



ROYALTY PAYMENTS TO THIRD PARTIES FOR THE PURPOSE OF CUSTOMS VALUATION OF IMPORTED GOODS (STUDY OF TAX COURT DECISIONS ON IMPORT DUTIES DISPUTES)

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ABSTRACT

Royalties and license fees in this case are all payments made in connection with, among other things, patent licenses, trademark rights, and copyrights. Costs incurred by importers on royalties must be added to the customs value by the WTO Customs Valuation Agreement. Concerning royalties the problem becomes more complicated when it involves payments to third parties. Legal regulations that do not sufficiently explore this topic often lead to disputes between importers and the government and continue to the court level. The aim in this study is to analyze how the customs rules for royalty payments to third parties related to imported goods and how the attitude of judges in determining the customs value of royalty payments on intellectual property related to imported goods. In conclusion for customs valuation, royalty payments to third parties are added to the actual or supposed price. It is irrelevant to whom the royalties are paid, what matters is that the buyer is obligated to pay royalties as long as the royalty payments relate to the imported goods in question. Of the two Tax Court Decisions on the Tobacco Blend cut filler import case and the Tax Court Decision on the shoe import case, the court decided to include in the customs value the payment of intellectual property royalties to third parties.

Keywords: customs value; royalties; import.

I. INTRODUCTION

Royalties and license fees in this case are all payments made in connection with, among other things, patent licenses, trademark rights, and copyrights. The costs incurred by the buyer for royalties must be added to the actual price or should be paid provided that the following criteria are met:

- Not included in the price actually or payable.
- Represents a sales transaction requirement that must be met.
- Related to imported goods.
- Payments can be made either directly or indirectly by the buyer to the seller.

In general, royalty payments are made based on the sale or utilization of goods containing royalties by buyers in the importing country. Thus the billing or calculation of the amount of royalties to be paid is usually not known at the time of submitting the goods import notification to customs and excise. So thus finding out it requires time which of course cannot be fulfilled at the time of submitting the goods import notification. Customs and excise can carry out an audit of the importer's bookkeeping of imported goods to find out the exact amount of royalty payments after the customs clearance process is carried out.¹

If the audit process finds royalty payments of a certain amount, Customs and Excise will correct the customs value on the goods import notification and collect the underpayment of import duties and taxes. However, in accordance with the provisions of Article 17 of the Customs Law, it is stated that

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¹ Dawny Marbagio and Rita Dwi Lindawati, *METODE MUDAH PENETAPAN NILAI PABEAN Menurut WTO, WCO Dan ACVG Frame*, ed. Ardiansyah Ardiansyah, 1st ed. (Yogyakarta: CV. Primaprint, 2020).

errors in the notification of customs value can result in the imposition of administrative fines which are quite large in amount and often cause objections from the importer.²

Article 15 Paragraph (1) of the Customs Law, states that the customs value for calculating import duties is the transaction value of the goods in question. Royalty is a component that forms the price in a goods import transaction so that the price notified usually includes royalties in it but if it does not include the royalty value, then the royalty is not taken into account in determining the customs value.³

The terms of the transaction value are regulated in the explanation of Article 15 paragraph (1) of Law Number 17 of 2006 which is the adoption of Article 8 of the WTO Valuation Agreement:⁴ "The meaning of the transaction value is the price paid or that should be paid by the buyer to the seller for the goods sold for export to the customs area plus royalties and license fees that must be paid by the buyer directly or indirectly as a condition of buying and selling imported goods. valued, as long as the royalties and license fees are not included in the actual price paid for the imported goods concerned".⁵

The Customs Law has explicitly mandated that national laws and regulations must contain provisions for determining customs value in accordance with the World Trade Organization (WTO) Valuation Agreement. Of course, this also includes implementing regulations as Article 15 paragraph (7) of the Customs Law which states: "Provisions regarding customs value for the calculation of import duties are further regulated by or based on ministerial regulations".⁶

Article 18 of the WTO Valuation Agreement stipulates the establishment of a Customs Appraisal Committee (hereinafter referred to as the Committee), which consists of representatives of each member. The Committee is obliged to elect its Chair and convene once a year, or as provided under the terms of this agreement, to allow members to consult on matters relating to the customs appraisal system proposed by members, which may affect the implementation of the agreement. this or affect the objectives of this agreement. The Committee also performs other tasks assigned to it by its members.⁷

Furthermore, Article 18 paragraph (2) of the WTO Valuation Agreement states that a Technical Committee on Customs Valuation will be formed (the Customs Value Technical Committee, hereinafter referred to as the Technical Committee) under the auspices of the Customs Cooperation Council (now the World Customs Organization). This committee will carry out the obligations as stipulated in Attachment II to this Agreement and must carry out its duties following the provisions contained therein.⁸

By the intent of the WTO Agreement, the arrangements of member countries it is expected to ensure: transparency is created, and does not have the effect of limiting, distorting, or disrupting international trade. In addition, the formulation of laws must be carried out in a consistent, uniform, impartial, and reasonable manner, and based on positive standards.⁹

² *Ibid.*

³ Agus Sriyanto, "TINJAUAN YURIDIS PENGENAAN BEA MASUK DAN PAJAK-PAJAK DALAM RANGKA IMPOR (PDRI) FILM IMPOR," *INFO ARTHA* 3 (May 23, 2017): 90–108, <https://doi.org/10.31092/jia.v3i0.44>.

⁴ Ardiansyah Ardiansyah, "Kedudukan WTO Valuation Agreement Dan Perjanjian Internasional yang Mengatur Teknis Pelaksanaannya Ditinjau dari Teori Keberlakuan Hukum Internasional," *IBLAM LAW REVIEW* 1, no. 2 (2021), <https://doi.org/10.52249/ilr.v1i2.28>.

⁵ Mohamad Jafar, "Kajian Atas Pengenaan Bea Masuk Menggunakan Tarif Spesifik," *Pusdiklat Bea dan Cukai*, 2014.

⁶ Cerah Bangun, "Transformasi Penyelesaian Sengketa Nilai Pabean (Studi Sengketa Nilai Pabean di Pengadilan Pajak)" (Disertasi Program Doktor Ilmu Hukum Fakultas Hukum Universitas Indonesia, 2018).

⁷ Ardiansyah Ardiansyah and Atma Suganda, "BURDEN OF PROOF OF CUSTOMS VALUATION DISPUTES IN INDONESIAN TAX COURT," *International Journal of Law, Government and Communication* 5, no. 20 (2020), <https://doi.org/10.35631/ijlgc.520008>.

⁸ *Ibid.*

⁹ Reza Zaki, *Hukum Perdagangan Internasional* (Jakarta: Prenada Media, 2021).

However, a conflicting statement issued by the International Chamber of GATT Customs Valuation Code states concerning royalties and license fees: "There is no part of the Customs Value Code where so much is left to interpretation and implementation, and so little can be relied upon as a source of reference." Critics have thought that rulemakers have not explored the topic sufficiently, and it is true that it progressed fairly slowly in the Geneva negotiations and revealed significant differences between governments (often about what issues needed attention, but how they should be resolved).¹⁰

Based on the background above, the problems that are discussed and analyzed in this paper are as follows:

1. What are the customs regulations for paying royalties to third parties for intellectual property related to imported goods?
2. What is the attitude of the judge in determining the customs value of royalty payments on intellectual property related to imported goods?

II. RESEARCH METHODS

This research is normative juridical research, namely research that is focused on examining the application of the rules or norms in positive law.¹¹ There are two approaches taken in this study, namely: first, the statutory approach to examine problems in the content of legal norms which form the basis of law enforcement. Second, an analytical approach to cases (analytical approach) from court decisions to find out the reasons of the parties to the dispute and the judge's considerations in deciding the case.¹²

Soekanto and Sri Mamudji mentioned 5 (five) approaches in normative research, namely approaches to legal principles, legal systematics, vertical and horizontal synchronization levels, comparative law, and legal history.¹³ Marzuki also stated that there are 5 (five) legal research approaches, namely statutory approach, analytical case approach, comparative approach, historical approach, conceptual approach.¹⁴

In this study, the approach of legislation regarding royalties as an element of customs value and a comparative approach is used¹⁵ berdasarkan hukum kepabeanan internasional untuk menjawab rumusan permasalahan pertama. Pendekatan peraturan perundang-undangan tentang penyelesaian sengketa serta pendekatan analitis kasus (analytical approach) dalam menjawab permasalahan kedua.¹⁶

III. DISCUSSION AND RESULTS

A. Legal Rules for Payment of Royalty on Intellectual Property Related to Imported Goods to Third Parties

1. Provisions of national legislation

Provisions regarding royalties that apply in the country are regulated in Law Number 10 of 1995 which has been amended by Law Number 17 of 2006 concerning Customs (hereinafter referred to as the Customs Law), Minister of Finance Regulation (PMK) Number 160/PMK.042010 concerning Customs Value for Calculation of Import Duty which took effect

¹⁰Anastasia Getman and Anna Agapova, "Peculiarities of Establishing the Customs Value of Goods Containing Intellectual Property Objects," in *Transportation Research Procedia*, vol. 63 (Elsevier B.V., 2022), 1881–90, <https://doi.org/10.1016/j.trpro.2022.06.208>.

¹¹Muhjad Hadin, *Penelitian Hukum Indonesia Kontemporer* (Yogyakarta: Genta Publishing, 2012).

¹²Ibrahim Johnny, *Teori Dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, 2006.

¹³Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Radjawali, 1985).

¹⁴Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2011).

¹⁵Mary Ann Glendon, Michael W. Gordon, and Paolo G. Carozza, *Comparative Legal Traditions: In A Nutshell* (St. Paul, Minn.: West Group, 1999).

¹⁶Peter Mahmud Marzuki, *Penelitian Hukum*.

on 1 October 2010. Article 15 paragraph (1) of the Customs Law states that the customs value for calculating import duty is the transaction value of the goods in question. Further explained in the Elucidation of Article 15 paragraph (1) it states that what is meant by transaction value is the price that is actually paid or should be paid by the buyer to the seller for the goods sold to be exported into the Customs Area plus, among others, royalties and license fees that must be paid by the buyer directly or indirectly as a condition of sale and purchase of the imported goods being assessed, as long as the royalties and license fees are not included in the price actually paid or that should have been paid for the imported goods concerned.¹⁷

Regulation of the Minister of Finance no. 160/PMK.04/2010 Article 2 paragraph (1) states that the customs value for the calculation of import duty is the transaction value of the relevant imported goods that meet certain conditions. Furthermore, in Article 5 paragraph (1) it states that the transaction value as referred to in Article 2 paragraph (1) is the price that is actually paid or should be paid by the buyer to the seller for the goods sold to be exported into the Customs Area plus the costs and/or the values that must be added to the transaction value as long as these costs and/or values have not been included in the price actually paid or payable. The costs and/or values as referred to in Article 5 paragraph (1) are further explained by Article 5 paragraph (3) which states that, among other things, royalties and license fees must be paid by the buyer directly or indirectly as a condition of sale and purchase. the imported goods being valued, as long as the royalties and license fees are not included in the price actually paid for the imported goods concerned. Then what is meant by the price actually paid or that should have been paid in Article 5 paragraph (1) explained in Article 5 paragraph (4) states that namely the total payment for imported goods, which has been paid or will be paid by the buyer to the seller or for the benefit of the seller.¹⁸

2. Sources of international customs law

In Annex II of the WTO Valuation Agreement, it is explained that the World Customs Organization has been authorized by the WTO to regulate the technical aspects of the WTO Valuation Agreement. The Technical Committee on Customs Valuation has formulated various policy instruments aimed at harmonization and standardization of the implementation and administration of the WTO Valuation Agreement among WTO contracting parties.¹⁹

The guidelines contained in the WCO Technical Committee on Customs Valuation instrument are intended to assist WTO members, in implementing the WTO Customs valuation Agreement, to be considered and included in national regulations regarding customs value in accordance with the WTO Valuation Agreement. In its Valuation Compendium, the WCO has published various policy instruments known as 'best practices.' These instruments are included to explain everything that constitutes 'best practices' to help standardize the interpretation and application of the provisions in the WTO Valuation Agreement.²⁰

If this instrument is not used as a guideline, there is a possibility of erroneous interpretation of the application of the provisions in the WTO Valuation Agreement between importers and Customs and Excise, even between different customs and excise institutions. For example regarding the concept of "sales". The selling concept is not explained in the WTO Valuation

¹⁷ Ardiansyah, "Redesain Mekanisme Pembuktian Nilai Pabean Oleh Administrasi Kepabeanan Sesuai Ketentuan WTO," *IBLAM Law Review* 1, no. 1 (2021).

¹⁸ Jafar, "Kajian Atas Pengenaan Bea Masuk Menggunakan Tarif Spesifik."

¹⁹ *Ibid*

²⁰ *Ibid*.

Agreement. So that each contracting party can develop its definition of the meaning of "sales" following their national interests. This definition may contradict the WTO Valuation Agreement so that the goal of establishing a uniform customs value system for customs and excise and the trade community is not achieved. The instruments issued by the Technical Committee on Customs Valuation (TCCV) are classified as follows:²¹

1. Advisory Opinion
2. Commentaries
3. Explanatory Notes
4. Case Studies

The legal products of the World Customs Organization in the form of Advisory Opinions, Commentaries, Explanatory Notes, and Case Studies that have been issued by the WCO Technical Committee on Customs Valuation in its Valuation Compendium, are international agreements that do not require ratification in their implementation because they contain technical material. or a technical implementation of the master agreement. Based on this method, to give a legal effect to the substance of international agreements, the state does not have to make a new Transformation Law, but can through the process of legal interpretation through existing laws and regulations. It is important to remember that the TCCV instrument is not part of the WTO Valuation Agreement, so incorporating the instrument into national regulations on customs value is a choice of each national policy.²²

The Customs Valuation Compendium has been clear and detailed enough to regulate technical procedures for determining customs value including various cases and situations that may occur at the implementation level for which solutions and legal considerations have been made in detail regarding the principles of article VII of the GATT. Thus, it should be used as guidance for member countries to adopt and implement it in their national legislation with broader considerations in order to create an orderly world trade order in harmony with the objectives of international trade law according to GATT and WTO.²³

3. Agreement on Implementation of Article VII of the GATT 1994.²⁴

In Article 8 paragraph 1(c) of the WTO Valuation Agreement, it is stated that in determining the customs value based on the provisions of Article 1 (transaction value), it is necessary to add certain values to the price that is actually paid or that should be paid, including royalties and license fees relating to imported goods whose customs value is being determined which must be paid by the buyer directly or indirectly, as a condition for the sale of the goods in question, as long as the royalties and license fees are not included in the actual or payable price.²⁵

The Interpretive Note of section 8.1.c further states that royalties and licenses include payments related to patents, trademarks, and copyrights.²⁶

²¹ Ardiansyah, *Pengaturan Nilai Pabean Oleh WTO dan WCO*, (Jakarta: IBLAM School of Law, May 12 2021). p. 15

²² Ardiansyah, "Kedudukan WTO Valuation Agreement Dan Perjanjian Internasional Yang Mengatur Teknis Pelaksanaannya Ditinjau Dari Teori Keberlakuan Hukum Internasional."

²³ Dawny Marbagio and Rita Dwi Lindawati, *METODE MUDAH PENETAPAN NILAI PABEAN Menurut WTO, WCO Dan ACVG Frame*.

²⁴ *Ibid.*

²⁵ Anton ZHUCHKOV, "ANALYSIS OF CURRENT PROBLEMS ON CUSTOMS VALUATION IN UKRAINE AND POSSIBLE MEASURES COMBAT FRAUD BY CUSTOMS VALUATION IN THE CONTEXT OF GATT AND WTO AGREEMENT ON CUSTOMS VALUATION," *Customs Scientific Journal*, no. 2 (2020), <https://doi.org/10.32836/2308-6971/2020.2.7>.

²⁶ Sheri Rosenow and Brian O'Shea, "WTO Valuation Agreement Text," in *A Handbook on the WTO Customs Valuation Agreement*, 2010, <https://doi.org/10.30875/8678054b-en>.

4. The Technical Committee on Customs Valuation (“TCCV”) Opinion on Identical Cases stipulates that royalty payments must be added to the Customs Value²⁷

a. Advisory opinion 4.6:²⁸

1. An importer makes two separate purchases of a concentrate from foreign manufacturer M.

M owns a trademark which may or may not be applied to the goods when they are sold after dilution depending on the terms of a particular sale for importation. The fee for use of the trademark is paid on a per unit basis. The imported concentrate is simply diluted with ordinary water and consumer packed before sale.

In the first purchase, the concentrate is diluted and resold without trademark with no requirement that the fee be paid. In the second case, the concentrate is diluted and resold with trademark and as a condition of the sale for import there is a requirement for payment of the fee.

2. The Technical Committee on Customs Valuation expressed the following view.

Since the goods in the first purchase are resold without the trademark and no fee is paid an addition is not appropriate. In the second purchase the fee required by M must be added to the price actually paid or payable for the imported goods.

Whereas the Technical Committee on Customs Valuation Advisory opinion 4.6 on the case of importation of concentrate which is then added with a diluent and packaged for sale with a trademark, is as follows:

In WCO Advisory opinion 4.6 states that royalty and license payments are conditions for sales and must be added to the price actually paid or payable for imported goods if the goods are resold (after adding diluent and packaged) with a trademark (if the goods are resold with the trademark) and trademark owners as well as manufacturers (suppliers).²⁹

b. Advisory Opinion 4.15

For royalty cases where the sales contract does not contain royalty payment requirements, to determine the condition of sale related to royalty payments is based on the existence of control of the license holder over imports as stated in Advisory Opinion 4.15 in full as follows:³⁰

1. Importer I of country S enters into a licence agreement with licence holder L established in country R under which I is required to pay to L, for the right to use its trademark, a royalty consisting of a fixed percentage calculated on the net income obtained by I from sales in country S of the products bearing such trademark. In the event that I fails to pay L the royalty, L will have the right to terminate the licence agreement. L and I are related under the terms of the Valuation Agreement.

²⁷“World Customs Organization,” accessed August 1, 2023, <https://www.wcoomd.org/en/topics/valuation/instruments-and-tools/advisory-opinions.aspx>.

²⁸Sheri Rosenow and Brian J. O’Shea, *A Handbook on the WTO Customs Valuation Agreement, A Handbook on the WTO Customs Valuation Agreement*, 2010, <https://doi.org/10.1017/cbo9780511733161>.

²⁹Luc De Wulf and Jose B. Sokol, *Customs Modernization Handbook, Customs Modernization Handbook* (The World Bank, 2005).

³⁰Hannes Schloemann and Christian Pitschas, “WTO Customs Valuation Agreement: Customs Value of Goods Imported as Gifts,” *Global Trade and Customs Journal* 8, no. Issue 1 (2013), <https://doi.org/10.54648/gtcj2013001>.

On the other hand, L has signed a supply agreement with company M of country X in order for M to manufacture the goods bearing its trademark and then to sell them to its licensee companies. Under this agreement, M must follow the specifications relating to quality, design and technology provided by L. The agreement also states that M undertakes to produce and to sell products with this trademark exclusively to companies related to L. Company M is not related to L or to I.

I enters into a contract with M under which M undertakes to sell to I goods bearing the trademark of L. There is no requirement in that contract to pay the corresponding royalty.

Is the payment of the royalty from importer I to licensor L a condition of sale of the goods that I purchases from supplier M, and is this royalty related to the goods?

2. The Technical Committee on Customs Valuation expressed the following view.

In this case, L controls the production and marketing processes relating to the goods bearing its trademark, as L decides who will be the manufacturer (M) and the importer (I) of these goods, through the supply and licence agreements, respectively, and furthermore L provides the designs and technology for manufacturer M. In turn, L is related under the terms of the Agreement to importer I, from whom it must then receive payment of the corresponding royalty.

The sales contract between M and I does not contain any clause requiring payment of a royalty. However, payment of the royalty is made as a condition of sale of the goods, because I would not be able to buy them if it failed to make that payment to L. Non-payment of the royalty to L by I would cause not only the termination of the licence agreement but also the withdrawal of the authorization given to M to sell to I the goods bearing such trademark. On the other hand, this possibility of non-payment is commercially unviable because I and L are related under the terms of the Agreement, which means that both companies have mutual business interests.

Also, given that the goods imported by I bear the trademark of L, it can be stated that the licence fees that allow the use of this trademark are related to the goods being valued.

It may therefore be concluded that the amount of the royalties should be added to the price actually paid or payable for the goods.

c. WCO Commentary 25.1

WCO Commentary 25.1 on Third Party Royalties and License Fees, adopted in April 2011 to determine whether royalty payments to third parties unrelated to the seller should be added to the customs value of imported goods. WCO has issued Commentary 25.1, reads in full as follows:³¹

1. The purpose of this document is to provide guidance regarding the interpretation and application of Article 8.1 (c) of the Agreement in cases where a royalty or licence fee is paid to a third-party licensor unrelated to the seller.

³¹ Fernando Piérola, "The Customs Valuation Agreement Interpreted for the First Time by a WTO Panel," *Global Trade and Customs Journal* 4, no. Issue 10 (2009), <https://doi.org/10.54648/gtcj2009042>.

2. Under Article 8.1 (c), royalties and licence fees are to be added to the price actually paid or payable for the imported goods where they are related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalty or licence fees are not included in the price actually paid or payable.
3. A common issue occurring in international trade is where the royalty or licence fee is paid to a third party, that is, a party other than the seller of the imported goods. Typically in these scenarios, the buyer/importer enters into a sales contract with the seller/manufacturer and also enters into a royalty or licence agreement with a third party licensor. In some cases, a royalty or licence agreement also exists between the licensor and seller/manufacturer.
4. For the purpose of making a determination under Article 8.1 (c), it is important to examine all the relevant documents, including the royalty or licence agreement and sales agreement. The royalty or licence agreement allows the owner of intellectual property rights (the “licensor”) to earn revenue from an invention or creative work by charging a user (the “licensee”) a fee or royalty to use the licensed product. The royalty or licence agreement will generally specify what rights are being granted to the licensee; the terms agreed between the licensor and licensee such as the length of the agreement, prohibited uses, rights to transfer and sublicense, warranties, termination of the licence contract, support and maintenance services, quality control provisions, etc.; and details regarding the payment of the royalty and licence fee. By licensing an intellectual property right, the licensor assigns a limited right to use its intellectual property, such as trademarks, but retains its ultimate ownership right. The sales agreement will specify terms and conditions relating to the sale for export of the merchandise being imported. The information contained in these agreements, and other relevant documents, may be indicative of whether the payment of the royalty or licence fee should be included in the customs value under Article 8.1 (c).
5. Where a royalty or licence fee is paid to a third party, it is considered unlikely that the fee would be included in the price actually paid or payable under Article 1. For the purposes of this Commentary, it is assumed that the royalty or licence fees have not been included in the price actually paid or payable. The analysis therefore focuses on the two main questions that stem from Article 8.1 (c):
 - is the royalty or licence fee related to the goods being valued; and,
 - is the royalty or licence fee paid as a condition of sale of the goods being valued ?Determining whether a royalty or licence fee is related to the goods being valued
6. The most common circumstances in which a royalty or licence fee may be considered to relate to the goods being valued is when the imported goods incorporate the intellectual property and/or are manufactured using the intellectual property covered by the licence. For example, if the imported goods incorporate the trademark for which the royalty or licence fee is paid, this would indicate that the fee relates to the imported goods
Determining whether a royalty or licence fee is paid as a condition of sale of the goods being valued

7. A key consideration for determining whether the buyer must pay the royalty or licence fee as a condition of sale is whether the buyer is unable to purchase the imported goods without paying the royalty or licence fee. When the royalty or licence fee is paid to a third party related to the seller of the imported goods, it is more likely that the fee is paid as a condition of sale than when it is paid to a third party unrelated to the seller. There can be various situations where payment of royalties or licence fees is considered a condition of sale even when they are paid to a third party. However, each situation must be analyzed based on all the facts surrounding the sale and importation of the goods, including the contractual and legal obligations contained in relevant documents, such as the sales agreement and the royalty or licence agreement.
8. The clearest indication that the buyer could not purchase the imported goods without paying the royalty or licence fee is where the sales documentation for the imported goods includes an explicit statement that the buyer must pay the royalty or licence fee as a condition of sale. Such a reference would be determinative in deciding whether a royalty or licence fee was paid as a condition of sale. The Technical Committee recognizes however, that the sales documentation may not include such an explicit provision, particularly when the royalty or licence fee is paid to a party unrelated to a seller. In this case, it may be necessary to consider other factors in order to determine whether payment of the royalty or licence fee is made as a condition of sale.
9. The Technical Committee is of the view that whether the buyer is unable to purchase the imported goods without paying the royalty or licence fee depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales and licence agreements and other pertinent information. The following are factors that could be taken into account in determining whether payment of the royalty or licence fee is a condition of sale:
 - (a) There is a reference to the royalty or licence fee in the sales agreement or related documents;
 - (b) There is a reference to the sale of the goods in the royalty or licence agreement;
 - (c) According to the terms of the sales agreement or the royalty or licence agreement, the sales agreement can be terminated as a consequence of breaching the royalty or licence agreement because the buyer does not pay the royalty or licence fee to the licensor. This would indicate a linkage between the royalty or licence fee payment and the sale of the goods being valued;
 - (d) There is a term in the royalty or licence agreement that indicates if the royalties or licence fees are not paid, the manufacturer is forbidden to manufacture and sell the goods incorporating the licensor's intellectual property to the importer;
 - (e) The royalty or licence agreement contains terms that permit the licensor to manage the production or sale between the manufacturer and importer (sale for export to the country of importation) that go beyond quality control.
10. Each case must be considered individually having regard to the relevant circumstances.³²

³²Jin-Kyu KIM and Se-Hun PARK, "A Study on the Customs Valuation of the Taxable Requirements of Royalties and License Fees," *THE INTERNATIONAL COMMERCE & LAW REVIEW* 91 (2021), <https://doi.org/10.35980/krcial.2021.08.91.275>.

5. Customs Valuation Control, published by the World Customs Organization, September 2007, Part IV Chapter 3, Paragraph 15, regarding Royalties or License Fees:³³

“In many cases, the contract of sale for the goods does not explicitly mention that a payment for royalties or licence fee has been made for the goods. Rather a separate agreement is made for patenst, licence or technology supply, etc. Goods often involving royalties or licence fee are musical recording, trademark goods, patented machines or processes”.³⁴

6. ASEAN Customs Valuation Guide,

Royalties and license fees must be added to the actual or payable price provided that:

- a. Bought by Buyers directly or indirectly. It is irrelevant to whom the royalties are paid, what matters is that the buyer is obligated to pay royalties.
- b. Related to goods whose customs value is being determined. Payment of royalties or license fees must be related to the imported goods concerned. Thus, royalties and license fees must be paid as a direct result of the import of these goods and their subsequent use after import.
- c. Requirements for the sale of goods whose customs value is being determined. Apart from being related to imported goods whose customs value is being determined, payments for royalties or license fees must be made because this is a requirement in the sale transaction of the imported goods concerned.³⁵

This means that royalties and license fees must be paid because at the time of the transaction, the buyer agreed to pay royalties or license fees as one of the conditions of the sale. Payments can be made directly or indirectly and there are no conditions stating to whom royalties must be paid. Thus payments can be made not to the seller. So royalty payments and license fees can be made to third parties who are the givers of the rights being transacted. When discussing these requirements the key factor is whether payment of royalties or licenses is a requirement in the sale of imported goods. A common understanding of this issue lies in the following question, “can imports be carried out without paying royalties or licences? If “yes” then the royalty or license payment is not a condition for the sale, otherwise the royalty and license payment is a condition for the sale.”³⁶

B. The judge's view of the import duty dispute case related to payment of royalties for imported goods

1. Decision of the Tax Court on the case of imported Tobacco Blend cut filler
 - a. Case Description

The Appellant imported cutfiller (raw material for cigarette production) and Philip Morris Philippines Manufacturing Inc. (“Philippine PM”). The transaction is based on a Supply Agreement dated 8 July 2010 (which has been effective since 1 January 2010) between the Appellant (as the buyer) and the PM of the Philippines (as the seller).

³³ World Customs Organization, *Customs Valuation Control*, 2007.

³⁴ Sheri Rosenow and Brian O’Shea, “A Handbook on the WTO Customs Valuation Agreement,” in *A Handbook on the WTO Customs Valuation Agreement*, 2010, <https://doi.org/10.30875/6c859031-en>.

³⁵ Dawny Marbagio and Rita Dwi Lindawati, *METODE MUDAH PENETAPAN NILAI PABEAN Menurut WTO, WCO Dan ACVG Frame*.

³⁶ ASEAN, *ASEAN CUSTOMS VALUATION GUIDE* (ASEAN, 2019).

The Appellant imported cutfiller (raw material for cigarette production) and Philip Morris Malaysia Sdn. Bhd. (“PM Malaysia”). The transaction is based on the Contract Manufacturing Agreement dated 25 February 2005 (which has been effective since 1 January 2005) between the Appellant (as the buyer) and PM Malaysia (as the Contract Manufacturer);

Royalty payments were made by the Appellant to PM Global Brands in order to obtain a license in relation to the Appellant's business as a producer and distributor of cigarettes with the trademark “Marlboro” in Indonesia. The License Agreement between the Appellant and PM Global Brands was signed on 1 January 2011 and became effective on 1 January 2011.³⁷

b. Judge's consideration

Disputes related to royalties that have been decided by Decision number Put-48146/PPIM.IX/19/2013 which stipulates that royalty payments by the APPLICANT for the appeal must be added to the Customs Value, as stated on page 66 of the decision as follows:

- Philip Morris Indonesia and Philip Morris Malaysia are affiliated companies (this can be seen in the Contract Manufacturing Agreement Article 1.1 which reads: “Affiliate” means any entity which controls, is controlled by or is under common control with a party, and “Control ” means the ability, directly or indirectly, to direct the affairs of another by means of ownership, contract or otherwise.);
- Philip Morris Indonesia and Philip Morris Product S.A. is an affiliated company (this can be seen in the License Agreement Article 1.1. which reads: “Affiliate” means any entity which controls, is controlled by or is under common control with a party, and “Control” means the ability, directly or indirectly, to direct the affairs of another by means of ownership, contract or otherwise.);
- Philip Morris Indonesia, Philip Morris Malaysia, and Philip Morris Product S.A. is an affiliate and all three are owned by Philip Morris International, based on the Independent Auditor's Report on the Financial Statements of the Appellant;
- Philip Morris Indonesia and Philip Morris Malaysia under the control of Philip Morris Product S.A;
- Cut Filler is the main component of cigarettes (cigarettes) and is not further processed but is ready to be processed for cigarette production;
- Philip Morris Product S.A controls the production, raw materials and sales of Philip Morris Indonesia (this can be seen in Article 4 of the License Agreement which reads: QUALITY CONTROL
- QUALITY CONTROL. Licensee shall manufacture, and procure that any Authorized Manufacturer manufactures, the Products in strict accordance with the Specifications and shall not sell any Products which are not so manufactured. Licensee shall submit to PMPSA or its designees each calendar quarter fair samples of all Products that have been manufactured and sold by it during the preceding calendar quarter. PMPSA shall at all times during the term of this Agreement be entitled to inspect, by its duly authorized agents, any premises where the Products are manufactured or stored, or where materials to be used in their manufacture are stored, by Licensee or any Authorized Manufacturer or for their respective accounts, and said agents shall have free access to all parts of said premises and may inspect and test the Products or such materials and make copies of the related books and records of Licensee or any

³⁷ Putusan Pengadilan Pajak, “Put-48146/PPIM.IX/19/2013.”

Authorized Manufacturer. PMPSA shall have an unqualified right to require such changes in materials or methods of manufacture as may reasonably be necessary to secure the production of Products complying in all respects with the Specifications, dan Pasal 7 yang berbunyi: TECHNICAL ASSISTANCE AND IMPROVEMENTS. PMPSA shall supply such technological assistance as PMPSA deems necessary or appropriate to enable Licensee or any Authorized Manufacturer to manufacture and sell the Products in accordance with the Specifications. Licensee or any Authorized Manufacturer shall assume the cost of reasonable travel and living expenses associated with the provision of such assistance. Licensee or any Authorized Manufacturer shall promptly communicate to PMPSA without charge any improvements relating to the Other Intellectual Property Rights Made by it or its employees, and once communicated such improvements shall become the sole property of PMPSA.);

- Royalty payments are not only for trade marks but also know how or other intellectual property rights (this can be seen in the License Agreement point B which reads: "PMPSA wishes to license the trademarks and certain other intellectual property rights to licensee, and licensee wishes to use the trademarks and other intellectual property rights, subject to and in accordance with the terms and conditions hereof.", and Article 1.6 which reads: "other intellectual property rights means any industrial and intellectual property rights, other than the trademarks, applicable to the products, as to which PMPSA has at any time during the term of this agreement the right to grant licenses and which are protected by statute, at law or in equity in the territory and/or in the country of manufacture of the product pursuant to this agreement, if this shall be other than territory, including all registered and unregistered copyright and similar rights which may subsist or may hereafter subsist in work or other subject matter, rights in relation to inventions (including patents and patent applications), right in relation to know-how, confidential information formation and trade secrets, and rights in relation to designs (whether registrable or not registrable);

The Assembly is of the opinion that the payment of royalties from Philip Morris Indonesia for the import of Cut Filler from Philip Morris Malaysia by Philip Morris Indonesia must be added to the Customs Value. Philip Morris Indonesia) in a royalty-related dispute was decided by the Tax Court in decision number Put-48146/PPIM.IX/19/2013 which stipulates that royalty payments by the APPLICANT for the appeal must be added to the Customs Value.³⁸

2. Decision of the Tax Court on the import of shoes

a. Case Description

- Goods traded by the Appellant in Indonesia are licensed goods, most of which are imported goods originating from the following countries: Bangladesh, Bosnia, Bulgaria, Cambodia, China, Egypt, El Salvador, Greece, Hong Kong, India, Israel, Italy, Malaysia, Mexico, Pakistan, Philippines, Singapore, Sri Lanka, Taiwan, Thailand, Turkey, USA, and Vietnam.
- The royalties for the License Items are paid to NIKE European Operation Netherlands in accordance with the invoice issued by NIKE International Ltd. In the Exclusive Distribution Agreement and Intellectual Property License, it states:

³⁸ Ibid.

- “The licensee has the right to subcontract for (i) manufacture of licensed products by finished product suppliers, (ii) import of licensed products into the licensed area, and (iii) marketing, demand creation, sales agency services or other services. etc. ...”
- However, these rights are still bound by the terms outlined by the Licensor, which include:
- If the Licensor does not approve the Licensed Items for the reason that the nature or quality of the Licensed Items is not satisfactory according to the Licensor, the Licensor must immediately stop all production and sales of the unapproved Licensed Items, or
- if requested by the Licensor, the Licensee will disclose to the Licensor the name and address of the subcontractor of the Licensee who produces the finished Licensed Goods, or its components that have Trademarks, for the purpose of inspection and product quality, or
- In no event shall the Licensee permit its subcontractors to dispose of defective Licensed Items without the written consent of the Licensor.

b. Judge's consideration

that based on the matters mentioned above, the Assembly concludes that the royalties paid by the Appellant to Nike European Operations Netherlands B.V meet the three requirements, namely:

a) Paid by the buyer directly or indirectly

To purchase goods, the buyer is required to pay royalties or license fees. Regardless of whether royalty payments are made to sellers or other parties (royalty holders or their proxies) who are not involved in the transaction of the imported goods in question, What is meant by terms of sale is that there is a legal obligation in a contract/agreement to pay royalties and if this obligation is not fulfilled then the contract/agreement becomes null and void.

b) Is a requirement for the sale of imported goods;

c) Relating to imported goods;

The imported goods in question have Intellectual Property Rights, among others in the form of trademark rights, copyrights or patent rights (in the imported goods there is a patented work process), so that it is a cost that must be added to the price actually paid or that should have been paid.³⁹

IV. CONCLUSION

For the purpose of customs valuation, royalty payments to third parties for intellectual property related to imported goods must be added to the actual or supposed price. It is irrelevant to whom the royalties are paid, what matters is that the buyer is obligated to pay royalties. Payment of royalties or license fees must be related to the imported goods concerned. Thus, royalties and license fees must be paid as a direct result of the import of these goods and their subsequent use after import.

Of the two cases, namely the Tax Court Decision on the Tobacco Blend cut filler import case and the Tax Court Decision on the shoe import case, the court decided to include in the customs value the payment of intellectual property royalties to third parties. However, in several cases, there were variations in implementation by both the Government and the courts.

³⁹ Putusan Pengadilan Pajak, “Put-46435/PP/M.VII/19/2013.”

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