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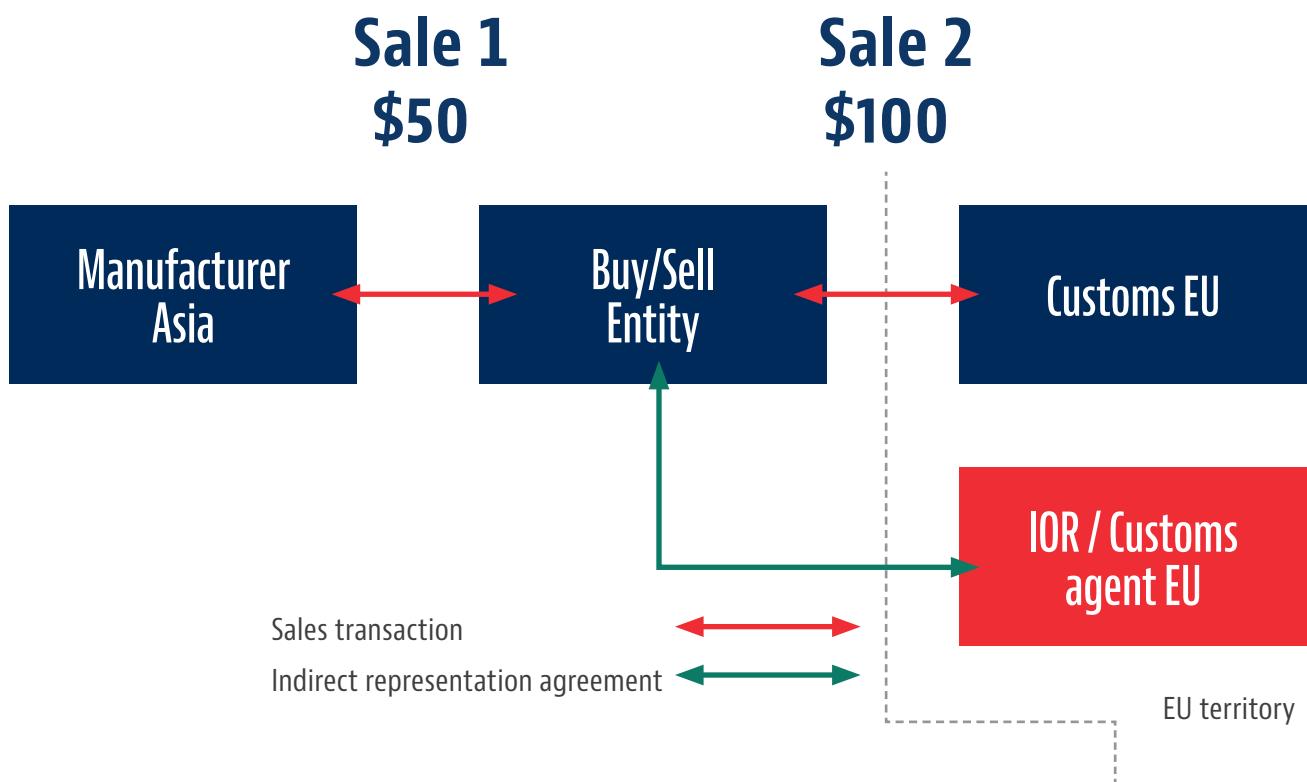
Diving Deeper into Customs The Last First Sale?



1. Introduction

The European Court of Justice ("ECJ") reached its verdict in Case C-249/18 which concerns post clearance amendment of a customs declaration. This client update provides you with an overview of (i) the relevant facts, (ii) the issue in the main proceedings, (iii) ECJ's ruling and (iv) the takeaway for EU importers/ distributors.

2. What were the relevant facts?



- The importer, upon importation into the EU, classified goods at code which provided for 0% customs duty.
- The importer declared a value based on the last sales transactions within the chain, using a value of (in the chart above) \$ 100.
- The value of the first transaction (\$ 50) could also have been declared under the then applicable customs legislation (Community Customs Code).

However, this would not have made a difference in duties, from the perspective of the importer, considering a 0% customs duty rate applied.

- Later on, the Dutch Customs Administration, successfully, challenged the 0% customs classification position. This led to additional customs duty charges based on a 13.9% customs duty rate.

- With this new ad valorem rate applicable, the choice of the sales transaction to base the customs value on became of higher relevance for the importer. Therefore, the importer wanted to amend the customs declarations, particularly the customs value, using the lower sales value within the chain (Sale 1).

3. The issue in the main proceedings

The issue in the main proceedings was whether the customs authorities should accept such an amendment of the customs declaration. The crux of the matter is, that EU customs regulations only allow for

such amendment in case of "incorrect or incomplete" information. On this basis, the Dutch customs authorities did not accept the post clearance amendment. As far as the authorities were concerned, both

values were formally correct for customs valuation purposes – so the use of the higher sales value could not be considered as "incorrect or incomplete" information.

4. ECJ's ruling

The ECJ considered that the error made in respect of the tariff classification is associated with the issue relating to

the declared value. Therefore, the value declared was based on "incorrect or incomplete" information

within the meaning of the respective EU regulation - opening the doors to post clearance adjustments in such cases.

5. Main takeaway for EU operators

The case concerns the interpretation of legal provisions of the former customs rules, the Community Customs Code (CCC). Under these provisions, the use of a prior sale, evidently, was possible.

The judgement is clear on the possibility to switch from the application of the, so-called, "Last Sale Principle" to the "First Sale Principle" in a post clearance adjustment scenario – at least under the application of the Community Customs Code.

Nonetheless, the Union Customs Code (UCC) – the current applicable customs regulation - in the meantime replaced the CCC. Under the wording of the UCC,

the use of a prior sale within a chain is no longer possible. Many EU importers, therefore, now declare the last higher sales value even when a lower sales value is available.

There are, however, solid arguments that back the conclusion that the Last Sale Principle should be possible even under the UCC, despite the wording of the new provisions.

Therefore, it may well be the case that the ECJ issues a ruling that surpasses this wording and, thereby, accepting the use of the First Sale Principle under the UCC!

Many EU operators would then have a keen interest in switching over from a last sale to a prior sale in a post clearance scenario. At this point, this ECJ ruling may come in handy because it can be used to substantiate the position that the post clearance amendment of the customs declaration should be possible. The way we see it is that the operator, upon importation, made the legitimate but rather wrong assumption that the first sale could not be used. This incorrect assumption could be interpreted as incorrect information on the basis of which the customs declaration was drawn – allowing for a post clearance application of the First Sale Principle. Here comes the last first sale to think about.

¹This would not have been the first time the ECJ surpasses the wording of EU customs regulations (see to this effect ECJ Case C-661/15).

Meet the team



Nicole Looks
Partner, EMEA Customs/Tax,
Amsterdam
+31 20 551 7889
nicole.looks@bakermckenzie.com



Jaap Huenges Wajer
Associate, EMEA Customs/Tax,
Amsterdam
+31 20 551 7167
jaap.huengeswajer@bakermckenzie.com



Erik Scheer
Partner, EMEA Customs/Tax,
Amsterdam
+31 20 551 7538
erik.scheer@bakermckenzie.com



Birgis Malik
Junior Associate, EMEA Customs/Tax,
Amsterdam
+31 20 551 7118
birgis.malik@bakermckenzie.com



Fernanda Herrmann
Legal Director, EMEA Customs/Tax,
Amsterdam
+31 20 551 7446
fernanda.herrmann@bakermckenzie.com



Yassine El Bojadaini
Junior Associate, EMEA Customs/Tax,
Amsterdam
+31 20 551 7881
yassine.elbojadaini@bakermckenzie.com

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