



Trade Consultants (Vic) Pty Limited • ABN 38 053 857 284 • ACN 053 857 284
Level 6, 350 Collins Street Melbourne Vic 3000 • GPO Box 2816 Melbourne Vic 3001
Phone + 61 3 9602 2299 • Fax + 61 3 9602 2455 • Web www.tradeconsultants.com.au

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Ms Antonina Bolschelarski
Trade Measures Branch
5 Constitution Avenue
Canberra ACT 2600

Dear Ms Bolschelarski,

Joint Study of the Administration of Australia's Anti-Dumping System

Please find attached our submission in relation to the Joint Study.

We are grateful for the opportunity to contribute to the Joint Study and look forward to participating in future proceedings.

To ensure that we are able to provide relevant and timely input to the Joint Study, we would also appreciate receiving copies of any documents circulated by the Joint Study team.

Yours Sincerely

Russell Wilkinson
Managing Director

Non Arms Length Export Prices

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Many multinational companies are members of affiliated groups of companies, which include 100% owned Australian subsidiaries.

Under export arrangements between some related parties, warranty and advertising costs in the Australian market are ultimately borne by the overseas parent company. In these arrangements, amounts paid to the subsidiary companies contain provision for reimbursement of warranty and advertising costs.

Although the warranty and advertising costs are part of the export price charged, they are expenses normally borne by unrelated distributors and part of Australian industry's cost structure.

An Australian sales route analysis by Customs, from the first unrelated transactions in Australia to a retailer, should confirm that transactions between parent companies and Australian subsidiaries are non-arms length sales, provided the reimbursements are treated as subsidies.

Sales then become non arms length where warranty and advertising reimbursements are included in export prices as a result of the application of Section 269TAA(1)(b), not (c), of the Customs Act 1901.

269TAA(1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:

(a) there is any consideration payable for or in respect of the goods other than their price; or

(b) the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or

(c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price”.

Customs policy in relation to Section 269TAA(1)(b) is outlined in the Australian Customs Service Manual, Volume 22, page 49, which states:-

“2.4.2 PRICE IS INFLUENCED BY A COMMERCIAL OR OTHER RELATIONSHIP

(4) A commercial or other relationship between parties does not immediately render the transaction non arms-length. There must be clear evidence that the price is influenced by the commercial or other relationship. To demonstrate this, Customs might compare the price paid or payable for the goods where there is no relationship between the buyer and the seller with the price paid or payable for the goods where there is a relationship”.

Evidence of the influence of the relationship between an overseas entity and Australian subsidiary on export prices and the inclusion of advertising and warranty costs, can be identified by reference to prices involving arms length distributors of like goods in Australia. As already mentioned, advertising and warranty costs would normally be borne by Australian companies/distributors and any comparison with prices to arms length distributors in Australia will demonstrate this aspect.

An examination should also be made of the impact of transfer pricing arrangements between the related overseas and Australian importers to determine the impact on export prices.

Article 2.3 of the WTO Anti-Dumping Agreement states:

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

Testing the reliability of export prices between related parties by reference to export prices for arms length importers is consistent with WTO requirements and is also consistent with practise in other jurisdictions.

We note the comments by Czako, Human and Miranda at page 134 of the publication entitled, "A Handbook on Anti-Dumping Investigations Arrangements";

Article 2.3 of the AD (WTO) Agreement provides that in cases where it appears to the authorities concerned that the export price is unreliable because of associates or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. The question arises in the context of whether such export sales to related parties, the affiliates in the country of import, reflect arm's length market prices since such sales are actually intra-company sales. The prices charged for intra-company sales are transfer prices that could be affected by a host of factors, such as tax considerations. In this case-study it is therefore assumed that the export price to a related distributor is regarded as unreliable in terms of Article 2.3. Therefore, the export price will be constructed on the basis of the resale price to the first independent purchaser in the country of import.

It is the practice of some Members to test the reliability of export prices in related-party transactions, rather than to assume its unreliability. Export prices from transactions involving related parties would therefore not automatically be viewed as unreliable. The reliability of related-party export prices is tested by comparing such prices to export prices to independent parties, if available, usually in terms of averages. If the difference between the average price to related parties and the average price to independent parties is significant, then the export prices to parties could be considered not to be at arm's length, which would imply that those prices are unreliable for the purpose of calculating the export price.

Where transactions between related parties are non-arms length, the Minister should be able to, in accordance with Section 269TAB(1)(b), calculate deductive export prices based on the first arms length sales in Australia, with deductions made for reasonable profit in Australia, advertising, marketing and warranty expenses (i.e. by excluding the reimbursements from the parent company).

Such an approach would generally result in lower export prices to those invoiced by the parent companies and therefore be consistent with "sales dumping" investigations carried out by other overseas Governments.

In our view, warranty and advertising compensatory arrangements between overseas parent companies and Australian subsidiaries reflect typical related party transactions. Such related party structures are utilised to camouflage "Sales Dumping" by invoicing goods with a higher export price and disguising losses in Australia through the aid of a subsidy that are a part of Australian industries cost structures.

Dumping Duty Absorption

Where major exporters are related to Australian importers, there is scope for the parties to simply absorb any dumping duties and not raise prices in the market place once measures are applied.

The EU has a procedure which allows local industry to apply for the reopening of an investigation if prices in the market do not alter after dumping measures are implemented.

In our view, similar procedures should be considered in relation to Australia's Anti-Dumping System.

Recommendations

In summary, we recommend that the Joint Study considers:

- reviewing the current approach to non-arms length transactions between overseas related exporters and Australian importers in light of the coverage of the warranty and advertising arrangements under Section 269TAA(1)(b);
- a revised methodology of re-calculating export prices on the basis of sales to independent parties and including normal business costs of advertising and warranty expenses irrespective of the length of time they have been in operation;
- modifying our review procedures to incorporate the EU mechanism for combating "dumping duty absorption" by related parties and others once measures are in place.