



DS CUSTOMS NEWSLETTER

January 2010

MODERNISED CUSTOMS CODE DRAFT IMPLEMENTATION PROVISIONS LAST VERSION

News about royalties paid as a condition of sale

RECALL :

The European communities Commission is currently discussing about the draft implementation provisions of the **modernised customs code dated of April 23rd 2008**. Among various important changes, we have called your attention on the one related to the customs valuation and, more specifically, to 1st sale and taxation of royalties.

The draft IPCC circulated last fall was written in a very negative way from business point of view since it concluded to highly increase the risk of taxation of royalties. Business community is involved in the process of discussion. DS has participated last fall, alone and through ICC, to a strong and coordinated action to lobby the EC Commission.

We have just received the last draft version circulated on January 6th.

COMMENT :

Article 230-11 of the draft MCCIPs seems to have been reviewed in a positive way. A slight amendment to the provision pertaining to "condition of sale" must be underlined.

In a previous version, as DS noticed, the customs code committee was inclined to define a condition of the "production", rather than a condition of sale. Previous version read:

“c) In other cases the payment of the royalties or licence fees is considered to be paid as a condition of sale for the imported goods, if the goods may not be produced or sold without the royalties or licence fees being paid directly or indirectly to the licensor.”

In our opinion, for the royalty payment to be a condition of sale, it must be imposed by the vendor or a related person. The right to manufacture the imported goods has nothing to do with the concept of condition of sale.

The current draft article 230-11 provides that the royalty is paid as a condition of sale :

“c) if the goods cannot be sold to, or purchased by the buyer without the royalties or license fees being paid.”

In our opinion, this actual version is more compliant with the CCC’s doctrine :

See Commentary 3:

“The question to be answered in this context is whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee. The condition may be explicit or implicit. In the majority of cases it will be specified in the licence agreement whether the sale of the imported goods is conditional upon payment of a royalty or licence fee. It is not however essential that it should be so stipulated.”

See also Commentary 11:

“(…) the payment could be an implicit condition of sale, if the buyer was not able to buy the goods from the seller and the seller would not be prepared to sell the goods to the buyer without the buyer paying the royalty fee to the licence holder.”

*

* *

While the current version seems to have waived the possibility to consider a “condition of manufacture”, the actual progress made with this draft is hard to assess for the time being.

DS will follow up the going on process very carefully and keep you timely informed

Should you require additional information, please feel free to contact us :

☎: +33 (0)1 53 67 50 00

☎: +33 (0)1 53 67 50 01

@: salva@dsavocats.com