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Tax News Flash

- Transfer Pricing & Customs

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Samjong KPMG Transfer Pricing & Customs Service Group provides readers Transfer Pricing & Customs related recent local tax issues and trends.

This newsletter is a monthly publication of Samjong KPMG Transfer Pricing & Customs Service Group. If you need more detailed explanation, please feel free to contact key contacts or Tai-Joon Kim for transfer pricing matters and Tae-Joo Kim for customs matters.

The following is a recent Korea's tax ruling in relation to transfer pricing

A decision on whether the fee paid by the taxpayer to the overseas parent company is subject to royalty income.
<Tax Tribunal Decision 2021Suh5598, 2023.08.09>

Background

- The taxpayer provides a service to distribute contents in Korea, then pays a Distribution Fee to the overseas parent company (hereinafter, 'HQ'). The Distribution Fee is in accordance with the subscription fee paid by the local subscribers. Accordingly, the taxpayer deemed the Distribution Fee as a business revenue of HQ and did not pay withholding tax for the Distribution Fees.

- The Tax Office claims that the taxpayer received a license for a right to use the copyright regarding video contents provided by the HQ. Accordingly, the fee paid by the taxpayer to the HQ is a royalty for copyright and would be subject to withholding tax.

Taxpayer's (Plaintiff) Claims

- The taxpayer claims that it contracted with the HQ for the purposes of service provision and was not licensed to use any copyright. The taxpayer was established for the purposes of non-exclusive distribution of membership in Korea. Accordingly, the taxpayer paid a fee to the HQ after the taxpayer recorded an arm's length profit margin for the resale of membership in Korea in its book.

- The taxpayer performed functions such as marketing and promotion that is necessary for the resale of membership. However, the taxpayer does not operate any department or personnel that would perform tasks relating to the distribution of contents.

Tax Office's (Defendant) Claims

- Although the taxpayer claims to be a limited risk distributor, the Tax Office claims the taxpayer to be the main entity to perform services considering that the taxpayer directly contracts with the subscribers, allows access to the HQ's contents, recipient of subscription fee, and performs maintenance for the website.

- Moreover, the taxpayer has been licensed the right to use copyright for HQ's contents to provide services to local subscribers. In order to provide streaming services for contents, the taxpayer can be deemed to have the right to transmit and reproduce such contents.

Tax Tribunal Decision

In accordance with the agreement between the taxpayer and the HQ, the taxpayer claims to distribute contents in the local market without the license which gives the right to use copyright. However, in consideration of the way in which the taxpayer provides services, the right to reproduce, transmit, and distribute is essentially licensed to the taxpayer.
Accordingly, the Tax Tribunal ruled that the fee paid by the taxpayer to the HQ is a royalty payment and is subject to withholding tax.

The following is a recent Customs-related Court case in Korea

Whether the subject product fall under the definition of 'free of charge imports' as defined in Article 17(1) of the Enforcement Decree of the Customs Act, therefore the customs value of the subject product cannot be determined under Article 30 of the Customs Act [Supreme Court, 2018du47714]

1) Fact

In 2004, the plaintiff, which manufactures and sells pharmaceuticals by importing pharmaceutical raw materials, signed an exclusive purchase agreement (hereinafter referred to as the "Agreement") with Japanese corporation A for enzyme-based raw pharmaceutical products, under which a certain percentage of the purchase volume was provided free of charge as a "Free Sample" when the purchase volume exceeded the annual threshold (hereinafter referred to as "Special terms and conditions"). The plaintiff subsequently renewed Special terms and conditions four times by changing the quantity of free samples.

In 2014, the plaintiff filed an import declaration for the raw pharmaceutical product (hereinafter referred to as 'the subject product'), which was provided free of charge, at an arbitrary price of 5000 yen/BU (Billion Unit).

After a customs audit of the Plaintiff in 2015, the Defendant denied the declared customs value of the Goods, finding that the subject products were free of charge imports and did not fall under the definition of 'goods sold for export to Korea' in Article 30(1) of the Customs Act, and assessed additional duties and other taxes against the Plaintiff, based on the transaction price

of the raw pharmaceutical purchased for commercial in accordance with Article 31 of the Customs Act (hereinafter referred to as the 'Tax Assessment').

The Plaintiff argued that the Agreement was an annual purchase contract in which a provisional base price was set for each year, and the final price was determined by supplying additional discounted quantities after the purchase of a certain quantity, and that the Special terms and conditions stipulated a quantity discount as a ‘price adjustment term’, therefore, the actual price paid for the subject product should be based on the 'total amount paid', which is the price of the commercial goods, divided by the 'total amount purchased', which is the sum of the commercial goods and the free of charge goods (subject product).

2) Issue

Whether the subject product fall under the definition of ‘free of charge imports’ as defined in Article 17(1) of the Enforcement Decree of the Customs Act, therefore the customs value of the subject product cannot be determined under Article 30 of the Customs Act.

3) Decision

The Agreement stipulates that if the annual purchase quantity is less than 1,688 BU, the additional supply will be 10% or 11% of the annual purchase quantity, and if the annual purchase quantity is more than 1,688 BU, the additional supply will be at a higher rate by section, so it is expected that a certain percentage of the goods will be supplied as a result. As this is an annual purchase contract with an actual price calculation method as claimed by the plaintiff, and the additional supplies are not less than 10% of the annual purchase quantity, it is difficult to conclude that the subject product are ‘free of charge imports’ as defined in Article 17(1) of the Enforcement Decree of the Customs Act.

4) KPMG’s comment

The subject court case is significant as it is one of the few cases in which the principle of substantive taxation has been applied to the determination of the value of imported goods that are dutiable under the Customs Act.

The subject product was ‘free samples’ and the plaintiff did not pay any consideration for exporter, and it is true that the Special terms and conditions of the Agreement stipulated that the goods were imported free of charge.

However, the Supreme Court viewed the Agreement as a structure in which the price of the goods was determined on a yearly basis according to the quantity supplied, the same as the general price adjustment terms, and held that even if the goods were supplied under the name

of 'free sample' and no consideration was paid at the time of importation, the final transaction price was not finalized under the Agreement, but that it could not be considered free of charge transaction.

If the company imports goods under a supply agreement similar to the case, and the transaction price is denied and determined by the method under Article 31 – 35 of the Customs Act, it is recommended to obtain professional opinions and explore the opportunity to apply for the tax refunds by trying to receive an official ruling.

Key Contacts

Samjong KPMG Transfer Pricing & Customs Service Group

Gil-Won Kang
Head of TAX 6
T. +82-2-2112-0907

Seung-Mok Baek
TP Partner
T. +82-2-2112-0982

Sang-Hoon Kim
TP Partner
T. +82-2-2112-7939

Tai-Joon Kim
TP Partner
T. +82-2-2112-0696

Yong-Jun Yoon
TP Partner
T. +82-2-2112-0277

Tae-Joo Kim
Customs Partner
T. +82-2-2112-7448

Young-Bin Oh
Customs Partner
T. +82-2-2112-0435

27th Floor, Gangnam Finance Center, 152, Teheran-ro, Gangnam-gu, Seoul, Korea