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THE NEED FOR GREATER CONVERGENCE AND COORDINATION BETWEEN CUSTOMS AND TAX AUTHORITIES OVER THE ISSUE OF TRANSFER PRICING

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Abstract

The article is devoted to the peculiarities of applying the transfer prices between the dependent enterprises inside the common area of the multinational corporations as well as to the complications and problems of convergence between the Customs and Tax authorities over the issue of controlling and checking the transfer prices. The need for this convergence and coordination between these mentioned state bodies is shown and proven. The main points of contact are analysed in the direction for controlling the transfer prices from the side of the Customs and Tax authorities. The comparison of the existing methods and approaches used by the Customs and Tax authorities in the plane of defining the transfer price and the Customs value is fulfilled. The ways of further cooperation and convergence between the Customs and Tax authorities are defined.

Keywords: Customs authority, Tax authority, multinational corporation, transfer price, customs value, taxation basis, customs taxes and duties, arm's length principle, WTO Agreement on Customs Valuation, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Introduction

As we know Customs and Tax authorities are the main elements of the state mechanism directed to regulation of business activity outside and inside the country in order to establish and guarantee just, equal and safe conditions for all the participants of this sphere. Consequently, the question concerning close convergence and coordination between these two official bodies is not new at all. Indeed, having in its disposal a strong and powerful joint mechanism of distinctly regulated Customs and Tax activities, the state could achieve desired goals more effectively. That is why it's so important to define those planes where the Customs and Tax bodies can interact with each other on the suitable level.

That's not a secret that both Customs and Tax authorities are trying to charge and collect taxes to refill regularly the state budget of each country. Although, of course, other duties of these two authorities are also important, since, in essence, they serve in favour of the common prosperity of the state.

Certainly, in order to provide to the full extend their responsibilities as for charging and collecting taxes, the Customs and Tax authorities need to be sure that the taxable base is defined correctly, and there are no unauthorized deviations between real and potentially possible level of taxation (Petrunya, Oleksiienko, 2010, p. 171). Exactly in this respect there could be some complexity and discrepancy in applying approaches as for defining the base of taxation, used by these two state bodies.

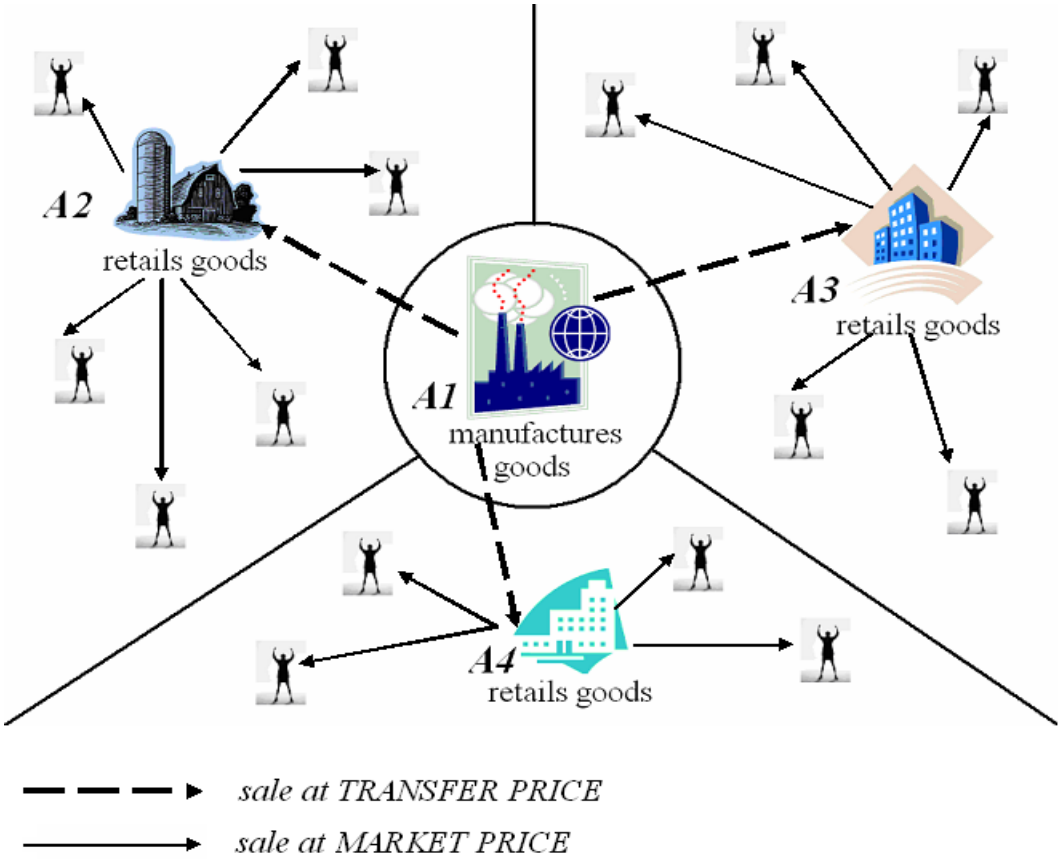
The point is that when the activities areas of two or more authorities overlap and contact with each other, it's necessary to have the similar methods, instruments and approaches for defining the same parameters (for instance, price, weight, quantity etc.), especially the most significant and crucial. I think, in the plane of the Tax and Customs activities such a situation can appear, in particular, when the taxable base is subject to taxation on the internal (inside the country) and external (when crossing the border) levels. Obviously, this peculiarity exists when dealing with international trading or other commercial activities between two or more stakeholders located in the different countries.

On my mind, many people will agree with my statement that it is beyond of any very complicated situations for defining and checking the actual transaction price if all the participants of the foreign economic activity are dealing on the true commercial basis and show their real expenditures and incomes. But it is almost ideal situation because on practice many companies are trying to decrease their income basis or to find some roundabout ways in order to lower their taxes and/or customs duties. And, I think, the multinational corporations (MNC) have reached the most significant success in this direction owing to peculiarities of existing the dependent companies inside the common area of the MNC which can deal efficiently in the direction of taxation avoidance with the help of special inner prices of transactions depending on the concrete aims and situations.

The main results of research

It is known that, dealing with each other in the inner area of the multinational corporation, the separate divisions or the individual entities of a larger multi-entity company can use the special transfer prices (Investopedia), as it is clearly shown at the following picture (figure 1).

Figure 1. Trading cooperation of dependent entities in the inner area of the multinational corporation



In a simplified form I would describe the common scheme of transactions between two dependent entities as parts of the MNC in the following manner.

One related enterprise manufactures some products (goods) in its country. Then it sells them at the special transfer price to another related company. Consequently, the first mentioned company delivers (through some transport company) the products to the country of its partner-company at prices much lower (or higher) than the corresponding market prices in the country of production. Afterwards these products are distributed in that country at the market prices.

Herewith, the transfer pricing provisions primarily suppose some additional income arising from an international transaction between two or more associated enterprises and comparable to similar transactions between unrelated enterprises (Ahuja, 2003). In other words, the main specificity of those transfer prices lies upon the fact that they are usually much different from the corresponding prices in comparison with transactions between independent parties.

Whether or no, but it's considered traditionally that transfer pricing policy, according to example of the majority of MNCs could be generally aimed at the following moments:

(1) evaluating financial performance of different business units (profit centres) of a conglomerate, and/or

(2) to shift earnings from a high tax jurisdiction to a low-tax one (BusinessDictionary.com).

Herewith, today approximately 30-50% of the world exports of goods and services are carrying out on the basis of transfer prices. Moreover, with using this mechanism of transfer pricing, the multinational corporations are reducing the tax burden on average by 10-15% (Gerasimenko, 2009). In that way, it's obviously that the main purpose of using the transfer pricing in practice is to minimize taxation and reduce payments of Customs duties, as well as the accumulation of profits in sales structures, registered in regions with preferential tax legislation**.**

Summarizing the tax avoidance peculiarities of this process I can say that, in general case, the multinational company is interested to use lowered transfer prices to sell products to the countries in which taxes are lower than taxes in the country of production. In that way, the related company in the importing country will receive the main income from selling these products on its market at the normal market prices. At the same time the exporting company will show the lowered level of profits which, in essence, will consist of margin between the lowered selling price and the prime costs for production of goods. Consequently, the amount of taxes from the corporate income in the importing country will be lower than it could be in the country of production.

And in contrary, in order to decrease the general taxation level the MNC will, obviously, try to use high transfer prices if the taxes in the country of production are lower than in purchasing (importing) country.

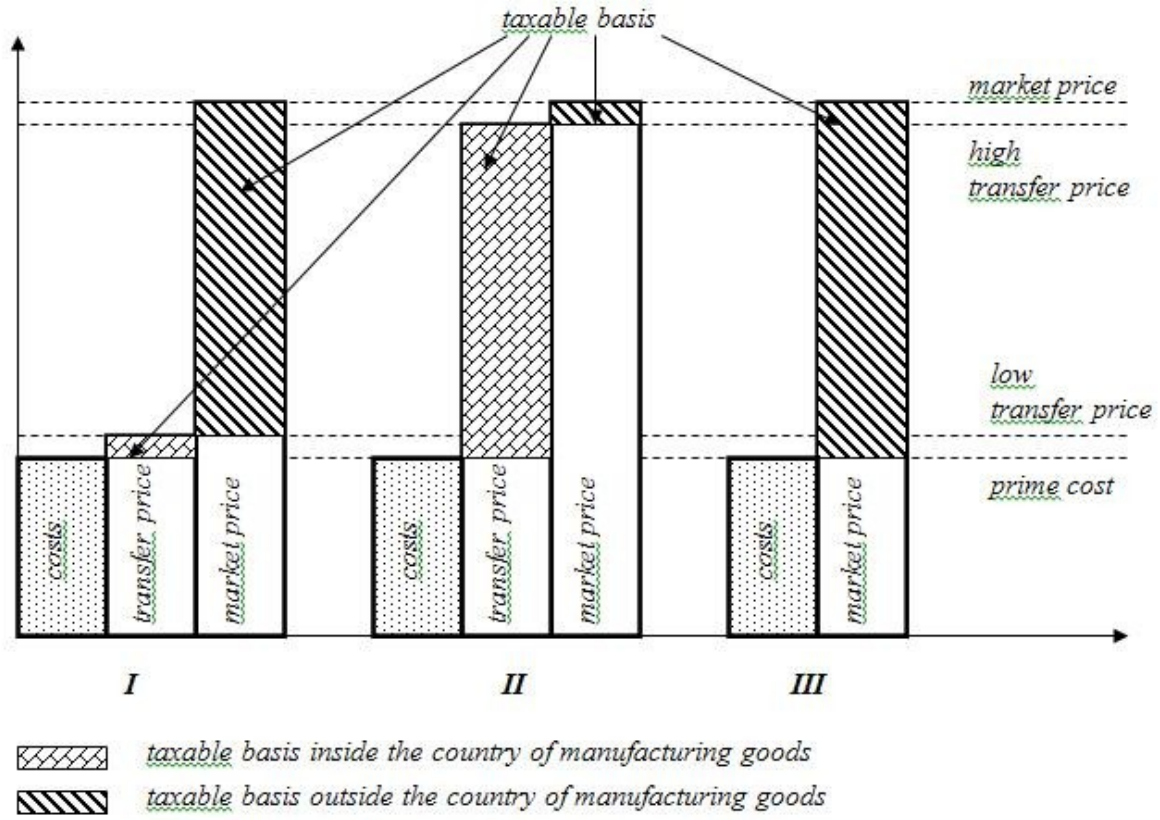
Advantages for the multinational corporation from using the transfer pricing mechanism are demonstrated on the figure 2.

It is necessary to accent at once that the *situation III* describes the normal international market relations when one company manufactures goods in its country and then sells them to the independent company located in other country.

Under the *situation I* we will consider the applying of the low transfer price which decreases the taxable basis inside the country of production of goods and, in turn, expands the main taxation burden into the country of further retailing.

At last, the *situation II* refers to the conditions when the high transfer price is applied. In this case the main taxation will be executed in the exporting country, including charging the relevant customs taxes and duties on import of goods. Therefore, in the country of retailing only relatively insignificant part of taxes will be paid.

Figure 2. Peculiarities of defining the taxable basis in result of applying the transfer prices between entities of the multinational corporation



In that way, the MNC can really earn the excess profits from which the initially possible taxes are paid at a lower amount. Moreover, taxes can even be out of payment at all when transfer prices are used for companies located in the preferential territories and other areas of free-tax trading (e.g. free economic area, free trade area etc.).

Of course, the multinational corporations should realize that Customs and Tax authorities don't like such a kind of deviation from the normal taxation level. Thereby, they try to resist it treating such situations as violations. Accordingly, the corresponding measures should be applied to these violations from the point of the most efficient sanctions (Oleksiienko, 2011).

In particular, the Tax agencies will try not to allow the decreasing of inner taxes amount as a result of lowering the taxable base in the country of production. On the other hand, taking into account my own Customs experience, I can say that the Customs authorities will try not to accept the lowered prices (which are the basis for the Customs valuation), because the low Customs value will lead to the low amount of Customs duties paid or payable and so on.

That is why the Customs and Tax agencies often frown upon transfer pricing aimed at tax avoidance and insist that each internal part of the firm deals with the other on 'arm's length' basis (BusinessDictionary.com) which assumes using the market price level or the relevant price level at least similar to the market one.

Consequently, it is easy to conclude that the Customs and Tax authorities using arm's length principle as well as other methods and approaches are trying to control the real amount of profits of the multinational corporations and other stakeholders.

Herewith, the international consensus supposes that these profits should be comparable to the profits that would have been realised in comparable transactions between independent enterprises (Centre for Tax Policy and Administration, 2011). Accordingly, the Customs and Tax authorities would charge and collect the relevant duties and taxes from these profits.

In other words, the transfer pricing itself can bring simultaneously the different effect to the Customs and Tax agencies, taking into account the multidirectional influence of the transfer prices level to fulfilling the taxes collection goals of both these bodies. And this is only one of many issues which don't allow Customs and Tax authorities to accept the unfair transfer price. In turn, I think it should make these state bodies to correct the deviated price levels, trying to solve the problems they have on the way for their greater convergence and coordination.

Unfortunately, such problems are not rare at all, taking into consideration the practical situations as to cooperation between particular state authorities, including the Customs and Tax services (Oleksiienko, 2006). In particular, many researchers tend to see the great challenges for convergence between these two state authorities underlining, for instance, the specific conflicts (Jiang Bian, Hao Jiang, 2010), complications (Renaud, 2010) and key differences (Butani, 2011) between transfer pricing and Customs valuation.

In general, the Tax and Customs authorities treating the transfer prices use the international standards, which are contained in the OECD Transfer Pricing Guidelines (2010) and the WTO Customs Valuation Agreement. Of course, there are some differences and similarities between these two sets of rules applied by Tax and Customs agencies to transfer pricing (Mikuriya, 2006).

Transfer pricing is a complex and controversial issue, indeed. Obviously, the proper transfer pricing will benefit the company as a whole and inappropriate pricing may spur managerial effort but may harm the profitability of an organization as a whole (Prithiviraj, 2009). That is why the transfer pricing methods may be chosen depending on the current practical situation. In particular, the world economic practice uses four main methods of transfer pricing (CostInfo.ru):

- method of calculation based on the current market price of the goods;
- method of calculation aimed at marginal costs;
- method of calculation based on costs of production;
- method of calculation aimed at bargain prices.

Herewith about half of the major multinational companies use transfer pricing at cost. However, they don't use the same cost basis (Prithiviraj, 2009). Some companies use full cost plus profit which have the appeal of simplicity and ease of calculation (Carter, Maloney, Van Vranken, 1998). Others may use variable cost, standard costs, actual costs or full cost (Prithiviraj, 2009). So, the correct transfer pricing system depends on the economic and legal environment. At the same time, it's considered that two the most common approaches to setting and revising transfer prices are to apply cost-plus and market-based procedures (Carter, Maloney, Van Vranken, 1998).

In turn, the WCO Customs Valuation Agreement assumes six general methods for defining the Customs value. All these methods should be applied in the strict sequence one by one, according to the provisions of the General Introductory Commentary to this WCO Agreement.

Herewith, the first and the main approach consists in applying the transaction value defined in the Article 1 (Customs Valuation Agreement). In this case the Customs value, in essence, is the contract price with the relevant correction, taking into account the provisions of the Article 8 (Customs Valuation Agreement), for instance, regarding some costs carrying out by the contracting parties when providing the foreign economic activity.

As for me, this first method, which uses the transaction value for defining the Customs value, is the most similar to the approach for defining the transfer prices on the basis of costs of production plus profit (cost-plus) and to the method of calculation aimed at bargain (contract) prices.

I think it can be explained according to the fact that the transaction value is the price actually paid or payable for the goods when sold for export to the country of importation (Customs Valuation Agreement, Article 1). In essence, it is the selling price which is indicated in trade contract, that is to say, the bargain price.

At the same time, forming the transaction value, obviously, parties include in it at least the costs used for producing the goods and desired level of profits. I consider these are the main elements of the contract price (transaction value) which corresponds with the transfer price, in general. Of course, it concerns the manufacturer which exports its products, in particular, to the other depending party as the part of the MNC.

Moreover, in the sub-paragraph (2) (a) of the Article 1 (Customs Valuation Agreement) it is underlined that in determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 (Customs Valuation Agreement) shall not in itself be grounds for regarding the transaction value as unacceptable. Therefore, I can insist that the Customs method of transaction value corresponds to the tax approach of costs plus profit for the transfer pricing.

In turn, the second and the third methods for Customs valuation which are based on the transaction value of identical (Customs Valuation Agreement, Article 2) and similar goods (Customs Valuation Agreement, Article 3), respectively, are close, I think, to the method of calculation the transfer price based on the current market price of the goods. On my mind, this relation can be explained in the way that when using these Customs valuation methods the Customs authorities are tending to be orientated on the real commercial level of market prices on the corresponding goods. The same approach the Tax bodies provide. Consequently, enough tight connection between the Customs and Tax authorities already exists in this case.

As we know, if the Customs value can not be defined with help of the above mentioned methods the next possible approaches could be used according to the deductive method (Customs Valuation Agreement, Article 5) or method of computed value (Customs Valuation Agreement, Article 6) in order depending on the request of importer (Customs Valuation Agreement, Article 4). In turn, the deductive value method, in its essence, uses the current market price of the goods as the basis of the further deductions. At the same

time, computed value is defined by the Customs bodies on the basis of the costs of production.

Accordingly, the last sixth method of Customs valuation (Customs Valuation Agreement, Article 7) assumes, on my mind, the use of different methods available for the Customs authorities, including market-based and bargain prices, marginal costs etc.

In addition, I think, it is interesting to study the table 1 given below which (as the author (Butani, 2011) considers) provides an approximate comparison of various methods of arriving at the valuation of goods under Customs and income tax law.

Table 1. The comparable approaches of the Tax and Customs authorities in the plane of defining the transfer price and the Customs value

Transfer pricing methods*	***Customs equivalent method***	***Basis of pricing discussion***
Comparable Uncontrolled Price ('CUP') Method	Transaction value of identical/similar goods	Price comparison of products
Resale Price ('RPM') Method	Deductive value Method	Margin and Expense analysis
Cost Plus ('CPLM') Method	Computed Value or Cost construction Method	Margin and Expense analysis
Profit Split ('PSM') Method	Residual Method	Customs – Price or Margin; TP – Margin
Transactional Net Margin ('TNMM') Method	Residual Method	Customs – Price or Margin; TP – Margin
Fall back Method	Residual Method	Price or Margin

- - the table is taken from the source: Butani, 2011.

In that way, I can assume that, theoretically, there are a lot of similar points of contact between the Tax and Customs authorities over the issues of transfer pricing and

Customs valuation, taking into account the similarity of the main approaches concerning this process. At the same time, I think, the most controversial problem in this case is to create the common agreed position of these both authorities according to defining the basis of the price (value) on goods which cross the border. Especially it is topical issue for the related parties of transaction.

As for me, taking into account the current differences and similarities between approaches to defining the transfer pricing, there are real need for the further cooperation and convergence between the Customs and Tax authorities concerning this issue. Moreover, as I've tried to show above, the sufficient conditions for this process already exist. So, in order to reach the substantial level of interaction between these two state bodies there would be desirable to develop the common method of calculation the transfer price which would be appropriate for use by both Tax and Customs agencies.

As a matter of fact the OECD officials insist that the arm's-length principle remains the main international standard (Transfer Pricing Guidelines, 2010). Although, it is considered there are some alternative proposals which, along with the arm's length approach, are destined to obtain a fair and reasonable allocation among taxing jurisdictions of the worldwide income of multinational enterprises (Brown Gianni, 1996), for instance, the formulary apportionment method.

I think it implies the unified approach which can be adapted in different countries to provide greater certainty as to transaction values. Herewith it is considered that this method proposes to use a formula to allocate profits for taxation only in the context of the arm's length standard rather than replacing the standard altogether (Avi-Yonah, 2009). Although, the alternative formulary proposals do not address the issues any more effectively than the arm's length approach does, and a formula system would seriously limit the flexibility allowed by the arm's length approach under the current regulations (Bell, 2009). And there is a condition that a shift from separate accounting to formulary apportionment increases productive efficiency when the weight on the sales factor is sufficiently high and decreases productive efficiency when the weight on the sales factor is sufficiently low (De Waegenaere, Sansing, 2007).

However, according to the fact that the formulary method tends to use the defined formula which allows transfer prices to approach closer to the market basis, this method could be used by the Customs agencies too in order to compare approximately the transfer prices level and the corresponding level of the Customs value proposed.

Taking into account all the characteristics of the above mentioned approaches, I think, the formulary method could be adapted on practice, but should be used in connection with the arm's length principle depending on the current situation in particular countries. On my mind, this would make the Tax and Customs authorities to achieve greater convergence.

At the same time, it is obvious that if some controversial problem exists the corresponding different views and opposing sides exist too. In that way, before declaring surely that there is the huge need for a tight convergence between Customs and Tax authorities in all the countries all over the world concerning the issue of transfer pricing, it’s necessary to study deeply current and potential advantages and disadvantages as for this closing-in.

Those who are in favor of convergence point out that a credibility question could arise if two sets of rules on value determination exist within one government (Mikuriya, 2006). They hold that this situation results in greater compliance costs for business and greater enforcement costs for government. The proponents suggest that since the provisions on related party transactions in the WTO Agreement on Customs Valuation is relatively concise, compared to the more precise and comprehensive OECD Guidelines on Transfer Pricing (2010), there might be a room for developing guidelines or explanatory / interpretative notes for their better application. They maintain that this approach does not imply the revision of the WTO Agreement, but is rather intended to facilitate and complement the proper implementation of the existing WTO rules. The approach should provide Customs administrations with a choice, instead of imposing an obligation. They encourage Customs, in particular, to follow the functional analysis epitomized in the OECD Guidelines in determining whether the relationship influenced the price. They also suggest that inputs from the Customs area would be beneficial for the future review of OECD guidelines.

Those who are cautious about convergence point out that the two systems are based on different principles regarding the valuation of imported goods: Customs determines the value of the goods based on information available at the time of importation with respect to individual transactions; transfer pricing determines the value of the goods based on information available at the year(s) end with respect to aggregated transactions (Mikuriya, 2006)**.** They argue that convergence could be more costly than leaving the current difference as they are. In this connection, concern was expressed about the implementation of capacity building on Customs valuation in developing countries. Their advice is to focus more on dispute resolution mechanisms to solve the questions that might arise from divergence in the two systems.

Summary and concluding remarks

Whether or no, both points of view, obviously, would require a more thorough comparison between the Customs and Tax bodies. In turn, it proves that there is a desire to establish system of coordinated activities for these two authorities in the plane of the most topical issues including this one.

At the same time, obviously, on practice there could be many different complications, restrictions and other issues which don't allow these regulatory bodies to interact always on the basis of clearly agreed, efficiently coordinated and legally approved decisions. Nevertheless, I think it's necessary to tend organizing such an approach according to which the activities of one authority will complement the activities of another, but not contradict to each other interfering to accomplish the main common mission.

That is why, taking into account the above mentioned arguments concerning the peculiarities for greater convergence and coordination between these two state authorities, despite the opposing points of view, I think it's highly important to realize and to project on practice the grade of interaction which is necessary and sufficient in each particular country depending on its specific needs and requirements.

Herewith, on my mind, ideally Customs and Tax authorities should contact and cooperate with each other often enough and in various planes of their activities, taking into account their common purpose of charging and collecting taxes, which is one of the most significant among their main functions, especially in connection with ensuring the state income. In other words, I do believe that there is a real practical need for greater convergence and coordination between Customs and Tax authorities over the issue of transfer pricing.

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