ARTIGO:

TRANSFER PRICING AND CUSTOMS VALUATION: TWO SIDES OF THE SAME COIN

Preços de transferência e valoração aduaneira: as duas faces da mesma moeda

Anna Dolores de Barros Oliveira Sá Malta[1]

RESUMO

O presente artigo procura analisar as complexidades envolvendo os preços de transferência e a valoração aduaneira no Brasil, destacando os desafios e discrepâncias no sistema existente, procurando compara-lo com os *standards* internacionais, em particular os adotados pela OCDE. A narrativa explora os esforços recentes no Brasil em alinhar seu regime de Preço de transferência com as boas práticas globais, inaugurando mudanças que impactam as corporações multinacionais que operam em seu território. A discussão engloba a evolução das regras sobre preço de transferência e metodologias de valoração aduaneira, enfatizando na necessidade de uniformização à luz das boas práticas internacionais, de modo a evitar problemas como a dupla taxação. O estudo destaca a importância do alinhamento do sistema brasileiro de Preço de transferência com as diretrizes da OCDE, de modo a promover maior claridade, consistência e certeza nas transações internacionais, procurando criar uma estrutura moderna e eficiente enquanto assegura uma base tributária e mitigando os riscos de dupla taxação no comércio internacional.

Palavras-chave: Valoração aduaneira. Comércio Internacional. OCDE. Preço de Transferência

ABSTRACT

This text delves into the complexities of transfer pricing and customs valuation in Brazil, highlighting the challenges and discrepancies in the existing system compared to international standards, particularly influenced by the OECD guidelines. The narrative explores Brazil's recent efforts to align its transfer pricing regime with global practices, ushering in changes that impact multinational corporations operating within its borders. Discussions encompass the evolution of transfer pricing rules and customs valuation methodologies, emphasizing the need for harmonization in light of international practices to avoid issues like double taxation. The text underlines the importance of aligning Brazil's transfer pricing system with OECD standards to provide clarity, consistency, and certainty in international transactions, aiming to create a modern and efficient framework while ensuring an accurate tax base and mitigating the risks of double taxation in international trade.

Keywords: Customs Valuation. International Trade. OECD. Transfer Pricing

---

[1]Conselheira Titular da 3ª seção de julgamentos do CARF. Professora de Direito. Master of Laws em Direito Aduaneiro pela Erasmus University Roterdã - Holanda. Mestre em Direito Público. Certificada em Gestão Jurídica Aduaneira e Tributação Internacional pelo MIB- Massachusetts Institute of Business. Formação em Mediação e Arbitragem pela FGV. Coordenadora do LLM de Direito Aduaneiro e Comércio Exterior da Universidade Católica de Pernambuco. Atualmente é Presidente da Associação Brasileira de Direito Aduaneiro e Fomento ao Comércio Exterior, Diretora Jurídica da Câmara de Comércio Brasil- Argentina em Pernambuco e membro colaboradora da Comissão de Direito Aduaneiro e Comércio Exterior da OAB/PE seccional Recife. Doutoranda em Direito Internacional pela Universidade Federal de Pernambuco.

1 INTRODUCTION

Brazil's position as the eighth largest economy in the world and the ongoing process of globalization make the taxation of multinational groups, especially with respect to transfer pricing, an important tax policy issue in Brazil. Transfer pricing rules aim to ensure that profits resulting from commercial and financial transactions between members of a

multinational group are allocated in a way that reflects the contribution value of each of the parties involved. In this sense, transfer pricing rules should ensure the adequate tax base and also contribute to preventing the erosion of countries' tax bases and the transfer of profits to low or zero tax jurisdictions, where little or no economic activity is found, in addition to preventing double taxation, distortion of investment decisions and competition between companies.

The main reason for developing studies on transfer pricing was the fact that Brazil's transfer pricing system was established in 1996 and remained relatively unchanged until the end of 2022. Furthermore, a large number of loopholes and divergences lead to cases of double taxation. The differences identified between the Brazilian regime and the OECD increase the risk of double taxation and, therefore, hinder both international trade and investments, by creating distortions and tax legal uncertainty tax matters for companies operating abroad.

Although it was inspired by the 1979 Report from the OECD, it has not evolved significantly for many years, whereas the OECD guidelines were significantly revised with the publication of the OECD Guidelines in 1995, and have been updated and clarified regularly, with the most significant updates in 2010, 2017 and most recently late 2022. The most significant change resulted from the BEPS[2] (Base Erosion Profit Shifting) Project. – particularly Actions 8 to 10 which aimed to address and limit abuses and tax avoidance through transfer pricing practices.

The Brazilian transfer pricing system contains a number of gaps and significant divergences from the OECD system that, on the one hand, can give rise to double taxation and, on the other hand, create opportunities for BEPS - (Base Erosion Profit Shifting).

---

[2] The BEPS Project (Base Erosion Profit Shifting) is an initiative of the G20 (Group of twenty countries with the largest economies) together with OECD (Organization for Cooperation and Economic Development) which aims to combat, on the international stage, the abuse of tax rules that lead to the erosion of the taxable base, mainly through the transfer of profits to destinations that have more favorable taxation or none at all taxation. This project is composed of fifteen action plans, where there is a suggestion of changes international norms and domestic tax norms.

I noted, therefore, that it would be important to study the matter of "transfer pricing" in depth, especially when the subject is compared with customs valuation.

While customs valuation is the process by which control is exercised over the customs value of imported goods in order to ensure that the parties do not voluntarily manipulate the values applied in the sale of goods, since it is the calculation base for import taxes. As for transfer pricing, all commercial transactions involving goods depend on the price practiced between the parties.

Faced with the economic growth of large developments and the tax planning carried out by them with the aim of taking advantage of more favorable tax regimes in other countries – other than the one where the income was generated – business interference in the composition of the price was gaining ground, directly reflecting on the import and export of goods.

It remains clear the institutes conflict during commercial transactions between related companies, since the price cannot be influenced for customs valuation purposes, but must comply with transfer pricing rules.

Both institutes are related to treasury control by the Federal Revenue of Brazil – either when importing for Customs Valuation or accounting of profit for Transfer Pricing.

The Arm's Length Principle is the basis for assessing the interference in the composition of price and valuation of goods during commercial transaction between related companies, with both institutes seeking to avoid distortions in international operations between related companies.

However, transfer pricing and customs valuation are stipulated based on different rules resulting from different international organizations. Although there is an international concern to bring both institutes closer or make them work in harmony, normally the application occurs independently. Moreover, the fact that customs valuation differs from transfer pricing does not in itself constitute a problem, at most, it can be an indication for further inspection.

Internationally, the OECD guidance enshrined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations is adopted by most countries around the world in their efforts to ensure that the tax base is adequate and to prevent double taxation and avoid base erosion and profit transfer practices. While the Brazilian system was clearly inspired by the version of the OECD Guidelines on Transfer Pricing available at the time of the legislation's introduction in 1996, the system has not significantly evolved since then and has not incorporated the progress of the guidance found in the OECD Guidelines. As a result, Brazil's transfer pricing system is not fully in line with the international standard of the Arm's Length Principle, enshrined in Article 9 of the OECD Model Convention and the United Nations Model Convention, the application of which is interpreted in detail in the OECD Guidelines.

Over the past two decades, Brazil has actively participated in international debates on tax issues in different multilateral forums, including the OECD and the United Nations, and in other regional initiatives. As a member country of the G20, Brazil has been at the forefront of the most recent and decisive projects that shape the rules of international taxation, such as the OECD/G20 BEPS Project.

The objective of this paper, therefore, is to analyze whether transfer pricing in Brazil is based on a complete comparability analysis, which includes the appropriate identification of commercial or financial relationships and careful consideration of the economically relevant circumstances of the taxpayer, the functions performed, assets used and risks assumed, and other comparability factors, as well as whether or not the concept of precise transaction delineation set out in the OECD Guidelines on transfer pricing would be found in Brazil's transfer pricing structure, noting the impacts of these accessions, the existing complexity between the transfer price relationship and customs valuation.

2 TRANSFER PRICING AND CUSTOMS VALUATION: TWO SIDES OF THE SAME COIN

2.1 GENERAL IDEAS ON SYSTEM HARMONIZATION

The difficulty of uniformly applying the normative text to more than one country means that we need organizational methods and systems (Costa, 2000, p. 29-31/ 261-262).

In my view, It is possible to build some starting points or elementary assumptions to establish the basis of dialogue in cross-border operations: the definition of what we understand as merchandise; its classification in a harmonized system; the verification of its origin for the definition of the corresponding tariff treatment and, in my opinion, most importantly, the fixing of its customs value, economic base on which, among others, taxes and eventual penalties will be levied, focal point of the argumentative magnifying glass placed to debate.

The different rounds of the General Agreement on Tariffs and Trade (GATT), especially until the 1970s, sought the progressive reduction of import tax rates, established on negotiations between countries and based on the application of ad valorem custom duties. The perception that the fight against protectionism could not be frustrated through improper and artificial handling of the tax base was the driving force behind discussions during the unsuccessful Havana Charter. This idea would later impact Article VII of the General Agreement on Tariffs and Trade and formed the basis of the Brussels Definition of Value which was incorporated into first customs related regulations in was it nowadays the European Union[3]

The “Brussels Definition of Value” (BDV) was developed by the CCC in 1950 based on the general foundations of the GATT from October 1947. The BDV Convention, which influenced the legislation of several countries, defined the customs value by the problematic expression “normal price”, which took into account a sale carried out under conditions of free competition (Cotter, 2018, p. 124-127).

The discussions of the study group for the European Customs Union, which culminated in the "Brussels Definition of Value" (BDV), represented an important and lasting milestone by allowing customs to use a theoretical value or price-parameter able to make adjustments on the information declared by the importer in case of discrepancy, impacting item II of art. 20 of the National Tax Code and the original wording of Art. 2 and 3 of Decree- Law No. 37/1966 (Trevisan, 2017). However, little by little, and notably at the end of the 20th century, it would give way to a positive notion transaction value of the imported goods that was already visible in the minutes of the meeting taking place in the 1960s during the Kennedy Round.

The Customs Valuation Agreement (CVA), resulting from the Tokyo Round (1973/1979) and ratified in 1986 by Brazil, broke with the assumptions of the BDV and the idea of a "normal price" for imports.

---

[3] TREVISAN, Rosaldo. O imposto de importação e o direito aduaneiro internacional. 1. ed. São Paulo: Aduaneiras/Lex Produtos Jurídicos, 2017: “*The Convention for the creation of a Customs Cooperation Council (CCC) was signed by thirteen countries in Brussels on 12/15/1950 and has contributed significantly for the development of International Customs Law, as it was the starting point for thematic in-depth studies which resulted in several other specific conventions, such as those referring to customs regimes and procedures, goods classification, origin and customs valuation.239 In its first years of life, the CCC was a forerunner.*“

The Marrakesh Protocol signed in 1994 marked the culmination of the 8-year- long Uruguay Round and established the World Trade Organization. It added to the international legal heritage not only the 15 articles of its constitutive agreement, but also four annexes, the first of them divided into three, including Annex 1A representing the GATT, and other agreements, such as the CVA, which came to regulate Article VII of the GATT. The normative set represented by the final act of the eighth round of multilateral trade negotiations was incorporated into the Brazilian legal system through Decree no 1.355/1994 and it is mandatory according to art. 2 of Decree-Law No. 37/1966 and item I of art. 75 of the Customs Regulation (CR), with regard to customs valuation.

On the one hand, the agreement, which sought to ensure a uniform tax base of customs duties, rejected the use of the value of goods of national origin as a parameter, mainly to fight the American Selling Price which was the most common valuation formula applied until 1979 by the United States (Basaldúa, 2016, p. 215-241).

On the other hand, it considerably reduced the spectrum of arbitrariness in setting the base by giving prestige to transactional adjustments, whether by the importer or the Administration. Such a finding does not imply, of course, the absolute opposability of the value declared by the importer to the customs authority, but only that Customs must comply with the new positive standard for valuation purposes.

It's not a coincidence that article 17 of the agreement warns that its text cannot be used as a way to coerce the Customs Administration during its work of verifying the veracity or accuracy of the information provided for valuation purposes. This is replicated by domestic regulation: inspection procedures are authorized in case of doubt, including the prerogative of eliciting information from the exporting country, which can be translated as a duty since the spirit of the agreement is cooperation between member countries.

All goods submitted to import clearance are subject to customs value control under the terms of the CVA, thus understood as the transaction value defined by article 1 with the adjustments provided by article 8 and the definitions of article 15. The term “transaction” seems to necessarily presuppose a sale, in order to reflect all payments, direct or indirect, made or to be made, as a condition for the sale of goods, in order to fully pay the installments intended for the seller.

Only in the event that is not possible to apply the general method, the substitutive methods will be adopted, successively and exclusively, in order to assess the value of: (i) the transaction of imported goods (articles 1 and 8); (ii) the transaction of identical goods (Article 2); (iii) transaction of similar goods; (iv) amount deducted —deductive method (Article 5); (v) computed or reconstructed value — computed method (Article 6); and (vi) fixation based on reasonable criteria consistent with the general principles and provisions of the agreement — fall back method (Article 7), with the order of the fourth and fifth methods being the responsibility of the importer, provided that the country has reservations in this regard.

Thus, if there is a binding relationship between importer and seller and, cumulatively, doubt regarding the veracity of the declared value, information must be requested to establish whether the relationship has significantly influenced the price. Only after this argumentative and probative journey, or in case of lack of objective and quantifiable data under the terms of art. 20 of Normative Instruction SRF No. 327, of 05/09/2003, the customs authority will be allowed to discard the transaction value and proceed to the subsequent method.

Paragraph 2 of article 1 of the CVA textually determines that the relationship between the parties is not sufficient reason to reject the declared value, requiring an examination of the circumstances in which the sale took place.

The simple fact of a price below prevailing market prices for identical goods between related parties is not sufficient for the rejection of the first method (transaction value) under the terms of Advisory Opinion No. 2.1 of the Customs Valuation Committee of the World Customs Organization (WCO), and time should be given for the importer to provide information and produce evidence.

The agreement goes so far as to offer binding refutation arguments, with the declared information prevailing, for example, in cases where the questioned price is close to the price charged in sales of identical or similar goods made to unrelated persons. This procedure was introduced in 1994 as a result of negotiations held during the Uruguay Round that culminated in Decision 6.1 (Basaldúa, 2013, p. 433-463) and which transferred, with a slightly different wording, to article 15 of Normative Instruction SRF n° 327[4], of 05/09/2003.

---

[4] This is a normative instruction for tax inspection in Brazil, which establishes rules and procedures for the declaration and control f the customs valuation of imported goods.

2.2 TRANSFER PRICING X CUSTOMS VALUATION

Customs Valuation, therefore, is identified as a methodology used by the IRS to determine the correct value of imported goods, in order to avoid under- and over-invoicing of operations, which can trigger, respectively, tax evasion or remittance in excess of foreign exchange abroad. Thus, the customs valuation rules aim to ensure that the payment of taxes and import fees are carried out correctly.

Known simply as CVA-GATT, it defines that the Customs Value, used as the basis for calculating the Import Tax, has the function of serving as a parameter for the application of possible fines and as a criterion for the application of trade defense measures (e.g. anti-dumping) and, whenever possible, one should use the transaction value as valuation method. In addition, the CVA-GATT requires that the Customs Value be calculated according to one of six specific methods.

Transfer pricing, on the other hand, is applied in the taxation of income in international trade operations, with the objective of correctly allocating profit to each jurisdiction and preventing tax evasion in transactions between related persons or located in countries with favored taxation. This is a specific methodology for demonstrating that the price charged between related parties would be the same as that paid between third parties, internationally known as the “Arm's Length Principle” (WCO, 2015).

The Arm's Length principle refers to transactions in which two or more unrelated and unaffiliated parties agree to do business, acting independently and in their self-interest. If this principle is met, we can say that the terms and conditions of the particular transaction are "at arm's length".

Two joint Conferences between OECD and WCO were held in May 2006 and 2007 in Brussels in order to bring together the two organizations. As it transpired, the lecturers had antagonistic positions on whether or not the mechanisms converged, which culminated in the publication of the "WCO Guide on Customs Valuation and Transfer Pricing“ intended to assist customs officials responsible for the customs valuation policy or who work in audits and controls of multinational companies (MNEs) (Basaldúa, 2013, p. 433-463).

In fact, convergence must be analyzed with even greater care in the Brazilian case, since the rules of transfer pricing deviate, at various times, from the OECD guidelines. In addition, if the transaction value is the guiding north in valuation, it is not possible to lose sight of the fact that transfer pricing is intended to reveal an undue advantage obtained by one of the parties of a deal that led to a reallocation of profit.

Even those willing to use it must take into account that the adjustment of the transaction value through the recognition of transfer pricing rules implies insertion of profit, which does not necessarily shift the valuation to the sixth method, since both the second and third methods are also transaction values in which the identified profit can eventually be accommodated.

There is still no identity of the methods or their application, since, in the case of transfer pricing, we are dealing with non-rigid and non-hierarchical recommendations (guidelines) operating synthetically and using an arm's length value, which looks at the average of operations (although the adjustment is made transaction by transaction). This differs from what happens in the CVA: for customs valuation purposes, the taxpayer does not get to choose the method that suits him or her best, and the evaluations of the imported goods are performed for each import separately.

It is important to reiterate that the order in which the methods are applied is mandatory, that is, it does not depend on the will of the taxpayer or the inspector, and the use of transfer pricing, in Brazil, should always be the last resort.

In the event of doubt as to the veracity or accuracy of the customs value and the impossibility of applying other previous valuation methods, the taxpayer will be required to present the transfer pricing calculation logs with the determination of the price charged, parameter price, method used and possible tax adjustment.

For customs valuation purposes, only the parameter price and method used will matter. Based on this value and the variation in relation to the price charged, the customs inspector will determine whether the customs value must be adjusted.

If the price charged is much lower than the parameter, the transaction price will be discarded and the parameter price will be considered as the basis for calculating import taxes, with the taxpayer having to pay the difference plus fine and interest.

2.3 TRANSFER PRICING IN BRAZIL VERSUS EUROPEAN UNION

As previously explained, transfer price is a tax statement for proving that the price practiced in operations with companies based abroad, considered related parties (intercompany) or, even if not related, reside and are domiciled in countries with favored taxation (tax haven), meet the rules set forth by law and regulations issued by the Federal Revenue Service.

In Brazil, the Federal Revenue requires that the price practiced between related parties abroad be arbitrated by Brazilian Transfer Pricing rules, since the country is not a member of the OECD and does not follow the doctrines commonly adopted in most developed countries.

The legislation dealing with Transfer Pricing rules determines the following methods to be applied to different operations:

IMPORTS:

- PIC: Compared Independent Prices
- PRL: Resale Price minus Profit
- CPL: Production Cost plus Profit
- PCI: Price under Import Quotation

EXPORTS:

- CAP: Acquisition or Production Cost plus Taxes and Profit
- PVEx: Sales Price on Exports
- PVA: Wholesale Price in the Country of Destination Less Profit
- PVV: Retail Price in the Country of Destination Less Profit
- Pecex: Price under Export Quotation

Made by the Author

On December 29th, 2022, the Brazilian Federal Government published Provisional Measure No. 1,152/2022[5], which aligned Brazil's transfer pricing system with the globally adopted one, based on OECD guidelines. The changes will have a drastic impact on multinationals that operate in the 8th largest economy in the world

Unlike what happens with countries that are part of the European Union, Brazil had not yet adhered to transfer pricing regulations in their basic aspects. The biggest change in the current system is the introduction of the Arm's Length Principle, absent in the current legislation. With this comes new transfer pricing methods, new documentation requirements and considerable changes in the treatment of intangible assets, financial transactions and business restructuring.

In general, in Brazil it can be said that the new transfer pricing rules reflect the most recent version of the OECD Transfer Pricing Guidelines, such as: Any type of financial or

[5] Brazil (2022),New legal framework for transfer pricing in Brazil, Brazil. https:// www.congressonacional.leg.br/materias/medidas-provisorias//mpv/155647#:~:text=2022%20Descri%C3%A7% C3%A3o%2FEmenta-

commercial transaction is within the scope of the new rules, unlike previous rules that focused on tangible goods, services and rights, the OECD's transactional and traditional methods replace current transfer pricing methods. This means that the TNMM and the Profit Split (in Brazil defined as MLT and MDL) are already available for transactions involving Brazilian multinationals, the comparability analysis, functional analysis and benchmarking become part of the transfer pricing analyzes, replacing the fixed margins, transfer pricing documentation will replace the calculations that are currently prepared and demonstrated via ECF, financial transactions and those involving intangibles, previously treated from a pure tax deductibility perspective, become transfer pricing topics, the functions of the DEMPE and the concept of hard-to-value intangibles (HTV) were introduced into the Brazilian universe of transfer pricing.

If the legislation is approved, Brazil will also carry out an expansion in the definition of services. Low value-added services, announced by the Brazilian Federal Revenue (RFB) during the joint press conference with the OECD, are not included in the decree and will probably be subject to an infra-legal rule, currently outside the radar of the Brazilian tax authorities, business restructuring will be on the agenda scope of transfer pricing rules.

Furthermore, Brazilian taxpayers are accustomed to making and reporting tax transfer adjustments directly on their income tax return. This option will remain, but more types of adjustments will be available. The Provisional Measure specifically mentions "offsetting" adjustments which are often referred to as "year-end adjustments" globally and which are popular when applied to transactional profit methods. On the other hand, in the event of a transfer pricing adjustment by the tax authorities, a secondary adjustment in the form of a presumptive loan will be introduced.

Last but not least, provision for relevant fines resulting from non-submission of documentation or submission of incomplete documentation.

However, even with this new legislation being passed in Brazil, some guidelines remain different compared to the OECD guidelines, such as:

- Commodities play an important role in the Brazilian economy and it is natural that they receive specific treatment. In general, the definition of commodities has been expanded and the application of mandatory methods has been abandoned. However, a clear preference for the PIC, specific rules on the timing of transactions and especially the requirement that importers and exporters of commodities register information related to transfer prices with the tax authorities, seem to add considerably to the complexity.

- Complementary adjustments are only allowed provided that the Brazilian company is not in a loss-making situation.

- The Brazilian Federal Revenue has specific ideas on how to deal with the uncertainties of operations involving intangibles that are difficult to value. One possibility is contingent payments (e.g.: in the form of licenses) and/or price adjustment clauses that would activate automatic adjustments if certain triggers are pulled.

- Intragroup lending appears to be capped at an interest rate that corresponds to the risk-free rate on a government bond in the lender's currency plus a spread to account for risks. This will hardly be aligned with the approaches outlined in Chapter X of the OECD Guidelines.

- Financial guarantees are also only allowed for 50% of the amount that exceeds the implied support. And this is only in case the guarantee is not considered an activity of the shareholder.

- Documentation requirements are also going beyond the OECD's idea of the Local File concept, including information on the group's overall tax situation and profitability.

Significant weaknesses can be found in the Brazilian transfer pricing system, mainly due to the absence of special considerations for more complex transactions and the general inadequacy of current rules dealing with these transactions. Weak points can also be found due to the particular characteristics of the system, such as the fixed margins approach, the freedom of method selection, among others.

2.4 TRANSFER PRICING IN BRAZIL: NEW PATHS FOR CUSTOMS VALUATION

Returning specifically to the transfer price relationship with customs valuation, in view of the adaptations of Brazilian legislation to the OECD, it is really not trivial to establish what would be the appropriate profit margin for each party in the operation.

Issues such as the function performed by each party – imagine that one of them is an industry and the other a distributor – or even the differences in the domestic market in each of the jurisdictions rule out the idea of a Solomonic profit sharing. That is why the Brazilian solution was the adoption of predetermined margins, which, although distancing themselves

from the international standard, in fact make the issue practical: it is enough to guarantee the predetermined margin in the importing country and no adjustment is due.

It turns out that the combination of the two disciplines generates a paradox.

On the one hand, motivated by the Brazilian transfer pricing legislation, the parties tend to reduce the prices charged on exports to the importing country, as this will make it easier, at least in theory, to reach the predetermined margin.

On the other hand, precisely because of this practice, the customs value will be pushed down, artificially influencing the value of the transaction and determining the inadequacy of the import calculation base in accordance with the customs valuation rules, resulting inoverchargeof all taxes due on the importation of goods and application of fines, since the customs value is also present in the bases for calculating other taxes due on importation.

Very complicated situation in Brazil.

Definitively incorporated into Brazilian legislation, the transfer pricing discipline included in the recent legislation enacted at the end of 2023[6], tends to resolve the issue. By adopting the Arm's Length Principle, according to international standards, the tendency is for the transfer price to converge towards the value of the transaction free from the influence of the relationship between the parties, satisfying both rules simultaneously.

At least in theory.

Naturally, it is worth recommending caution given that it is still unknown whether the Provisional Measure will actually be approved in Brazil, as proposed by the Executive Branch, nor whether there will be any surprises in the inevitable issuing of a regulatory decree and other normative acts within the competence of the Federal Revenue. It seems, however,

---

[6] BRAZIL (2023). *New legal framework for transfer pricing in Brazil.* Retrievable at https://www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/l14596.htm

that Brazil's convergence with international practices related to transfer pricing can, by reflex, resolve a domestic harmonization problem of great importance for Brazilian importers.

But that's not all.

The potential end of predetermined margins in the calculation of transfer pricing also provides for the end of a generally neglected paradox: the contradiction between Brazilian transfer pricing rules and customs valuation rules, derived from the GATT/94 agreement.

The Agreement on the Implementation of Article 7 of the GATT is based on a very simple principle, that the customs value – the basis for calculating the import tax – must represent the value of the transaction, which is the“price paid or payable for goods on sale for export to the country of importation”, duly adjusted in accordance with its Article 8. And just as it occurs in the discipline of transfer pricing in relation to transactions between “related parties”, there is concern in the agreement with the possibility that the “related parties” will artificially influence the price paid or to be paid for the goods, aiming to obtain undue tax advantage.

This, in my view, given the recent changes, is the time for multinationals operating in Brazil to carry out a healthcheck of the transfer pricing model from an OECD perspective. For foreign multinationals, this means integrating Brazilian subsidiaries into the global transfer pricing model. As for Brazilian multinationals, this means in-depth analysis of their operating model.

In addition, the current absence of specific transfer pricing rules for the transfer of intangibles and business restructurings offers options for transitioning to an efficient operating model.

It is also important to point out that, due to the broad scope of the new legislation, its relevant impact will go beyond the Transfer Price, mainly in supply chain projects, corporate reorganizations, project financing and its financial modeling, use of IP, use of shared services, among others.

3 FINAL ANALYZES

In short, customs valuation and transfer pricing are usually on opposite sides of an import operation. If the taxpayer imports at a price higher than the parameter price, it means that part of the taxable profit is being sent abroad and, therefore, transfer pricing should be taken into account when calculating the Actual Profit, but for customs valuation this represents a higher collection of taxes. Thus, if the taxpayer has a plan to reduce his transfer pricing tax adjustment, the procedure may become evidence against him or her in a customs valuation inspection.

Brazil's specific divergences from the OECD and their effects (impact on investment and revenue collection), given Brazil's move towards becoming an OECD member, makes it important to start considering the degree of alignment of the existing

regime that would be desirable to improve, as well as the necessary changes to avoid obstacles to accessing the organization, above all, to avoid harmful inspection.

From an international perspective most countries today also apply the general Arm's Length Principle in financial transactions. Countries are expected to gain greater consistency and certainty by following the forthcoming guidance on financial transactions produced by the OECD Inclusive Framework on BEPS, which will provide additional clarity on the application of the Arm's Length Principle in these situations. The rules in Brazil, however, contain a limited number of methods, including fixed margins for some of them, which do not always necessarily lead to the same results, or to reasonable results, which means that, internationally, there is potential uncertainty in the current system.

In the context of aligning Brazil's system with the OECD transfer pricing standard, the objective of any future efforts is to establish the conditions for the implementation of a modern, simple and efficient transfer pricing system that is in line with the OECD standard. Such a system must achieve the dual objective of ensuring the appropriate tax base in Brazil and in other jurisdictions involved, in addition to avoiding double taxation and, at the same time, preserving simplicity for administrations and taxpayers, in an environment that promotes legal certainty applied to taxation national and internationally.

Transfer pricing typically involves more than one tax jurisdiction. As a result, any transfer pricing adjustment in one jurisdiction implies that unless that adjustment is reflected in the other jurisdictions, divergent results will arise, as the same profits will be taxed as income of two different entities belonging to a single group of multinational companies, thus creating double taxation.

Such results can be avoided when the respective jurisdictions follow the same transfer pricing standards and approaches to their application and interpretation or, in cases where divergent results materialize, double taxation can be avoided by making a corresponding change in the other jurisdiction. However, if the other jurisdiction does not agree to make a corresponding adjustment, the multinational group will be taxed twice on this portion of its profits as they will be subject to taxation in two different jurisdictions. To minimize this risk, an international consensus involving common principles and approaches (that is, the Arm's Length Principle) was established for determining transfer pricing in cross- border transactions. In the absence of adherence to common principles and approaches, the risks of double taxation are magnified.

BIBLIOGRAPHY

BASALDÚA, Ricardo Xavier. Tributos al comercio exterior. Buenos Aires: Abeledo Perrot, 2a edición, 2016.
_______. La Organización Mundial del Comercio y la regulación del comercio internacional. Buenos Aires: Abeledo Perrot, 2a edición, 2013, pp. 433-463.

Commissie Transfer pricing en btw; Vereniging voor Belastingwetenschap (Rotterdam). Transfer Pricing En Btw : De Effecten Van Transfer Pricing Aanpassingen Op De Heffing Van Btw; Geschriften Van De Vereniging Voor Belastingwetenschap, No. 259; VvBw, vereniging voor Belastingwetenschap: Rotterdam, 2019.

Cooper, J.; Fox, R.; Loeprick, J.; Mohindra, K. Transfer Pricing and Developing Economies : A Handbook for Policy Makers and Practitioners; Directions in Development. Public Sector Governance; World Bank Group: Washington, DC, 2016.

COSTA, José Augusto Fontoura. Normas de Direito Internacional – aplicação uniforme do Direito uniforme. São Paulo: Editora Atlas, 2000, pp. 29-31 e 261-262.

COTTER, Juan Patricio. Derecho Aduanero y Comercio Internacional. Buenos Aires: Ediciones IARA, 2018.

Emmanuel, C. R.; Mehafdi, M.; Chartered Institute of Management Accountants. Transfer Pricing; Advanced Management and Accounting Series; Academic Press: London, 1994.

Feinschreiber, R.; Kent, M. Transfer Pricing Handbook : Guidance on the Oecd Regulations; Wiley Corporate F&a Series; John Wiley & Sons: Hoboken, N.J., 2012.

Ignat, I.; Ionescu-Feleagă Liliana. Transfer Pricing in Manufacturing : An Analysis of the Oecd Guidelines; Contributions to Finance and Accounting; Springer: Cham, Switzerland, 2022.

Intangibles in the World of Transfer Pricing : Identifying - Valuing - Implementing; Heidecke Björn, Hübscher Marc C, Schmidtke, R., Schmitt, M., Eds.; Springer: Cham, 2021.

Li, J.; Paisey, A. Transfer Pricing in China : Concepts, Controls, Practices, and Audit Assessment; Palgrave Macmillan: Singapore, 2019.

Lyons, T. J. Eu Customs Law, Third.; Oxford Eu Law Library; Oxford University Press: Oxford, United Kingdom, 2018.

Macedo, L. C. L. (2020). Ad valorem tariffs and customs valuation: implications for the stability and predictability of national revenue from tariffs. Maastricht University. p. 252.

OECD (2012),Lidando Efetivamente com os Desafios dos Preços de Transferência, OECD Publishing, Paris, https://doi-org.eur.idm.oclc.org/10.1787/9789264169463-en .

OECD (2018), Preço de transferência no Brasil: Convergência para o Padrão OCDE. OECD Publishing, Brasil. https://www.oecd.org/tax/transfer-pricing/precos-de-transferencia-no-brasil- convergencia-para-o-padrao-ocde-folheto.pdf .

Organisation for Economic Co-operation and Development. Dealing Effectively with the Challenges of Transfer Pricing; OECD: Paris, 2012.

Schön Wolfgang; Konrad, K. A.Fundamentals of International Transfer Pricing in Law and Economics; Mpi Studies in Tax Law and Public Finance, V. 1; Springer: Berlin, 2012.

Transfer Pricing and Value Creation; Petruzzi, R., Tavares Esq, R. J. S., Eds.; Series on International Tax Law, Volume 116; Linde Verlag: Wien, 2019.

Treidler, O. Transfer Pricing in One Lesson : A Practical Guide to Applying the Arm's Length Principle in Intercompany Transactions, First.; Management for Professionals; Springer: Cham, Switzerland, 2020.

TREVISAN, Rosaldo. O imposto de importação e o direito aduaneiro internacional. 1. ed. São Paulo: Aduaneiras/Lex Produtos Jurídicos, 2017.

Turner, G. Transfer Pricing in International Business : A Management Tool for Adding Value, 1st ed.; International Business Collection; Business Expert Press: New York, N.Y. (222 East 46th Street, New York, NY 10017), 2013.

WORLD CUSTOMS ORGANIZATION. WCO Guide to Customs Valuation and Transfer Pricing, June 2015.