Workshop on Advance Ruling for Customs Valuation and Challenges with Transfer Pricing

*co-organized by*
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Legislative and policy framework for advance rulings

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Outline

• 1. EU advance rulings regime
• 2. Spanish national advance rulings regime
• 3. US advance rulings regime
• 4. Relevant considerations for the establishment of an advance ruling system
Legislative framework for advance rulings in the EU

• At the EU level there are two topics covered by binding information:
  – Origin (Binding Origin Information, BOI).
  – Tariff classification (Binding Tariff Information, BTI).
    • There is no Binding Valuation Information (BVI).

• National legal systems can provide national mechanisms:
  – In customs law matters? Not in Spain, art. 88.8 LGT
  – In VAT matters > The tax base in VAT on imports is based on the customs value
    • In Spain we have “questions in tax matters” (art. 88-89 LGT)
EU legislative framework (2)

- **Legal Basis** for BTI/BOI:
  - Articles 11 and 12 of the Community Customs Code (CC)
  - Articles 5 to 14 of the Implementing Provisions of the Customs Code (IPCC)
    - Art. 20 MCC; Art. 32 of the Proposal for a Union Customs Code
EU legislative framework (3)

• **BTI/BOI** is:
  - A decision on the tariff classification/origin of goods.
  - Issued by the customs of a Member State.
  - In response to a written application of the trader.
  - Binding on the customs of all Member States.
  - That provides legal certainty to traders.
• **BTI/BOI** is:
  
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EU legislative framework (5)

- A decision on the tariff classification/origin of goods.
- As a “decision” (art. 4.5 CC), it can be appealed.
  - Appeals: Articles 243 to 246 CC
  - Appeal must be lodged in MS where decision has been taken.
  - Right to appeal may be exercised
    - Initially before the customs authorities designated for that purpose.
    - Subsequently before an independent body
  - Implementation of disputed decision not suspended during appeal.
• **BTI/BOI** is:
  – A decision on the tariff classification/origin of goods.
  – **Issued by the customs of a Member State.**
  – In response to a written application of the trader.
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• **Issued by the customs of a Member State.**

  – 1. **Time.** BTI/BOI should be “issued without delay”. If not issued within 3 months applicant must
     • be informed of the reason
     • given a date when it is expected the BTI will be issued
  
  – 2. **Cost to traders.** BTI/BOI is issued free of charge.

  – 3. **Requirements.** Customs can only issue a BTI/BOI when
     • 1. The mandatory boxes on the application have been completed and
     • 2. All information required by customs to enable them to determine classification/origin has been submitted.
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  - Binding on the customs of all Member States.
  - That provides legal certainty to traders.
• In response to a written application of the trader (1).
  – Applicant is the person who applies for BTI/BOI; the applicant might act as an agent of the holder, or be the holder himself/herself.
  – Holder is issued BTI/BOI by customs in his name.
  – The applicant is legally responsible for the accuracy of the information in the BTI/BOI application.
  – BTI/BOI is issued in respect of prospective imports/exports, but not for intra intra-Community trade.
EU legislative framework (10)

• **In response to a written application of the trader (2)**
  
  – Information to be supplied on BTI/BOI application:
    
    • Details of applicant and holder
    
    • Detailed description of the goods and classification envisaged (BTI)
    
    • Relevant documents and data (possibly translated)
    
    • Indication of particulars to be treated as confidential
    
    • Does it relate to a prospective import or export?
    
    • Declare whether holder already has applied for BTI/BOI or has BTI/BOI for identical goods.
• **BTI/BOI** is:
  – A decision on the tariff classification/origin of goods.
  – Issued by the customs of a Member State.
  – In response to a written application of the trader.
  – **Binding on the customs of all Member States.**
  – That provides legal certainty to traders.
• **Binding on the customs of all Member States (1)**
  – In general, BTI/BOI is valid for 6 years with certain exceptions.
    • 3 years in the MCC and UCC
  – **BTI/BOI only binds in respect of the holder.**
    • Not even another company in the group is protected, ECJ case C-153/10, *Sony*, of 7 April 2011.
    • The MCC and UCC provide that the holder is also bound.
  – **BTI/BOI only refers to one type of goods.**
  – **A BTI/BOI can never be invoked retroactively.**
• **Binding on the customs of all Member States (2)**

  – BTI/BOI is invalid when it is based on inaccurate or incorrect information provided by the applicant.

  – BTI/BOI ceases to be valid when:
    
    • A Regulation/Agreement is adopted and the information in the BTI/BOI no longer conforms to the law
    
    • It is no longer compatible with the interpretation of the law
    
    • It is revoked or amended, provided that the holder has been informed in advance. A period of extended use may be granted.
• **Binding on the customs of all Member States (3)**

  **Period of extended use** (also called “period of grace”):
  
  • May be granted when BTI/BOI is revoked and
  • Holder has entered into a contract based on the revoked BTI/BOI

  – It is granted for a maximum of six months but may be also granted for a shorter period.

  • When a Regulation does not expressly provide any period of extended use, none is to be deemed to apply (ECJ case C-288/09 and 289/09, *BSkyB*, of 14 April 2011).
EU legislative framework (15)

- **BTI/BOI** is:
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  - Binding on the customs of all Member States.
  - That provides legal certainty to traders.
EU legislative framework (16)

- That provides legal certainty to traders (1).
  - The problem with **divergent BTI/BOI** – where the information provided for specific goods differs from the information given in another BTI/BOI for the same goods.

- Procedure in cases of divergent BTI/BOI:
  - 1. Member States try to resolve divergences bilaterally
    - If resolved, BTI/BOI with incorrect information must be revoked
    - If not resolved, refer the matter to the Commission
  - 2. Commission will place matter on agenda of Customs Code Committee
  - 3. When a decision is taken, Commission will take necessary steps to confirm classification/origin. Incorrect BTI/BOI must be revoked
• That provides legal certainty to traders (2).
  – Database for BTI/BOI (Thesaurus):
    • One public database (showing non-confidential information only) and a full database available only to Customs authorities
  – **Beware!** BI only protects the holder.
Spanish advance rulings system (1)

- **Legal base:** Articles 88-89 of the General Tax Act (LGT)
  - It is a general mechanism for the Spanish tax system

- **Main features (1):**
  - Application must be made in writing, containing all relevant factual details.
  - **Any doubt** about any aspect of the tax system can be substantiated in an application.
  - Any person under a tax obligation can apply; also entities representing a group of interested parties.
  - Application must be made before the due time for the tax obligation. The application does not suspend or extend the period to comply.
Main features (2):

- The maximum period to provide the advance ruling is 6 months.
- The advance ruling is binding on the Administration, not on the taxpayer. *Any person under the same circumstances of fact is equally protected.*
- The advance ruling is not a decision. It cannot be appealed.
  - The taxpayer can appeal the tax determination where the interpretation of the ruling is implemented.
- **Answer is provided**, in writing, **by the Taxation General Directorate** (central body in the Ministry of Finance, independent of the Tax Administration).
- An electronic database of advance rulings is available on internet.
US advance rulings system (1)

- **Legal base:** 19 CFR 177 – Administrative Rulings

- A distinction must be made between
  
  - **Advance ruling** (ruling letter): Written statement issued by Customs, in response to a written request, that interprets and applies customs law to a specific set of facts.
  
  - **Information letter:** Written statement by Customs stating a well-established interpretation or principle of customs law, without applying it to a specific set of facts.
US advance rulings system (2)

- **The question**
  - In general, it must refer to a prospective transaction
  - Must be put in writing, in the form of a letter addressed to the Commissioner of Customs and Border Protection (CBP)
  - Must identify confidential information
  - Only those with a direct and demonstrable interest in the question can ask (can be put through an authorized agent)
  - Can provide a “statement of position” (suggested answer)
  - Can request priority consideration
  - **Must contain all the relevant facts and documents**
US advance rulings system (3)

- **Must contain all the relevant facts and documents**
- **In valuation cases in particular: all of the applicable information including**
  - information which would be required on an invoice;
  - describe the nature of the transaction (whether f.o.b./c.i.f., ex-factory, or some other arrangement);
  - the relationship (if any) of the parties,
  - whether the transaction was at arm's-length,
  - whether there have been other sales of the same or similar merchandise in the country of exportation,
  - whether an agency relationship exists,
  - or any other information relevant
- **Related documents: a copy of any invoice, contract, agreement, or other relevant document.**
• **Procedural aspects**
  
  • In case the request is nonconforming, CBP will notify so in writing, opening a 30 days period to supply the additional information or otherwise conform the request.
  
  • An oral discussion can be requested
    – Parties will not be bound by the arguments or position advocated at the oral discussion.
  
  • Changes in the status of the transaction (i.e. from prospective to current or to completed) must be notified. Action on the transaction will normally be withhold pending the ruling.
  
  • Duration: “as expeditiously as possible”
  
  • The ruling request can be withdrawn at any moment pending.
  
  • **No ruling will be issued** in respect of nonconforming requests; regarding essentially hypothetical transactions; contrary to sound administration; pending litigation.
Effect of advance rulings

- Binding for CBP.
  - Regarding classification rulings, the importer is requested to inform in the customs declaration that the goods were the object of a ruling (failure to comply can result in penalties)
- Applies, from the date of issuance, to all unliquidated entries.
  - Subject to the verification of the facts.
- In respect of third parties under the same circumstances of fact: “may be cited as authority”.
  - But the revocation of a ruling is only made public in respect of public notice or comment procedures (traders need to check if the ruling is valid)
- Valuation rulings: “will be applied only with respect to transactions involving the same merchandise and like facts”
• **Publication of decisions**
  - Within 90 days, in the Customs Bulletin or by other means (internet).
  - If the ruling modifies previous interpretation adversely, prior notice in the Federal Register and opportunity for comment to interested parties are provided.
    • If the new –adverse- interpretation prevails, increased duty “shall be effective only as to merchandise entered (…) on or after the 90th day after publication of the change in the Federal Register”.
  - Rulings apply immediately after their publication, unless they provide otherwise.
**US advance rulings system (7)**

- **Modification or revocation of interpretative rulings**
  
  An interpretative ruling can be modified or revoked by a new ruling. This can have the effect of modifying or revoking the treatment of substantially identical transactions.

  - A distinction is made depending on the time during which the ruling was in effect:
    - If it was 60 calendar days or less, the modification or revocation is made by simply giving written notice to the person concerned in the ruling. The new ruling will be effective on the date of issuance.
    - If it was in effect longer, a notice will be published announcing the proposed change and inviting comments (for 30 calendar days), then after another 30 calendar days for consideration of comments, a final modifying or revoking notice will be published. The new ruling will be effective 60 calendar days after publication.
    - Publication and issuance is not required when there is a change in the law (acts, regulations, executive orders, treaties, judicial decision...)

  - “Substantially identical transactions” are those were there was an actual determination by Customs (not without examination or review) by a competent authority at entry and for over a 2-year period Customs consistently applied the criteria on a national basis. Burden of proof is on the trader. Prior treatment is protected; new ruling is effective 60 calendar days after publication.
US advance rulings system (8)

- **Request of advice by field officers**
  - The US system also provides a procedure that allows field officers to request guidance on the correct interpretation or treatment to Headquarters Office (ensure consistency).

- **Inconsistent customs decisions**
  - Traders can request Headquarters to bring into consistency discrepancies suffered at different locations of entry.
    - By means of a written letter to Headquarters, with identification of the inconsistency, locations of entry, entries data. The petition is published for public comment (15 calendar days), and in the next 15 days a decision is made, effective immediately.
Relevant considerations for the establishment of an advance ruling system (1)

• **Do not try to invent the wheel** (again!)
  - A legal framework for advance rulings is a complex legal affair. Foreign legislation can provide a useful template and valuable experience (both for good and for bad!).

• **Ruling request:** In writing!
  - Make a detailed list of relevant information and related documents to provide
    - Not only mandatory info and documents: the aim should be to provide the trader with a helping list to avoid the supply of insufficient information.
  - Provide an opportunity to rectify non-conforming requests
  - Identify and protect confidential information
Relevant considerations for the establishment of an advance ruling system (2)

- **Who, what:** Define the scope of potential persons who can submit a request (direct interest or also entities representing a group?). The request should regard a potential transaction.

- **Procedure:** consider providing an opportunity for discussion in the procedure.
  - It can be a useful tool to clarify doubts and make the request more detailed and specific.
  - Consider suspending the determination procedure
  - Otherwise, limit the duration of the procedure

- **Effect:** If fairness and legal certainty is a consideration, a ruling should protect any person under the same circumstances of fact.
Relevant considerations for the establishment of an advance ruling system (3)

• **Decision-making:** centralize decision-making
  - That way inconsistency is minimized, “rulings shopping” is avoided, and equality is better served.

• **Publicity:** make rulings public and available on an internet database
  - If the aim is to encourage compliance, equality and legal certainty, make access as easy as possible.

• **Appeals:** consider if it is appropriate to provide appeals against the ruling
  - Relevant factors: 1) Does it bind the person who asked?; 2) Does it protect anyone under the same circumstances of fact?
Relevant considerations for the establishment of an advance ruling system (4)

- **General interpretative letters**: are complementary, not substitutive. Can provide comprehensive and general information for a wider audience.

- Allow (encourage!) a formal consultation procedure by field officers.

- Allow petitions to bring consistency to inconsistent interpretations.
Legislative and policy framework for advance rulings

Thanks for your attention!

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