



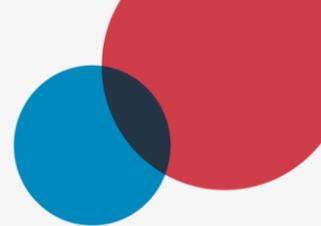
TAXAND

INDIRECT TAXES AND TP ADJUSTMENTS

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SESSION OVERVIEW



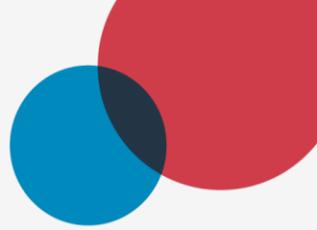
INDIRECT TAXES AND TP ADJUSTMENTS: A NEW WORLD OF UNINTENDED CONSEQUENCES

A panel led by Barbara Fleckenstein-Weiland of Flick Gocke Schaumburg, Taxand Germany, explored the intersection of VAT and customs duties with the new world of transfer pricing. The panel included Ulf Freytag of Fresenius SE & Co. KGaA, Marc Brocardi of Arsene Taxand France, Martijn Jaegers of Taxand Netherlands and Rajeev Dimri of BMR Taxand India.



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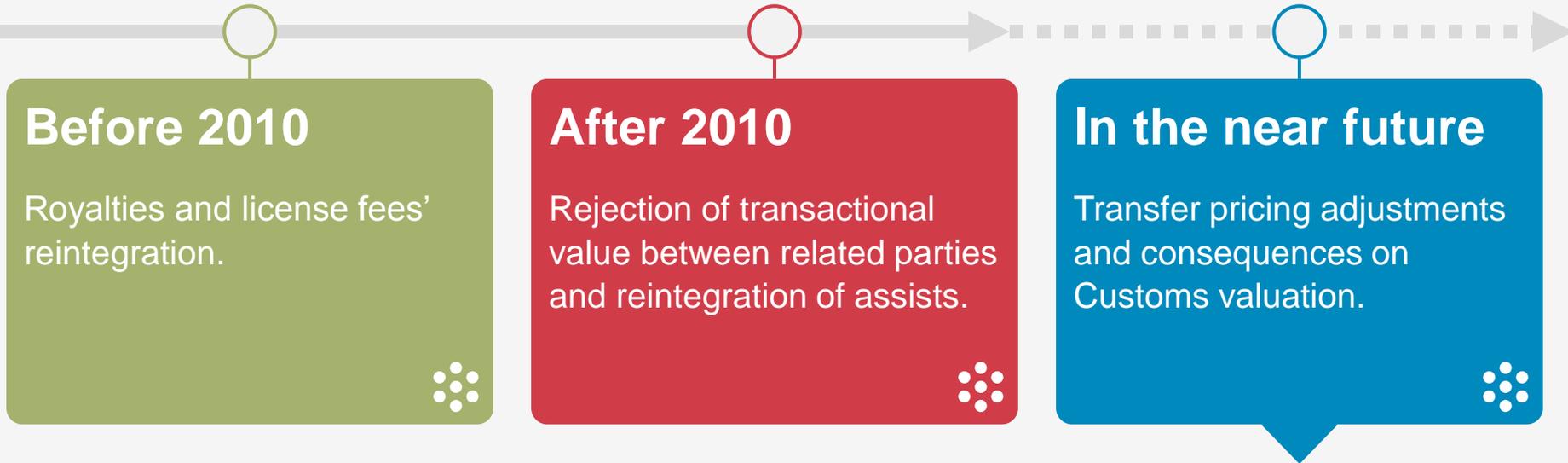
1. TP adjustments and customs/import VAT
2. TP adjustments and VAT
3. Risk of penalties
4. Taxand's Take





**TP ADJUSTMENTS
AND CUSTOMS/
IMPORT VAT**

CUSTOMS AUDITS: VALUATION'S HOT TOPICS!



Until now, both Customs and Tax authorities choose to look away and did not really challenge this area. With the new EU Customs code, we feel that this topic will become fashionable!

IMPACTS ON CUSTOMS DUTIES AND IMPORT VAT

TP corrections would have direct impacts on Customs duties and import VAT:

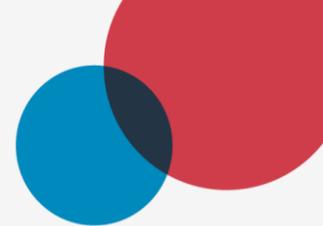
In case of an **upward adjustment**:

- ❖ Customs duties were reduced and additional duties shall be paid
- ❖ Import VAT was reduced (import VAT taxable basis + import VAT on Customs duties) and additional import VAT shall be paid.

In case of a **downward adjustment**:

- ❖ Extra Customs duties have been paid and should be reimbursed
- ❖ Extra import VAT have been paid and, since it had been deduced, it is not necessary to claim for reimbursement.

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Customs Authorities will be more vigilant when the imported goods are subjected to Customs duties since:

- ❖ Customs duties are allocated to the EU's Budget and local Customs Authorities are accountable
- ❖ For import VAT, reverse-charge mechanism becomes widespread and, in any case, import VAT is deductible as far as the taxable person is generally entitled to input VAT deduction.



PROCEDURES TO ADJUST CUSTOMS VALUE

UCC proposes two different procedures in order to adjust Customs value on the basis of TP:

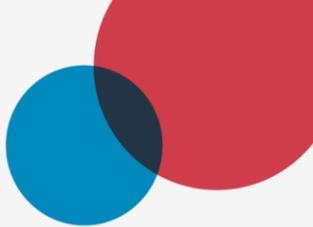
- ❖ The former **provisional value procedure** (article 254 of the CCC implementing rules and article 166 of UCC) – see slide n°7
- ❖ The **adjustment procedure** (article 156 of the CCC implementing rules and article 73 of UCC) – see slide n°8

Adjustment procedure was initially applicable **only** to elements which are to be added to the price actually paid or payable (royalties, assists, etc.) although not quantifiable at the time of incurrance of the customs debt.

The UCC extended such procedure to **the price actually paid or payable**.

Therefore, such procedure seems now applicable for TP adjustments.

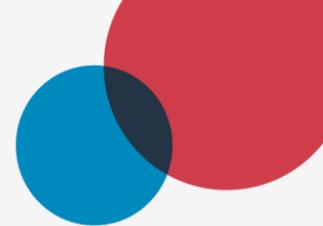
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This procedure seems to be the only one which permits adjustment of Customs value after the importation of the goods in order to take into account TP adjustments.



PROVISIONAL VALUE PROCEDURE



Operators who want to benefit from such procedure shall apply for a **specific authorisation**.

Such authorisation:

- ❖ Specifies operations (goods, flows, commercial relation involved)
- ❖ Organises the terms of the incomplete declaration and the after clearance's regularisation.

Such procedure allows to declare Customs value in two steps:

First step: Provisional value declaration and Customs duties payment on the basis of the provisional value.

Second step: Customs value regularisation and Customs duties' adjustment on the basis of a definitive value.

As soon as the operator knows the necessary elements for the correction of the provisional value, he must contact the Customs authorities in order to determine the definitive Customs value.

The formula for the calculation of the definitive Customs value is provided by the Provisional value agreement.

In order to benefit from such procedure, the operator shall be able to have a consistent administrative organisation which allows him to have **a perfect visibility and traceability of physical flows, notably declaration by declaration if Customs duties are collected**.

ADJUSTMENT PROCEDURE



This procedure has been extended to TP by the UCC. Therefore, at this stage, our hindsight is insufficient. Operators who want to benefit from such procedure shall apply for a specific authorisation and meet conditions:

Adjustment authorisation may be granted when:

- ❖ The application of the provisional value procedure would, in the circumstances, **represent disproportionate administrative costs**
- ❖ The Customs value determined will not significantly differ from that determined in the absence of authorisation.

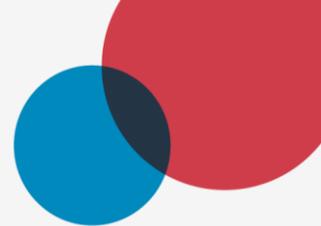
The applicant must fulfil the following conditions:

- ❖ Absence of any serious and/or repeated infringements
- ❖ A consistent accounting system
- ❖ An efficient and accurate administrative organisation which is suitable for the management of the flow of goods
- ❖ Internal controls to detect illegal or irregular transactions.

Important:

- ❖ Operator who owns such authorisation declare a **definitive Customs value** which take into account an **adjustment rate** which has been defined by Customs authorities on the basis of the information provided by the operator
- ❖ **No adjustment of Customs value can be made** after the importation of the goods = this procedure is less complex to implement than the provisional value one but, in case of TP's downward adjustment, too much Customs duties would be paid without normally the possibility to be reimbursed.

CONCLUSIONS



TP adjustment logically implies Customs value's adjustments.



Such adjustments will create a consistent administrative burden for the operator notably when the imported goods are dutiable. Therefore, a full traceability is necessary.



On the other hand, such adjustments may also represent a financial opportunity if the reimbursement of the Customs duties paid can be obtained.

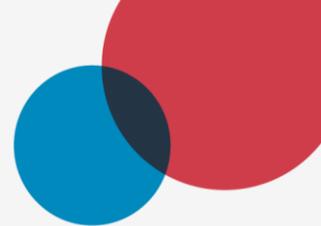


Therefore, this topic will surely be the key point of Customs value's management in the coming years.



**TP ADJUSTMENTS
AND VAT**

INT'L TP ADJUSTMENTS → VAT CORRECTIONS?



2 types of International corrections addressed:

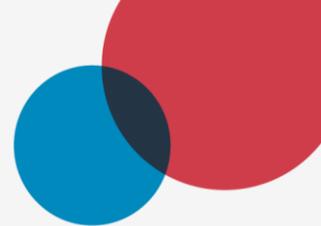
- ❖ **'Primary correction'** where Tax Authority corrects taxable profit, and
- ❖ **'Secondary correction'** where related company compensates taxable profit for primary correction in other jurisdiction.

Mere primary correction triggers change VAT taxable amount?

- ❖ **Upward correction supplier level** → additional taxable supply?
- ❖ **Downward correction supplier level** → no change in financial flows, just correction in CIT base.

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INT'L TP ADJUSTMENTS → VAT CORRECTIONS?



Secondary correction to compensate for primary correction abroad

❖ Treated as informal capital, dividend payment or fictitious loan.

Likely not in scope of VAT, but what if funds do flow between parties?

❖ When treated as fictitious loan: What about the interest 'revenue'?

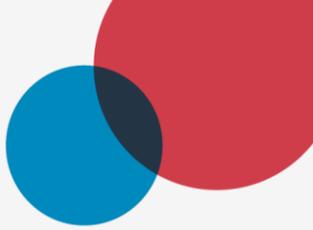
Interest not charged following an agreement → not 'effected for consideration'.

Focus on TP corrections effected by financial flow between Supplier and related Buyer to document such flow

- ❖ Principle often is: If there is a payment, there must be a transaction. For example, a year-end correction through charge of additional 'service fee'
- ❖ This principle could be overturned by facts when correction is not clearly linked to price correction on individual transaction basis.

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TP VAT CORRECTIONS ALSO ON NATIONAL LEVEL?



A correction of the remuneration can be beneficial to fiscal neutrality

- ❖ E.g. parent company with the right to reclaim VAT in full, procures services for subsidiary – with limited VAT reclaim – and charges its subsidiary a significantly lower remuneration for the provided service.

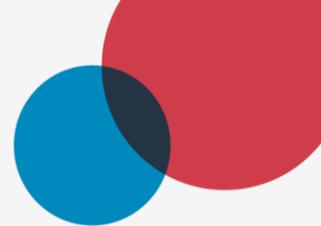
Open market value; art. 80 VAT-directive

- ❖ “In order to prevent tax evasion or avoidance... the taxable amount is to be the open market value”
- ❖ Not all member-states have implemented and where implemented, mostly limited.



**RISK OF
PENALTIES**

RISK OF PENALTIES



There is no harmonisation of criminal law. If, e.g. under German law, the VAT or import VAT base raises, the company is required to inform the revenue authorities about it (German law: §153 AO). Similar rules might apply to changes of the customs value (which is disputed). There are some potential risks, in case the company doesn't comply with that duty:

Potential risk for **the company**:

- ❖ Risk of an estimation (to the disadvantage of the company)
- ❖ Assessment of administrative fines
- ❖ Interest damage
- ❖ Risk to lose the status as AEO.

Potential risk for the **active persons**:

- ❖ Fines for violation of supervisory duties
- ❖ Tax evasion due to gross negligence
- ❖ Tax evasion
- ❖ Liability for claims against the company due to the violation of duty.



**TAXAND'S
TAKE**

TAXAND'S TAKE

1

TP Adjustments imply customs value's adjustments. This topic will be the key point of customs value's management in the coming years.

2

TP Corrections such as e.g. year-end-corrections between related companies will often be seen by tax authorities as charge of additional 'service fee'. This can result in actual costs, e.g. where the party charged is not entitled to full input VAT deduction.

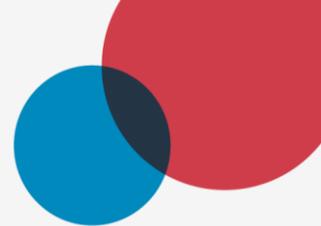
3

Failure to correct the customs value or the VAT base might trigger penalties for taxable persons and for the representatives acting on behalf of such taxable persons. There is no harmonisation of criminal law within the Member States of the European Union.



**SPEAKER
PROFILES**

SPEAKER PROFILE



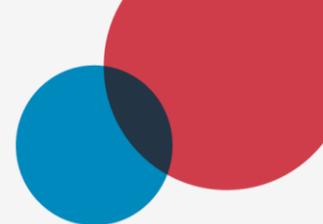
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Marc Brocardi is a partner of Arsene Taxand in France. He leads the Customs team, which performs both advisory and litigation works for domestic and multinational firms in all matters managed by Customs Authorities in France (Customs duties, excises duties, green taxes, export control...). The team is active in various sectors and its expertise also includes supply chain reorganisations.

SPEAKER PROFILE



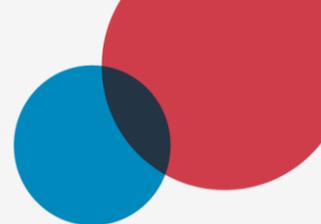
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Rajeev Dimri is based in Taxand India where he is a partner and leader of BMR Advisors' indirect tax practice. Rajeev is an active member of various trade associations, providing input on legislative and policy issues of indirect taxes in India. He is currently assisting a range of companies in India for GST transition, due to be introduced from 1 July 2017.

SPEAKER PROFILE



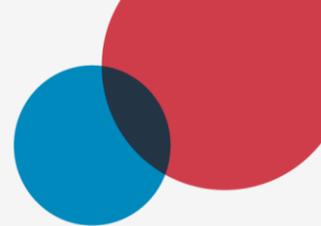
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Barbara Fleckenstein-Weiland is a member of Taxand's global indirect tax leadership team and partner of Flick Gocke Schaumburg, which is Taxand Germany. Barbara is specialised in VAT, Customs and Energy taxes. She represents Taxand in the VAT expert group of the European Commission.

SPEAKER PROFILE



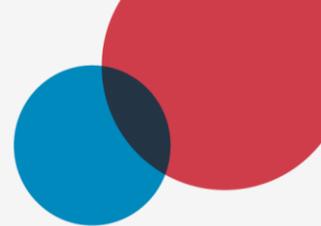
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Ulf Freytag started his professional career with a Big Four's Global Transfer Pricing Service Line in Frankfurt in 1999. He finished his doctoral thesis about cost sharing arrangements and received his PhD and became a German Certified Tax Advisor in 2003. After two years with a Tax Law Firm he joined the Fresenius Group. Ulf became Head of the Fresenius SE & Co. KGaA Tax Department in 2012.

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Martijn Jaegers is a VAT and Customs partner at Taxand Netherlands. He has been advising clients active in various industries for almost 20 years. The assignments extend beyond the rendering of tax advice alone, as dispute resolution and court representation have become increasingly important. Martijn is an attorney-at-law and is admitted to the Amsterdam Bar.



ABOUT TAXAND

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