of transfer pricing, the calculation of the profit portion is crucial. Transfer pricing methods rely on carefully chosen uncontrolled comparable transactions or independent comparable companies to establish an arm's length price.

When a special relationship exists between parties and its impact on pricing cannot be disproven, customs valuation methods bear similarities to transfer pricing methods. In the absence of official guidelines for such integration, it may be possible for taxpayers to leverage comparable transactions or companies carefully selected and applied in transfer pricing documentation to calculate the profit

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portion for customs valuation, as long as the documentation is prepared in accordance with the respective country's GAAP.

3. From a supply chain perspective, MNEs may consider implementing restructuring strategies to mitigate the impact of higher customs duties. Transfer pricing strategies employed by MNES may include lowering operating margin levels for limited risk distributors, or converting contract manufacturers into toll manufacturers, for example.

How would general anti-abuse provisions in your jurisdiction address such strategies, assuming the behavior of parties aligns with economic reality and the new or modified contractual agreements?

Japan's corporate tax legislation, including its transfer pricing rules, lacks specific provisions to address potential misuses in business restructuring. This gap exists even in cases where a Japanese subsidiary of a multinational company decreases its taxable income through restructuring, such as transitioning from a wholesale distributor to a sales support company (a commissionaire arrangement).

If the Japanese corporation's business itself remains unchanged despite such a restructuring (e.g., changing to a sales support company while continuing to bear actual inventory and credit risks), the restructuring would likely be deemed tax avoidance planning. In this case, where only the form changes but not the substance, transfer pricing taxation would probably be enforced. However, if the actual business substance (functions and risks) changes to align with the new contractual arrangement, the risk of the Japanese corporation being subject to transfer pricing taxation after the restructuring may be lower due to the absence of anti-abuse provisions.

A significant ruling came in the *Adobe Japan* case (2008), where the Appellant provided marketing and support activities relating to software that its foreign parent sold in Japan, for which it received a commission. The Japanese tax authorities had issued a transfer pricing assessment using secret comparables based on the resale price method. The issue in dispute was whether the commission paid by the parent company satisfied the arm's length standard. The Tokyo High Court overturned the assessment, finding that the "transactions between Adobe Japan and its overseas related parties were service transactions in both legal and economic substance, and that there were clear differences in function and risk between the service transactions Adobe Japan conducted and the resale transactions selected by the tax authorities as comparable transactions.

From a permanent establishment ("PE") perspective, Japan's corporate tax laws, having implemented the OECD's BEPS Action 7, could regard a related-party agent as a PE, even if the agent is an independent agent. Therefore, in cases of business re-characterization or restructuring, the risk of creating a PE has increased.

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4. How are customs authorities in your jurisdiction responding to transfer pricing year-end adjustments? What are the specific requirements and procedures for decreasing customs duties following a year-end adjustment?

In Japan, transfer pricing and customs operate under distinct legal frameworks and are administered independently. As a result, transfer pricing adjustments do not impact the customs valuation of the same transaction, and likewise, changes in customs valuation do not affect transfer pricing assessments.

Regarding voluntary year-end price adjustments, Section 4-2 of CTL Circular (concerning application of the Primary Method) provides some guidance. It states that if, after the buyer's payment of the invoice, the price of the goods is adjusted pursuant to a price adjustment clause and a separate payment or receipt is made, the price actually paid is the invoice price plus the adjustment. The same applies when such adjustment is made and a separate payment or receipt is made after the customs declaration is filed.

However, Section 4-2 of the CTL Circular also states that the above treatment does not apply if the price adjustment clause is deemed to fall under the conditions that make it difficult to determine the customs price. Price adjustment clauses between parties with a special relationship may fall into this category. This is because, as previously mentioned, the Primary Method is not applicable when an exporter and importer have a "special relationship" and it cannot be demonstrated that this relationship does not affect the transaction price.

Furthermore, a Q&A on the CTB's website provides the following response regarding a transfer pricing compensating adjustment case made in an advanced pricing arrangement (APA) for import transactions from an overseas related entity to a Japanese corporation:

> *(Translation of CTB's answer)*
>
> *In the above transaction, whether your company pays or receives an adjustment to the seller, the adjustment is recognized as a price adjustment for the imported goods delivered or received pursuant to the price adjustment clause attached to the import transaction. Therefore, the adjusted price is used to calculate the customs value.*
>
> *(Reason)*
>
> *"Price actually paid" refers to the total amount actually paid or payable by the buyer to or on behalf of the seller to import the goods, taking into account the transaction circumstances and other factors.*
>
> *In the above transaction, it was agreed in the sales agreement that the purchase price of the imported goods would be the price including the adjustment related to the APA. Furthermore, if such an adjustment is incurred, the transaction documents will make clear that the adjustment will be paid or received between your company and the seller, and that it corresponds to the imported goods.*
>
> *Consequently, the adjustment will be paid or received by your company as an adjustment to the price of the imported goods pursuant to the price adjustment clause attached to the import transaction. In light of the transaction status and other circumstances related to the imported goods, the total amount actually paid by your company to conduct the import transaction for the imported goods is deemed to be the*

> *adjusted price, and thus the adjusted price is the price actually paid for the imported goods.*
>
> *Therefore, if an adjustment is paid from your company to the seller after payment of the purchase invoice price of the imported goods, the price actually paid will be the purchase invoice price plus the adjustment. If your company receives an adjustment from the seller, the price actually paid will be the purchase invoice price minus the adjustment.*

The Q&A clarifies two important points regarding compensating adjustments under an APA:

- When such adjustments are made as price adjustments for the previous year, based on a clause in the sales agreement, both increases (when the Japanese importer pays the price adjustment to the exporter of a foreign-related party) and decreases (when the Japanese importer receives the price adjustment from the foreign-related exporter) in customs valuation will be recognized.
- More significantly, the Q&A suggests that the Primary Method could be applicable to related-party transactions if an APA is in place. Typically, for transactions involving parties with a special relationship, the Primary Method cannot be used unless it is proven that this relationship does not influence the transaction price. The Q&A implies that the existence of an APA serves as evidence that the special relationship does not affect the transaction price, thus allowing the use of the Primary Method.

Given the absence of explicit customs regulations confirming that an APA can serve as proof, taxpayers should seek clarification from customs offices or experts on a case-by-case basis. This verification could address whether the interpretation is accurate and whether a transfer pricing local file, even without an APA, could suffice as evidence.

At a minimum, when aiming to use the transfer pricing local file to demonstrate that a special relationship doesn't influence transaction prices, it's advisable to provide detailed descriptions of related-party import transactions and their pricing policies. These descriptions should be as comprehensive as possible, focusing on individual transactions regardless of the applied transfer pricing method. This approach enhances the likelihood that the local file will withstand scrutiny by customs authorities.

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