



**The regulation of retroactive transfer pricing adjustments
and valuation of imported goods under the *Customs and
Excise Act 91 of 1964***

Dissertation accepted in fulfilment of the requirements for the degree of Master of
Laws in the Faculty of Law

North-West University

BY

Maselwa Oratile

LLB

24431915

 **orcid.org/0000-0003-4164-8949**

Supervisor: Prof HT Chitimira

Graduation: November 2020

SOLEMN DECLARATION

I **Oratile Maselwa**, hereby declare that the Dissertation, entitled: **The regulation of retroactive transfer pricing adjustments and valuation of imported goods under the *Customs and Excise Act 91 of 1964***, is submitted in fulfilment of the requirements for the Master of Laws(LLM) degree is the product of my research and option with the exception of references of the sources acknowledged herein and that I have not any prior time submitted it to any university or by any person for any qualification.

Signature of Candidate: O. Maselwa

University Number: 24431915

Signed at NWU Mafikeng on this.....day of November 2019

Declared before me on this day of November 2019

Signature of Supervisor.....

ACKNOWLEDGEMENTS

Firstly, I would like to thank the Lord Almighty.

I gratefully acknowledge and extend my sincere gratitude to Prof HT Chitimira under whose supervision this dissertation was conducted, for his unwavering support, his graciously devoted time, extensive guidance, advice, patience and motivation he has shown me throughout this dissertation. God bless him.

I also like to thank my family, friends and colleagues for the support provided during this journey.

DEDICATION

To my late mother, Tuelo Maselwa

ABSTRACT

Retroactive transfer pricing adjustment is defined as the adjustment of prices of goods sold within the MNEs in accordance with its transfer pricing policy. Retroactive transfer pricing adjustment is usually performed yearly, and such an adjustment ultimately affects the customs value of goods imported by the MNEs within the financial year that the adjustment is performed. In this regard, the customs declarations of previous imports that are affected by the performed adjustments must be amended. The prices can be adjusted downwards or upwards depending on whether the targeted margin was met. This adjustment of the price of imported goods must also be reported to SARS customs, and the bill of entries affected by such adjustment must be amended accordingly by way of voucher of correction. The regulation of retroactive transfer pricing adjustments is imperative to the economy of South Africa. Considering that MNEs might have a considerable number of imports from the parent company or other subsidiaries over-seas, the requirement to process a voucher of correction for the import transactions affected by the retroactive transfer pricing turns to be an administrative burden for both SARS and MNEs. In certain instances, the exercise of processing what can be thousand of vouchers of correction tend to become an impractical task for both MNEs and SARS. The other challenge of retroactive transfer pricing adjustments is that they are prone to manipulation by the MNEs to perform only downward adjustments to evade paying the correct customs duties. Accordingly, this research recommends that South Africa should establish measures to properly regulate retroactive transfer pricing adjustments and customs valuation. In this regard, the researcher discusses the measures that could be employed to circumvent possible manipulation of retroactive transfer pricing adjustments and eliminate the administrative burden associated with processing vouchers of correction.

Keywords: transfer pricing, retroactive transfer pricing adjustments, customs valuation, voucher of correction; downwards and upwards adjustments

TABLE OF CONTENTS

SOLEMN DECLARATION	i
ACKNOWLEDGEMENTS	ii
DEDICATION	iii
ABSTRACT	iv
CHAPTER ONE	1
RESEARCH OUTLINE	1
1.1 <i>Introduction</i>	1
1.2 <i>Background of the Study</i>	5
1.3 <i>Statement of the Problem</i>	9
1.4 <i>Aims and Objectives</i>	14
1.4.1 <i>Aims</i>	14
1.4.1 <i>Objectives</i>	15
1.5 <i>Research Question</i>	15
1.6 <i>Rationale and justification</i>	15
1.7 <i>Literature Review</i>	16
1.8. <i>Assumptions and Hypothesis</i>	23
1.8.1 <i>Assumptions</i>	23
1.8.2 <i>Hypothesis</i>	24

1.9	<i>Scope and Limitations of the Study</i>	24
1.10	<i>Research Methodology</i>	25
1.11	<i>Relevance to Research Unit flame</i>	26
1.12	<i>Ethics</i>	26
1.13	<i>Framework (Structure) of the study</i>	26

CHAPTER TWO

HISTORICAL ASPECTS OF RETROACTIVE TRANSFER PRICING ADJUSTMENTS AND CUSTOM VALUATION OF GOODS IN SOUTH AFRICA

2.1	<i>Introduction</i>	28
2.2	<i>Definition of historical Aspects of retroactive transfer pricing Adjustment in South Africa</i>	29
2.3	<i>The meaning of Historical Aspects of Customs Valuation in South Africa</i>	38
2.4	<i>Overview of historical aspects of retrospective transfer pricing adjustment and customs valuation in South Africa</i>	40
2.5	<i>Conclusion</i>	41

CHAPTER THREE

CURRENT REGULATORY ASPECTS OF RETROACTIVE TRANSFER PRICING ADJUSTMENT IN SOUTH AFRICA

3.1	<i>Introduction</i>	42
3.2	<i>The Regulation of Retroactive Transfer under the CEA</i>	45
3.3	<i>The Regulation of Retroactive Transfer Pricing under the Customs Duty Act and Customs Control Act</i>	52
3.4	<i>Customs Valuation in terms of the transaction</i>	54
3.4.1	<i>Transaction value method</i>	56
3.4.1.2	Instances where the transaction value cannot be accepted because parties are related	57
3.4.2	<i>The transaction value of identical goods method</i>	58
3.4.3	<i>The transaction value of similar goods method</i>	59
3.4.4	<i>The deductive value method</i>	60
3.4.5	<i>The computed value method</i>	61
3.4.6	<i>Residual method</i>	62
3.5	<i>Conclusion</i>	62

CHAPTER FOUR

CHALLENGES ASSOCIATED WITH THE RELIANCE ON RETROACTIVE TRANSFER PRICING ADJUSTMENT IN SOUTH AFRICA

4.1	<i>Introduction</i>	64
4.2	<i>Challenges Associated with Retroactive Transfer Pricing Adjustments in South Africa</i>	67

<i>4.2.1 The requirement to pass a voucher of correction by MNEs on Retroactive Transfer Pricing Adjusted Transactions</i>	67
<i>4.2.2 The complexity of the Customs Valuation Methods</i>	70
<i>4.2.3 The use of Transfer Pricing Policy documentation for Customs Valuations Retroactive Transfer Pricing Adjusted Transactions</i>	73
4.3 Conclusion	77
CHAPTER FIVE	
CONCLUSION AND RECOMMENDATIONS	
5.1 Introduction	79
5.2 Recommendations	81
5.3 Conclusion	96
BIBLIOGRAPHY	99
LIST OF ABBREVIATIONS	118

CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

Customs valuation and adjustments of the customs value are currently regulated by the *Customs and Excise Act* (as amended)¹ in South Africa. The *CEA* provides that customs duties on imported goods must be based on the customs value determined by the process of customs valuation.² In this regard, it is important to determine the correct customs value at the time of importation for the correct customs duties to be levied. Furthermore, the *CEA* provides for retroactive adjustments of the customs value, which entails that transfer prices declared can be adjusted retrospectively after a certain period.³

Retroactive transfer pricing adjustment is the adjustment done in accordance with the transfer pricing policy of a concerned related party, usually Multinational Enterprises (MNEs). Prices of goods sold within MNEs are referred to as transfer prices. Thus, retroactive transfer pricing adjustments occur only within related parties, and for the purposes of this research, the focus is placed only on MNEs. When the MNEs perform the retroactive transfer pricing adjustments, such adjustments affect the customs value of goods imported by the MNEs within the group. This entails that the customs value of the goods imported within the group have to be adjusted, and the customs declarations passed also have to be amended by the MNEs.

The legislature enacted the *Customs Duty Act*⁴ and the *Customs Control Act*⁵ that are not yet in effect,⁶ to regulate customs valuation and retroactive transfer pricing

¹ 91 of 1964 (*CEA*), see sections 65, 66 and 67; see related discussion by De Wet E, Hestermey H and Wolfrum R *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press South Africa 2015) 215.

² See section 47 of the *CEA*; See related discussion by Malm M *Customs Valuation and Transfer Pricing Two Sides of the Same Coin* (LLM dissertation 2009) 2.

³ See section 66(1) of the *CEA*.

⁴ 30 of 2014 (*Customs Duty Act*), see sections 115-135; see related discussion by Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM dissertation University of Pretoria 2016) 46.

⁵ 31 of 2014 (*Customs Control Act*), see sections 174 and 178; see related discussion by Subban V "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 1; 4; Amadi V *Customs Reform as a Means To Enhancing Trade Facilitation for Increased Market Access: A South African Perspective* (LLM-dissertation University of the Western Cape 2015) 64.

adjustments once they come into effect. The *Customs Duty Act*⁷ will have provisions relating to customs valuation for cross border transactions within the MNEs. On the other hand, the *Customs Control Act*⁸ will have provisions relating to entries that must be processed by the MNEs as a result of retroactive transfer pricing adjustments. The *Customs Duty Act* and the *Customs Control Act* were published in the government gazette on 14 July 2014,⁹ but will only come into effect on the date to be determined by the president.¹⁰ The researcher submits that statutory rules and regulations to the *Customs Duty Act* and the *Customs Control Act* are still being drafted. Therefore, the *Customs Duty Act* and the *Customs Control Act* are not yet into effect. Moreover, the South African Revenue Services (SARS) is still preparing for the implementation of the *Customs Duty Act* and the *Customs Control Act* by drafting relevant policies and updating its systems to align them with the provisions of the *Customs Duty Act* and the *Customs Control Act*.¹¹ The current policies and systems on customs regulation in South Africa are based on the provisions of the *CEA* which will change once the *Customs Control Act* and the *Customs Duty Act* come into effect.

The *Customs Duty Act* will deal with the imposition and collection of customs duties by making provisions for payment of duties on goods imported into South Africa with provisions enabling SARS to impose and collect customs duties.¹² The *Customs Control Act*, on the other hand, will make provisions for the procedural aspects like processing declarations and passing of vouchers of corrections.¹³ The *Customs Duty Act* and *Customs Control Act*, just like the *CEA* will not deal precisely with retroactive

⁶ See section 927 of the *Customs Control Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 46.

⁷ See sections 115-135 in chapter 7 of the *Customs Duty Act*.

⁸ See sections 174, 177 and 178 of the *Customs Control Act*; see related discussion by Subban V "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 1; 4;

⁹ Sieberts ZC *The Impact of the Amendments to the VAT Act in respect of Indirect Export Transactions by Road or Rail* (LLM-dissertation University of Pretoria 2014) 71.

¹⁰ See section 944(1) of the *Customs Control Act*; see related discussion by see related discussion by Fritz C *An Appraisal of selected Tax-Enforcement Powers of the South African Revenue Services in the South African Constitutional Context* (LLD dissertation University of Pretoria 201) 92.

¹¹ See section 942 of the *Customs Control Act*; see related discussion by Amadi *Customs Reform* 65.

¹² See section 19 (1) of the *Customs Duty Act*; see relate discussion by Fritz C *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service* 107.

¹³ See sections 163 and 174 of the *Customs Control Act*.

transfer pricing adjustments but with valuation and declaration of cross-border transactions that will be subjected to retroactive transfer pricing adjustments.

The enactment of the *Customs Duty Act* and the *Customs Control Act* was aimed at aligning the South African customs to the modernisation of customs procedures as prescribed by the *International Convention on the Simplification and Harmonization of Customs Procedures*.¹⁴ South Africa is a member state of this Convention. As a result, South Africa has the obligation to ensure that its customs legislation and customs procedures are aligned with the Kyoto Convention. The Convention assists customs authorities around the world with harmonisation and simplification of customs procedures. The legislature has separated excise and customs by enacting the *Excise Duty Act*,¹⁵ which will only deal with excise matters. As a result, this research does not discuss the *Excise Duty Act* in detail. Excise matters deal with locally manufactured goods; this research focuses on the customs value of imported goods within MNEs. The *Excise Duty Act* will deal only with excise matters. Retroactive transfer pricing and customs valuation are not excise matters, as matters concerning the importation of goods will be dealt with under the *Customs Control Act* and *Customs Duty Act*. Excise is the form of tax imposed on goods considered to be luxurious and sometimes harmful to health, environment, etc., manufactured locally in South Africa or imported.¹⁶ Retroactive transfer pricing adjustments and customs valuation are dealt with when there is valuation of imported goods, and for the purpose of this research, the focus is on the importation of goods within MNEs.

Transfer pricing is the determination of transfer prices for transactions between related parties¹⁷ such as Multinational Enterprises (MNEs). Transfer pricing only occurs between related parties and this research is limited to MNEs only. Transfer pricing can be defined as the determination of cross-border transfer prices between

¹⁴ See Article 16 of the *International Convention on the Simplification and Harmonization of Customs Procedures* 30 March (1999) (Revised Kyoto Convention).

¹⁵ 91 of 1964 (*Excise Duty Act*), see section 5; see related discussion by Gabriel KC *Comparison on the Rules of Origin for Customs and Excise* (MCom in Taxation University of Pretoria 2014) 18.

¹⁶ Preece R "Key Controls in the Administration of Excise Duty" 2008 *World Customs Journal* 72; 73.

¹⁷ See section 31 of the *Income Tax Act* 58 of 1962; see related discussion by Eden L *Business and Management, Finance and Economics, International Business Transfer Pricing, and the Multinational Enterprise* (Oxford University Press Great Clarendon St 2009) 593; see related discussion by Helland AT *Application of Transfer Pricing-Efficiency and Taxation* (Master's thesis in Industrial Economics University of Stavanger 2010) 6.

related or associated parties. As a result, this research deals with transfer pricing within MNEs on their cross-border transactions, with a specific focus on retroactive transfer pricing adjustments. The price within MNEs is not normally the same price between unrelated parties, as the price may be influenced by the relationship of companies within an MNE. As a result, the transfer pricing must be properly regulated to ensure that it is not used by MNEs to evade taxes by performing downward adjustment in order to pay less customs duties.

Transfer pricing is a mechanism used by MNEs to determine the prices of goods bought and sold within the concerned MNE.¹⁸ However, transfer pricing may be manipulated by MNEs for tax advantages. As a result, the prices of goods bought and sold within an MNE are often viewed with scrutiny by the South African Revenue Service (SARS) customs as they are prone to manipulation by MNEs. The scrutiny by SARS includes conducting post-clearance audits on cross-border transactions within MNEs. In order to prevent the evasion of customs duties, SARS customs must ensure that the price declared by MNEs is not manipulated by the MNEs.

One may also define transfer pricing as the determination of the price of goods and services between affiliated companies¹⁹ situated in different tax authorities.²⁰ These prices determined and declared by the MNEs must be the transaction value of the goods in terms of the *CEA*²¹ and the *Customs Duty Act* (when it comes into effect).²² The transaction value method is the primary valuation method prescribed by the *CEA* for the valuation of imported goods.²³ The transaction value of goods is the true value of imported goods, and on such transaction value, the correct customs duties can be levied. Retroactive transfer pricing adjustments is the adjustment of the customs value of previous imports transaction of an MNE. Retroactive transfer pricing adjustments occur as a result of the transfer pricing policy of the concerned

¹⁸ Perčević H and Hladika M “Application of Transfer Pricing Methods in Related Companies in Croatia” 2017 *Economic Research-Ekonomska Istraživanja* 613.

¹⁹ See section 31 of the *Income Tax Act* 58 of 1962; see related discussion by Feinschreiber R *Transfer Pricing Methods: An Applications Guide* (John Wiley & Sons Inc Hoboken New Jersey 2004) 49.

²⁰ See section 31 of the *Income Tax Act* 58 of 1962; see related discussion by Perčević and Hladika 2017 *Economic Research-Ekonomska Istraživanja* 611.

²¹ Section 66 of the *CEA*; see related discussion by by Michaletos “More Holistic Planning Around Custom Valuation and Transfer Pricing” *News and Press TaxTalk* (15 November2013) 44.

²² Section 131 of the *Customs Duty Act*; see related discussion by Michaletos *News and Press* 44.

²³ See section 66 of the *CEA*.

MNE, which dictates whether the customs value of previous imports must be adjusted downwards or upwards for the MNEs to meet its targeted profit margins. The research discusses retroactive transfer pricing adjustments as they are the type of adjustments catered for under the *CEA*.

Due to large percentages of cross border transactions between MNEs, there is a need for adequate and clear legislative provisions to regulate the determination of customs value on retroactive transfer pricing adjusted²⁴ transactions in South Africa. If retroactive transfer pricing adjustments are not properly regulated, the fiscus could suffer great loss as retroactive transfer pricing adjustments may be used by MNEs to evade customs duties. The proper regulation of retroactive transfer pricing adjustment and determination of the customs value has important benefits to both MNEs and SARS. MNEs will have certainty regarding the customs value to be declared at the time of importation. As a result, the MNEs will avoid potential penalties associated with under-valuation and costs associated with passing vouchers of corrections. Robust legislative provisions will curb the possibilities of undervaluation. SARS, on the other hand, will benefit due to the relief on the administrative burden as there will be no need to process vouchers of corrections amending the customs value when there are adequate legislative provisions on retroactive transfer pricing adjustments.

1.2 Background to study

MNEs often make transfer pricing adjustments at the end of the financial year.²⁵ Only MNEs can have transfer prices since transactions within the MNEs are controlled. This is done to achieve the gross margin profit set by the MNE's in terms of their transfer pricing policies, budgets, and forecasting.²⁶ However, MNEs may not always achieve the profits that were planned for at the beginning of the financial year. As a result, the MNEs have to make voluntary retroactive transfer pricing adjustments²⁷ to

²⁴ Bulana 2016 *Munich Personal Repec Archive* 16.

²⁵ Tuominen J *The link between Transfer Pricing and the EU Customs Valuation Law: Is there any and how could it be Strengthened?* (Masters Dissertation Master's Programme in European and International Tax Law Lund University 2018) 18.

²⁶ Brown GA, Green WH and Johnson AD *U.S Transfer Pricing Sourcebook* (World Trade Executive Corncord USA 2005) 8.

²⁷ Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation Law* 18.

the customs value of goods imported throughout the year. These adjustments are made to reflect the true profit achieved by the MNE for the respective financial year.

Retroactive transfer pricing adjustment is the amendment to the cost price of imported goods, either through a debit (downwards) or credit (upwards) note to ensure that a limited risk distributor's operating margin falls within that prescribed by the MNE's transfer pricing policy.²⁸ This affects the customs value of declarations passed by the MNEs throughout the year as the corresponding adjustments must be performed. The only way to remedy the situation is for the MNEs to pass vouchers of correction, amending the customs values that were affected by the retroactive transfer pricing adjustments. Passing vouchers of corrections for what can be thousands of entries passed throughout the year is costly and cumbersome for the MNEs.²⁹ Additionally, this causes a heavy administrative burden for SARS to capture and process the voucher of corrections.

SARS levies customs duties on the value of imported goods.³⁰ In order to levy duties, there is a need for customs valuation by both SARS and the MNEs. Customs valuation by MNEs and SARS enables them to determine the correct customs value which in turn enables the correct assessment of the customs duties. Customs duties are based on the customs value; therefore, the correct customs value results in correct customs duties. Customs valuation is the determination of the value of imported goods by the MNEs when processing an import declaration or by SARS in the case of an application by the importer for a value determination or when SARS performs a post-clearance audit.³¹ In other instances, SARS may determine the value of imported goods when they stop the goods at the time of importation.

²⁸ Gaarlandt F, Ramathodi O and Rheeder C "South African Tax Authorities Increase Scrutiny Of Retroactive Transfer Pricing Adjustments" *Indirect Tax Alert* (26 February 2015) 1; see related discussion by Harmse L and Van der Zwan P "Alternatives for the treatment of transfer pricing adjustments in South Africa" 2016 *De Jure* 288; 230.

²⁹ Michaletos *News and Press: TaxTalk* 45.

³⁰ See section 44 of the *CEA* and section 19 of the *Customs Duty Act*; see related discussion by Wijnbeek DH *The Admissibility of Evidence in Tariff Classification for Customs Duty* (LLM Mini-Dissertation North-West University 201) 1; Belapure AM *Export & Import Management* (Horizon Books United States of America 2014) 153.

³¹ See section 65 (4) of the *CEA*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 50.

The determination of the value of imported goods enables SARS to impose duties as the duties are proportional to the value of imported goods.³² A valuation problem occurs when retroactive transfer pricing adjustments take place on cross border transactions of MNEs as it is often difficult to determine the correct customs value on transactions subjected to retroactive transfer pricing adjustments. The difficulty is due to uncertainty when it comes to determining the correct customs value on retroactive transfer pricing adjusted transactions.³³ The uncertainty is caused by the fact that there are no clear-cut rules on the valuation of cross border retroactive transfer pricing adjusted transactions within MNEs. Sufficient legislative provisions on the determination of customs value on cross border retroactive transfer pricing adjusted transactions for South Africa is the solution to these uncertainties.

The problems of retroactive transfer pricing adjustment are a result of the inadequacy of the current provisions of the *CEA*,³⁴ the *Customs Control Act*³⁵ and the *Customs Duty Act*,³⁶ which prescribes a hierarchical use of customs valuation methods and processing of vouchers of correction on adjusted transactions. The valuation provisions under *CEA* are inadequate on retroactive transfer pricing adjusted transactions as it does not prescribe which valuation method that can be used. The *CEA*³⁷ prescribes the transaction value as the primary method of valuation, and it requires the transaction value method to be eliminated before the alternative methods can be used. The transaction value method is not always the best valuation method to use on retroactive transfer pricing adjusted transaction. The alternative valuation methods are eminent as one would have to compare the prices declared with prices of similar or identical goods sold between independent parties to establish if the relationship within the MNE influenced the price paid or payable for the imported goods.

³² See section 44 of the *CEA*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 6.

³³ See section 65, 66 and 67 of the *CEA*; see related discussion by Ragvald S *Uncertain Transfer Pricing Rules– A Comparison of Three Jurisdictions* (Master thesis University of Lund 2007) 4.

³⁴ See sections 65, 66 and 67 of the *CEA*; see related discussion by De Wet, Hestermey and Wolfrum *The Implementation of International Law* 215.

³⁵ See sections 174 and 178 *Customs Control Act*; see related discussion by Michaletos *News and Press: TaxTalk* 45.

³⁶ See sections 115-135 of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

³⁷ See section 66 of the *CEA*.

The methodology for determining the customs value for imported goods subject to *ad valorem*³⁸ duty rates is set out in the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (Valuation Agreement).³⁹ The World Trade Organisation (WTO) member countries must implement the Valuation Agreement.⁴⁰ The implantation of the WTO is needed to have uniform methods to determine the value of goods internationally when countries trade with each other.⁴¹ This facilitates trade and enables the customs authority to impose and collect the correct customs duties. South Africa is a member of the WTO and has implemented the Valuation Agreement through the enactment of the valuation provisions in the *CEA*.⁴² South Africa, as a result, determines the value of imported goods according to the provisions of the *CEA* and use the Valuation Agreement as a guide. It is submitted that South Africa will determine the value of imported goods in terms of the *Customs Duty Act* once it comes into effect. ⁴³ The provisions relating to value determinations will be contained in the *Customs Duty Act* when it comes into effect.

The World Customs Organisation (WCO) is an intergovernmental organisation with more than 170 member states,⁴⁴ including South Africa. The WCO is the mother body of customs authorities around the world with the main purpose of providing coordination and assistance to its member countries in customs matters.⁴⁵ The WCO published a guide referred to as the Guide to Customs Valuation and Transfer Pricing⁴⁶ that deals with transfer pricing and customs valuation issues. The guide

³⁸ *Ad valorem* refers to a rate of duty that is based on the percentage of the customs value.

³⁹ *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994) Agreement 1868 U.N.T.S. 279; see related discussion by Bulana O "Transfer Pricing and Customs Valuation: Key Differences and Mitigation of Potential Risks" 2016 *Munich Personal Repec Archive* 1; 3.

⁴⁰ Rajkarnikar PR "Implementation of The WTO Customs Valuation Agreement In Nepal: An Ex Ante Impact Assessment" *Asia-Pacific Research and Training Network on Trade Working Paper* (August 2006) 7.

⁴¹ Wolfe R "Letting the Sunshine in at the WTO: How Transparency Brings The Trading System to Life" *Staff Working Paper ERSD-2013-03 Queens University* (13 March 2013) 9.

⁴² See sections 65, 66 and 67 of the *CEA*.

⁴³ See sections 127 to 136 of the *Customs Duty Act*.

⁴⁴ Carsten W "The Structure and Function of the World Customs Organization" 2009 *Global Trade and Customs Journal, Kluwer Law International* 131; 132.

⁴⁵ Hobbing P "Customs Cooperation in the Area of Freedom, Security and Justice The role of Customs in the Management of the EU's External Border" 2011 *CEPS Liberty and Security in Europe* 4.

⁴⁶ Reis DNFT *The tension between Transfer Pricing and Customs Valuation* (Master's Dissertation Technical University of Lisbon 2012) 21; see related discussion by World Customs Organisation 2018 <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/revenue-package/wco-guide-to-customs-valuation-and-transfer-pricing.pdf?la=en> accessed 26 October 2018 14.

was published as an attempt to provide the customs authorities around the world with guidance on retroactive transfer pricing adjustments and customs valuation.

The WCO guide provides that due to common ownership in the MNEs, the price charged for transfer of goods and services between MNEs may not necessarily be subject to many market forces such as supply and demand, as opposed to the price charged between independent parties. As a result, the transfer prices charged by MNEs may be set in a way that is unacceptable to customs authorities and unfair to other traders⁴⁷ as the MNEs may manipulate the transfer price to suit their business needs. Ping and Silbertrtze⁴⁸ provide that MNEs want to have a lower transfer price, as the duties applicable are also be lower. This further influence the Value Added Tax (VAT) due on importation, as it also be lower. This same conduct makes retroactive transfer pricing to be prone to abuse by MNEs⁴⁹ if not properly regulated.

1.3 Statement of the problem

The CEA requires an importer of goods to pass a voucher of correction should he or she want to amend the customs value of imported goods.⁵⁰ The *Customs Control Act*, when it comes into effect, will require the same voucher of correction to amend the customs value incorrectly declared as contained in the CEA.⁵¹ Once retroactive transfer pricing adjustments are performed, the value of the goods declared at the time of importation changes and this has to be corrected by way of a voucher of correction. The requirement to pass a voucher of correction becomes a problem to SARS and MNEs due to a large number of import transactions conducted within an MNE. This results in the exercise of passing vouchers of correction being cumbersome and expensive for the MNEs. On the side, the requirement to process a voucher of correction imposes an administrative burden on SARS as they have to administrator what could be thousands of vouchers of correction. In the case of *Levi Strauss v Commissioner of the South African Revenue Services*, SARS issued a

⁴⁷ Ping L and Silbertrtzein C "Transfer Pricing, Customs Duties and VAT Rules: Can we bridge the Gap?" 2007 *World Commerce Review* 36; 37.

⁴⁸ Ping and Silbertrtzein 2007 *World Commerce Review* 36.

⁴⁹ Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in The South Africa Legal Regime* (LLM-desideration University of Cape Town 2007) 4.

⁵⁰ See section 40(3) of the CEA; see related discussion by Michaletos *News and Press: TaxTalk* 45.

⁵¹ See section 174 of the *Customs Control Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 31-32.

demand for the duties and VAT on previous imports, amounting to R160 million.⁵² Levi Strauss is an MNE, and this goes to show that MNEs normally have a substantial amount of import transactions. As a result, if vouchers of corrections are to be processed, they have to be thousands and thousands import bill of entries. In this regard, the researcher submits that the *Customs Control Act*, when it comes into effect will not address the current difficulties of passing vouchers of corrections as voucher of correction will still be required for retroactive transfer pricing adjusted transactions.⁵³

The *CEA* and the *Customs Control Act*⁵⁴ (when it comes into effect) further require the particulars of the invoice, including the customs value, to be correct at the time of importation.⁵⁵ In this regard, it becomes difficult for MNEs to comply with this requirement as the customs value is subject to an adjustment. The customs values of transactions subjected to retroactive transfer pricing adjustments have to be adjusted at a later stage by the MNEs. Moreover, the *Customs Duty Act*⁵⁶ prescribes the hierarchical approach in the application of the valuation method. In this regard, the researcher submits that the hierarchical application of the valuation methods on retroactive transfer pricing adjustments is not always practical as retroactive transfer pricing adjusted transactions may require immediate use of alternative valuation methods. The *Customs Duty Act*⁵⁷ provides that transactions concluded otherwise than the ordinary course of trade under full competitive conditions, as one of the grounds that can be used to eliminate the use of the primary valuation method.

Before one can import goods, one must determine the customs value of those goods to enable the SARS to assess the amount of duty payable, since SARS imposes customs duties based on the customs value of imported goods. In terms of the *CEA*, customs duties are payable on goods imported into the Republic of South Africa.⁵⁸

⁵² *Levi Strauss v Commissioner of the South African Revenue Services* (case no: 2093/2015) para 2.

⁵³ See section 174 of the *Customs Control Act*.

⁵⁴ See section 177(1)(a)(iii) of the *Customs Control Act*, see related discussion by Ping and Silbertrzein 2007 *World Commerce Review* 37.

⁵⁵ See section 41 of the *CEA*; see related discussion in Henta's *Verspreiders Cc Applicant and The Commissioner for The South African Revenue Service* Case No: 22826/11 para 24.

⁵⁶ See sections 127 and 128 of the *Customs Duty Act*; see related discussion by Reis *The Tension between Transfer Pricing and Customs Valuation* 17.

⁵⁷ See section 129(1) (b) of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 53.

⁵⁸ See section 44 of the *CEA*.

The *CEA*,⁵⁹ the *Customs Duty Act*⁶⁰ and the *Customs Control Act*⁶¹ require an importer to declare the correct customs value of the goods⁶² at the time of importation. The problem is that when an importer, usually MNEs, has retroactive transfer pricing adjustments, the customs value at the time of importation is not ascertained, as the adjustments, which are usually done yearly may increase or decrease the customs value. This then makes it difficult for the MNEs to comply with the provisions requiring a correct value to be declared at the time of importation.

The other problem with retroactive transfer pricing adjustments is that the MNEs are required to process a voucher of correction amending the customs value of previous declarations affected by the adjustment.⁶³ The passing of voucher of correction is a cumbersome exercise for MNEs as there can be thousands of entries to amend. The problem associated with cross border retroactive transfer pricing adjusted transaction is the valuation thereof, as the valuation methods as prescribed by the *CEA*⁶⁴ and the *Customs Duty Act*⁶⁵ are insufficient in this regard. The insufficiency is due to the hierarchical approach taken by both *CEA* and the *Customs Duty Act*. The hierarchical valuation, which entails the elimination of the transaction value method before utilising the alternative methods, is not always the best approach as the transaction value method may not always apply to retroactive transfer pricing adjusted transactions within MNEs.

The MNE at the time of importation declare an estimated customs value⁶⁶ to SARS, which may change once there is an adjustment. This, in turn, is a contravention of the *CEA*,⁶⁷ which requires the declared customs value to be correct at the time of

⁵⁹ See section 65 of the *CEA*; see related discussion by Michaletos *News and Press: TaxTalk* 45.

⁶⁰ See section 116(1)(b) of the *Customs Duty Act*; see related discussion by De Wet, Hestermeijer and Wolfrum *The Implementation of International Law* 216.

⁶¹ See section 167(1)(f) of the *Customs Control Act*; see related discussion by De Wet, Hestermeijer and Wolfrum *The Implementation of International Law* 216.

⁶² *The Commissioner of the South African Services v Formalito Pty Ltd* 2005 4 ALL SA 16 (SCA) para 6.

⁶³ See section 40(3) of the *CEA*; see related discussion by Michaletos *News and Press: TaxTalk* 45

⁶⁴ See sections 65, 66 and 67 of the *CEA*, see related discussion by Michaletos *News and Press: TaxTalk* 44.

⁶⁵ See sections 115-135 in Chapter 7 of the *Customs Duty Act*, see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 8.

⁶⁶ Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

⁶⁷ See section 40(1)(a) of the *CEA*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 44.

importation. SARS may view this as an under declaration of the customs value where the adjustment performed uplifts the customs value declared at the time of importation. The *CEA*⁶⁸ and the *Customs Control Act*⁶⁹ further requires the particulars of the invoice to be correct at the time of importation, including the customs value. Retroactive transfer pricing adjusted transactions do not allow the importer to declare the correct value at the time of importation and comply with the provisions of the *CEA*.⁷⁰ The MNE cannot confirm the final value or correct value until the adjustment is performed. The same status provisions are likely to continue under the *Customs Control Act*⁷¹ and *Customs Duty Act*⁷² when they come into force. The current provisions of the *Customs Control Act* and *Customs Duty Act* require the customs value to be correct at the time of importation.

Practical difficulties with retroactive transfer pricing adjustments include the declaration of a customs value that have to be adjusted later by the MNEs. The customs value is adjusted due to pricing adjustment being required by a transfer pricing policy of concerned MNEs. Once there is an adjustment of the declared customs value of the imported goods by the MNEs, only then will the correct customs value be known by the MNEs. As required by the *CEA*, the MNE has to pass vouchers of correction⁷³ for the entries passed upon importation.⁷⁴ This is costly for both the MNEs and SARS as the MNEs may have thousands of bills of entries passed during the year. The MNEs have to pay for the services of a clearing agent or any other representative familiar with customs processes to assist in processing vouchers of correction. A clearing agent normally does the processing of entries and vouchers of correction on behalf of importers. The clearing agent is registered with SARS for such purposes and has systems in place for clearance purposes.

⁶⁸ See section 41 of the *CEA*; see related discussion by Lyons T *EC Customs Law* (Oxford University Press New York 2001) 273.

⁶⁹ See section 177(1)(a)(iii) of the *Customs Control Act*; see related discussion by Lyons *EC Customs Law* 273.

⁷⁰ See sections 40 and 41 of the *CEA*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 44.

⁷¹ See sections 167(1) (f) and 177(1) (a) (iii) of the *Customs Control Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 44; Lyons *EC Customs Law* 273.

⁷² See section 116 of the *Customs Duty Act*; see related discussion by De Wet, Hestermey and Wolfrum *The Implementation of International Law* 216.

⁷³ Subban V “Customs and transfer pricing – what is SARS up to?” 2013 *Without Prejudice* 44; 44.

⁷⁴ Michaletos *News and Press: TaxTalk* 44.

Capturing and administering what can be thousands of vouchers of correction passed for retroactive transfer pricing adjusted transactions is very difficult, if not impossible, for SARS.⁷⁵ This, in turn, causes an administrative burden for SARS and makes it difficult for SARS to enforce the provisions of the *CEA*. Additionally, insufficient regulation of retroactive transfer pricing adjustment may increase non-compliance by MNEs. The MNEs are discouraged to notify SARS once the adjustments have been affected to avoid costs associated with passing vouchers of correction.⁷⁶

Moreover, there are no robust legislative provisions to ensure that the MNEs do not only apply downward/upward adjustment of their customs declarations.⁷⁷ There is no mechanism in the *CEA*⁷⁸ and the *Customs Duty Act*⁷⁹ to ensure that MNEs do not apply under-invoicing to avoid paying high customs duties. The *CEA* provides that the customs value must be determined by the transaction value method, which might easily be manipulated by MNEs to under-invoice the subsidiaries and declare such prices as the price paid or payable as per the transaction value method.

There is no sufficient legislative mechanism in place to prevent retroactive transfer pricing adjustments manipulation⁸⁰ by MNEs.⁸¹ As outlined, under the current regime, the MNEs might under-invoice its related parties and manipulate the customs value. Lack of legislative provisions to prevent retroactive transfer pricing adjustment manipulation may lead to underpayment of duties and Value Added Tax (VAT),⁸² as the MNEs may apply under-invoicing to declare a lower customs value that attracts lower duties.⁸³ This poses not only a problem to SARS but also the *fiscus* and the economy of South Africa. Revenue that was due to the *fiscus* will be lost, and this negatively impact the economy of South Africa.

⁷⁵ Michaletos *News and Press TaxTalk* 45.

⁷⁶ Klang A *Possible VAT Implications Due to Voluntary and Involuntary Transfer Pricing Adjustments in the EU* (Master of Laws Graduate Dissertation Lund University 2013) 26.

⁷⁷ Fyfe *Understanding and Managing Risks of Transfer Pricing* 7.

⁷⁸ Michaletos *News and Press: TaxTalk* 44.

⁷⁹ See sections 115-135 in Chapter 7 of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

⁸⁰ Galuszka J "Transfer Pricing as a Problem of Multinational Corporation" 2013 *University of Economics in Katowice* 188; 188.

⁸¹ Eden *Business and Management*,) 593.

⁸² Michaletos *News and Press: TaxTalk* 45.

⁸³ Östensson O "Mis invoicing in Mineral Trade: What Do We Really Know?" *Mineral Economics* 2017 77;79.

1.4 Aims and objectives of the proposed study

1.4.1 Aims

For the purposes of this research; aims include the main goals that are expected to be achieved by the researcher at the end of the research. In this regard, this research seeks to:

- a) expose the shortcomings of the *CEA* in relation to retroactive transfer pricing adjustments and the determination of the customs value to levy taxes in South Africa. The shortcomings of the *CEA*,⁸⁴ the *Customs Duty Act*⁸⁵ and the *Customs Control Act*⁸⁶ in regulating retroactive transfer pricing adjustments and customs valuation are also discussed. This is done in order to demonstrate the need for robust legislative regulation on retroactive transfer pricing adjustments in South Africa.
- b) analyse solutions to the difficulties experienced by the SARS and MNEs in South Africa due to the shortcomings of the *CEA*, the *Customs Duty Act* and the *Customs Control Act* in determining the customs value on retroactive transfer pricing adjusted cross border transactions in South Africa. The discussed shortcomings expose the need for simplified procedures on retroactive transfer pricing adjustments.
- c) analyse the regulation of retroactive transfer pricing adjustments and the customs valuation under the *CEA* and the *Customs Control Act* and *Customs Duty Act*. This is done to compare the *CEA* and the *Customs Control Act* and *Customs Duty Act* and establish if the loopholes and shortcomings of the *CEA* on retroactive transfer pricing adjustments can be circumvented by the *Customs Control Act* and *Customs Duty Act*.

⁸⁴ See sections 65, 66 and 67 of the *Customs Act*; De Wet, Hestermey and Wolfrum *The Implementation of International Law* 215.

⁸⁵ Chapter 7; sections 115-135 of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

⁸⁶ See sections 174 and 178 of the *Customs Control Act*; see related discussion by Subban *2009 Tax Insight* 4.

1.4.2 Objectives

For the purposes of this research, the objectives include measures that are taken by the researcher to achieve the goals and aims of the research. To achieve the aims mentioned above, the research:

- a) investigates whether the current provisions of the *CEA* are robust enough to regulate retroactive transfer pricing adjustments and the determination of the customs value in South Africa. This shows the need to amend the *CEA* and enact robust provisions relating to retroactive transfer pricing adjustments and customs valuation.
- b) investigates the adequacy of the *CEA* and the *Customs Duty Act* in determining the customs value to be declared to SARS on retroactive transfer pricing adjusted cross border transactions within MNEs. This is to demonstrate the need for adequate legislative provisions for the valuation of retroactive transfer pricing cross-border transactions.

1.5 Research question

This research seeks to address the following question:

- (a) is the current customs legislation robust enough to regulate retroactive transfer pricing adjustments and customs valuation in South Africa?

1.6 Rationale and justification

Retroactive transfer pricing adjustments, if not properly regulated, poses a threat to the economic growth of South Africa. In this regard, it is crucial to adequately regulate retroactive transfer pricing adjustments and customs valuation in South Africa. The researcher submits that although the *CEA* and the *Customs Duty Act* provides for retroactive transfer pricing adjustments, the provisions relating to determining the customs value, invoicing and processing vouchers of correction are not robust enough to curb the possible manipulation of retroactive transfer pricing adjustments.⁸⁷ Under the current regime, MNEs can still manipulate retroactive transfer pricing adjustments by under-pricing the value of imported goods to evade

⁸⁷ Harmse LH *Alternatives for the treatment of secondary transfer pricing adjustments in South Africa* (Mcom- Dissertation North-West University Potchefstroom Campus 2014) 22.

customs duties. This research discusses the regulation of retroactive transfer pricing and customs valuations by analysing customs valuation legislative framework. This is followed by the fact that the *CEA* and the *Customs Control Act* and *Customs Duty Act* are inadequate in regulating retroactive transfer pricing adjustments.⁸⁸ The said Acts are inadequate as they require a correct value to be declared at the time of importation, prescribing the transaction value method, and the requirement of voucher of correction to amend the customs value on the entries after the adjustments are performed. In this regard, this research exposes the need for adequate guidelines and legislative provisions on the determination of the customs value, amending the values on entries already processed, and declaration of a customs value on retroactive transfer pricing adjustments in South Africa.

1.7 Literature review

According to Rosholt and Dhabhi,⁸⁹ the concept of transfer pricing adjustments and customs valuation has been an on-going concern for MNEs and customs authorities.⁹⁰ The researcher concurs with this submission and submits further that this problem can have a negative impact on the economy of South Africa if cross border transactions between MNEs increase over time as it is difficult to apply valuation methods to such transactions and manage possible manipulation of such transactions by MNEs.⁹¹ It is difficult to apply the valuation methods on retroactive transfer pricing adjustments as the *CEA* prescribes the elimination of the transaction value method before other valuation methods can be utilised.⁹² This makes it difficult to value retroactive transfer pricing adjusted transactions as one would have to look at the other methods to compare the price within MNEs with the price of similar goods sold between unrelated parties. The comparison can show if the relationship within the MNEs influenced the price of the goods sold within MNEs.

⁸⁸ See section 40(3), 41 and 66 of the *CEA*.

⁸⁹ Rosholt A and Dhabhi A "Customs Organization publishes guide to Customs Valuation and Transfer Pricing" 2015 *Trade Watch World* 1; 1.

⁹⁰ Rosholt and Dhabhi 2015 *Trade Watch World* 1.

⁹¹ Allan *The OECD Transfer Pricing Guidelines* 1.

⁹² See section 65 of the *CEA*.

There are other concerns on retroactive transfer pricing and customs valuation under the *CEA*⁹³ and the *Customs Duty Act*.⁹⁴ These include the requirement to process a voucher of correction, amending the customs value once the adjustment is performed. This is a concern to MNEs and SARS as MNEs may have thousands of import entries affected by the adjustment which causes an administrative burden on SARS and becomes expensive for MNEs to process the required vouchers of correction. The more cross border transactions, the more the retroactive transfer pricing adjustments must be done by the MNEs. As a result, there will be more vouchers of correction to be passed to adjust the customs values of imported goods, and this causes an administrative burden on SARS and is very costly to MNEs.

Most of the writers like Jovanovich⁹⁵ and Bekker⁹⁶ mainly focused on the harmonisation of transfer pricing and customs valuation. This was done by comparing transfer pricing and customs valuation to find similarities and differences that could lead to harmonisation of the two. Both transfer pricing and customs valuation share the same ideology, which is to determine the price of goods sold between related parties in a fair and neutral way.⁹⁷ The price of goods between related parties must not be influenced by their relationship⁹⁸ and the valuation and transfer pricing methods must achieve this. Customs rejects the price influenced by the relationship⁹⁹ as it does not reflect the true value of the goods imported.

Transfer pricing and customs valuation use different methods¹⁰⁰ to determine prices of goods bought and sold by MNEs. Transfer pricing uses the arm's length principle,

⁹³ See sections 65, 66 and 67 of the *CEA*; see related discussion by De Wet, Hestermey and Wolfrum *The Implementation of International Law* 215.

⁹⁴ Chapter 7; sections 115-135 of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

⁹⁵ Jovanovich JM *Customs Valuation and Transfer Pricing Is It Possible to Harmonize Customs and Tax Rules?* (Kluwer Law International Ltd London 2002) 19.

⁹⁶ Bekker A "Cross-Border Transactions and the Tale of Valuation" in Oosterhoff D *et al* (eds) *Transfer Pricing and Customs Valuation: Two Worlds of Tax as One* (International Bureau of Fiscal Documentation the Netherlands 2009) 648.

⁹⁷ Bakker A and Oosterhoff D (eds) *Transfer Pricing and Customs Valuation: Two Worlds to Tax as One* (IBFD The Netherlands 2009) 3; see related discussion by Reis *The Tension between Transfer Pricing and Customs Valuation* 9.

⁹⁸ Reis *The tension between Transfer Pricing and Customs Valuation* 9.

⁹⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 160.

¹⁰⁰ Customs valuation methods include the transaction value method, transaction value of identical goods method, transaction value of similar goods method, the deductive method, the computed value method and residual method. The transfer pricing methods are the arm's length method, comparable uncontrolled price method, the resale method, the cost-plus method, the profit split method and the transactional net margin method

while the customs valuation uses the transaction value method as their primary valuation method. The *CEA* prescribes the transaction value method as the primary valuation method of imported goods.¹⁰¹ The arm's length method is used to determine prices between MNEs and from income tax. According to the arm's length method, the price charged within the MNEs must be the same as the price between independent companies.¹⁰² The transaction value means the price paid or payable for the goods upon importation.¹⁰³ In this regard, the value of goods imported by MNEs must conform to this definition. The value of goods imported by the MNE must conform to the transaction value definition to prove that their relationship did not influence the price of the imported goods.

Reis¹⁰⁴ argues that transfer pricing and customs valuation should be merged. The reason for this argument is that transfer pricing and customs valuation contain differences and inconsistencies. Thus, merging the two eliminate such differences and inconsistencies as there will be a single set of rules used to determine the transfer prices within MNEs. The argument against merging transfer pricing and customs valuations is that this could lead to double taxation.¹⁰⁵ Reis¹⁰⁶ compared transfer pricing and customs valuation intending to identify the differences and similarities, which subsequently assist in aligning the two concepts. This research concurs with Reis' approach as it is advantageous for the MNE and customs in terms of documentation required to prove that the relationship did not influence the price when customs valuation and transfer pricing are aligned. The documentation requirements will be the same; as a result, easy to administrate. Once aligned, it will be easy to administrate documentation required for valuation purposes as the same document provided for transfer pricing purposes will be acceptable for customs valuation purposes also.

¹⁰¹ See section 66 of the *CEA*; see related discussion by Tuominen J *The link between transfer pricing and the EU customs valuation law: Is there any and how could it be strengthened?* (Master Thesis, Master's Programme in European and International Tax Law Lund University 2018) 11.

¹⁰² Smith AO "The Impact of Transfer Pricing on Financial Reporting: A Nigerian Study" 2015 *Research Journal of Finance and Accounting* 208;210; See related discussion by Cheng W and Zhang D "The Arm's Length Principle, Transfer Pricing and Foreclosure under Imperfect Competition" *Monash University Department of Economics Discussion Paper* (2010) 2.

¹⁰³ See section 66 (1) of the *CEA* and section 131 (1) of the *Customs Duty Act*; see related discussion by Michaletos *News and Press: TaxTalk* 44.

¹⁰⁴ Reis *The tension between Transfer Pricing and Customs Valuation* 12.

¹⁰⁵ Reis *The tension between Transfer Pricing and Customs Valuation* 10.

¹⁰⁶ Reis *The tension between Transfer Pricing and Customs Valuation* 18, 19.

Ping and Silbertrtzein¹⁰⁷ argue that transfer pricing and customs valuation are some of the complex issues in international trade.¹⁰⁸ The complexity of transfer pricing and customs valuation is due to the existence of two separate rules covering these two concepts. The research concurs with this argument and submits that retroactive transfer pricing adjustment is also a complex tax issue in South Africa. The complexity is due to the fact that transfer pricing is governed by two separate rules being the *Income Tax Act*¹⁰⁹ and the *CEA* governs customs valuation. Thus, when there are transfer pricing adjustments in relation to cross-border transactions, it becomes cumbersome for MNEs to provide the documentary evidence for their transactions as the set of rules requires different documents. Furthermore, the methods used to determine the value of goods bought and sold within the MNEs are different for transfer pricing and customs valuation.

The legislative provisions of the *CEA* on retroactive transfer pricing adjustments need to be clear to enable SARS to properly deal with retroactive transfer pricing adjusted cross border transactions to circumvent possible manipulation by MNEs. Customs authorities and MNEs are often uncertain about how to deal with retroactive transfer pricing adjustments when determining the customs value.¹¹⁰ The uncertainties are due to no clear-cut provisions on the valuation of cross-border transfer pricing adjusted transactions. This research acknowledges these uncertainties and submits that sufficient legislative provisions must be incorporated in the *Customs Duty Act* and *Customs Control Act* to remedy these uncertainties. The *Customs Duty Act* and *Customs Control Act* are not yet in effect, and this could be used as an opportunity to remedy the loopholes in the *CEA* by enacting robust provisions regulating retroactive transfer pricing adjustments to curb possible manipulation by MNEs.

Tuominen¹¹¹ provides that transfer pricing and customs valuation have left MNEs with uncertainty on how to comply with the provisions of both customs valuation and transfer pricing. The uncertainty is due to the fact that both customs valuation and

¹⁰⁷ Ping and Silbertrtzein 2007 *World Commerce Review* 36.

¹⁰⁸ Friedhoff M *The Treatment of Transfer Pricing Adjustments for the Purpose of Customs Valuation* (LLM Dissertation European Fiscal Studies 2017) 3.

¹⁰⁹ 58 of 1962 (*Income Tax Act*), section 31; see related discussion by Sharma M *et al Income Tax Act 2009* (Manupatra India 2009) 689.

¹¹⁰ Friedhoff *The Treatment of Transfer Pricing Adjustments* 3.

¹¹¹ Tuominen *The link between Transfer Pricing and the EU Customs Valuation Law* 1.

transfer pricing have different documentary requirements to prove that the relationship within the related parties did not influence the price of the goods. Transfer pricing documentation includes the transfer pricing policy prepared by an MNE while customs documentation used for valuation includes amongst others invoices and sale contracts. This research submits that MNEs often find themselves uncertain about whether they have complied with both transfer pricing and customs valuation rules. However, the research only focuses on the regulation of retroactive transfer pricing adjustment and determining the customs value under the *CEA*,¹¹² *Customs Control Act*¹¹³ and *Customs Duty Act*.¹¹⁴ Transfer pricing under the *Income Tax Act*¹¹⁵ is not be discussed in the research as retroactive transfer pricing adjustments on cross border-transactions are catered for under the *CEA*¹¹⁶ and the *Customs Duty Act*.¹¹⁷

Michaletos¹¹⁸ argues that the major concern for customs authorities when it comes to retroactive transfer pricing adjustments and determination of customs value is to safeguard misuse. Manipulation or misuse of retroactive transfer pricing adjustments is mostly under-pricing of imported goods as it results in the MNEs paying lower duties.¹¹⁹ MNEs would want to have a lower customs value of imported goods to pay less customs duties and VAT. Retroactive transfer pricing manipulation may lead to underpayment of customs duty and VAT¹²⁰ by MNEs. There is a need for the proper regulation of retroactive transfer pricing to prevent this manipulation in South Africa. Proper regulation of retroactive transfer pricing adjustments is needed to ensure that MNEs do not manipulate retroactive transfer pricing adjustments to evade customs duties on their cross-border transactions. The *Customs Control Act* and *Customs Duty Act* still have the same shortcomings the *CEA* has in relation to combating

¹¹² See sections 40(3) 65, 66 and 67 of the *CEA*; see related discussion by De Wet, Hestermeijer and Wolfrum *The Implementation of International Law* 215

¹¹³ See sections 167, 174, 177 and 178 of the *Customs Control Act*.

¹¹⁴ See sections 15-135 in Chapter 71 of the *Customs Duty Act*.

¹¹⁵ Section 31 of the *Income Tax Act*; see related discussion by Sharma M *et al Income Tax Act* 689.

¹¹⁶ See sections 65, 66 and 67 of the *CEA*; see related discussion by De Wet, Hestermeijer and Wolfrum *The Implementation of International Law* 215.

¹¹⁷ See sections 15-135 of the *Customs Duty Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing* 110.

¹¹⁸ Michaletos *News and Press: Taxtalk* 44.

¹¹⁹ Ping and Silbertritzlein 2007 *World Commerce Review* 36.

¹²⁰ Michaletos *News and Press: Taxtalk* 44. Harmse *Alternatives for The Treatment of Secondary Transfer Pricing Adjustments* 22.

possible retroactive transfer pricing manipulation. The the application of valuation methods is still maintained in the *Customs Duty Act* as it is in the *CEA*.

Customs authorities, including SARS, use the Organisation for Economic Co-operation and Development guidelines for guidance in dealing with the problems associated with transfer pricing.¹²¹ One of the problems associated with transfer pricing includes customs valuations of cross-border transactions within MNEs. Reference is made to the Organisation for Economic Co-operation and Development guidelines when dealing with problems like potential manipulation of retroactive transfer pricing adjustments by MNEs. However, the guidelines are insufficient in solving the problem, as Van Haren¹²² considers these guidelines to be arbitrary. The reason for this submission is because the Organisation for Economic Co-operation and Development guidelines are complex, and SARS and MNEs are often uncertain when determining the customs value on retroactive transfer pricing adjusted transactions and referring to the guidelines.

In 2017, the World Customs Organisation published a case study 14.2 to address transfer pricing and customs valuation.¹²³ The case study examined the use of transfer pricing documentation being the transfer pricing report when customs have to determine whether or not the relationship of the MNE did not influence the price of imported goods.¹²⁴ This was done by utilising a transfer pricing transaction example within an MNE. The case study concluded that the transfer price between the MNE concerned was influenced by the relationship within the MNE. As a result, alternative valuation methods should be used to determine the value of imported goods. The researcher concurs with the case study as the price of the imported goods in the provided example was not based on open market conditions, and the price of similar goods sold between independent parties was also different as the transfer price within the MNE.

The alternative valuation methods are considered to be more complex. The alternative valuation requires a comparison of data that is not always easily

¹²¹ Ragvald Uncertain *Transfer Pricing Rules* 18.

¹²² Van Haarren MI *Accounting for Transfer Pricing Adjustments in Customs Valuation* (LLM-Dissertation Erasmus University Rotterdam's 2016) 1.

¹²³ Methenis B and Smith TR "EY Global Trade Quarterly Update" 2017 *TradeWatch* 1; 1.

¹²⁴ Cooper J *et al Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners* (World Bank Group Washington DC 2017) 241.

accusable. If the transaction value of identical or similar goods method is used, it requires the comparison of the price declared by the MNE with the price of the same or identical goods sold for between independent parties.¹²⁵ However, it is difficult to obtain data for the independent parties. That data includes sales contracts and the cost of sales that informed the price of the similar goods. The MNE runs a risk of declaring the incorrect customs value by using the alternative valuation methods as they might not have access to information that allow them to make the comparison required by the alternative valuation methods. The incorrect declaration of customs value could lead to potential penalties issued by SARS to the MNE for undervaluation as the *CEA*¹²⁶ prescribes penalties for undervaluation of goods.

Ping and Silbertrtzein¹²⁷ submit that transactions that were subjected to retroactive transfer pricing adjustment make trade complicated and costly for MNEs and difficult to administer for customs authorities. The costs related to retroactive transfer pricing adjustments are due to passing vouchers of correction required to amend declarations affected by the adjustments. The research concurs with this submission as it is costly to the MNE to pass vouchers of correction to what could be thousands of entries. In relation to the submission of administrative burden for SARS, the researcher concurs with this submission. Capturing the vouchers of corrections for thousands of bills of entries passed by the MNE causes an administrative burden for SARS.

Bulana¹²⁸ submits that there are still uncertainties with determining the customs value on national legislation of most customs authorities. This uncertainty also extends to the regulation of transfer pricing transactions between MNEs. The position of most customs authorities, including SARS in the acceptance of transfer pricing documents, is that establishing the customs value is not clear. The research concurs with this view but further submits that the uncertainty is also found in the South African *CEA*, the *Customs Control Act* and *Customs Duty Act*. This uncertainty may lead to retroactive transfer pricing adjustments manipulation and underpayment of customs duties and VAT.

¹²⁵ Pagter H and Van Raan R *The Valuation of Goods For Customs Purposes* (Springer Science and Business Media New York 2013) 63.

¹²⁶ See section 80 of the *CEA*.

¹²⁷ Ping and Silbertrtzein 2007 *World Commerce Review* 36.

¹²⁸ Bulana 2016 *Munich Personal Repec Archive* 16.

Harmse and Van der Zwan¹²⁹ argue that transfer pricing manipulation leads to profit shifting by MNEs to a jurisdiction with lower taxes. To avoid taxes in a country where profit originates, MNEs move their profit to a country with a lower tax rate using cross-border retroactive transfer pricing adjustments. MNEs may use transfer pricing in profit shifting to avoid high taxes in the country where the profit originates.¹³⁰ This is done by undervaluing the goods sold from the country of export so to create the impression that the MNE concerned is not about making a profit. The researcher concurs with this submission as transfer pricing, if not properly regulated, could lead to profit-shifting. The researcher agrees that there is a possible manipulation of transfer pricing when it comes to customs valuation. The manipulation would be for the selling company to have a lower customs value of exported goods or to adjust the values of exported goods lower to appear as if they are making a loss in order to pay less income tax.

The focus of the research is not on profit shifting. The issue of profit shifting is more regulated by the *Income Tax Act*, and the research only focuses on retroactive transfer pricing adjustments manipulation under the *CEA*. This research examines the misuse of retroactive transfer pricing adjustment to evade customs duties and VAT, compliance for MNEs and administration by SARS. Retroactive transfer pricing adjustments are not properly regulated in South Africa; as a result, they are prone to manipulation and abuse. This is due to the shortcomings of the *CEA* on the regulation of retroactive transfer pricing adjusted transactions.

1.8 Assumptions and hypotheses

1.8.1 Assumptions

This research is premised on the following assumptions:

- a) The poor regulation of retroactive transfer pricing adjustments and customs valuation could negatively affect international trade and the economy of many countries, including South Africa. Poor regulation of retroactive transfer pricing

¹²⁹ Harmse and Van der Zwan 2016 *De Jure* 288.

¹³⁰ Wittendorff J *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Kluwer Law International the Netherlands 2010) 286.

adjustments leads to manipulation by MNEs, and customs duties can be evaded.

- b) Fair retroactive transfer pricing adjustments and customs valuations promote the economic stability of South Africa and deter the abuse of retroactive transfer pricing adjustment to evade customs duties and VAT by MNEs.
- c) Robust retroactive transfer pricing adjustment and customs valuation laws deter the manipulation of retroactive transfer pricing adjustments by MNEs that lead to underpayment of customs duties and VAT by MNEs¹³¹ in South Africa.

1.8.2 Hypothesis

South Africa is struggling to prevent retroactive transfer pricing adjustments manipulation by MNEs through the provisions of the *CEA* that requires a voucher of correction and true value at the time of importation.¹³² The shortcomings of combating retroactive transfer pricing adjustments manipulation are also in the *Customs Control Act*¹³³ and *Customs Duty Act*¹³⁴ as both Acts still contain the same provisions as the *CEA*. Consequently, the researcher investigates whether the valuation methods as prescribed by the *CEA* and the *Customs Duty Act* are robust to determine the customs value on cross border retroactive transfer pricing adjusted transaction to prevent manipulation in South Africa. This follows the fact that retroactive transfer pricing adjustments, if not properly regulated, may lead to undervaluation of imported goods by MNEs which ultimately lead to underpayment of customs duties and VAT. In this regard, this research discusses the possible shortcoming associated with the regulation of retroactive transfer pricing adjustment and customs valuations in South Africa.

1.9 Scope and limitations of the study

This research focuses on retroactive transfer pricing adjustments and customs valuation under the *CEA*, the *Customs Control Act* and *Customs Duty Act*. Transfer

¹³¹ Wittendorff *Transfer Pricing and the Arm's Length Principle* 19.

¹³² See sections 40 and 41 of the *CEA*.

¹³³ see sections 174 and 178 of the *Customs Control Act*; see related discussion by Amadi *Customs Reform* 39.

¹³⁴ See sections 115-135 of the *Customs Duty Act*.

pricing in terms of the *Income Tax Act*¹³⁵ is not discussed in this research. This research mainly focuses on the regulation of retroactive transfer pricing adjustments and customs valuation under the *CEA*, the *Customs Duty Act* and the *Customs Control Act*. This follows the fact that the provisions of the *CEA* and the *Customs Control Act* and *Customs Duty Act* are insufficient when one has to determine the customs value on cross border transactions between MNEs. In this regard, the approach that is undertaken by the SARS and MNEs still has some gaps in the determination of the customs value on retroactive transfer pricing adjusted transactions.

The researcher submits that the *CEA*, the *Customs Control Act* and the *Customs Duty Act* do not adequately provide for the determination of the customs value on retroactive transfer pricing adjusted transactions in South Africa. Consequently, the *CEA* and the *Customs Control Act* and the *Customs Duty Act* are not robust enough to effectively curb possible retroactive transfer pricing adjustments manipulation in South Africa. This research examines the regulation of retroactive transfer pricing adjustment in South Africa by analysing the *CEA*, the *Customs Control Act* and *Customs Duty Act*. In this regard, the research seeks to recommend the amendment of the *Customs Control Act* and *Customs Duty Act* in order to address the shortcoming of the requirement for a voucher of correction and the correct value at the time of importation of the current *CEA* in relation to retroactive transfer pricing adjustment and determination of customs value.

1.10 Research Methodology

A qualitative research method was used for this research. As a result, relevant primary and secondary sources were utilised throughout the dissertation. Primary sources are the original sources, while secondary sources are those sources that discuss, comment on, evaluate and interpret the primary sources. The researcher visited the library to access primary sources such as relevant legislation and secondary sources such as books, case law, and journal articles. The researcher also utilised the Internet to access other relevant information. In this regard, the

¹³⁵ See section 31 of the *Income Tax Act*; see related discussion by Sharma *et al* *Income Tax* 689.

dates available in the bibliography are the dates on which the researcher accessed the websites provided.

For the purposes of this research, the *Potchefstroom Electronic Law Journal* referencing style was used.

1.11 Relevance to Research Unit Theme

The research focuses on the regulation of retroactive transfer pricing adjustments and customs valuation in South Africa. Therefore, the research falls under the Finance, Trade and Investment Research Unit of the Faculty of Law. Moreover, the research falls under Tax Law, with ancillary modules; aspects of International Law and aspects of International Tax Law under Master's in Mercantile Law module of the Faculty of Law. It is hoped that the final research findings will be contained in the LLM dissertation and/or some parts of this research will be published as book chapters or journal articles.

1.12 Ethics

This work is qualitative research in which all primary and secondary sources used were referenced. Every effort was made to comply with all copyright laws. The researcher did not conduct group or individual interviews or questionnaires. There are no conflicts of interest with regard to this research. No criminal or other disclosures requiring legal action and having potentially adverse effects, risk, or hazards for research participants was made in the course of the study. There was no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North West University for harm to participants arising from the conduct of the research.

1.13 Framework (structure) of the study

This research consists of five chapters, including this chapter.

Chapter One provides the background to the study. It outlines the research questions, statement of the problem, literature review, scope, and limitations of the study, rationale and justifications, assumptions and hypotheses. The chapter also outlines the aims and objectives of the study, structure of the dissertation, the

methodology used in the research, and the relevance of the research unit. Chapter Two discusses the historical development and application of the concepts retroactive transfer pricing adjustments and customs valuations in South Africa. This is done to trace the development of retroactive transfer pricing regulations to date.

Chapter Three examines legislative provisions dealing with the retroactive transfer pricing adjustments and the determination of customs value in South Africa. The provisions emanating from the *CEA*, the *Customs Control Act* and the *Customs Duty Act* in relation to customs valuation and transfer pricing are analysed in this chapter.

Chapter Four evaluates the challenges associated with retroactive transfer pricing adjustments and the determination of customs value in South Africa. This is done by analysing the provisions safeguarding retroactive transfer pricing adjustments manipulation under the *CEA*, the *Customs Control Act* and *Customs Duty Act*. The chapter also discusses the administrative burden that comes with retroactive transfer pricing adjustments and determination of customs value for SARS. The practical problems MNEs face in declaring the correct customs value on retroactive transfer pricing adjusted cross border transactions are also examined.

Chapter Five provides conclusions and recommendations. The chapter recommends measures that could offer possible solutions to the problem of retroactive transfer pricing adjustments and determination customs value, compliance for MNEs, and administrative burden for SARS in South Africa.

CHAPTER TWO

HISTORICAL ASPECTS OF RETROACTIVE TRANSFER PRICING ADJUSTMENTS AND CUSTOMS VALUATION OF GOODS IN SOUTH AFRICA

2.1 Introduction

This chapter traces the origin of retroactive transfer pricing adjustments in South Africa from 1964 to date. This is done to ensure that the retroactive transfer pricing adjustments are properly regulated to curb against possible manipulation by Multinational Enterprises (MNEs) in South Africa. Retroactive transfer pricing adjustments has become an area of concern due to the increased rate of trade by MNEs situated in different tax authorities and the potential manipulation of retroactive transfer pricing adjustments to evade customs duties. Retroactive transfer pricing adjustments occur only between related parties being MNEs. This research only focuses on MNEs as retroactive transfer pricing adjustments can only occur within an MNE. Independent parties cannot have retroactive transfer pricing adjusted transactions. As a result, manipulation of transfer pricing adjustments can be done by MNEs which poses a threat to the South African economy as MNEs account for most of the international trade.¹³⁶

Transfer pricing was initially regulated by the *Organisation for Economic Co-Operation and Development Model Tax Convention Treaty*¹³⁷ in South Africa till the enactment of the transfer pricing provisions under the *Income Tax Act* as amended.¹³⁸ The regulation of transfer pricing under the *Income Tax Act* came into effect in 1995.¹³⁹ The research focuses on retroactive transfer pricing and customs valuations under the *Customs and Excise Act* (as amended),¹⁴⁰ the *Customs Control*

¹³⁶ Harmse LH *Alternatives for the Treatment of Secondary Transfer Pricing Adjustments in South Africa* (Mcom- Dissertation North-West University Potchefstroom Campus 2014) 8.

¹³⁷ Article 9 of the *Organisation for Economic Co-Operation and Development Model Tax Convention Treaty* (1948).

¹³⁸ 58 of 1962 (*Income Tax Act*), see section 31; see related discussion by Ngotho CP *The OECD Transfer Pricing Guidelines: An Evaluation of Their Effectiveness in The Kenya's Tax Regime* (LLM- Dissertation University of Nairobi 2011) 41. Lord TS *Transfer Pricing in South African Income Tax Law* (Postgraduate Diploma in Income Tax Law at University of Cape Town 2014) 9.

¹³⁹ Lord TS *Transfer Pricing in South African Income Tax Law* 23.

¹⁴⁰ 91 of 1964 (*CEA*), see sections 65, 66 and 67; see related discussion by De Wet E, Hestermey H and Wolfrum R *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press South Africa 2015) 215

*Act*¹⁴¹ and the *Customs Duty Act*.¹⁴² Transfer pricing adjustments on the customs value can only be performed under the customs legislation and not the *Income Tax Act*. Retroactive transfer pricing adjustments can only be performed under the *CEA* on the customs value of imported goods. In turn, the MNEs may utilise transfer pricing adjustments to manipulate the value of imported goods in order to pay less customs duties and Value Added Tax (VAT) at the time of importation.¹⁴³ This is due to the loopholes of under-invoicing or only performing downwards adjustments in the *CEA* relating to the regulation of retroactive transfer pricing adjustments.

A retroactive transfer pricing adjustment is commonly described as the amendment to the cost price of imported goods, either through a debit (downwards) or credit (upwards) note.¹⁴⁴ This is done following the transfer pricing policy of the affected MNE.¹⁴⁵ This means that MNEs retroactively adjust the prices of the imported goods due to the adjustment performed as a result of a transfer pricing policy of a concerned MNE.¹⁴⁶ This is done to ensure that a limited risk distributor's operating margin falls within what is prescribed by the transfer pricing policy of the concerned MNEs.¹⁴⁷ In addition, this is also done to ensure that MNEs do not shift their profit to a country with less tax rate through under or over-pricing pricing cross-border transactions.¹⁴⁸ Retroactive transfer pricing adjustments are used by MNEs to spread their profit to achieve the targeted profit margin.¹⁴⁹ The MNEs do this to monitor and evaluate the performance of their entities or subsidiaries.¹⁵⁰

¹⁴¹ 31 of 2014 (*Customs Control Act*), see sections 174 and 178; see related discussion by Subban V "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 1; 4; Amadi V *Customs Reform as a Means To Enhancing Trade Facilitation for Increased Market Access: A South African Perspective* (LLM-dissertation University of the Western Cape 2015) 64.

¹⁴² 30 of 2014 (*Customs Duty Act*), see sections 115-135.

¹⁴³ Tuominen J *The link between transfer pricing and the EU customs valuation law: Is there any and how could it be strengthened?* (Master Thesis, Master's Programme in European and International Tax Law Lund University 2018) 14.

¹⁴⁴ Gaarlandt F, Ramathodi O and Rheeder C "South African Tax Authorities Increase Scrutiny Of Retroactive Transfer Pricing Adjustments" *Indirect Tax Alert* (26 February 2015) 1.

¹⁴⁵ Tuominen J *The Link Between Transfer Pricing and the EU Customs Valuation Law* 35.

¹⁴⁶ Cottani G *Transfer Pricing* (IBFD Amsterdam 2011) 148.

¹⁴⁷ *Hamamatsu Photonics Deustschland GmbH v Hauptzollamt München* 2017 (C-529/16) para 13-15; see related discussion by Gaarlandt, Ramathodi and Rheeder *Indirect Tax Alert* 1.

¹⁴⁸ Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in The South Africa Legal Regime* (LLM-desideration University of Cape Town 2007) 1.

¹⁴⁹ Klang A *Possible VAT Implications Due to Voluntary and Involuntary Transfer Pricing Adjustments in the EU* (Master of Laws Graduate Dissertation Lund University 2013) 20.

¹⁵⁰ Steiss C.F and Blanchette L "The International Transfer-Pricing Debate" 1995 *Canadian Tax Journal* 1566; 1576.

2.2 Historical Aspects of Retroactive Transfer Pricing Adjustments in South Africa from 1964

The value of imported goods must be based on the actual value.¹⁵¹ The actual value is the price paid or payable for the goods by the importer.¹⁵² In this regard, the customs value must be arrived at by the importer based on open competitive conditions. This means that the value of the imported goods must be the value between a willing buyer and a willing seller, independent of each other. The goods sold within the MNE may not necessarily be subjected to open market forces as opposed to goods sold between independent parties.¹⁵³ The MNE controls the prices of goods sold within the MNE. In most instances, the parent company dictates the prices based on the performance of its subsidiaries.

The use of transfer pricing must artificially determine the prices of goods sold within the MNE.¹⁵⁴ In practice, these prices are not determined by market forces but by the controlled relations within the MNE.¹⁵⁵ The parent company often dictates the pricing strategy and techniques on cross border transaction between MNEs, and the MNEs transacting have a say in the price setting.¹⁵⁶ Consequently, there is a need for regulation of retroactive transfer pricing adjustments to ensure that the customs value on retroactive transfer pricing adjusted transaction is determined by the MNE and SARS in a fair and neutral manner.¹⁵⁷ The CEA regards the value of imported goods to be transaction value and it should not be influenced by the relationship within the MNE.¹⁵⁸

South Africa was one of the first African countries to implement legislative provisions relating to transfer pricing¹⁵⁹ due to the recommendations provided by the Katz

¹⁵¹ See section 65 of the CEA, see related discussion Michaletos *News and Press: TaxTalk* 45.

¹⁵² See section 66 of the CEA; see related discussion in *Commissioner, SARS v Trend Finance (Pty) Ltd* [2007] SCA 59 (RSA) para 6; De Wulf and Sokol *Customs Modernization Handbook* 158.

¹⁵³ Kamdar M "Acceptable Methods for Determining An Arm's Length Price for Transfer Pricing" 2018 *Sabinet African Journals* 18; 18.

¹⁵⁴ Klang *Possible VAT Implications* 19.

¹⁵⁵ Kamdar 2018 *Sabinet African Journals* 18.

¹⁵⁶ Kamdar 2018 *Sabinet African Journals* 18.

¹⁵⁷ Allan *The OECD Transfer Pricing Guidelines* 20.

¹⁵⁸ Pagter and Van Raan *The Valuation of Goods For Customs Purposes* 33.

¹⁵⁹ Lord *Transfer Pricing in South African Income Tax Law* 7

Commission¹⁶⁰ in 1995.¹⁶¹ Before 1995, there was no specific regulation on transfer pricing in South Africa other than the exchange control that was regulating mainly currency manipulation matters.¹⁶² The exchange control regulation dealt with the control and management of transfer prices¹⁶³ within MNEs. The exchange control regulation regulated the exchange rate movement,¹⁶⁴ and in this regard, the arm's length principle was recommended as an ideal way to deal with cross border transactions between MNEs.

The lack of specific regulation of retroactive transfer pricing adjustments and customs valuation was due to the fact that, at the time, South Africa was not participating in international trade.¹⁶⁵ The reason South Africa was not participating in international trade was due to economic and trade sanctions that were imposed on South Africa in the mid-1980s to pressurise South Africa to end apartheid.¹⁶⁶ South Africa re-joined and participated in international trade after 1994.¹⁶⁷ South Africa participated in international trade through amongst others, importing and exporting goods with other countries. After 1994 the level of international trade increased in South Africa,¹⁶⁸ with the majority of it taking place between MNEs.¹⁶⁹ In 1995, the revised section 31 of the *Income Tax Act* was introduced,¹⁷⁰ dealing with transfer pricing from an Income tax perspective. This means that *the Income Tax Act* looked at income acquired by the company and how profit was distributed within the MNE, as opposed to looking at the value of imported goods, which is dealt with under the *CEA*.

¹⁶⁰ *Third interim report of the Commission of Inquiry Into Certain Aspects Of The Tax Structure of South Africa 1995* (Katz Commission)

¹⁶¹ Ngotho *The OECD Transfer Pricing Guidelines* 40.

¹⁶² Moyo LM *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* (Mcom- dissertation University of Johannesburg 2015) 15.

¹⁶³ Allan *The OECD Transfer Pricing Guidelines* 36.

¹⁶⁴ Allan *The OECD Transfer Pricing Guidelines* 31.

¹⁶⁵ Manyaka PO *Prescriptive of the South African Tax Legislation in Providing Guidance on how to Transact at an Arm's Length Price* (Mcom University of Witwatersrand 2010) 15.

¹⁶⁶ Levy PI "Sanctions on South Africa: What did they do?" *Centre Discussion Paper No. 796* (1999 Yale University). 2.

¹⁶⁷ Beger RS *Transfer Pricing considerations for intra-group services a study of specific challenges which have caused disputes between taxpayer and tax authorities from a Transfer Pricing and International Tax perspective* (Mcom- dissertation University of Witwatersrand 2015) 8.

¹⁶⁸ Allan *The OECD Transfer Pricing Guidelines* 36.

¹⁶⁹ Malevu SM *The Possible Introduction of Advance Pricing Agreements in South African Income Tax Legislation* (Mcom Nelson Mandela Metropolitan University 2011) 6.

¹⁷⁰ Van der Westhuizen M *The impact of section 31(2) of the Income Tax Act on the South African Tax Practice* (Mcom- dissertation University of Johannesburg 1998) 2.

The Katz Commission notes that South Africa was prone to retroactive transfer pricing manipulation.¹⁷¹ The Katz Commission benchmarked other countries' approaches when dealing with retroactive transfer pricing manipulation to establish the best approach that could be taken by South Africa.¹⁷² The first approach recommended by the Katz Commission was for South Africa to introduce clear legislative provisions on what can be regarded as an acceptable price for transfer pricing transactions between MNEs.¹⁷³ The other recommendation by the Katz Commission was for South Africa to adopt the arm's length method, which is the equivalent of the transaction value method, to determine the price of goods sold and bought within the MNE.¹⁷⁴ The arm's length is defined as the price that would normally be arrived at by independent parties on a willing buyer and willing seller basis under open market conditions.¹⁷⁵

In 1999, the South African Revenue Service (SARS) issued the SARS Practice Note 7¹⁷⁶ to provide guidance on transfer pricing matters.¹⁷⁷ The SARS Practice Note 7 provided that although there is no statutory obligation to prepare and maintain the transfer pricing policy, it would be in the best interests of the taxpayer to prepare a transfer pricing policy.¹⁷⁸ The lack of transfer pricing policy makes the taxpayer run the risk of lacking documentary evidence that the transaction price of imported goods was concluded at arm's length.¹⁷⁹ The arm's length method requires SARS to determine the price of uncontrolled transactions between independent parties¹⁸⁰ to determine whether the relationship influenced the price paid or payable for the imported goods. The transfer pricing policy becomes relevant to retroactive transfer pricing adjusted transactions as it provides guidance on how the retroactive transfer pricing adjustments are performed.

¹⁷¹ Moyo *Requirements of Transfer Pricing Documentation* 15.

¹⁷² Moyo *Requirements of Transfer Pricing Documentation* 15.

¹⁷³ Moyo *Requirements of Transfer Pricing Documentation* 15.

¹⁷⁴ Moyo *Requirements of Transfer Pricing Documentation* 16.

¹⁷⁵ Kamdar 2018 *Sabinet African Journals* 19.

¹⁷⁶ SARS' Practice Note No 7 (199) (SARS Practice note 7) see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁷⁷ The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* (Juta Cleremont 2010) 523.

¹⁷⁸ The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* 523; see related discussion by Bakker A and Levey MM *Transfer Pricing and Intra-Group Financing: The Entangled World of Financial Markets and Transfer Pricing* (IBFD The Netherlands 2012) 454.

¹⁷⁹ The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* 523.

¹⁸⁰ Kamdar 2018 *Sabinet African Journals* 19.

In 2002, there was an introduction of the transfer pricing policy requirement,¹⁸¹ whereby SARS required the MNE to submit their transfer pricing policy when determining the customs of value on retroactive transfer pricing adjusted transactions. There has been limited guidance in terms of what must be included in the transfer pricing documentation. Since the implementation of the revised *Income Tax Act* in 1995,¹⁸² the requirement of a transfer pricing policy has not been properly outlined in the legislation.

The SARS Practice Note 7 provides guidelines in preparing and maintaining transfer pricing documentation,¹⁸³ being the transfer pricing policy or study. In 2004, SARS started to request MNEs to disclose their transfer pricing documentation.¹⁸⁴ Before the introduction of submitting the transfer pricing policy to SARS, MNEs were only required to tick whether they had a transfer pricing policy or not when they are completing their annual corporate tax return.¹⁸⁵ The challenge is that there is no statutory requirement for maintaining and producing the transfer pricing policy. SARS Practice Note 7 openly provides that there is no statutory requirement to maintain transfer pricing policy.¹⁸⁶ In 2005, SARS issued an addendum to Practice note 7 that stipulated that there is no statutory requirement for MNEs to prepare and produce a transfer pricing policy.¹⁸⁷ The addendum stated that it is however important for MNEs to prepare and produce a transfer pricing policy to eliminate the risks associated with lack of documentation.¹⁸⁸

In 2012, SARS issued a communication¹⁸⁹ to MNEs informing them of their obligation to inform SARS when they have made retroactive transfer pricing adjustments. SARS made it known that failure to declare retroactive transfer pricing adjustments is a customs risk.¹⁹⁰ If SARS is not aware of retroactive transfer pricing adjustment, in a case of upward adjustment, there is a risk that the MNE will not

¹⁸¹ Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁸² See Section of the *Income Tax Act*, see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁸³ Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁸⁴ Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁸⁵ Thersby K "Transfer pricing case: no place to hide" 2005 *Tax Breaks Newsletter* 7; 7.

¹⁸⁶ See SARS' *Practice Note No 7* para 10.2.1; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 33.

¹⁸⁷ Lord *Transfer Pricing in South African Income Tax Law* 34.

¹⁸⁸ Lord *Transfer Pricing in South African Income Tax Law* 34.

¹⁸⁹ Gaarlandt, Ramatlhodi and Rheeder *Indirect Tax Alert* 1.

¹⁹⁰ See section 40 of the *CEA*; see related discussion by Gaarlandt, Ramatlhodi and Rheeder *Indirect Tax Alert* 1.

bring the outstanding customs duties into account. Failure to notify SARS of retroactive transfer pricing adjustments may lead to potential penalties associated with under-declaring the customs value imposed by SARS.¹⁹¹ This shows that SARS was starting to pay more attention to retroactive transfer pricing adjustments and customs valuation under the *CEA* to guard against possible misuse and manipulation.¹⁹² Another significant change that came in 2012 is that the taxpayer was obliged to make the adjustments and submit the transfer pricing documents by the MNEs to SARS. The required transfer pricing policy is to enable SARS to determine whether the customs value is rightfully adjusted.

2.2.1 Historical Aspects of the Regulation of Retroactive Transfer Pricing under the Organisation for Economic Co-operation and Development Guidelines

Transfer pricing,, emanates from the *Organisation for Economic Co-Operation and Development Model Tax Convention*¹⁹³ and the Organisation for Economic Co-Operation and Development transfer pricing guidelines for MNEs.¹⁹⁴ The Organisation for Economic Co-operation and Development guidelines are very influential on the regulation of transfer pricing, and as many countries, including South Africa, have adopted such guidelines.¹⁹⁵ Many countries, including South Africa, have adopted the arm's length method to determine the value of transactions within the MNEs, which is the method, prescribed by the Organisation for Economic Co-operation and Development guidelines on transfer pricing. The Organisation for Economic Co-operation and Development guidelines on transfer pricing and transfer pricing documentation requirements are not legally binding to member states; however, these guidelines are used as an interpretive tool.¹⁹⁶ South Africa, as a Non-member State to the Organisation for Economic Co-operation and Development,¹⁹⁷

¹⁹¹ See section 91 of the *CEA*; see related discussion Fyfe *Understanding and Managing Risks of Transfer Pricing* 43; Gaarlandt, Ramathodi and Rheeder *Indirect Tax Alert* 1.

¹⁹² See section 41(4) of the *CEA*; see related discussion by Lyons *EC Customs Law* 273.

¹⁹³ See Article 9 of the *Organisation for Economic Co-operation and Development Model Tax Convention Treaty* (1948); see related discussion by Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation Law* 6.

¹⁹⁴ See Chapter IV of the *Organisation for Economic Co-Operation and Development, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, (2010); see related discussion by Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation Law* 2.

¹⁹⁵ Fyfe *Understanding and Managing Risks of Transfer Pricing* 7.

¹⁹⁶ Calderón J "The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?" 2007 *Intertax* 4; 4 & 26.

¹⁹⁷ Lord *Transfer Pricing in South African Income Tax Law* 14.

uses the Organisation for Economic Co-operation and Development guidelines on transfer pricing when dealing with transfer pricing. South Africa trades with member states to the Organisation for Economic Co-operation and Development.

The *Organisation for Economic Co-operation and Development Model Tax Convention Treaty* stipulates that the MNE must set transfer prices within the MNE in the same way as the prices between independent parties in comparable circumstances.¹⁹⁸ When the retroactive transfer pricing adjustments are performed, they must be performed in the way that the price is not be affected by the relationship within the MNEs. The Organisation for Economic Co-operation and Development issued its first guideline in transfer pricing in 1979.¹⁹⁹ In tax and transfer pricing, the Organisation for Economic Co-operation and Development has held the position of guidance since its 1979 Report on Transfer Pricing and Multinational Enterprises.²⁰⁰ This report has, over the years, been amended to align itself with current developments. The 1979 report provided that transactions between the MNE should reflect the arm's length principle.²⁰¹ The 1979 report also addressed issues of transfer pricing and tax avoidance.²⁰² The report provided that retroactive transfer pricing adjustments should not be confused with the problems of tax avoidance. Transfer pricing becomes a tax avoidance issue only when it is manipulated to evade paying higher customs duties and VAT.

The 1979 report by the Organisation for Economic Co-operation and Development recommended the arm's length method to be used to determine transfer prices between MNEs.²⁰³ The 1979 report did not discuss the transfer pricing documentation²⁰⁴ and whether MNEs are obligated to prepare and maintain transfer pricing policy. In 1984, the Organisation for Economic Co-operation and

¹⁹⁸ Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation* 6.

¹⁹⁹ Moyo *A comparative analysis of the legislative requirements of Transfer Pricing documentation* 18.

²⁰⁰ Report on Transfer Pricing and Multinational Enterprises (1979); see related discussion by Allan *The OECD Transfer Pricing Guidelines* 8.

²⁰¹ Allan *The OECD Transfer Pricing Guidelines* 11.

²⁰² Cottani G *Transfer Pricing* (IBFD Amsterdam 2011) 6.

²⁰³ Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* 18.

²⁰⁴ Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* 18.

Development issued another report on transfer pricing.²⁰⁵ The 1984 report was titled Transfer Pricing for Multinational Enterprises-Three Taxation Issues.²⁰⁶ The 1984 report was an expansion of the 1979 report.²⁰⁷ The Transfer Pricing for Multinational Enterprises- Three Taxation Issues report did not discuss the transfer pricing documentation just like the 1979 report²⁰⁸. The 1984 report still maintained that transactions between MNEs should be subjected to the arm's length principles.

In 1995, a report titled Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations²⁰⁹ was published. The Organisation for Economic Co-operation and Development report of 1995 came as an attempt to keep up and adapt to modern business transactions²¹⁰ in relation to transfer pricing. The Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations report of 1995 defined transfer pricing as the prices at which an enterprise transfer physical goods to associated enterprises.²¹¹ This definition was adopted by South Africa and selected by member and non-member states of Organisation for Economic Co-operation and Development. The definition of transfer pricing as prescribed by the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations report of 1995 was incorporated in the *Income Tax Act*.²¹²

The Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations report 1995 set out methods, like the arm's length method, which were developed internationally for

²⁰⁵ Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* 18.

²⁰⁶ Transfer Pricing and Multinational Enterprises: Three Taxation Issues (1984).

²⁰⁷ Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* 18.

²⁰⁸ Moyo *A Comparative Analysis of the Legislative Requirements of Transfer Pricing Documentation* 18.

²⁰⁹ *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations Report* (1995); see related discussion by Allan *The OECD Transfer Pricing Guidelines* 5.

²¹⁰ Mauricio MJ *Transfer pricing and the arm's length principle in the European Union law and domestic law* (LLM-desertion Universidad do Minho 2013) 14.

²¹¹ See paragraph 11 of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations Report (1995); see related discussion by Allan *The OECD Transfer Pricing Guidelines* 8.

²¹² See Section 31 of the Income Tax Act; see related discussion by Allan *The OECD Transfer Pricing Guidelines* 37.

determining and evaluating taxpayers' transfer prices.²¹³ In the application of the transfer pricing methods, the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations report endorses the arm's length principle. The arm's length provides that the price of goods sold within the MNE should be the same as the price between independent companies.²¹⁴ Thus, even retroactive transfer pricing adjustments must confine to the arm's length principle.

The Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations report of 1995 gets updated from time to time to cover the developments within transfer pricing, including retroactive transfer pricing adjustments. The Organisation for Economic Co-operation and Development encourages member countries to adopt the guidelines on transfer pricing as set out in their reports when dealing with transfer pricing and customs valuations in their national legislation. In this regard, even though South Africa is a non-member of Organisation for Economic Co-operation and Development,²¹⁵ it has adopted the guidelines as set out in the Organisation for Economic Co-operation and Development report of 1995. The element of the 1995 report, such as the use of arm's length method, which is the equivalent of the transaction value method, is adopted in the *CEA*.²¹⁶

In 2013, the Organisation for Economic Co-operation and Development Action plan on Base Erosion and Profit Shifting²¹⁷ was published. The 2013 action plan's objective was to address the issue of base erosion and profit shifting that comes under the pretext of transfer pricing. Base erosion and profit shifting are a process whereby the MNEs shift their profit to a country with lower tax rates to pay less tax. The profit originates in one country, but it will be shifted to a country with lower tax rates for tax benefit purposes. The 2013 action plan led to the Organisation for

²¹³ Allan *The OECD Transfer Pricing Guidelines* 8.

²¹⁴ Cheng W and Zhang D "The Arm's Length Principle, Transfer Pricing and Foreclosure under Imperfect Competition" *Monash University Department of Economics Discussion Paper* (2010) 2.

²¹⁵ Lord *Transfer Pricing in South African Income Tax Law* 14.

²¹⁶ See section 66 of the *CEA*; see related discussion by Michaletos *News and Press TaxTalk* 44

²¹⁷ Organisation for Economic Co-operation and Development Action plan on Base Erosion and Profit Shifting (2013); see related discussion by Kiluma R *Transfer Pricing in Tanzania: Regulating Foreign Investors' Transparency Obligations* (LLM-desertion University of Pretoria 2017) 29.

Economic Co-operation and Development Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report.²¹⁸ The 2015 report dealt with the disclosure guidelines for MNEs and the transfer pricing documentation. The 2015 report recommended that MNEs must maintain and prepare a transfer pricing policy. In 2017, the Organisation for Economic Co-operation and Development issued the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.²¹⁹ The 2017 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations focused extensively on disclosure programmes as a means to deal with base erosion and profit shifting. In this regard, the 2017 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations recommended that the MNE should prepare and maintain the transfer policy, which must be submitted to tax authorities when requested. The transfer pricing policy is also useful when SARS decides to audit the retroactive transfer pricing adjusted transactions.

2.3 Historical Aspects of Customs Valuation in South Africa

The purpose of customs valuation is to determine the value of imported goods for the imposition of customs duties.²²⁰ The value of imported goods is determined by the importer when they make an entry or by SARS upon voluntary request by the importer or when SARS conducts an audit. Customs valuation internationally is regulated by the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade,²²¹ which is part of the *General Agreement on Tariffs and Trade (GATT)*.²²² South Africa adopted GAAT in 1947.²²³ The World Trade Organisation (WTO) member countries use the *Valuation Agreement* by adopting its provisions in their national legislation to determine the customs value of imported goods. South Africa is a member of the World Trade Organisation, and it

²¹⁸ Organisation for Economic Co-Operation and Development Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report (1995).

²¹⁹ Organisation for Economic Co-Operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017); see related discussion by Kiluma R *Transfer Pricing in Tanzania* 29.

²²⁰ Masui Y "Transfer Pricing and Customs Duties" 1996 *50 Bulletin for International Fiscal Documentation* 315;315.

²²¹ See Article 1-7 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994) (*Valuation Agreement*).

²²² See Article VII of the *General Agreement on Tariffs and Trade* (1948).

²²³ Yanai A "South American Trade Policy: Interactions between Trade Policy and the WTO Negotiations" 2013 *Institute of Developing Economies, Japan External Trade Organization* 69; 70.

became a signatory to the *Valuation Agreement* in 1983.²²⁴ As a result, South Africa has an obligation to align its national legislation in relation to customs valuation with the *Valuation Agreement*. In this regard, the principles of the *Valuation Agreement*²²⁵ are adopted by implementing the transaction value method in section 66 of the *CEA* and *Customs Duty Act*.²²⁶ The valuation of imported goods in South Africa has been regulated in the *CEA* since 1964 to date.²²⁷ However, the legislature has enacted the *Customs Duty Act* to regulate the determination of the customs value on imported goods.²²⁸ The *Customs Duty Act* will eventually replace the parts of *CEA* dealing with customs valuation and imposition of duties when it comes into effect.

South Africa assessed customs duties based on the *Convention on the Valuation of Goods for Customs Purposes*,²²⁹ commonly known as the Brussels Definition of Value (BDV).²³⁰ The BDV was the first international valuation standard based on the principles of the *Valuation Agreement*.²³¹ The BVD provides that a normal price of the imported goods is the price that a good would fetch in an open market between a buyer and seller independent of each other.²³² The BVD got much reception in 1970, when more than 100 countries adopted this approach,²³³ including South Africa. In South Africa, customs duties and taxes are assessed from the price of imported goods by SARS. Thus, the price of imported goods must be determined by SARS and the importer fairly and neutrally. The objective determination of the price of imported goods is to ensure that the MNE pays the correct amount of duties, as the duties are based on the customs value.

²²⁴ Bakker A and Oosterhoff D (eds) *Transfer Pricing and Customs Valuation: Two Worlds to Tax as One* (IBFD The Netherlands 2009) 505.

²²⁵ Fyfe *Understanding and Managing Risks of Transfer Pricing* 46.

²²⁶ 30 of 2014 (*Customs Duty Act*) see section 127; see related discussion by Tuominen *The link between transfer pricing and the EU customs valuation law* 11.

²²⁷ See sections 65, 66 and 67; see related discussion by De Wulf and Sokol *Customs Modernization Handbook* 54.

²²⁸ See sections 115-135 of the *Customs Duty Act*.

²²⁹ *Convention on the Valuation of Goods for Customs Purposes* 28 July (1953); see related discussion by Clarete R L *Customs Valuation Reform in the Philippines* (University of the Philippines School of Economics 2004 Background paper prepared for the World Development Report 2005) 2.

²³⁰ Rosenow S and O'Shea BJ *A Handbook on the WTO Customs Valuation Agreement* (Cambridge University Press New York 2010) 6; see related discussion by Clarete *Customs Valuation Reform* 2.

²³¹ De Wulf and Sokol *Customs Modernization Handbook* 157.

²³² See Annex 1 of the BVD; see related discussion by Clarete *Customs Valuation Reform* 2; Rosenow and O'Shea *A Handbook on the WTO Customs Valuation Agreement* 6.

²³³ De Wulf and Sokol *Customs Modernization Handbook* 157.

The *General Agreement on Tariffs and Trade* members formulated a customs valuation code, during its Tokyo round trade negotiations in 1979.²³⁴ The customs valuation code formulated in 1979 entails that the determination of customs value on imported goods must be based on fair and neutral systems or methods. In the WTO Uruguay Round Agreement, member states to the WTO were requested to adopt the *Valuation Agreement*.²³⁵ The Uruguay Round occurred from 1986 to 1994.²³⁶ The outcome of the Uruguay Round was that member states should adopt and reinforce the *Valuation Agreement*. South Africa in this regard, did adopt the *Valuation Agreement* as per the recommendations of the Uruguay Round.

2.4. Overview of Historical Aspects of Retrospective Transfer Pricing Adjustments and Customs Valuation in South Africa.

Retroactive transfer pricing adjustments and customs valuation remains the most important international tax issue facing MNEs,²³⁷ and most tax authorities including in South Africa. Due to a large percentage of trade between MNEs,²³⁸ the valuation of transfer pricing transactions has become an important tax issue for both MNEs and SARS customs.²³⁹ Transfer pricing is mainly regulated by the Organisation for Economic Co-operation and Development guidelines²⁴⁰ and *Income Tax Act*,²⁴¹ while retroactive transfer pricing adjustments and customs valuation are regulated by the valuation agreement and *CEA*,²⁴² the *Customs Control Act* and the *Customs Duty Act* (once they come into effect).

Despite the provisions contained in the Organisation for Economic Co-operation and Development guidelines and the local customs legislation, there are still

²³⁴ Clarete *Customs Valuation Reform 2*; see related discussion De Wulf and Sokol *Customs Modernization Handbook* 157.

²³⁵ Rabby and Verlinden 2015 *PricewaterhouseCoopers* 146.

²³⁶ Oxley A "The achievement of GATT Uruguay Round" 1994 *A Journal of Policy Analysis and Reform* 45; 52.

²³⁷ Ielyzaveta G *The Role of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations for OECD and non-OECD countries* (Master Thesis in European and International Tax Law Lund University 2013) 4.

²³⁸ Bonturi M and Kiichiro F "Globalisation and intra-Firm Trade" 1993 *OECD Economic Studies* 145;146.

²³⁹ Allan *The OECD Transfer Pricing Guidelines* 8.

²⁴⁰ Tuominen *The Link Between Transfer Pricing and The EU Customs Valuation Law* 2.

²⁴¹ See Section 31; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 506.

²⁴² See sections 65 and 66 of the *CEA*; see related discussion by Michaletos *News and Press: TaxTalk* 45.

shortcomings in relation to the regulation retroactive transfer pricing²⁴³ and customs valuations in South Africa. The shortcomings relating to the passing of vouchers of correction by MNEs and the administrative burden this cause for SARS are still not addressed in the OECD guidelines, *CEA*²⁴⁴ and the *Customs Control Act*. Retroactive transfer pricing laws have not been consistently developed since the 1940's, and as a result, they are prone to manipulation. The possible manipulation of retroactive transfer pricing adjustment, if not curbed, poses a threat to the South African economy.

2.5. Conclusion

Retroactive transfer pricing adjustments and customs valuation have the same objective, which is to determine the price of goods sold between MNEs in a fair, neutral way and to ensure that the relationship between the MNEs do not influence the price paid of the goods.²⁴⁵ South Africa has adopted the principle of determining the customs value based on fair and neutral systems or methods in the *CEA*, and the *Customs Duty Act*. There has been little development on retroactive transfer pricing adjustments under the *CEA* as opposed to transfer pricing under the *Income Tax Act*. In 2012, there was a significant focus on retroactive transfer pricing adjustments by SARS.²⁴⁶ In this regard, the MNEs have the obligation to notify SARS of the retroactive adjustment they make to the customs value of imported goods. The adjustment is normally performed once the MNE receives a credit, debit note or an amended invoice. SARS should be notified within a month (30 days) of receiving a credit, debit note or an amended invoice. Subsequently, the MNE must amend their original declarations by passing a voucher of correction and pay the customs duties and VAT over to SARS where there was an increase in the customs value or claim a refund if the customs value is decreased.²⁴⁷

Since 2012, failure to declare retroactive transfer pricing adjustments to SARS is an offence and may result in interest and penalties being levied by SARS to MNE.²⁴⁸ In this regard, the MNE may lose its right to claim back the duties and VAT where there

²⁴³ Allan *The OECD Transfer Pricing Guidelines* 79.

²⁴⁴ See sections 65 and 66; see related discussion by Michaletos News and Press: *TaxTalk* 45.

²⁴⁵ Tuominen *The link between transfer pricing and the EU customs valuation law* 14.

²⁴⁶ Gaarlandt, Ramathodi and Rheeder *Indirect Tax Alert* 1.

²⁴⁷ Fyfe *Understanding and Managing Risks of Transfer Pricing* 31; 32; see related discussion by Michaletos News and Press: *TaxTalk* 45

²⁴⁸ Gaarlandt, Ramathodi and Rheeder *Indirect Tax Alert* 1.

was a downward adjustment in instances where SARS is not notified within 30 days after the adjustment.²⁴⁹ Although there has been much focus on retroactive transfer pricing adjustments since 2012, the legislative provisions of the *CEA* dealing with retroactive transfer pricing adjustment still have shortcomings. The shortcomings of the *CEA* in retroactive transfer pricing adjustment are not addressed in the *Customs Control Act* and *Customs Duty Act*. The shortcomings are that the MNEs must pass vouchers of correction for thousand entries amending the customs value. For SARS, it is a huge administrative burden to capture, and action vouchers of correction passed to amend the customs value on retroactive transfer pricing adjusted transactions.

²⁴⁹ Gaarlandt, Ramathodi and Rheeder *Indirect Tax Alert* 1.

CHAPTER THREE

CURRENT REGULATORY ASPECTS OF RETROACTIVE TRANSFER PRICING ADJUSTMENTS IN SOUTH AFRICA

3.1 Introduction

The *Custom and Excise Act*²⁵⁰ regulates customs valuation and enables the South African Revenue Service (SARS) to levy customs duties on imported goods. The regulation of customs valuation is by the provision of valuation methods and the levying of customs duties. The *CEA* provides that customs duties are payable on imported goods into South Africa.²⁵¹ The customs duties levied by SARS are based on the customs value. It is prudent for the correct and true customs value to be determined at the time of importation in order to determine the correct customs duties payable.²⁵² Retroactive transfer pricing adjustments are performed only by MNEs as per their transfer pricing policy, having an impact on the customs value of goods imported within the MNEs. As a result, the valuation of the cross-border transfer pricing transactions within MNEs becomes important to determine whether the MNEs correctly did the adjustments.

Just like the *CEA*, the *Customs Duty Act*²⁵³ will regulate the imposition and collection of customs duties on goods imported into South Africa once it comes into effect. The provisions empowering SARS to levy customs duties on imported goods will be contained in the *Customs Duty Act* when it comes into effect. Furthermore, valuation methods to determine the customs value of imported goods will also be contained in the *Customs Duty Act* when it comes into effect. The *Customs Duty Act* will still provide for the calculation of customs duties on the customs value.²⁵⁴ The provisions of the *Customs Duty Act* will also have to be updated to enable the correct

²⁵⁰ 91 of 1964 (*CEA*) see section 65, 66 and 67; see related discussion by *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002 (4) SA 823 (SCA) para 1 where it was held that the regulation of the determination of the customs value is contained in the *CEA*.

²⁵¹ See section 47 of the *CEA*; see related discussion by Bakker A and Oosterhoff D (eds) *Transfer Pricing and Customs Valuation: Two Worlds to Tax as One* (IBFD The Netherlands 2009) 4.

²⁵² See Article VII of *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994); see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 4.

²⁵³ 30 of 2014 (*Customs Duty Act*); see sections 115-135 in chapter 7 of the *Customs Duty Act*; see related discussion on the imposition of customs duties by Fyfe *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation* 46.

²⁵⁴ See Sections 19 and 20 of the *Customs Duty Act*.

calculation of the customs duties due to cross-border transactions within by Multinational Enterprises (MNEs) that will be subjected to retroactive transfer pricing adjustments.

Customs duties are a form of tax imposed by SARS on goods imported into South Africa.²⁵⁵ To ensure that this form of tax is not evaded by MNEs, there is a need for robust regulation of retroactive transfer pricing adjustments and customs valuation in South Africa. If MNEs evade the customs duties, such evasion can negatively affect the economy of South Africa.²⁵⁶ SARS needs to determine the correct value of imported goods. If the customs value is incorrect at the time of importation, the customs duties paid would also be incorrect as the customs duties would have been calculated based on the incorrect value. The determination of the customs value of imported goods by the importer or SARS is done by way of customs valuation²⁵⁷ using customs valuation methods as provided for in the *CEA*.²⁵⁸ The prices of goods bought and sold within MNEs are referred to as transfer prices.²⁵⁹ The adjustments of such prices retroactively are referred to as retroactive transfer pricing adjustments. In this regard, this research only focuses on retroactive transfer pricing adjustments occurring within the MNE. Transactions between independent parties are not subjected to control or common ownership that occurs with transactions within MNEs. The prices between independent parties are subjected to competitive marketing conditions.

The *Income tax Act*²⁶⁰ regulates transfer pricing by providing for the valuation of transfer pricing transactions within MNEs by guiding the adjustments of profit of a company. Retroactive transfer pricing adjustments, on the other hand, is not specifically provided for in the *CEA*, however, once the retroactive transfer pricing adjustments are performed and such adjustments affect the value of goods imported,

²⁵⁵ *Patrick Lorenz Martin Gartner v. The South African Revenue Service* (unreported) case number 12632/12 para 18, it was held that the *CEA* is of fiscal nature responsible for the imposition and collection of customs duties.

²⁵⁶ Aumeerun B, Jugurnath B and Soondrum H "Tax evasion: Empirical evidence from sub-Saharan Africa" 2016 *Journal of Accounting and Taxation* 70; 72.

²⁵⁷ Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM-dissertation University of Pretoria 2016) 6.

²⁵⁸ 91 of 1964 (*CEA*) see section 65, 66 and 67; see related discussion by *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002 (4) SA 823 (SCA) para 1.

²⁵⁹ Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in the South African Legal Regime* (LLM-dissertation University of Cape Town 2007) 1.

²⁶⁰ 58 of 1962 (*Income Tax Act*), see section 31; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 506.

the adjustment of such prices is regulated by the *CEA*. The *CEA* allows the MNEs to go back and adjust the customs value of imported goods by way of a voucher of correction as a result of retroactive transfer pricing adjustments.²⁶¹ This research deals only with retroactive transfer pricing adjustments that have implications on the customs value under the *CEA*. The retroactive adjustments of prices of imported goods within the MNEs affect customs valuation of cross-border transactions within MNEs. The valuation methods must be employed to determine if the retroactive transfer pricing adjustment was performed correctly. Retroactive transfer pricing adjustments are the adjustment of the customs value of imported goods within MNEs, which usually occur at the end of the financial year of the concerned MNEs²⁶² as per the MNEs transfer pricing policy. The declared customs value can be adjusted upwards or downwards as a result of retroactive transfer pricing adjustments.²⁶³ The adjustment results in the customs value of previous imports increasing or decreasing.

3.2 The Regulation of Retroactive Transfer Pricing under the CEA

The provisions of customs valuation and retroactive adjustments of the customs value are contained in the *CEA*.²⁶⁴ According to the *CEA*,²⁶⁵ the value of imported goods must be the transaction value, which is the price paid or payable for the imported goods.²⁶⁶ The valuation provisions of the *CEA* further empower SARS to determine the value of imported goods in writing by issuing a value determination.²⁶⁷ SARS may also stop goods at the time of importation and conduct a value inquiry. The provisions of the *CEA* provide for certain additions and subtractions of certain costs when determining the customs value of imported goods.²⁶⁸ For example, commission other than buying commission must be added to when calculating the customs value.

²⁶¹ See section 40(3) of the *CEA*.

²⁶² *Fyfe Transfer Pricing and Customs Valuation Rules* 12.

²⁶³ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 53.

²⁶⁴ See section 65 - 67 of the *CEA*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 523.

²⁶⁵ See section 65(1) of the *CEA*; see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002(4 SA 823 (SCA) para 1.

²⁶⁶ *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another* (A406/14) [2015] ZAGPPHC 1104 para 4.

²⁶⁷ See section 65(4) of the *CEA*.

²⁶⁸ See sections 66 and 67 of the *CEA*.

The CEA²⁶⁹ embodies the principles of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Valuation Agreement)*.²⁷⁰ The CEA mentions the relationships that are provided for in the *Valuation Agreement*²⁷¹ which makes parties to be related.²⁷² One of the examples of listed related parties, the CEA, provides that two parties shall be deemed to be related if the other party directly or indirectly owns more than five percent of the equity share capital of both parties. This is usually the case in MNEs, where the parent company can own more than five percent of the share capital on the subsidiary situated in South Africa. Transactions within MNEs are regarded as transactions between related parties as provided for in the CEA. This can be seen in instances where the relationship could influence the price paid or payable for imported goods.

The CEA²⁷³ provides that the fact that a relationship exists within MNEs does not in itself disqualify the use of the transaction value method. The transaction value method can still be utilised by the MNEs or SARS to determine the customs value of imported goods within the MNEs as long it can be proved that the relationship did not influence the price of imported goods. Although the CEA provides that relationships like the one within an MNE could possibly disqualify the use of the transaction value for valuation purposes,²⁷⁴ the mere existence of a relationship within the MNEs does not mean the relationship influenced the price paid or payable for the imported goods.²⁷⁵ The existence does not automatically disqualify the use of the transactional value method to determine the customs value. There must be evidence to prove that the relationship within the MNEs influenced the price paid or payable in order to disqualify the use of the primary transaction valuation method.²⁷⁶ In instances where it can be proven that the relationship did influence the price of imported goods, the

²⁶⁹ See section 66(2) (a) of the CEA; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 48.

²⁷⁰ See Article 1 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994) provide that the transaction value method is prescribed as the primary valuation method by the *Valuation Agreement*.

²⁷¹ See Article 15(4) and (5) of the *Valuation Agreement*: see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 48.

²⁷² See section 66(2) (a) of the CEA.

²⁷³ See section 66(3) of the CEA; see related by Fyfe *Transfer Pricing and Customs Valuation Rules* 49.

²⁷⁴ See section 66(2) of CEA.

²⁷⁵ See Article 1.2(a) of the *Valuation Agreement* see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 20-21.

²⁷⁶ Fyfe *Transfer Pricing and Customs Valuation Rules* 11.

alternative valuation method in their hierarchical order can be used to determine the customs value.²⁷⁷

The *CEA*²⁷⁸ provides that if an importer and supplier are related like in the case of MNEs, this relationship must be indicated by inserting the code letter “R” on the declaration under the valuation code. The requirement of declaring the relationship on the customs declaration alerts SARS that the value declared may be influenced by the relationship within the MNEs. Even though the companies within MNEs are related, their relationship may not necessarily affect the price of goods traded between them.²⁷⁹ Where it can be demonstrated that the price paid is based on open market conditions, and the relationship did not influence the price, then such price is the correct price for customs valuation purposes. According to the *Valuation Agreement*²⁸⁰ the circumstances surrounding the sale is one of the tests to establish whether the relationship influenced the price paid or payable for imported goods. The valuation methods prescribed by the *CEA* like circumstances surrounding the sale or the value of identical goods can be used as alternatives to the transaction value method.²⁸¹ The alternative valuation methods are used where the transaction value method cannot be used due to the suspicion that the relationship within the MNE influenced the price paid or payable.²⁸²

The *CEA* and its Rules in determining the customs value provide that, in instances where the importer is not related to the supplier, the importer indicates this by inserting the code letter N on their declaration.²⁸³ The insertion of N on the declaration indicates to SARS that there is no relationship between the importer and the supplier, and the fewer chances that the value declared could be influenced or undeclared. The Rules to the *CEA* further requires the importer, regardless of the relationship, to declare which valuation method applies to their transaction.²⁸⁴ The declaration of the valuation method is to enable SARS to know which method was

²⁷⁷ Desiderio and Desiderio 2010 *World Customs Journal* 41.

²⁷⁸ See section 66(2) (c) of the *CEA*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 523.

²⁷⁹ Pagter and Van Raan *The Valuation of Goods For Customs Purposes* 33.

²⁸⁰ See Article 1.2 (a) and (b) of the *Valuation Agreement*.

²⁸¹ Ping L and Silbertrtein C “Transfer Pricing, Customs Duties and VAT Rules: Can we bridge the Gap?” 2007 *World Commerce Review* 36; 37.

²⁸² Pagter and Van Raan *The Valuation of Goods For Customs Purposes* 19.

²⁸³ See section 66(2)(c) and Rule 66.03 of the *CEA*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 523.

²⁸⁴ See Rule 66.05 to the *CEA*.

used if they do an investigation on the value declared. The *CEA* provides for six valuation methods that can be used to determine the value of imported goods either by SARS or MNEs.²⁸⁵ The six valuation methods are: the transaction value method, the transaction value of identical goods method, the transaction value of similar goods method, the deductive value method, the computed value method and the residual method. The six mentioned valuation methods can be used to determine the customs value, and the importer must declare which one was used to determine the value of the imported goods for customs duty purposes to enable SARS to determine if a valuation investigation is needed.

Companies within MNEs are related parties within the provisions of the *CEA*;²⁸⁶ the Rules to the *CEA* provide that the MNEs have to complete a valuation questionnaire by making use of a form DA 55.²⁸⁷ The DA 55 contains questions that enable SARS to determine the circumstances surrounding the actual price that was paid or payable for the imported goods. The questions on the DA55 are asked by SARS to determine whether the relationship within the MNE influenced the price paid or payable.²⁸⁸ The DA55 is used to combat the possible manipulation of retroactive transfer pricing adjustments by dictating if there might be any undervaluation through the questionnaire.

The Rules to the *CEA* provides that once the valuation questionnaire is completed, SARS may further request documents relating to the transaction.²⁸⁹ These include, among others, the invoices, price agreements, the transfer pricing documentation which is the transfer pricing policy of the MNE.²⁹⁰ Although SARS requires the transfer pricing policy of the MNE,²⁹¹ the provisions concerning SARS accepting the transfer pricing policy as proof that the relationship of the MNE did not influence the price paid for imported goods, are not clear cut. SARS seems to be reluctant to

²⁸⁵ See sections 66(1), 66(4), 66(5), 66(7), 66(8) and 66(9) of the *CEA* which provides for all the six-valuation method referred to as Method 1 to 6 by Rule 66.05 to the *CEA*.

²⁸⁶ See section 66(2)(a) of the *CEA*

²⁸⁷ See Rule 65.01 to the *CEA*; See related discussion by Michaletos *News and Press: TaxTalk* 45.

²⁸⁸ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 523.

²⁸⁹ See Rule 65.01 to the *CEA*.

²⁹⁰ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 524.

²⁹¹ Lord TS *Transfer Pricing in South African Income Tax Law* (Dissertation: Postgraduate Diploma in Income Tax Law at University of Cape Town 2014) 8 and 33; see related discussion by Allan *The OECD Transfer Pricing Guidelines* 11.

accept the transfer pricing documentation for customs valuation purpose, but SARS use the transfer pricing documentation for verification purposes.²⁹²

The *CEA* provides that SARS may determine the transaction value of goods imported by way of issuing a Value Determination.²⁹³ The provisions relating to the value determination goes to regulate retroactive transfer pricing adjustments in that SARS may determine the value of the goods even after the adjustments are performed to ensure that the price was rightfully adjusted. The Value Determination may be done at the request of the importer or where a dispute arises concerning value between SARS and the MNEs. In instances that SARS may contend that the adjustment to the value of imported goods was not properly done, SARS issues a value determination. If the MNEs dispute the value determination issued, recourse will be to appeal such determination to a high court having jurisdiction in terms of the provisions of the *CEA*.²⁹⁴

The process of issuing a value determination is regulated by the provisions of the *CEA*, which empowers SARS to determine the value of goods imported in writing.²⁹⁵ The rules to the *CEA* provide that when SARS issues a value determination, they allocate it a reference number²⁹⁶. Hence it is referred to as a Value Determination Number (VDN). Such a Value Determination is only in effect to the goods and person mentioned in the determination.²⁹⁷ Where SARS wants to curb manipulation of the customs value, a value determination may be issued that have to be utilised at the time of importation. However, this approach is not effective on retroactive transfer pricing adjustments as the adjustments take place after importation. In this regard, retroactive transfer pricing adjustments are still open to manipulation by MNEs where downwards adjustments can be performed on the customs value of previous imports.

²⁹² Fyfe *Transfer Pricing and Customs Valuation Rules* 51.

²⁹³ See section 66 of *CEA*.

²⁹⁴ See section 65 (6) of *CEA* see related discussion in *Levi Strauss v Commissioner of the South African Revenue Services* (unreported) case no: 2093/2015 para 1; *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002((4 SA 823 (SCA) para 13.

²⁹⁵ See of 65(4) (a) (i) of the *CEA*; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 51.

²⁹⁶ See Rule 66.05 to the *CEA*.

²⁹⁷ See section 65(4) (a) (ii) of the *CEA*; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 50.

The provisions of the *CEA*²⁹⁸ provides for the amendment of a Value Determination issued by SARS. Such amendment is done in instances where, for example, the determination was issued, and SARS did not have certain information or in instances where there was simply an error of law or fact at the time of the determination. A value determination issued to MNEs can be amended once certain information becomes available, like once the adjustments are performed. It is submitted that although the *CEA* provides for the amendment of a value determination, it would be impractical for SARS to amend a value determination each time the adjustments are performed due to retroactive transfer pricing adjustments.

The *CEA* provides that an importer must ensure that the particulars of such an entry are true and accurate when making an import declaration.²⁹⁹ This, in turn, suggests that although there are retroactive transfers pricing adjustments, at the time of importation, the MNEs must ensure that they declare the correct customs value. The *CEA* provides that all the particulars of the goods that are entered for import must be disclosed, and the importer must ensure their correctness.³⁰⁰ This relates to even the customs value that is later adjusted by the MNE through retroactive transfer pricing adjustments. The *CEA* provides that the customs value upon importation to be the true value of the goods.³⁰¹ This means that even though the MNEs are still going to adjust the customs value at a later stage through retroactive transfer pricing adjustments, at the time of importation, the MNEs are required to declare the correct customs value.

Furthermore, the *CEA* provides that the particulars of an invoice must be correct at the time of importation,³⁰² including the customs value. The particulars of an invoice

²⁹⁸ See section 65(4) (b) of the *CEA*; see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002((4 SA 823 (SCA) para 13.

²⁹⁹ See section 40 of the *CEA*; see related discussion in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*; *Commissioner of Customs and Excise v Rennie's Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) para 11; *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another* (A406/14) [2015] ZAGPPHC 1104 para 4.

³⁰⁰ See section 40 of the *CEA*; see related discussion in *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another* (A406/14) [2015] ZAGPPHC 1104 para 5.

³⁰¹ See section 40(1)(b) of the *CEA*; see related discussion in *Commissioner, SARS v Trend Finance (Pty) Ltd* [2007] SCA 59 (RSA) para 5.

³⁰² See section 41 of the *CEA*: see related discussion by *Henta's Verspreiders CC v The Commissioner for The South African Revenue Services* (unreported) case number 22826/11 para 24.

are required to be sufficient and correct.³⁰³ In this regard, retroactive transfer pricing adjusted transactions do not allow for the value that is declared to customs to be the true value at the time of importation as the value still has to be adjusted, usually at the end of the year. An entry with an incorrect customs value is invalid.³⁰⁴ Thus, in a strict sense the entries passed by MNEs for transactions that will retroactively be adjusted are invalid. The *CEA* provides that a false declaration of a customs value is a serious offence.³⁰⁵ Goods to which the customs value was falsely declared are liable to forfeiture.³⁰⁶ This, in turn, entails that cross-border transactions within MNEs where there are retroactive transfer pricing adjustments can be subjected to forfeiture penalties.

SARS must ensure that the relationship within the MNEs does not influence the price paid or payable of the goods sold and bought within the MNE. Some mechanisms are in place in the *CEA*, like the valuation methods to test whether the relationship did not influence the price of imported goods between MNEs. Valuation methods can be used and in certain cases, SARS conducts a Post-Clearance Audit (PCA) on cross border transactions within MNEs.³⁰⁷ This is done on selected companies that go through the audit, where the MNE have to complete a questionnaire from which it can be established if retroactive transfer pricing adjustments will be performed. In relation to the valuation methods, SARS tests the valuation method used and determine whether indeed the price declared by the MNEs complies with the requirements as set out in the method. In these instances, SARS may decide that the requirements of a method were not met, and as a result, use a different method to arrive at a different price. SARS may also use the method declared by the importer and arrive at a different price as to what the importer declared.

³⁰³ Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another (A406/14) [2015] ZAGPPHC 1104 para 5.

³⁰⁴ *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another* (A406/14) [2015] ZAGPPHC 1104 para 5.

³⁰⁵ See section 80 of the *CEA*.

³⁰⁶ See section 88 of the *CEA*; see related discussion in *Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another* (A406/14) [2015] ZAGPPHC 1104 para 6.

³⁰⁷ *Fyfe Transfer Pricing and Customs Valuation Rules* 50.

3.3 The Regulation of Retroactive Transfer Pricing under the Customs Duty Act and Customs Control Act

The *Customs Control Act* and *Customs Duty Act* are not yet in force, and there will only come to force on the date to be determined by the President. As a result, this research discusses the regulations that will be in place once these Acts come into force. The *Customs Duty Act* when it comes into effect will replace some parts of the *CEA* dealing with the valuation of goods, imposing and collecting customs duties, and the imposition of penalties.³⁰⁸ The provisions relating to the valuation of imported goods will be contained in the *Customs Duty Act*. The procedural aspects of the *CEA* will be contained in the *Customs Control Act*.³⁰⁹ The provisions about customs valuation in the *Customs Duty Act* are largely based on the *Valuation Agreement*. The provisions of the *Customs Duty Act*³¹⁰ which deals with the determination of customs value between related parties, give effect to the provisions of the *Valuation Agreement*.³¹¹

The *Customs Duty Act* has provisions relating to the valuation of cross-border transactions within MNEs that will be subjected to restorative transfer pricing adjustments. The *Customs Duty Act* stipulates instances where the transaction value method cannot be used to determine the value of imported goods within MNEs.³¹² The *Customs Duty Act*³¹³ stipulates that where the contract of sale was not concluded in the ordinary course of trade under fully competitive conditions, the transaction value method cannot be used to determine the value of imported goods.

The *Customs Control Act* provides that the contents of the declaration must be true and accurate, including the value of the imported goods.³¹⁴ This entails that even though the MNEs will still have to adjust the customs value of imported goods, at the time of importation, the declared customs value must be correct. The *Customs Control Act* further provides that MNEs should pass a voucher of correction if there is

³⁰⁸ Fyfe *Transfer Pricing and Customs Valuation Rules* 46.

³⁰⁹ See section 944(1) of the *Customs Control Act*; see related discussion by Fritz C *An Appraisal of selected Tax-Enforcement Powers of the South African Revenue Services* 9.

³¹⁰ See sections 129(1)(i) and 130 of the *Customs Duty Act*.

³¹¹ See article 1.1 and 1.2 of the *Valuation Agreement*.

³¹² See section 129(1) (b) Fyfe *Transfer Pricing and Customs Valuation Rules* 53.

³¹³ See section 129(1)(b) of the *Customs Duty Act*; these provisions emanate from the provision of article 7 of the *General Agreement on Tariffs and Trade* (1948).

³¹⁴ See section 167 of the *Customs Control Act*.

an amendment of customs value.³¹⁵ In the instances of retroactive transfer pricing adjustments performed by the MNEs, vouchers of correction must be passed amending the customs value of imported goods once the adjustment is done³¹⁶ as required by the *Customs Control Act*. The shortcoming the *CEA* have concerning the cost implication and administrative burden for passing vouchers of correction of what can be thousands of bills of entries are still contained in the *Customs Control Act*. The *Customs Control Act* when it comes into effect will still cause problems for the MNEs and SARS in relation passing of voucher of corrections. The problems relate to the cost implications and administrative burden associated with the requirements for a voucher of correction.

The *Customs Control Act* provides that the particulars of the invoice must be correct at the time of declaration.³¹⁷ The same provisions that regulate invoicing within MNEs are also provided for in the *CEA*.³¹⁸ The regulation of cross-border transactions that are subjected to retroactive transfer pricing must comply with this provision. The invoice that would have been utilised at the time of importation is invalid after the adjustments as the customs value would have changed either downward or upward. An amended invoice showing the new price after the adjustment has to be issued and be used to process a voucher of correction. This means that thousands of invoices and vouchers of corrections have to be processed as required by the *CEA*.³¹⁹

On cross border transactions that are subjected to retroactive transfer pricing adjustments, the customs value has to be amended once the adjustments are done. In regulating this, the *Customs Control Act* provides that an invoice must be amended once a credit or debit note is received.³²⁰ This means that an MNE is required to amend the invoice once the adjustments are performed and accordingly amend the declaration by passing a voucher of correction. The *Customs Control Act* provides that the MNEs are required to notify SARS of the amended invoice that is issued after retroactive transfer pricing adjustments are performed.³²¹ The purpose

³¹⁵ See section 174 of the *Customs Control Act*.

³¹⁶ Michaletos *News and Press: TaxTalk* 45.

³¹⁷ See section 177 of the *Customs Control Act*.

³¹⁸ See section 41 of the *CEA*.

³¹⁹ See sections 40(3) of the *CEA*.

³²⁰ Section 178 of the *Customs Control Act*.

³²¹ See section 178(5) of the *Customs Control Act*.

of this notification is to enable SARS to verify the adjustments and ensure that there was no manipulation of the customs value. The MNE is required by SARS to submit such an amended invoice, debit, or credit note. An amended invoice, debit, or credit note accompanies the voucher of correction submitted by the MNEs.

The *Customs Duty Act* empowers SARS to make value determinations.³²² Value determinations, as provided for in the *Customs Duty Act*, regulates retroactive transfer pricing adjustments in that where SARS is suspicious of an adjustment performed by the MNEs, SARS is empowered to issue its own value determination. Such a determination is in relation to the goods and mentioned in the determination.³²³ In terms of the *Customs Duty Act*, SARS may re-determine the value of a previous determination or issue a re-determination.³²⁴ This is to enable SARS to re-issue determinations after certain information becomes available, like after the transfer pricing adjustments are performed. In the *CEA*, the process of issuing a re-determination is referred to as an amendment of the value determination.

The *Customs Duty Act* provides that any person clearing goods for home consumption in South Africa is making self-determination of the value of such goods.³²⁵ This provision entails that when MNEs declare goods for import into South Africa, they are making self-determination of the value the imported goods. When valuing the imported goods, one would have to utilise valuation methods as provided for in the *CEA*. In relation to the valuation methods that must be utilised for cross-border retroactive transfer pricing adjusted transactions, the *Customs Duty Act* just like the *CEA*, provides the transaction value method as the primary valuation method.³²⁶ The hierarchical use of the valuation methods³²⁷ as contained in the *CEA* is also provided by the *Customs Duty Act*.³²⁸ This means that when determining the customs value, the MNEs must utilise the valuation methods in hierarchical form as

³²² See section of the 117 of the *Customs Duty Act*.

³²³ See section 65(4) (a) (ii) of the *CEA*; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 50.

³²⁴ See section 118 of the *Customs Duty Act*.

³²⁵ See section 166 of the *Customs Duty Act*.

³²⁶ Tuominen J *The link between transfer pricing and the EU customs valuation law*: 11.

³²⁷ See Article 1 of the Valuation Agreement; see related discussion Fyfe *Transfer Pricing and Customs Valuation Rules* 8; by Tuominen *The link between transfer pricing and the EU customs valuation law*, 10.

³²⁸ See section 128 of the *Customs Duty Act*.

provided for in the *CEA*. When the *Customs Duty Act* comes into effect, the MNEs are still required to eliminate the transaction value method before the alternative valuation methods can be used in their hierarchical order.³²⁹

The *Customs Duty Act* provides that relationships between contracting parties are a disqualifying factor for the use of the primary valuation method.³³⁰ The relationship of the MNEs qualifies in the mentioned relationships in the *Customs Duty Act*. On the face of it, one may conclude that MNEs could not utilise the transaction value method to determine the customs value. However, according to the *Customs Duty Act*,³³¹ SARS may accept the use of the transaction value method if the MNEs prove that the relationship did not influence the price paid or payable for the goods.³³² Thus, the relationship within the MNEs does not automatically disqualify the use of the transaction value method.

3.4 Customs Valuation Methods in terms of the CEA and Customs Duty Act

SARS has put much focus on managing the risks associated with retroactive transfer pricing adjustments and customs valuation.³³³ Intensifying audits did the focused on retroactive transfer pricing adjusted transactions and customs valuation thereof. It is against this background that it is prudent to analyse valuation methods under the *CEA* and as they will be in *Customs Duty Act* once it comes into effect. The customs valuation methods are vital when it comes to determining the correct customs value on retroactive transfer pricing adjusted transactions within the MNEs. The *CEA* defines a customs value as the transaction value.³³⁴ The transaction value is defined as the price actually paid or payable for goods when sold for export to South Africa.³³⁵ The price of goods sold and bought within the MNEs must confine to this definition.

Customs valuation ensures that the determination of the value on imported goods is based on fair and neutral methods excluding the use of arbitrary methods or

³²⁹ Fyfe *Transfer Pricing and Customs Valuation Rules* 22.

³³⁰ See Section 130 of the *Customs Duty Act*.

³³¹ See section 130(3) (a) of the *Customs Duty Act*.

³³² Fyfe *Transfer Pricing and Customs Valuation Rules* 20.

³³³ Fyfe *Transfer Pricing and Customs Valuation Rules* 12.

³³⁴ See section 65 of the *CEA*; see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002(4 SA 823 (SCA) para 1.

³³⁵ See section 66 (1) (d) of the *CEA* see related discussion by *Levi Strauss v Commissioner of the South African Revenue Services* (case no: 2093/2015) para 16.

systems.³³⁶ To ensure that the price of imported goods is fair and neutral price, there are valuation methods provided for in the *Valuation Agreement* and adopted in the *CEA*. The *Customs Duty Act* will also provide for the valuation methods as set out in the *Valuation Agreement*. As outlined earlier the valuation methods are applied in a hierarchy,³³⁷ meaning that one will first have to eliminate the first method being the transaction value method before moving to alternative valuation methods.³³⁸ The exception to the hierarchical application of the valuation methods is when it comes to the computed and deductive methods, which can be applied in reverse at the request of the importer.³³⁹ The alternative methods are only used in cases where the transaction value cannot apply.³⁴⁰ This would be instances where there is proof that the relationship influenced the customs value. The customs valuation methods, in their hierarchical order,³⁴¹ are discussed as follows:

3.4.1 *The transaction value method*

The primary method used for customs valuation is the transaction value.³⁴² When MNEs or SARS is determining the customs value on retroactive transfer primary pricing adjusted transaction, they must utilise the transaction value method first. The alternative valuation methods can only be used once the transaction value method is eliminated. The transaction value method is often referred to as the primary basis of customs valuation.³⁴³ In terms of the *CEA*,³⁴⁴ this method determines the value of goods as the price paid or payable when sold for export to South Africa.³⁴⁵ The transaction value method is the first method in the valuation methods, and it is used in many jurisdictions³⁴⁶ including South Africa. For MNEs to be able to use the

³³⁶ Tuominen *The Link Between Transfer Pricing and the EU Customs Valuation Law* 2.

³³⁷ Article 1 of the *Valuation Agreement*; see related discussion Fyfe *Transfer Pricing and Customs Valuation Rules* 8; by Tuominen *The link between transfer pricing and the EU customs valuation law* 10.

³³⁸ Fyfe *Transfer Pricing and Customs Valuation Rules* 22.

³³⁹ See section 66(7) to (8) of the *CEA*; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 53.

³⁴⁰ Tuominen *The link between transfer pricing and the EU customs valuation law* 12.

³⁴¹ See sections 66(1), 66(4), 66(5), 66(7), 66(8) and 66(9) of the *CEA*.

³⁴² Fyfe *Transfer Pricing and Customs Valuation Rules* 20.

³⁴³ Tuominen *The link between transfer pricing and the EU customs valuation law* 11.

³⁴⁴ See section 66 of the *CEA*; see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002(4 SA 823 (SCA) para 1.

³⁴⁵ See section 66(1) of the *CEA*; see related discussion by Tuominen *The link between transfer pricing and the EU customs valuation law* 10; 11.

³⁴⁶ Marsilla SI "Towards Customs Valuation Compliance through Corporate Income Tax" 2011 *World Customs Journal* 73;74.

transaction value method, they must prove that the price paid for the imported goods is not influenced by their relationship.³⁴⁷ In case of MNEs, if SARS suspects that the price paid for the imported goods is influenced by the relationship between the parties, the MNE is given an opportunity to prove otherwise by providing evidence to SARS.³⁴⁸

The *Valuation Agreement*³⁴⁹ stipulates that the mere fact that there is a relationship between parties at the time of importation does not necessarily mean that the transaction value method cannot be used for valuation purposes. The MNEs are not automatically disqualified from using the transaction value method due to the relationship that exists within them. Fefy (2016)³⁵⁰ argues that the transaction value cannot just be rejected out of hand. SARS cannot reject the use of the transaction value method on retroactive transfer pricing adjusted transactions. It remains the responsibility of the importer to prove to SARS that the relationship did not influence the price paid. Thus, the use of the transaction value method is permissible even on retroactive transfer pricing adjusted transactions as long as it can be proven that the relationship did not influence the price paid or payable for the imported goods. However, in cases of MNEs where there are transfer pricing policies, the argument that the relationship did not influence the price paid or payable tends not to hold water. In circumstances where the relationship between the MNEs influenced the price paid or payable, the transaction method cannot apply.³⁵¹ The alternative methods, in this instance, in sequential order, must be used to determine the price.³⁵²

3.4.1.1 Instances where the transaction value cannot be accepted because parties are related

In terms of the *CEA*, the onus is on the MNEs to prove that the price paid for the imported goods was the transactional value,³⁵³ and the relationship did not influence the price. The transaction value method may be utilised to determine the customs

³⁴⁷ Tuominen *The link between transfer pricing and the EU customs valuation law*_10.

³⁴⁸ Fyfe *Transfer Pricing and Customs Valuation Rules* 20.

³⁴⁹ See Article 1.2(a) of the *Valuation Agreement*.

³⁵⁰ Fyfe *Transfer Pricing and Customs Valuation Rules* 21.

³⁵¹ Kim 2013 *Tax Notes International* 1032.

³⁵² Article 3-7 of the *Valuation Agreement*.

³⁵³ See section 66 (1) (d) of the *CEA* see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 47.

value only in instances where the MNEs can prove that the price paid or payable for the imported goods was not influenced by the relationship.³⁵⁴ The *CEA*³⁵⁵ sets out rules to determine whether the relationship did influence the price. The *Customs Duty Act* provides for instances where one cannot use the transaction value method.³⁵⁶ The *Customs Duty Act* provides that in cases where the contract of sale was not concluded in full competitive conditions, the transaction value method cannot apply. Where the MNEs determined the price of goods sold and bought within the MNEs and such price was not subjected to open market conditions, such price cannot be used as the price paid or payable as per the transaction value method. The provisions of the *Customs Duty Act*³⁵⁷ stem from the *Valuation Agreement*,³⁵⁸ which stipulates that the price of imported goods shall be the actual value determined to the exclusion of arbitrary methods. The price of imported goods within the MNEs shall confine to these provisions.

In instances where the MNEs import a bundle or multiple goods at the same time, the test of determining that the transaction value method is applicable must be carried out in respect of every product under contention.³⁵⁹ Each product is priced differently, even if the goods may be the same or identical, there is a possibility for the importer to price them differently. Thus, it is prudent for SARS to evaluate the transaction value of goods separately. SARS cannot be persuaded when it is proven that the transaction value method applies to one product then the others in the consignment were not determined by the transaction value method. The determination of value is in respect to the specific goods.

3.4.2 *The transaction value of identical goods method*

The *CEA* provides that the second valuation method after the transaction value method is the transaction value of identical goods method.³⁶⁰ The transaction value

³⁵⁴ Fyfe *Transfer Pricing and Customs Valuation Rules* 47.

³⁵⁵ See section 66 (1) (d) of the *CEA* see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 46.

³⁵⁶ See section 129(1) (b) the *Customs Duty Act*.

³⁵⁷ See section 129(1) (b) of the *Customs Duty Act*.

³⁵⁸ See Article 7 of the *Valuation Agreement*; see related discussion by Fyfe *Transfer Pricing and Customs Valuation Rules* 54.

³⁵⁹ Jovanovich MJ *Customs Valuation and Transfer Pricing. Is It Possible to Harmonize Customs and Tax Rules?* (LIm-dissertation McGill University, Montreal 2000) 52.

³⁶⁰ See sections 66(4) of the *CEA*; see related discussion by Tuominen *The link between transfer pricing and the EU customs valuation law* 12.

of identical goods is applicable when the transaction value method cannot apply.³⁶¹ For this method to be applicable, the importer must be able to demonstrate that the identical goods are priced the same as the goods being valued. This is to ensure that the transaction value method is properly eliminated. The goods used for comparison must be of the same commercial characteristics and quantities as the goods valued.³⁶² The identical goods used for comparison must have the same characteristics and material, which enables them to perform the same function and can be commercially interchangeable.³⁶³

The *Valuation Agreement*³⁶⁴ defines identical goods as goods that are the same in all respects, meaning physical appearance and quality. However, a minor difference in appearance does not preclude the goods from falling under the category of identical goods.³⁶⁵ The value of identical goods that is used when the transaction value method is not applicable must be the value of goods that are sold for export to the same country of importation, and they must be sold for export at almost the same time as the goods being valued.³⁶⁶ In this instance, the identical goods used under this method are the goods sold to South Africa at about the same time as the goods being valued. The identical goods used must be at the same commercial level as the goods being valued.³⁶⁷

3.4.3 The transaction value of similar goods method

The *CEA* provides that the transaction value method of similar goods is the third method after the similar goods method.³⁶⁸ The transaction value of similar goods method is used where the transaction of identical goods identical method is not applicable.³⁶⁹ The transaction value method of similar goods looks at the value of

³⁶¹ Ping and Silbertrtzein 2007 *World Commerce Review* 37.

³⁶² Tuominen *The link between transfer pricing and the EU customs valuation law* 12.

³⁶³ See Article 2 of the *Valuation Agreement*; see related discussion by Ainsworth RT "IT-Advanced Pricing Agreements: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax-Customs VAT" 2007 *Rutgers Computer & Tech. LJ* 1; 68.

³⁶⁴ See Article 15 of the *Valuation Agreement*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 80.

³⁶⁵ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 80.

³⁶⁶ See Article 2 of the *Valuation Agreement*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁶⁷ See Article 2(1) (b) of the *Valuation Agreement*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁶⁸ See sections 66(5) of the *CEA*; see related discussion by Pagter and Van Raan *The Valuation of Goods For Customs Purposes* 63.

³⁶⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

goods that are not alike in all respects but have similar characteristics, which enables them to perform the same function and makes them commercially interchangeable.³⁷⁰ The same provision relating to the transaction of similar goods method is adopted in the *Customs Duty Act*.

3.4.4 *The deductive value method*

The *CEA* provides that the deductive method is used where the information required to determine the customs value is unavailable at that time.³⁷¹ The deductive value method is similar to the resale method³⁷² of transfer pricing.³⁷³ The deductive value method looks at the resale price of previous imported similar or identical goods to the ones being imported.³⁷⁴ The previously imported goods, when using this method, must have been sold under the same conditions as the goods being imported. The difference between the deductive value method and the resale price method is that the deductive method requires a comparison of the customs value of imported similar or identical goods over a short period.³⁷⁵

The deductive method provides that in order to arrive at the customs value, the resale price of imported similar or identical goods to the ones being valued must first be determined. In the resale price, one must deduct the profits, general costs, and other costs, what remain is the customs value.³⁷⁶ An example that is allowed to be deducted from the resale price when using the deductive value method is a commission paid or agreed to be paid.³⁷⁷ The deductive value method is not used more often because it is too complex thus, difficult to apply in practice.³⁷⁸ The deductive method and the computed value method may be used in reverse at the request of the importer.³⁷⁹

³⁷⁰ See Article 3 of the *Valuation Agreement*; see related discussion by Ainsworth 2007 *Rutgers Computer & Tech. LJ* 68.

³⁷¹ See sections 66(7) of the *CEA*; see related discussion by Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷² Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁷³ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷⁴ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷⁵ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁷⁶ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷⁷ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷⁸ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁷⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

3.4.5 *The computed value method*

The CEA provides that the computed value method is used when other valuation methods cannot be applied to the transactions.³⁸⁰ The computed method is considered to be similar to the cost-plus method³⁸¹ of transfer pricing. The computed value method looks at the cost that went into manufacturing the goods being valued.³⁸² The computed value method requires a comparison of the profit of the manufacture in order to determine the customs value. The comparison of the manufacturing costs of the supplier must be done with the other supplier that manufactures the same product in the same country.³⁸³ The computed value is considered to be the best alternative valuation method for the transaction value method as the computed value method is less complex.³⁸⁴ The information required is often readily available to the importer.

Certain difficulties often arise when the computed method is used. These include the requirement to obtain confidential information of suppliers in foreign countries relating to their manufacturing costs.³⁸⁵ This difficulty is easily circumvented, where the suppliers are willing to provide such information to their buyers in South Africa. However, the foreign supplier may be unwilling to disclose the required information³⁸⁶ to determine the customs value. MNEs are not prone to this difficulty of the possibility of the foreign supplier being reluctant to provide information relating to the manufacturing cost because with MNEs, the supplier and the buyer are related. The other difficulty with the computed value method is that the foreign supplier's information may not adhere to local South African principles. Thus, it may be difficult for SARS customs to analyse such information provided for production costs etc.³⁸⁷ Similar provisions pertaining the computed value method are adopted in the *Customs Duty Act*.

³⁸⁰ See section 66(8) of the CEA.

³⁸¹ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁸² Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 564.

³⁸³ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁸⁴ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 563.

³⁸⁵ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁸⁶ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

³⁸⁷ Fyfe *Transfer Pricing and Customs Valuation Rules* 25.

3.4.2 Residual method

The CEA provides that the residual method is the final method that is used when all the above-discussed methods are not applicable.³⁸⁸ The method is commonly known as the fall-back method. The fall-back method allows for the person determining the customs value to go back to the methods mentioned above, and to apply them again but in a more flexible manner.³⁸⁹ The provisions of the residual method are adopted in the *Customs Duty Act*.

3.6 Conclusion

The CEA provides that the declared customs value can be adjusted retrospectively under certain circumstances.³⁹⁰ In South Africa, the circumstance whereby the declared customs value may be retroactively adjusted is when the goods were sold between related parties being MNEs. Where there is transfer pricing adjustments of the value of any imported goods in terms of a group transfer pricing policy after the goods have been imported into South Africa, the MNE is required to make a corresponding customs value adjustment, which is called retrospective transfer pricing adjustment. Performing retroactive transfer pricing adjustments is not necessarily a clear-cut function and has practical difficulties for the MNE and SARS. This entails that the MNE has to pass voucher of correction for all bills of entries affected by the adjustment. This is extremely costly for the MNE and administratively impossible for SARS.

Currently, transfer pricing and valuation methods are different and are applied differently.³⁹¹ When determining the value of goods, transfer pricing adopts the best method of applicable circumstances.³⁹² Customs valuation, on the other hand, has a strict hierarchy,³⁹³ where one can't just skip other method and apply the best method in the circumstances.³⁹⁴ There are certain methods between transfer pricing and

³⁸⁸ See section 66(9) of the CEA; see related discussion by Tuominen *The link between transfer pricing and the EU customs valuation law* 12.

³⁸⁹ Tuominen *The link between transfer pricing and the EU customs valuation law* 12.

³⁹⁰ Tuominen *The link between transfer pricing and the EU customs valuation law* 11.

³⁹¹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 525.

³⁹² Kim 2013 *Tax Notes International* 1032.

³⁹³ Tuominen *The link between transfer pricing and the EU customs valuation law* 10.

³⁹⁴ Fyfe *Transfer Pricing and Customs Valuation Rules* 8.

customs valuation that are comparable, and other methods are incomparable.³⁹⁵ In customs valuation, the methods must be eliminated in their hierarchical approach.

The research submits that customs valuation in relation to retroactive transfer pricing adjusted cross border transactions should not follow the strict hierarchical approach; instead, the transfer pricing approach should be followed. This is because it is not always effective and adequate to determine the customs value of retroactive cross border transactions using the transaction value method, as there is a need to test the value against similar or identical transactions. The moment one has to use similar or identical transactions to determine whether the relationship of the MNE influence the price paid or payable, then one is operating outside the ambit of the transaction value methods.

Although retroactive transfer pricing adjustments are allowed by the current customs legislation, the *Customs Duty Act* and *Customs Control Act*, still needs to be viewed with scrutiny. This is because of the possible abuse³⁹⁶ of retroactive transfer pricing adjustment in order to evade customs duties. The customs legislation has shortcomings concerning the cost implications for MNEs' being required to pass voucher of correction for retroactive transfer pricing adjustments transaction. The administrative burden that comes with the vouchers of corrections for retroactive transfer pricing adjusted transactions is also not addressed by the customs legislation in South Africa.

³⁹⁵ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 525.

³⁹⁶ Munyadziwa R and Roy B "The challenges faced by Developing Countries regarding Transfer Pricing" *Southern African Accounting Association Biennial International Conference Proceedings* (2017 University of Witwatersrand) 750.

CHAPTER FOUR

CHALLENGES ASSOCIATED WITH RETROACTIVE TRANSFER PRICING ADJUSTMENTS IN SOUTH AFRICA

4.1 Introduction

The process of buying and selling goods within affiliated or related parties of Multinational Enterprises (MNEs) is referred to as transfer pricing.³⁹⁷ The price of goods bought and sold within the MNE is referred to as transfer pricing.³⁹⁸ Thus, transfer pricing only occurs on transactions within the MNE. Retroactive transfer pricing adjustment occurs only within the MNE, and independent parties cannot perform such adjustments. The research, in this regard, focuses on retroactive transfer pricing occurring within the MNE. The use of transfer pricing is a legitimate method of conducting international trade for MNEs. However, what is considered illegitimate about transfer pricing and retroactive transfer pricing adjustments is when MNEs use it to manipulate prices of goods sold within the MNE for, amongst other reasons, evading customs duties on imported goods.³⁹⁹ The evading of customs duties means high yields of profit for the MNEs.

South Africa has tightened its control measures by increasing audits conducted by the South African Revenue Service (SARS) in the field of customs valuation and transfer in relation to cross border transactions within MNEs.⁴⁰⁰ This is evidenced by the increased audits on retroactive transfer pricing adjusted transactions. The audits are put in place in an attempt to curb possible manipulation and abuse of retroactive transfer pricing adjustments and customs valuations in South Africa.⁴⁰¹ This is done by intensifying audit programmes on retroactive transfer pricing adjusted transactions.⁴⁰² The audits enable SARS to detect instances where the MNEs did not properly perform retroactive transfer pricing adjustments.

³⁹⁷ Ngundi M *Transfer Pricing Management Strategies by Multinational Enterprises Within the Main Investment Segment of The Nairobi Securities Exchange* (MBA-dissertation 2012 University of Nairobi) 1.

³⁹⁸ Ngundi *Transfer Pricing Management Strategies* 1.

³⁹⁹ Els M "Arm's Length Standard Transfer Pricing Disputes on the Rise" 2017 *Deloitte* 1;1.

⁴⁰⁰ Els 2017 *Deloitte* 1.

⁴⁰¹ Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in the South Africa Legal Regime* (LLM-dissertation University of Cape Town 2007) 4.

⁴⁰² Els 2017 *Deloitte* 1.

South Africa is having challenges with retroactive transfer pricing adjustments⁴⁰³ and customs valuations. Retroactive transfer pricing adjustments are still prone to manipulation by MNEs due to the shortcomings in the regulation thereof. One of the challenges pertains to the prevention of tax evasion⁴⁰⁴ by using retroactive transfer pricing adjustments and customs valuation loopholes found in the statutory provisions. The loopholes found in the South African customs legislation are as a result of the lack of certain legal provisions on the treatment of retroactive transfer pricing adjustments and customs valuations. The *Customs and Excise Act*⁴⁰⁵ and the *Customs Duty Act*⁴⁰⁶ do not prescribe which valuation method is to be utilised on retroactive transfer pricing adjusted transactions.⁴⁰⁷ Additionally, the *CEA, Customs Control Act*⁴⁰⁸ and *Customs Duty Act* do not address the administrative burden that comes with processing vouchers of corrections amending the customs values as a result of the retroactive transfer pricing adjustments.

The other problem that comes with retroactive transfer pricing adjustments is obtaining and understanding the transfer pricing policy of an MNE.⁴⁰⁹ The difficulty with obtaining the transfer policy of the concerned MNE is due to a lack of a statutory obligation for MNEs to have a transfer pricing policy.⁴¹⁰ SARS, in this regard, have difficulties obtaining transfer pricing policy from the MNEs, which is useful in determining the transaction value of goods sold within the MNEs. Moreover, if the transfer pricing policy is obtained, there are no statutory provisions on what a transfer pricing policy should contain.

⁴⁰³ Munyadziwa R and Roy B “The Challenges Faced By Developing Countries Regarding Transfer Pricing” *Southern African Accounting Association Biennial International Conference Proceedings* (2017 University of Witwatersrand) 751.

⁴⁰⁴ Munyadziwa and Roy “The challenges faced by Developing Countries regarding Transfer Pricing” 751.

⁴⁰⁵ See section 65, 66 and 67 of the *Customs and Excise Act* 91 of 1964 (*CEA*); see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002(4 SA 823 (SCA) para 1.

⁴⁰⁶ 30 of 2014 (*Customs Duty Act*), see sections 115-135 in chapter 7; see related discussion by Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM-dissertation University of Pretoria 2016) 46.

⁴⁰⁷ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 8.

⁴⁰⁸ 31 of 2014 (*Customs Control Act*), see sections 174 and 178; see related discussion by Subban V “Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment” 2009 *Tax Insight* 1; 4.

⁴⁰⁹ Munyadziwa and Roy “The Challenges Faced by Developing Countries regarding Transfer Pricing” 750.

⁴¹⁰ A transfer pricing policy is an intercompany policy that set out how transactions of goods sold within MNEs are priced. See related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 35.

The lack of statutory obligation to have a transfer pricing policy and what should be the contents of the transfer pricing policy disadvantages MNEs as it becomes difficult to prove what the retroactive transfer pricing adjustment was based on. Furthermore, the task of compiling transfer pricing documents becomes cumbersome on MNEs as there is no statutory guidance on the format and content of a transfer pricing policy. The transfer pricing policy is a very complex and long document that poses a challenge to SARS and SARS must peruse and understand it properly. There are limited knowledgeable resources that further increase the challenge within SARS to effectively and efficiently prevent retroactive transfer pricing adjustment manipulation and abuse by MNEs.⁴¹¹

The manipulation of transfer pricing by MNEs has been a major concern⁴¹² for South Africa. These manipulations by MNEs involve downward adjustment and under-invoicing in order to pay less duties and Value Added Tax (VAT). Downward adjustments occur when the MNE adjusts the values of the goods bought and imported within the company to be lower than what it would ordinarily be if the goods were bought and sold between independent parties. Under-invoicing occurs when the selling company within the MNE charges lower prices to the related buying company. Both under-invoicing and downward adjustments are actions that can only occur between related parties, usually MNEs. In this regard, retroactive transfer pricing adjustments pose a risk of under-invoicing and downwards adjustments by the MNE to avoid paying high duties.

Retroactive transfer pricing adjustments occur only within the MNE and cannot occur between independent parties. MNEs experience problems with the requirement to pass vouchers of correction and amending the customs value of previous declarations⁴¹³ as a result of retroactive transfer pricing adjustments. This exercise is cumbersome and costly for MNEs as there can be a lot of entries to amend. In the

⁴¹¹ Munyadziwa and Roy "The Challenges Faced by Developing Countries regarding Transfer Pricing" 750.

⁴¹² Harmse L and Van der Zwan P "Alternatives for the Treatment Of Transfer Pricing Adjustments in South Africa" 2016 *De Jure* 288; 288.

⁴¹³ Michaletos "More Holistic Planning Around Custom Valuation and Transfer Pricing" *News and Press TaxTalk* (15 November 2013) 45.

normal course of the event, the MNE has to utilise the clearing agent⁴¹⁴ to process the vouchers of correction on its behalf, which is costly.

A large number of vouchers of correction required to be processed furthermore causes a huge administrative burden for SARS. Once a voucher of correction is passed, SARS needs to process it, which entails verifying, approving, or rejecting the voucher of correction. Although SARS has broadened the scope of audits on retroactive transfer pricing adjustment transactions, inadequate legislative provisions⁴¹⁵ on retroactive transfer pricing adjusted transactions leaves room for manipulation by performing downward adjustments, even where there was supposed to be an upward adjustment, by MNEs.

4.2 Challenges Associated with Retroactive Transfer Pricing Adjustments in South Africa

4.2.1 The Requirement to Pass a Voucher of Correction by MNEs on Retroactive Transfer Pricing Adjusted Transactions

A voucher of correction is a document that is used in the South African customs environment to amend any details or particulars that need to be changed in the declaration or bill of entry that has already been passed to SARS as required by the CEA.⁴¹⁶ A clearing agent normally processes a voucher of correction on behalf of an importer or exporter where there are amendments that need to be performed to the original bill of entry. Retroactive adjustments must be made to each import transaction and as a result to each import declaration of the MNE⁴¹⁷ in order to adjust the value previously declared upward or downward depending on the adjustment performed. As customs duties are levied by SARS proportional to the value of the goods at the time of importation, the adjustment performed by the MNE affects the duties that were paid at the time of importation. Upwards adjustments entail that the customs value is higher than what it was at the time of importation.

⁴¹⁴ A clearing agent is an entity that is licensed with SARS in terms of section 64B of the CEA to process customs declaration on behalf of importers and exporters.

⁴¹⁵ See sections 41, 65, 66 and 67 of the CEA.

⁴¹⁶ See section 40(3) of the CEA; see related discussion by Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 31.

⁴¹⁷ Ainsworth RT "IT-Advanced Pricing Agreements: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax-Customs VAT" 2007 *Rutgers Computer & Tech. LJ* 1; 158.

Thus, there will be outstanding duties that must be brought into account by the MNE.⁴¹⁸

Downward adjustment entails that the customs value of the imported goods has to be adjusted lower to what it was at the time of importation. This means that higher duties were paid at the time of importation. The MNE is entitled to a refund of duties overpaid.⁴¹⁹ However, before SARS can collect the duties that were underpaid at the time of importation as a result of retroactive upward transfer pricing adjustment or SARS can refund the MNE in the case of downward adjustments, a voucher of correction for the affected entries must be processed amending the customs value of every bill of entry that was subjected to the adjustments. The challenge with regards to processing the required vouchers of correction is that the concerned MNE might have thousands of entries that require vouchers of correction. In turn, this causes an administrative burden for SARS to process and approve such entries and it is costly for the MNE to enlist the services of the clearing agent to process the vouchers of correction required.

Retroactive transfer pricing adjustments mean that a bill of entry of previous imports after the adjustment is performed does not suffice as a valid entry under the provisions of the CEA,⁴²⁰ which requires the correct and true customs value to be declared at the time of importation.⁴²¹ In this regard, a value that is adjusted at a later stage was declared at the time of importation, which can be seen by SARS as not a true value or correct value. As a result, the MNE must pass a voucher of correction, substituting the original bill of entry with a new bill of entry to reflect the new customs value after the adjustment. In this regard, the MNE might have thousands of entries to be corrected, resulting in a costly and cumbersome exercise for the MNE.⁴²² On the other side, SARS will be burdened by vouchers of correction that need to be verified and approved.

Another problem associated with retroactive transfer pricing adjustments is the risk of potential penalties that could be imposed by SARS on MNEs for an alleged under-

⁴¹⁸ Bakker A and Oosterhoff D *Transfer Pricing and Customs Valuation: Two Worlds to Tax As One* (IBFD The Netherlands 2009) 54.

⁴¹⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 54.

⁴²⁰ See section 39 of the CEA; see related by Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 57.

⁴²¹ See section 40(1)(c) of the CEA.

⁴²² Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 31.

declaration that came as a result of retroactive transfer pricing adjustments.⁴²³The CEA provides that SARS can impose a penalty where there was an under-declaration of the customs value. In this regard, if the MNE performs an upward adjustment, adjusting the customs value upward, this can be perceived by SARS as an under-declaration of the value of the goods at the time of importation. An under-declaration of the customs value makes an entry to be invalid.⁴²⁴ In this regard, SARS may impose penalties for an invalid entry.

When MNEs perform a downward adjustment adjusting the customs value downward, the declared customs value will be reduced. In this regard, downward adjustments are voluntarily performed by the MNE, adjusting the customs value of each import transaction affected by the adjustment. As a result, the duties will also be proportionally reduced, meaning the MNE will be entitled to a refund of duty.⁴²⁵ Even in the instance of a downward adjustment, there is still a challenge of passing a voucher of correction before claiming a refund of duty. Furthermore, SARS can still impose a penalty for misdeclaration as an incorrect customs value was declared at the time of importation.

In terms of the CEA,⁴²⁶ once the adjustments are performed, the exporting related party must issue an amended invoice to the importing related party amending the initially declared customs value. SARS must be notified within 30 days by the MNE once the customs value is amended and a credit/ debit note or amended invoice amending the invoice has been issued. After SARS had been notified about the debit/credit note or amended invoice issued, the MNE must process a voucher of correction, amending the relevant entries. Downward adjustments may require SARS to pay a refund of duties to the MNE as it means that the incorrect duties were paid at the time of importation. The process of voucher of corrections that must be completed before the refund is paid out due to retroactive transfer pricing adjustments might pose administrative challenges for SARS.⁴²⁷

⁴²³ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 32.

⁴²⁴ See sections 39 and 40 of the CEA; see related discussion in the *Commissioner of the South African Revenue Service v Formalito (Pty) Ltd* case number 328/04 para 6.

⁴²⁵ Bulana O "Transfer Pricing and Customs Valuation: Key Differences and Mitigation of Potential Risks" 2015 *Munich Personal Repec Archive* 1;21.

⁴²⁶ See section 41 (4) of the CEA.

⁴²⁷ Bulana 2015 *Munich Personal Repec Archive* 21; see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 57.

The MNE must pass vouchers of correction to the affected entries and the amended invoice must be attached for the MNE to get their refund. A voucher of correction is required because the value of the goods has changed, meaning that the bill of entry passed before the adjustments no longer comply with the provisions of the *CEA*.⁴²⁸ Such a bill of entry must be substituted with a new bill of entry.⁴²⁹ According to the *CEA*,⁴³⁰ an application for a refund relates to a bill of entry. Thus, a voucher of correction is required for each bill of entry.

4.2.2 *The Complexity of the Customs Valuation Methods*

Customs valuation methods is a system used by SARS and MNEs as provided for in the *CEA*⁴³¹ to determine the value of goods imported into South Africa. The purpose of determining the customs value is that the customs duties are based on the customs value of imported goods.⁴³² The customs valuation method provides that the primary valuation method for imported goods is the transactional value method.⁴³³ The transactional value method provides that the price for goods imported into South Africa is the price paid or payable for such goods when they were sold for export into South Africa.⁴³⁴ This entails the use of the transactional value method on retroactive transfer pricing adjusted transactions. This is challenging to determine whether the relationship within MNEs influenced the price paid or payable and SARS have to look outside the confinements of the transaction value method. Furthermore, there are six valuation methods, which must be used in their chronological sequence eliminating the transaction value method before utilising the alternative valuation methods to determine the customs value. The challenge with this is that the alternative valuation methods are often complex for the MNEs and SARS to utilise in determining the customs value.

⁴²⁸ See section 39 of the *CEA*; see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 57.

⁴²⁹ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 57.

⁴³⁰ See section 76(3) of the *CEA*; see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 57.

⁴³¹ See sections 65, 66 and 67 of the *CEA*; see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 6.

⁴³² Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 6.

⁴³³ See section 66 of the *CEA*; see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 20.

⁴³⁴ See section 66 of the *CEA*; see related discussion in *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* case number 20923/2015 – unreported para 16; *Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another* 2006 (2) BCLR 304 (C) para 29.

On retroactive transfer pricing adjusted transactions, the relationship that exists within the MNE makes it difficult to use the primary transactional valuation method. The primary valuation method in retroactive transfer pricing adjustment cannot be utilised at least without looking at other valuation methods as it is prudent to determine the price of the goods sold within the MNE in comparison with the price of goods sold between independent parties. The comparison of the price of goods sold within the independent parties itself is the use of alternative valuation methods, for example, the price of similar or identical goods.⁴³⁵

Import transactions between two separate entities of an MNE in South Africa and another in a foreign country are regarded as related party transactions,⁴³⁶ and the customs valuation of the transaction between related parties is subject to scrutiny by SARS.⁴³⁷ SARS scrutinises the transaction within the MNE as they are prone to abuse whereby the relationship within the MNE may influence the price paid or payable for the imported goods,⁴³⁸ making the prices non-complaint with the valuation methods. Related parties transactions may be examined by SARS customs to determine whether the relationship influenced the price paid or payable.⁴³⁹ After examining the related party transaction within the MNE, if SARS finds that the relationship influenced the price, it may adjust the price of the goods imported accordingly. Where there is a need to uplift the price of the goods, outstanding duties that come as a result of the upliftment can be demanded from the MNE. Furthermore, where SARS finds that the relationship influenced the price paid or payable, SARS may impose penalties for under-declaring the customs value and false statement.⁴⁴⁰

In determining whether the relationship indeed influenced the price paid or payable for the imported goods within the MNE, SARS examines whether that price is lower

⁴³⁵ Allan *The OECD Transfer Pricing Guidelines* 24.

⁴³⁶ See Article 15 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994); see related discussion by Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 18.

⁴³⁷ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 81;91;113.

⁴³⁸ Allan *The OECD Transfer Pricing Guidelines* 9.

⁴³⁹ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 20.

⁴⁴⁰ See section 84 of the *CEA*; see related discussion in *Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another* 2006 (2) BCLR 304 (C) para 19.

than it would be had the parties been unrelated.⁴⁴¹ In cases of related party transactions, SARS require a valuation questionnaire to be completed by the MNE.⁴⁴² The objective of the valuation questionnaire is to determine whether the valuation method that was utilised to determine the customs value at the time of importation was correct and applied correctly by the MNE. If the wrong valuation method was utilised to determine the customs value of the goods imported, it is likely that the customs duties paid were also incorrect. In this regard, SARS determines the appropriate method that was supposed to be utilised at the time of the importation. Furthermore SARS utilises what they have determined to be the correct valuation method to determine the customs value, and if this exercise result in the upliftment of the customs value, a letter of intent followed by a letter of demand can be issued by SARS demanding the underpayment of duties, and in some instances a penalty can also be levied for an invalid entry and misdeclaration. Thus, it becomes prudent for MNEs to ensure that the correct customs valuation method is utilised to determine the value of goods sold within the MNE and ultimately imported into South Africa.

The problem facing MNEs and SARS when it comes to retroactive transfer pricing adjustments is the selection of the most suitable valuation method to determine the transaction value of imported goods between MNEs.⁴⁴³ Once SARS can establish that the relationship within the MNE influenced the price paid or payable of the imported goods,⁴⁴⁴ an alternative valuation method must be used to determine the price of imported goods as the transaction value method cannot apply.⁴⁴⁵

The use of alternative customs valuation methods is complex and difficult. In this regard, MNEs would prefer to use the transactional valuation method instead of alternative valuation methods. The alternative valuation methods, for example, the transaction value of similar goods, requires an investigation of what the price of the

⁴⁴¹ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 20.

⁴⁴² Michaletos *News and Press: TAXtalk* 45.

⁴⁴³ Lord TS *Transfer Pricing in South African Income Tax Law* (Dissertation: Postgraduate Diploma in Income Tax Law at University of Cape Town 2014) 8; see related discussion by Els 2017 *Deloitte* 1.

⁴⁴⁴ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 21.

⁴⁴⁵ Fritz C *An Appraisal of selected Tax-Enforcement Powers of the South African Revenue Services* 22; De Wulf L and Sokol JB *Customs Modernization Handbook* (The World Bank Washington, DC 2005) 159.

goods being valued would be if the transaction was between independent parties.⁴⁴⁶ The use of the transaction of the similar good method requires data of independent parties, and that data might be difficult to get as most companies are reluctant to disclose their data, such as the cost of sale. Moreover, there is no statutory obligation on South African companies to disclose their data for it to be used to determine the transaction value of similar goods or for customs valuation purposes in general. In this regard, the use of alternative valuation methods, warranted by retroactive transfer pricing adjustments, is a difficult task for both SARS and the MNEs.

The use of alternative customs valuation methods may be burdensome on the MNE as they will be required to gather data to justify the alternative customs valuation method used. The onus is on the importer to prove that the price paid or payable is the same as the price of similar or identical goods that were sold under the same conditions as the goods being valued between unrelated parties.⁴⁴⁷ This is a time consuming and costly exercise for the MNEs,⁴⁴⁸ as they would have to invoke the services of a valuation specialist in this regard. Additionally, the process of comparing the prices of identical goods can further be hindered as companies trading with the same products, as the one being valued, may be reluctant to disclose their manufacturing and pricing processes. Thus, determining the prices of comparable transactions is a complex, difficult task.⁴⁴⁹

4.2.3 The Use of Transfer Pricing Policy Documentation for Customs Valuation of Retroactive Transfer Pricing Adjusted Transactions

SARS has a transfer pricing questionnaire that is used as the first point of an investigation by SARS to determine whether the relationship within the MNE influenced the price of imported goods.⁴⁵⁰ The valuation questionnaire requires the importer to provide information on how the value of imported goods was determined and supporting documents such as the invoice and sale agreements may be called

⁴⁴⁶ Pagter and Van Raan *The Valuation of Goods For Customs Purposes* 63.

⁴⁴⁷ Michaletos *News and Press: TaxTalk* 45.

⁴⁴⁸ Michaletos *News and Press: TaxTalk* 45.

⁴⁴⁹ Melnychenko R, Pugachevska K and Kasianok K "Tax Control of Transfer Pricing" 2017 *Tax Control of Transfer Pricing. Investment Management and Financial Innovations* 40; 47.

⁴⁵⁰ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 50.

for the MNE to verify the correctness of the completed valuation questionnaire.⁴⁵¹ In this regard, when MNEs file their annual corporate income tax return, they are asked if they performed any transfer pricing adjustments throughout the year. This is a mechanism that was adopted by SARS to combat possible misuse of transfer pricing adjustments. If an MNE had transfer pricing adjustments, and SARS perceives it as a risk, an audit may be conducted.⁴⁵² If the MNE performed a retroactive transfer pricing adjustment, SARS may conduct an audit to determine if the customs value of imported goods was correctly determined and adjusted. In conducting an audit, the transfer pricing policy may be requested by SARS, and if provided to SARS, it may contain useful information, such as the financial position and what led to the price of the goods sold within MNE.

Although it is not compulsory in South Africa for MNEs to prepare and submit their transfer pricing policy,⁴⁵³ SARS may request it, and where requested, the transfer pricing policy must be submitted.⁴⁵⁴ SARS recommends that MNEs should prepare the transfer pricing policies to avoid being charged with non-disclosure, which is considered an offence.⁴⁵⁵ Moreover, the MNE may lack the documentary proof to substantiate that the prices of goods imported were not at arm's length if they do not prepare and produce the transfer pricing policy.⁴⁵⁶

The advantage of preparing and maintaining a transfer pricing policy is that it can be used to assist tax authorities to determine the risk⁴⁵⁷ associated with transfer pricing manipulation. Having a transfer pricing policy is viewed as one of the factors that promote compliance for MNEs.⁴⁵⁸ From the transfer policy of an MNE, SARS may determine the risk of transfer pricing manipulation and decide whether it is necessary to conduct an audit to determine whether the price of imported goods was at arm's length. In the event an audit is conducted, a transfer pricing policy may make the

⁴⁵¹ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 50.

⁴⁵² Muljee TGB *South African transfer pricing income tax legislation: is there still a gap?* (LLM-dissertation University of the Witwatersrand, Johannesburg) 20.

⁴⁵³ Lord *Transfer Pricing in South African Income Tax Law* 44.

⁴⁵⁴ Allan *The OECD Transfer Pricing Guidelines* 73; see related discussion by The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* (Juta Cleremont 2010) 523; Lord *Transfer Pricing in South African Income Tax Law* 33.

⁴⁵⁵ The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* 523.

⁴⁵⁶ The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* 523.

⁴⁵⁷ Kiluma R *Transfer Pricing in Tanzania: Regulating Foreign Investors' Transparency Obligations* (LLM-dissertation University of Pretoria 2017) 30.

⁴⁵⁸ Kiluma R *Transfer Pricing in Tanzania* 30.

audit easier⁴⁵⁹ as it guides SARS as to how the adjustments are done, the formulas, and factors that led to the adjustments being performed. Transfer pricing policy also explains other factors such as what makes up the cost of sales, and what was considered by the MNE in arriving at the transfer price.

The MNEs place a lot of effort and expenses in preparing the transfer pricing policy. The MNE may have to outsource the services of audit, accounts, and law firms to assist in compiling the transfer pricing documentation. Thus, the downside of maintaining a transfer pricing policy is that it is time-consuming and costly for the MNE to prepare.⁴⁶⁰ The transfer pricing documentation must be drafted in a way that it can be used to prove compliance by the MNE,⁴⁶¹ and prove whether the price paid or payable for imported goods complies with the transactional value method.

The challenge with preparing and maintaining transfer pricing policy is whether SARS can accept the transfer pricing policy as proof that the relationship within the MNE did not influence the price paid or payable. Generally, the transfer pricing policy cannot solely be accepted as proof that the price paid or payable for imported goods was at arm's length and was not influenced by the relationship.⁴⁶² There is additional information and documents such as pricing agreements that SARS may require to determine whether the relationship within the MNE influenced the price of imported goods.⁴⁶³ However, the transfer pricing policy may contain relevant information that may assist SARS to determine whether the relationship influenced the price paid or payable.⁴⁶⁴

In South Africa, the onus is on the MNE to prove that the price of imported goods was at arm's length.⁴⁶⁵ In this regard, the onus is on the MNE to point out such relevant information to SARS in their transfer pricing policy.⁴⁶⁶ The relevant information that may assist SARS to determine whether the relationship influenced

⁴⁵⁹ Kiluma R *Transfer Pricing in Tanzania* 30.

⁴⁶⁰ Lord *Transfer Pricing in South African Income Tax Law* 45; see related discussion by Allan *The OECD Transfer Pricing Guidelines* 69,

⁴⁶¹ Allan *The OECD Transfer Pricing Guidelines* 70.

⁴⁶² Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 37.

⁴⁶³ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 8.

⁴⁶⁴ Grace D, Toro E and Caballero M "An opportunity to support US Customs Valuations" 2012 *International Tax Review* 46; 47.

⁴⁶⁵ Bakker A and Levey MM *Transfer Pricing and Intra-Group Financing: The Entangled World of Financial Markets and Transfer Pricing* (IBFD The Netherlands 2012) 450.

⁴⁶⁶ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 37.

the price paid or payable may include, amongst others, the purchase agreement, their costing to manufacture the product,⁴⁶⁷ which led to the price set. The transfer pricing policy would ideally have to include the formula demonstrating how the adjustments are done. Preparing transfer pricing policy may also turn into a fruitless exercise since SARS does not consider the transfer pricing policy as sufficient evidence to show that the relationship did not influence the price paid or payable and the transaction value method is applicable.⁴⁶⁸

There is a lack of statutory provision in relation to the transfer pricing policy⁴⁶⁹ under the *CEA*. There are no specific guidelines as to what must be contained in the policy for customs valuation purposes. The SARS Practice Note 7 openly states that there are no statutory requirements to maintain a transfer pricing policy in South Africa.⁴⁷⁰ There are no explicit statutory obligations for the MNE to prepare and maintain the transfer pricing documentation⁴⁷¹ under the *CEA*.

The other challenge concerning the transfer pricing policy is the complexity of the policy.⁴⁷² It is not easy for SARS to go through the document and understand it properly. SARS or *CEA* does not state what is meant by the transfer pricing policy and what should it contain.⁴⁷³ This, in turn, means that the MNEs are at liberty to include any information they deem relevant on transfer pricing, making it a difficult task for SARS to understand the transfer pricing policy. The lack of specifications with regards to the transfer policy is problematic for the MNEs.⁴⁷⁴ Thus; the uncertainty on what contents the transfer pricing policy should contain makes transfer pricing policy to be more complex.

⁴⁶⁷ Grace, Toro, and Caballero 2012 *International Tax Review* 46; 47.

⁴⁶⁸ Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 69.

⁴⁶⁹ Lord *Transfer Pricing in South African Income Tax Law* 8.

⁴⁷⁰ See SARS' Practice Note No 7 para 10.2.1; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 33; see related discussion by Mberi FC *Addressing Challenges Facing SARS Relating To The Application Of Transfer Pricing In Business Restructurings* (LLM-dissertation Potchefstroom Campus of the North-West University 2012) 56.

⁴⁷¹ Allan *The OECD Transfer Pricing Guidelines* 70.

⁴⁷² The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* 523.

⁴⁷³ See SARS Practice Note No. 7 par 10; see related discussion by Allan *The OECD Transfer Pricing Guidelines* 73.

⁴⁷⁴ Allan *The OECD Transfer Pricing Guidelines* 73.

The difficulty with transfer pricing documentation is that the transfer policies differ from company to company.⁴⁷⁵ The companies often include what they deem to be pertinent and important.⁴⁷⁶ There is no basic required information that must be included in a transfer pricing policy. The problem is that the transfer pricing policy is not mentioned in the customs legislation. As a result, MNEs do not understand the importance of preparing the transfer pricing policy for customs valuation purposes as its objectives are not included in the customs legislation.⁴⁷⁷

There are capacity constraints in SARS as transfer pricing specialists are in short supply.⁴⁷⁸ The transfer pricing documentation has extensive data that needs to be considered, and this becomes a difficult task with the given capacity constraints. There must be robust processes and legislative provisions to ensure that the transfer pricing policy is updated, and it reflects the true and accurate position of the MNE when requested by SARS.⁴⁷⁹

4.3 Conclusion

As much as MNEs account for much of the world trade and economy, transfer pricing within MNEs has challenges for both SARS customs and MNEs.⁴⁸⁰ These challenges are associated with retroactive transfer pricing adjustments occurring within the MNEs and experienced in South Africa. Transfer pricing rules for both MNEs and SARS are complex, thus making it difficult for MNEs to comply with them due to this complexity. Retroactive transfer pricing adjustments, if not properly regulated, can accrue costs for both MNEs and SARS in relation to passing vouchers of correction. Inadequate regulation of retroactive transfer pricing adjustments may lead to lengthy audits and litigation between SARS and the MNEs.

⁴⁷⁵ Moyo LM *A Comparative Analysis of the legislative requirements of Transfer Pricing documentation* (Mcom- dissertation University of Johannesburg 2015) 19.

⁴⁷⁶ Moyo LM *A comparative analysis of the legislative requirements of Transfer Pricing documentation* 19.

⁴⁷⁷ Moyo LM *A Comparative Analysis Of The Legislative Requirements Of Transfer Pricing Documentation* 19.

⁴⁷⁸ Joubert B "Transfer Pricing: Taxpayers should brace for attention from SARS" 2019 *Deloitte* 1; 2.

⁴⁷⁹ Joubert 2019 *Deloitte* 2.

⁴⁸⁰ Tanzi V *Globalisation, Technological Developments, and the Work of Fiscal Termites* (International Monetary Fund 2010) 10.

There are shortcomings in the current *CEA* and the *Customs Duty Act* on retroactive transfer pricing adjustments, which lead to uncertainty for both the MNEs⁴⁸¹ and SARS. The problem is that SARS may incorrectly perceive retroactive transfer pricing adjustments as an indication that the MNE declared an incorrect customs value at the time of importation.⁴⁸² Thus, there is the requirement to pass a voucher of correction amending the customs value of previous imports. Moreover, the passing of vouchers of correction is expensive for the MNE and causes an administrative burden on SARS. The voucher of correction passed amending the customs value is processed by a clearing agent on behalf of the MNE at a fee; thus, a cost implication for MNEs. On the other hand, once the voucher of correction is passed SARS must process, verify and approve or reject such a voucher of correction, thus a demonstrative burden on the part of SARS.

MNEs must make the effort that the prices of imported goods are at arm's length,⁴⁸³ without the relationship influencing such prices. The determination of whether the prices of imported goods were at arm's length requires SARS to compare the prices of imported goods between MNEs with the price of uncontrolled transactions between independent parties.⁴⁸⁴ The challenge is that this activity is data extensive and requires SARS to access information of independent parties. SARS may not be able to have access to such information, or where SARS can access such information, the information may be incomplete or hard to interpret.⁴⁸⁵ Moreover, even the MNEs themselves won't necessarily have access to information of other companies in order to determine the comparable data⁴⁸⁶ and arrive at the price that independent parties could have arrived at.

⁴⁸¹ Moyo LM *A comparative analysis of the legislative requirements of Transfer Pricing documentation* 19.

⁴⁸² Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* 44.

⁴⁸³ Markham M *The Transfer Price of Intangibles* (Kluwer Law International the Netherlands 2005) 197.

⁴⁸⁴ Kamdar M "Acceptable Methods for Determining an Arm's Length Price for Transfer Pricing" 2018 *Sabinet African Journals* 18; 19 see related discussion by Melnychenko Pugachevska and Kasianok "2017 Tax control of transfer pricing. Investment Management and Financial Innovations 47.

⁴⁸⁵ Kamdar M 2018 *Sabinet African Journals* 19.

⁴⁸⁶ Munyadziwa and Roy "The challenges faced by Developing Countries regarding Transfer Pricing" 758.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The customs value is used as a basis for the South African Revenue Service (SARS) to levy duties⁴⁸⁷ as the customs duties are calculated on a percentage of the customs value. In this regard, there are various customs valuation methods like the transaction value method that can be used to determine the customs value of imported as provided for in the *Customs and Excise Act*.⁴⁸⁸ In South Africa, the primary valuation method to be used to determine the customs value of imported goods in terms of the *CEA* is the transaction value method,⁴⁸⁹ which entails that the customs value of imported goods is the price paid or payable.⁴⁹⁰ The transaction value method requires the customs value not to be influenced by the relationship between the buyer and the seller. The value influenced by the relationship is not the true value for the goods imported.

There is a risk that the price of goods sold within Multi-National Enterprises (MNEs) may be influenced by the relationship that exists within the MNEs as the transactions are controlled. In this regard, the transaction value method can be used to determine the customs value of goods imported within the MNEs if it can be proven that the relationship of the MNE did not influence the price paid or payable for the imported goods.⁴⁹¹ The challenge is then the use of alternative valuation methods which are considered to be complex and requires external data of other companies that might not be easily obtainable for both SARS and the MNEs.

⁴⁸⁷ *Shaikh v Standard Bank* [2007] SCA 168 (RSA) para 3.

⁴⁸⁸ See sections 66(1), 66(4), 66(5), 66(7), 66(8) and 66(9) of the *Customs and Excise Act* 91 of 1964 (*CEA*); see related discussion in *Samcor Manufacturing (Pty) Ltd v Commissioner SARS* 2002((4 SA 823 (SCA) para 1

⁴⁸⁹ See section 65 of the *CEA*.

⁴⁹⁰ *Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 20923/2015 – unreported para 16, see related discussion by Tuominen J *The link between transfer pricing and the EU customs valuation law: Is there any and how could it be strengthened?* (LLM-dissertation in European and International Tax Law Lund University 2018) 10.

⁴⁹¹ Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM-dissertation University of Pretoria 2016) 8.

SARS views retroactive transfer pricing adjustments with scrutiny.⁴⁹² This scrutiny is informed by the likelihood of MNEs to manipulate retroactive transfer pricing adjustments by adjusting the prices downwards to get a refund on duties and VAT, and for the intention of evading the correct payment of duties and VAT. An MNE may easily manipulate the cost of an imported product in order to perform a downward adjustment.⁴⁹³ There are loopholes in the current *CEA* that could lead to the manipulation of retroactive transfer pricing adjustments. Despite the legislature in 2014 enacting the *Customs Control Act*⁴⁹⁴ and the *Customs Duty Act*,⁴⁹⁵ there are still some weaknesses like the requirement of a voucher of correction and the valuation methods prescribed for the cross border retroactive transfer pricing adjusted transaction, considering that the *CEA* requires the transfer pricing policy of MNEs dealing with retroactive transfer pricing adjustments⁴⁹⁶ and customs valuation.

South Africa still has challenges that still need to be addressed. For example, the requirement of processing vouchers of correction in relation to retroactive transfer pricing adjustments and selecting the appropriate valuation method for retroactive transfer pricing adjusted transactions.⁴⁹⁷ The existing customs legislation has shortcomings when it comes to curbing retroactive transfer pricing manipulation in South Africa. The *CEA* does not have provisions that ensure that the MNEs are not only performing downward adjustments only. It is against this background that South Africa needs robust transfer pricing adjustment legislative provisions to guard against possible abuse and manipulation by MNEs. The research recommends that measures that must be introduced in the South African legislation to deal with problems associated with retroactive transfer pricing adjustments and customs valuation.

⁴⁹² Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 11.

⁴⁹³ Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in the South Africa Legal Regime* (LLM-desideration University of Cape Town 2007) 28.

⁴⁹⁴ 31 of 2014 (*Customs Control Act*), see sections 174 and 178; see related discussion by Subban V "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 1; 4.

⁴⁹⁵ 30 of 2014 (*Customs Duty Act*), see sections 115-135 in chapter 7; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 46.

⁴⁹⁶ Munyadziwa R and Roy B "The challenges faced by Developing Countries regarding Transfer Pricing" *Southern African Accounting Association Biennial International Conference Proceedings* (2017 University of Witwatersrand) 761.

⁴⁹⁷ Munyadziwa and Roy "The challenges faced by Developing Countries regarding Transfer Pricing" 762.

5.2 Recommendations

Various recommendations aimed at resolving retroactive transfer pricing adjustments and customs valuations problems in South Africa are provided below. It is hoped that these recommendations will be utilised by the relevant authorities to combat retroactive transfer pricing manipulation in South Africa. Given this background, it is recommended that:

a) *The Tax Administration Act, CEA, the Customs Control Act, and the Customs Duty Act be Amended to Allow for Advanced Pricing Agreements*

Advanced Pricing Agreements are defined as agreements that determine the transfer price of a controlled transaction between the MNEs for a fixed period.⁴⁹⁸ Controlled transactions refer to transactions between the MNEs and include transfer pricing.⁴⁹⁹ Transfer pricing is a process by which MNEs determine the transfer price of their interfirm transactions.⁵⁰⁰ Advanced Pricing Agreements is normally initiated by the importer, who negotiates with its suppliers in a different country to enter into such an agreement.⁵⁰¹ In Advanced Pricing Agreements, the MNEs will have an agreement with its subsidiaries in South Africa that future transactions will be conducted at a certain agreed price.⁵⁰² In this regard, the retroactive transfer pricing adjustments can be avoided as the prices will be pre-determined within the MNEs.

SARS will have to be aware of the Advanced Pricing Agreement and approve such Advanced Pricing Agreements.⁵⁰³ SARS must be satisfied that the pre-determined price is the transactional value. The transactional value for imported goods is the price paid or payable.⁵⁰⁴ The price agreed between the importer and the customs

⁴⁹⁸ Ping L and Silbertrtzein C "Transfer Pricing, Customs Duties and VAT Rules: Can we bridge the Gap?" 2007 *World Commerce Review* 36; 38.

⁴⁹⁹ Gray M *A Critical Analysis from a South African Perspective of Advance Pricing Agreements for Multinational Enterprises* (MCOM-Dissertation University of the Witwatersrand 2017) 5.

⁵⁰⁰ Ngundi M *Transfer Pricing Management Strategies by Multinational Enterprises Within the Main Investment Segment of The Nairobi Securities Exchange* (MBA-dissertation 2012 University of Nairobi)1.

⁵⁰¹ Ping and Silbertrtzein 2007 *World Commerce Review* 38.

⁵⁰² Allan *The OECD Transfer Pricing Guidelines* 34.

⁵⁰³ Allan *The OECD Transfer Pricing Guidelines* 34.

⁵⁰⁴ See section 65(1) of the CEA.

authority will be treated by SARS as the price arrived at arm's length⁵⁰⁵ which is the equivalent of a transactional value. The Advanced Pricing Agreements can be unilateral, bilateral or multilateral.⁵⁰⁶ It is important to differentiate between unilateral and bilateral as their application and benefits are not the same. A unilateral Advanced Pricing Agreements are agreement between the taxpayer and the concerned tax authority,⁵⁰⁷ and multilateral APA is an agreement between two or more tax administrations⁵⁰⁸ on how to price cross-border transfer pricing adjusted transactions within MNEs.⁵⁰⁹ Bilateral or multilateral Advanced Pricing Agreements are preferred as opposed to unilateral Advanced Pricing Agreements⁵¹⁰ as bilateral Advanced Pricing Agreements have advantages such as the avoidance of double taxation and certainty on transfer prices within the MNEs.⁵¹¹ This can assist with the problems experienced in South Africa relating to retroactive transfer pricing adjusted transactions as with bilateral Advanced Pricing Agreements, the prices of goods sold to MNEs with presence in South Africa will be pre-determined, and the adjustments can be avoided. This will also provide certainty of transfer prices within MNEs, which will benefit both SARS and MNEs.

South Africa currently does not have the Advanced Pricing Agreements programme.⁵¹² An Advanced Pricing Agreements programme is the programme that allows MNEs to negotiate with the tax authority to enter into an agreement for prospective transactions for a specific period, usually three to five years, whereby transfer prices will be pre-determined. Advanced Pricing Agreements are not part of South African legislation.⁵¹³ As a result, APAs are not included as part of advanced

⁵⁰⁵ Lord TS *Transfer Pricing in South African Income Tax Law* (Dissertation: Postgraduate Diploma in Income Tax Law at University of Cape Town 2014) 47; see related discussion by Allan *The OECD Transfer Pricing Guidelines* 34.

⁵⁰⁶ Allan *The OECD Transfer Pricing Guidelines* 34.

⁵⁰⁷ Bakker A and Oosterhoff D *Transfer Pricing and Customs Valuation: two worlds to tax as one* (IBFD The Netherlands 2009) 228; see related discussion Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 22.

⁵⁰⁸ Lord *Transfer Pricing in South African Income Tax Law* 46.

⁵⁰⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 228.

⁵¹⁰ Lord *Transfer Pricing in South African Income Tax Law* 46.

⁵¹¹ Lord *Transfer Pricing in South African Income Tax Law* 46.

⁵¹² Mberi FC *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing in Business Restructurings* (LLM-dissertation Potchefstroom Campus of the North-West University 2012) 56; see related discussion by Munyadziwa and Roy "The challenges faced by Developing Countries regarding Transfer Pricing" 762; Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 105.

⁵¹³ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 4-5.

ruling as set out Chapter 7 of the *Tax Administration Act*.⁵¹⁴ This means that if Advanced Pricing Agreements were allowed in South Africa, they were going to form part of advanced rulings covered by Chapter 7 of the *Tax Administration Act*. In this instance, SARS would be allowed to issue an advanced ruling for transfer prices of future imports of concerned MNEs. Advanced rulings are not available for MNEs in relation to transfer pricing.⁵¹⁵ In this regard, it is submitted that Chapter 7 of the *Tax Administration Act* should be amended to include Advanced Pricing Agreements as one of the advanced ruling SARS can issue.

It is often difficult to determine the transaction value of a transaction that will be subjected to retroactive transfer pricing adjustments at the time of importation as the transfer price will still have to be adjusted after importation.⁵¹⁶ Advanced Pricing Agreements are agreements between the tax authority and concerned importer used to determine the transaction value of goods in advance.⁵¹⁷ Thus, Advanced Pricing Agreements are beneficial for both SARS and the MNEs.⁵¹⁸ Advanced Pricing Agreements are one of the tools that could be used to avoid disputes between SARS and MNEs⁵¹⁹ around retroactive transfer pricing adjustments.⁵²⁰ As the price will be pre-determined and agreed to by the tax authority and the importer, they cannot be any dispute around such prices at the time of importation or when the tax authority conducts audits. This research recommends that South Africa should enact legislative provisions that will accommodate Advanced Pricing Agreements under Chapter 7 of the *Tax Administration Act* providing for advanced rulings. The provisions of Chapter 7 of the *Tax Administration Act*⁵²¹ that allows SARS to reject Advanced Pricing Agreements in the case of MNEs should be repealed. The *Tax Administration Act* provides that SARS may reject an application for an advanced ruling if the application requires an advance ruling of the price of goods sold within

⁵¹⁴ 28 of 2011 (*Tax Administration Act*) see section 80(1)(a)(iii); see related discussion by Gray *Critical Analysis from a South African Perspective of Advance Pricing Agreements* 23.

⁵¹⁵ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 97.

⁵¹⁶ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 6.

⁵¹⁷ Kerschmer I and Stiasny M "The experience with Advanced Pricing Agreements" 2013 *Intertax* 588; 588; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 46.

⁵¹⁸ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 6-7.

⁵¹⁹ Ping and Silbertrtzein 2007 *World Commerce Review* 38.

⁵²⁰ Kerschmer and Stiasny 2013 *Intertax* 588.

⁵²¹ See Section 80(1)(a)(iii) of *Tax Administration Act*; see related discussion by Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 4-5

related persons. MNEs fall under the category of related persons, and SARS is empowered to reject an application from MNEs for an advanced ruling of the price of imported goods within MNEs. These provisions should be repealed as pre-determined prices for cross border transactions within the MNEs will bring certainty for SARS and MNEs about the prices of imported goods. This will, in turn, minimise disputes around the correct value of goods imported within the MNEs.

SARS should implement the Advanced Pricing Agreements programme in South Africa.⁵²² APA will bring certainty on prices to be declared for cross -border transactions within the MNEs. For the APA to be effective and feasible in South Africa, it must be a bilateral or multilateral agreement.⁵²³ Bilateral or multilateral Advanced Pricing Agreements allows f MNEs based in different countries to partake in the agreement. Related parties in a different tax authority may not be willing to make a corresponding adjustment if they did not partake in the agreement. The related party may doubt its effectiveness and benefits, if it did not partake in the agreement. The researcher does foresee the Advanced Pricing Agreements being a feasible solution for MNEs having their related parties in South Africa. It is most likely for the MNE to agree to APA to circumvent the cost related to the tedious process of passing vouchers of correction to amend the customs values after importations. Advanced Pricing Agreements will also assist in MNEs circumventing possible penalties that may arise due to under-declarations. As the prices will be pre-determined and agreed to between SARS and the MNE, there cannot be any allegations of under-declaring the customs value by SARS.

The Advanced Pricing Agreements reduce uncertainty when it comes to retroactive transfer pricing adjustments⁵²⁴ and the customs value to be declared to SARS. In this regard, if South Africa adopts Advanced Pricing Agreements, the valuation method used by the MNEs will most likely not be questioned.⁵²⁵ The issues of the appropriate valuation method will be discussed and agreed upon at the time the Advanced Pricing Agreements agreement is concluded. Advanced Pricing

⁵²² Mberi *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing* 56.
⁵²³ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 24; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 98.

⁵²⁴ Ragvald S *Uncertain Transfer Pricing Rules – A Comparison of Three Jurisdictions* (LLM- desideration University of Lund 2007) 56.

⁵²⁵ Ragvald *Uncertain Transfer Pricing Rules* 56.

Agreements also reduce costs related to noncompliance and disputes surrounding retroactive transfer pricing adjustments,⁵²⁶ as SARS cannot penalise MNEs for any misdeclaration of the customs value that is predetermined and agreed to. In this regard, Advanced Pricing Agreements can reduce audits,⁵²⁷ as SARS will not audit the price that is pre-determined and agreed to by MNEs and SARS. This will, in turn, reduce costs for MNEs.

SARS lacks the capacity to audit retroactive transfer pricing adjustments transactions within MNEs. SARS will be required to utilise specialists in transfer pricing and customs valuation to achieve meaningful audits results on retroactive transfer pricing adjusted transactions. With lack of expertise on transfer pricing and customs valuation, an audit on retroactive transfer pricing adjustment, which requires analysis of complex transfer pricing policies and customs valuation guidelines, may be fruitless. For the MNEs, they often outsource a representative with transfer pricing and customs valuation knowledge and make use of legal representatives in the event of a dispute arising from an audit. Thus, audits on retroactive transfer pricing adjusted transactions can be very costly and should be minimised as much as possible. Advanced Pricing Agreements have been recognised as one of the methods that can strategically reduce risks associated with retroactive transfer pricing adjustments.⁵²⁸ Many countries have adopted APA.⁵²⁹ Thus, South Africa should also consider adopting Advanced Pricing Agreements. The introduction of Advanced Pricing Agreements will increase compliance for MNEs.⁵³⁰ Advanced Pricing Agreements will also yield high revenue for SARS with the limited resources available and reduce unnecessary exorbitant administrative costs for SARS.⁵³¹

The risks associated with retroactive transfer pricing adjustments like the underpricing of the imported goods within MNEs could be reduced or avoided if the Tax

⁵²⁶ Malik MK *Tax Avoidance By Multinational Enterprises Through Transfer Pricing* (LLM-desideration University of Warwick 2006) 55; see related discussion by Mberi *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing* 56; Lord *Transfer Pricing in South African Income Tax Law* 47.

⁵²⁷ Allan *The OECD Transfer Pricing Guidelines* 86; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 48; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 48.

⁵²⁸ Malevu SM *The Possible Introduction of Advance Pricing Agreements in South African Income Tax Legislation* (Mcom Nelson Mandela Metropolitan University 2011) 2.

⁵²⁹ Malevu *The Possible Introduction of Advance Pricing Agreements* 3.

⁵³⁰ Munyadziwa and Roy "The challenges faced by Developing Countries regarding Transfer Pricing" 762.

⁵³¹ Malevu *The Possible Introduction of Advance Pricing Agreements* 3.

Administration Act allows for Advanced Pricing Agreements⁵³² to be used to pre-determine the value of goods imported within the MNEs. Advanced Pricing Agreements, if adopted in South Africa, will result in less or no retroactive transfer pricing adjustments. In turn, there will be no need for MNEs to pass vouchers of correction. The customs value will be pre-determined, and there will be no need for the MNEs to perform retroactive transfer pricing adjustments and amend the customs value of previous imports by a voucher of correction. The elimination of vouchers of correction will ease the administrative burden for SARS and eliminate the costs for MNEs associated with retroactive transfer pricing adjustments. The other advantage of Advanced Pricing Agreements is that they will provide certainty for the MNE and SARS⁵³³ as the prices of imported goods within the MNEs will be pre-determined. In addition, the transfer price of imported goods within the MNEs will be well known in advance before importation. As a result, there will be no dispute of the transfer price after importation between SARS and the MNEs.⁵³⁴

If SARS finds that the prices of imported goods within the MNE were incorrectly adjusted, and SARS adjust such prices further upwards, SARS may impose penalties associated with under-entry and incorrect statements.⁵³⁵ This shows the need for Advanced Pricing Agreements in South Africa. In this regard, the MNE will be certain about the price they declared to SARS. As a result, the risk of penalties will be eliminated, unless the transaction fell outside the condition of the Advanced Pricing Agreements.⁵³⁶ The Advanced Pricing Agreements opens a discussion between SARS and the MNEs concerning the prices of intended imports within the MNEs. In these discussions of the prices of intended imports within MNEs, SARS will provide guidance in relation to the pre-determined transfer prices. Such guidance will be incorporated in the Advanced Pricing Agreements.⁵³⁷ This, in turn, will provide the MNE with more certainty, and SARS cannot allege mis-declaration of prices of imported goods in these circumstances.

⁵³² Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 7.
⁵³³ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 7-8.
⁵³⁴ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 8.
⁵³⁵ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 8.
⁵³⁶ Lord *Transfer Pricing in South African Income Tax Law* 38.
⁵³⁷ Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements* 8.

The other advantage of Advanced Pricing Agreements is that they will contribute positively to the economy of South Africa.⁵³⁸ Foreign companies will want to invest in subsidiaries in South Africa having confidence that there will be less or no retroactive transfer pricing disputes, or where there are disputes, they will be resolved easily and timeously⁵³⁹ due to the existence of Advanced Pricing Agreements. The MNEs can avoid the risk of having to pay huge sums of import duties in the case of upward adjustments with Advanced Pricing Agreements.⁵⁴⁰ The Advanced Pricing Agreements can be used as evidence in support of the transactional value declared.⁵⁴¹ Thus, the Advanced Pricing Agreements can be used as a basis to determine whether the relationship influenced the price of goods sold within the MNE.

Arguments against Advanced Pricing Agreements are that the agreements are not sufficient to prove that the relationship did not influence the price paid for the imported goods⁵⁴² within the MNE. In relation to this submission, the onus is on the MNE to prove to SARS that the relationship did not influence the price for the imported goods. Additionally, there are other documents such as the transfer pricing policy and the sale agreement that can be used to test whether the relationship influenced the price payable or paid for the imported goods within the MNE.⁵⁴³ The Advanced Pricing Agreements will normally include comparable data, whereby the price of the goods being valued between other independent parties importing the same product as the MNEs can be established. There are also alternative valuations methods that can be used to determine the customs value, for instance, SARS can always invoke the transaction value of a similar or identical product as the one being valued to determine whether the relationship did not influence the price paid or payable of imported goods.

⁵³⁸ Lord *Transfer Pricing in South African Income Tax Law* 54.

⁵³⁹ Lord *Transfer Pricing in South African Income Tax Law* 54.

⁵⁴⁰ Allan *The OECD Transfer Pricing Guidelines* 34.

⁵⁴¹ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 37.

⁵⁴² Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 232; see related Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 37.

⁵⁴³ Grace D Toro E and Caballero M "An opportunity to support US Customs Valuations" 2012 *International Tax Review* 46; 47.

The Advanced Pricing Agreements, if implemented in South Africa, will call for the amendment of the *Tax Administration Act*⁵⁴⁴ providing for advanced rulings. This will entail the provisions that specifically exclude an advanced ruling to be issued by SARS on the price of imported goods within MNEs to be amended to allow for such a ruling. The further amendment will also be required to the *CEA*⁵⁴⁵ and the *Customs Duty Act* that provide that the price of imported goods is a transactional value, which is the price paid or payable for the imported goods. In this regard, a clause will have to be inserted that allows for the pre-determined prices in terms of Advanced Pricing Agreements to be accepted by SARS customs as a transactional value in terms of the *CEA* and the *Customs Duty Act*.

b) the CEA, the Customs Control Act and the Customs Duty Act be Amended to eliminate shortcomings in relation to Provisional Declarations

A provisional declaration is a customs declaration based on incomplete information or pending confirmation of the information declared.⁵⁴⁶ There are several reasons that might require a provisional declaration, for example, where the customs value of the goods is not known at the time of importation, then the importer makes a provisional declaration that will be completed once such value is ascertained.⁵⁴⁷ Provisional declaration on cross-border transactions that will be subjected to retroactive transfer pricing adjustment will entail a declaration of a provisional value that will later be adjusted after the MNEs perform the transfer pricing adjustments.⁵⁴⁸ The MNEs will provisionally declare the value as at the time of importation, the final value will only become known once the year-end transfer pricing adjustments are performed. When the MNEs makes a provisional declaration, they can reconcile the value at a later stage once the adjustment is performed either provisional

⁵⁴⁴ See section 80(1)(a)(iii) of *Tax Administration Act*.

⁵⁴⁵ See sections 65 and 66 of the *CEA*.

⁵⁴⁶ See section 1 of the *Customs Control Act*; see related discussion by Claeys S *The Convergence Between Customs, VAT, and Transfer Pricing in a Global Supply Chain* (LLM-dissertation in EU Customs Law European Fiscal Studies 2018) 24; Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 43.

⁵⁴⁷ Maria M *Customs Valuation and Transfer Pricing: Two Sides of the Same Coin* (LLM-dissertation in Commercial Law Jönköping University 2009) 53.

⁵⁴⁸ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 43.

declarations.⁵⁴⁹ A provisional declaration allows the MNE to declare a correct value on transactions that will be subjected to retroactive transfer pricing adjustment at a later stage.⁵⁵⁰

South Africa did not have a provisional declaration system under the *CEA*⁵⁵¹ till the insertion for provisional declaration in 2008.⁵⁵² Provisional declarations will also be provided for under the *Customs Control Act*,⁵⁵³ which is not yet into effect. The *Customs Control Act*⁵⁵⁴ mentions provisional declarations as a type of clearance declaration that will be allowed when it comes into effect. This entails that when the *Customs Control Act* comes into effect, the current status will prevail whereby MNEs will be able to provisionally declare the price of the goods bought and sold within the group. Such provisionally declared prices have to be amended by a final complete declaration that will contain the final price after the adjustments are performed.

Although the *CEA* and *Customs Control Act* provide for provisional declarations, there are still shortcomings in both Acts that make provisional declaration mentioned therein to be an ineffective solution to the problems of retroactive transfer pricing adjustments. The first shortcoming concerning provisional declarations as contained in the *CEA* and *Customs Control Act*⁵⁵⁵ is the requirement for a supplementary declaration. Both the *CEA* and the *Customs Control Act* provides that a provisional declaration must be followed up by a full and final declaration within the prescribed timeframe⁵⁵⁶ to amend the information that was provisionally declared. The *CEA* and Rule 24 to the *Customs Control Act* (which is not yet into effect) provide that a supplementary declaration must be made within seven working days from the acceptance of the provisional declaration. Rule 24 of the *Customs Control Act* goes

⁵⁴⁹ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 34.

⁵⁵⁰ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 43.

⁵⁵¹ See section 39B of the *CEA*; see related discussion Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 100.

See section 34 of *Revenue Laws Second Amendment Act* 61 of 2008 which inserted section 39B in the *CEA* providing for provisional declarations.

⁵⁵³ See section 164 (1) of the *Customs Control Act*.

⁵⁵⁴ See section 164 (1) (a) of the *Customs Control Act*.

⁵⁵⁵ See section 39B of the *CEA* and section 526 of the *Customs Control Act*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 106.

⁵⁵⁶ See section 39B of the *CEA* and section 526 of the *Customs Control Act*.

on to provide that a supplementary declaration is voucher of correction of a provisional declaration.

The timeframe provided for the supplementary declaration that must follow a provisional declaration under the *CEA and Customs Control Act*, which is seven days from delivery of provisional declaration, is unreasonable and unpractical in retroactive transfer pricing adjusted transactions. The correct customs value on cross border transactions that will be subjected to retroactive transfer pricing adjustments becomes known after the adjustment is performed, which is usually yearly or quarterly. As a result, the MNEs will not be able to submit a supplementary declaration within the stipulated time frame under the customs legislation with retroactive transfer pricing adjustments transactions. This, in turn, makes provisional declarations as contained in the South African customs legislation to be redundant when it comes to retroactive transfer pricing adjustments. Based on the impractical timeframes to submit a supplementary entry, the *CEA and Customs Control Act* should be amended to allow for a longer timeframe to submit a supplementary entry on provisional declaration related to retroactive transfer pricing adjustments.

The provisional declaration, as contained in the customs legislation, does not eliminate the administrative burden associated with retroactive transfer pricing adjustments. The requirements of a supplementary declaration that constitute a voucher correction will still cause an administrative burden⁵⁵⁷ for both SARS and the MNEs.⁵⁵⁸ The MNEs will still be required to submit a supplementary declaration for what could be a thousand bills of entries passed throughout the year.⁵⁵⁹ It is the researcher's submission that the MNEs should be allowed to declare the customs value pending the adjustment provisionally, and supplementary declaration must not be required within seven days from delivery of the provisional declaration for retroactive transfer pricing adjusted transactions. The *CEA and Customs Control Act* must be amended to allow the MNEs to submit a supplementary declaration to the provisional declaration only once the adjustment is performed.

⁵⁵⁷ Claeys *The Convergence Between Customs, VAT, and Transfer Pricing* 24.

⁵⁵⁸ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 102.

⁵⁵⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 401.

Provisional declarations, if adopted as set out in this research, will circumvent potential penalties associated with the undervaluation of goods.⁵⁶⁰ The correct value of imported goods is unknown at the time of importation on retroactive transfer pricing adjustment transactions,⁵⁶¹ a provisional declaration will allow MNEs to provisionally declare the value and supplement the entry only once the adjustment is performed. Additionally, the MNEs will not contravene the provisions of the *CEA*⁵⁶² which requires that the customs value be correctly declared at the time of importation if MNEs are allowed to provisionally declare the customs value on transfer pricing transactions without a supplementary or final declaration being required in seven days. A final declaration should at least be required once the MNEs perform the adjustments.

The *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*⁵⁶³ allows for the importer to delay the final determination of the value of goods.⁵⁶⁴ In this regard, the importer will still be allowed to import goods against adequate security⁵⁶⁵ to ensure that, in the event, the customs value is uplifted, the customs authority may still recover the duties.⁵⁶⁶ The provisional declarations on retroactive transfer pricing transactions that will be adjusted at a later stage can be implemented in the same manner as in the *Valuation Agreement*, where the MNEs will be allowed to import on a provisional value against security. The security will safeguard SARS' interest in the event the customs value is adjusted upwards, and SARS can use the security lodged to recover any duties that will be applicable after the adjustments are performed.

⁵⁶⁰ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 43-44.

⁵⁶¹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 401.

⁵⁶² See sections 40 and 41 of the *CEA*.

⁵⁶³ See Article 13 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (1994) (*Valuation Agreement*); see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 33.

⁵⁶⁴ See Article 13 of the *Valuation Agreement*; see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 101.

⁵⁶⁵ Jovanovich JM *Customs Valuation and Transfer Pricing: Is It Possible to Harmonize Customs and Tax Rules?* (Kluwer Law International Ltd London 2002) 108-109 and 132.

⁵⁶⁶ See Article 13 of the *Valuation Agreement*; see related discussion by Jovanovich *Customs Valuation and Transfer Pricing* 108-109.

Provisional declarations will eliminate the possibilities of overpayment of customs duties in the case of downward⁵⁶⁷ adjustment and take away the administrative burden for SARS that comes with processing refund claims. It is submitted that SARS must align its customs legislation with the *Valuation Agreement* and allow for improved provisions relating to provisional declarations on retroactive transfer pricing adjustments. Provisional declarations are a feasible solution if SARS wishes to ensure that a correct customs value is declared on retroactive transfer pricing adjusted transactions. South Africa can improve the provisions and SARS systems that will permit for provisional declarations of customs values⁵⁶⁸ without the final declaration to follow up within seven working days. In relation to the customs legislation, the requirement of a supplementary declaration on retroactive transfer pricing adjustments within seven days should be repealed.

c) the CEA, the Customs Control Act and the Customs Duty Act should be Amended to Provide for Price Review Clause

A price review clause is a contract sale in which the price is provisionally fixed,⁵⁶⁹ and the final determination of the price payable is subjected to certain factors which are outlined in the contract.⁵⁷⁰ The price review clause becomes useful in instances where the data needed to determine the price of goods sold is not available at the time of importation.⁵⁷¹ If the price review clause is adopted in South Africa as recommended in this research in relation to retrospective transfer pricing adjustments, the MNEs will insert a price review clause in the contract of sale of goods within the MNEs. The price of goods bought and sold within the MNEs according to the price review clause will be provisionally set, pending the adjustment performed by the MNEs. The final price of the goods bought and sold within the MNEs is only known once the adjustment is performed, usually yearly or quarterly adjustments.⁵⁷² A price review clause will assist the MNE in declaring the price paid

⁵⁶⁷ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 44.

⁵⁶⁸ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 102.

⁵⁶⁹ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 184.

⁵⁷⁰ Ainsworth RT "IT-Advanced Pricing Agreements: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax-Customs VAT" 2007 *Rutgers Computer & Tech. LJ* 1;96.

⁵⁷¹ Reis DNFT *The tension between Transfer Pricing and Customs Valuation* (Master's thesis Technical University of Lisbon 2012) 25.

⁵⁷² Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 88.

or payable for the goods imported and avoid possible disputes on whether the relationship influenced the price of goods imported.⁵⁷³ As the price will be pre-determined and agreed on by SARS and the MNEs, there cannot be a dispute on such price when declared upon importation.

South Africa does not allow price review clauses for customs valuations. In this regard, it is recommended that there should be a price review clause in the South African customs legislation that permits the MNEs to make a provisional declaration of the customs value on retroactive transfer pricing adjusted transactions in South Africa. The adoption of a price review clause will bring certainty for both SARS and MNEs on the customs value that must be declared at the time of importation on cross border transactions will be subjected to retroactive transfer pricing adjustments. The price review clause will delay the final declaration and determination of the customs value,⁵⁷⁴ as the final customs value will be determined and declared to SARS after the adjustment. A price review clause will still entail the utilisation of valuation methods in their chronological order to determine the customs value of goods sold within MNEs.⁵⁷⁵ It is recommended that South Africa should adopt price reviews in the customs legislation and allow the delayed determination of the customs value on retroactive transfer pricing adjustments. The price contained in the price review contract will be based on what would likely be the final customs value.⁵⁷⁶

A price review clause can be utilised by the MNEs in an instance where the MNEs are not in possession of the final customs value the time of importation.⁵⁷⁷ The MNEs at the time of importation does not have quantifiable data to determine the price of goods sold within the MNE objectively. The quantifiable objective data to determine the correct customs value only becomes available to MNEs only after the adjustment is performed. As a result, this research recommends that price review clauses should be utilised for the determination of the customs value at the time of importation on transactions that will later be subjected to retroactive transfer pricing

⁵⁷³ by Reis *The Tension Between Transfer Pricing and Customs Valuation* 27.

⁵⁷⁴ See Article 13 of Article 13 of the *Valuation Agreement*; see related discussion by Reis *The Tension Between Transfer Pricing and Customs Valuation* 25.

⁵⁷⁵ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 182.

⁵⁷⁶ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 182.

⁵⁷⁷ Reis *The Tension Between Transfer Pricing and Customs Valuation* 25.

adjustments. The price review clause will eliminate disputes between MNEs and SARS on the price that is supposed to be declared at the time of importation.

A price review will be desirable for South Africa as it normally contain a formula used to determine the price of imported goods.⁵⁷⁸ In this regard, SARS can utilise the formula to determine whether the relationship within the MNE influenced the price paid or payable. It has been submitted that the MNE should include a price review clause in their sale agreement,⁵⁷⁹ as it would help determine the transactional value once the adjustments are performed.⁵⁸⁰ The price review will be based on the objective assessment of the transfer pricing policy of the concerned MNE, and it will be sufficient to delay the determination of the transaction value, which will be done after the adjustments.⁵⁸¹ The price review clause and the formula in the sale contract can be utilised to eliminate the problems associated with retroactive transfer pricing adjustments.⁵⁸² If SARS does not allow for the delayed determination of final customs value on retroactive transfer adjusted transactions, it would be difficult for the MNE to prove that the relationship did not influence the price paid or payable for the imported goods.⁵⁸³

d) *The CEA, the Customs Control Act and the Customs Duty Act be amended to provide guidance and acceptance of Transfer Pricing documentation and the use of alternative valuation methods*

SARS should relook at its policy and legislative provisions in relation to the transfer pricing documentation⁵⁸⁴ as well as its acceptance for customs valuation purposes. The transfer pricing documentation is normally the transfer pricing policy of the MNE which is developed after completing a transfer pricing study. Currently, customs legislation is silent on whether transfer pricing documentation can be utilised to prove that the relationship of the MNE did not influence the customs value. Even though

⁵⁷⁸ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 101.

⁵⁷⁹ Reis *The Tension Between Transfer Pricing and Customs Valuation* 26.

⁵⁸⁰ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 106; see related discussion by Reis *The Tension Between Transfer Pricing and Customs Valuation* 25.

⁵⁸¹ Reis *The Tension Between Transfer Pricing and Customs Valuation* 26.

⁵⁸² Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 182.

⁵⁸³ Bakker and Oosterhoff *Transfer Pricing and Customs Valuation* 183.

⁵⁸⁴ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 120.

SARS may request a transfer pricing policy, there is no legislative provision of what should be contained in that transfer pricing policy. SARS should specify exactly what must be contained in the transfer pricing policy.⁵⁸⁵ South Africa must have regulations relating to retroactive transfer pricing adjustments documentation. Although there are guidelines from the OECD about the transfer pricing policy, the guidelines are not clear and detailed and⁵⁸⁶ do not provide a clear legal position concerning retroactive transfer pricing policy in South Africa. The MNEs should be provided with a format of a transfer pricing policy.⁵⁸⁷ There must be minimum prescribed information a transfer pricing policy should contain.

The transfer pricing policy should incorporate information that will be useful by SARS⁵⁸⁸ in determining whether the relationship of the MNE influenced the price paid or payable of the imported goods between MNEs. The information that must be contained in the transfer pricing policy must include, amongst others, the cost of production and the mechanism used to arrive at the price of imported goods. This will enable SARS, from the transfer pricing policy, to decide on the customs value and determine whether the relationship within the MNE influenced the prices.

The transfer pricing policy is useful as it contains the formula used to adjust the price of goods sold within the MNE.⁵⁸⁹ As a result, SARS can interrogate the formula to determine whether the price declared for imported goods was influenced by the relationship. The transfer pricing policy can be utilised by the MNE to support the transactional value of the goods sold within the MNE.⁵⁹⁰

Another solution to problems associated with retroactive transfer pricing adjustments is the use of alternative valuation methods.⁵⁹¹ The South African customs legislation allows for the use of alternative valuation methods; however, the requirement is that

⁵⁸⁵ Allan *The OECD Transfer Pricing Guidelines* 86.

⁵⁸⁶ Kiluma R *Transfer Pricing in Tanzania: Regulating Foreign Investors' Transparency Obligations* (Llm-desertion University of Pretoria 2017) 55.

⁵⁸⁷ Kiluma R *Transfer Pricing in Tanzania* 57.

⁵⁸⁸ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 43.

⁵⁸⁹ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 35.

⁵⁹⁰ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 37.

⁵⁹¹ Claeys *The Convergence Between Customs, VAT, and Transfer Pricing* 24.

the transaction value method must be eliminated first.⁵⁹² In this regard, one cannot elect to utilise alternative valuation methods without first eliminating the transaction value method. It is submitted that the requirement of eliminating the transaction value method should not apply to retroactive transfer pricing adjusted transactions. One always has to invoke the use of alternative methods. For example, one needs to look at similar or identical goods sold between independent parties. By looking at the price of the goods sold between independent parties, one is already utilising the alternative valuation methods.

e) the CEA, the Customs Control Act and the Customs Duty Act be Amended to allow for Single Voucher of Corrections on Retroactive Transfer Pricing Adjustments

A voucher of correction is a document used by importers/exporters to amend the details on the declaration (SAD 500) already submitted to SARS, for example, where an incorrect value was declared to SARS, a voucher of correction will be used to correct such value. SARS should consider allowing the MNEs to pass a single voucher of correction⁵⁹³ Retroactive transfer pricing adjusted transactions should be done once the adjustments are performed. A single voucher of correction will minimise the administrative burden for SARS and the MNEs⁵⁹⁴ when it comes to retroactive transfer pricing adjusted transactions. The MNE should be allowed to make a single declaration after the adjustment, instead of, as the current legislative provisions, to pass a thousand vouchers of corrections for a bill of entries that were passed throughout that year.⁵⁹⁵

5.3 Conclusion

Transfer pricing is an issue facing international tax and traders at large. The problems that come with retroactive transfer pricing are more detrimental in developing countries, including South Africa.⁵⁹⁶ With the limited resources within

⁵⁹² Michaletos 2013 *TaxTalk* 2013 45.

⁵⁹³ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 120.

⁵⁹⁴ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 106.

⁵⁹⁵ Michaletos J “More Holistic Planning around Customs Valuation and Transfer Pricing” 2013 *TaxTalk* 2013 44; 45 see related discussion by Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 21.

⁵⁹⁶ Mberi *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing* 56.

SARS to deal with retroactive transfer pricing adjustments,⁵⁹⁷ effective, efficient and robust legislative provisions are the solution to the possible retroactive transfer pricing manipulation by MNEs. Although SARS is currently paying more attention to retroactive transfer pricing adjusted transactions, there is still a lot to be done about developing retroactive transfer pricing legislation in South Africa.⁵⁹⁸ As the *Customs Control Act* and *Customs Duty Act* are not yet into effect,⁵⁹⁹ the legislature should utilise this opportunity to incorporate the recommendations provided in this research to address the challenges associated with retroactive transfer pricing adjustments and customs valuation.

South Africa has developed legislation to deal with base erosion and profit shifting associated with transfer pricing.⁶⁰⁰ However, South Africa has not developed robust legislation in relation to the determination of the customs value on retroactive transfer pricing adjusted transactions and the possible manipulation thereof by MNE to evade customs duties and VAT. Thus, it will be beneficial for South Africa to adopt Advanced Pricing Agreements, bulk voucher of correction on provisional declarations, and do away with the requirement to pass vouchers of correction on retroactive transfer pricing adjustments. The MNEs should be allowed to pass a single declaration after the adjustments, and not to amend each bill of entry affected by the retroactive transfer pricing adjustment.⁶⁰¹ The requirement to pass a supplementary declaration on provisional in terms of the *Customs Control Act* should be revoked.

The Advanced Pricing Agreements and provisional declarations will protect MNEs from possible penalties associated with retroactive transfer pricing adjustments.⁶⁰² The Advanced Pricing Agreements will also eliminate retroactive transfer pricing

⁵⁹⁷ Munyadziwa and Roy “The challenges faced by Developing Countries regarding Transfer Pricing”751.

⁵⁹⁸ Munyadziwa and Roy “The challenges faced by Developing Countries regarding Transfer Pricing” 760.

⁵⁹⁹ Levendal J *A case study of the Customs Administrative Penalty Provision as contained in the Customs & Excise Act, No.91 of 1964 of South Africa, and a comparison of the South African regime with selected foreign Customs Penalty Regimes* (LLM-dissertation University of Cape Town) 2.

⁶⁰⁰ Munyadziwa and Roy “The challenges faced by Developing Countries regarding Transfer Pricing” 761.

⁶⁰¹ Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 12.

⁶⁰² Fyfe *Understanding and Managing Risks of Transfer Pricing and Customs Valuation Rules* 110; see related discussion by Lord *Transfer Pricing in South African Income Tax Law* 44.

audits⁶⁰³ that can be costly for both SARS and the MNEs. If the recommendations set out in this research are adopted, the economy of South Africa will grow as retroactive transfer pricing adjusted transactions account for a large portion of international trade with South Africa. If the provisional declarations are allowed together with a bulk voucher of correction, they will address the difficulty of MNEs to reconcile every retroactive transfer pricing adjusted transaction by way of a voucher of correction.⁶⁰⁴ MNEs will want to have branches in South Africa knowing that there will be no or fewer disputes about retroactive transfer pricing adjustments. The price review clause, together with a transfer pricing policy can be utilised to prove that their relationship did not influence the price of goods imported within the MNE.

⁶⁰³ Lord *Transfer Pricing in South African Income Tax Law* 48.

⁶⁰⁴ Fyfe *Understanding and Managing Risks of Transfer Pricing* 34.

BIBLIOGRAPHY

Literature

Ainsworth 2007 *Rutgers Computer & Tech*

Ainsworth RT "IT-Advanced Pricing Agreements: Harmonizing Inconsistent Transfer Pricing Rules in Income Tax-Customs VAT" 2007 *Rutgers Computer & Tech. LJ* 1-167

Allan *The OECD Transfer Pricing Guidelines*

Allan OO *The OECD Transfer Pricing Guidelines: An Analysis of Their Application in the South Africa Legal Regime* (LLM-dissertation University of Cape Town 2007)

Amadi *Customs Reform*

Amadi V *Customs Reform as a means to enhancing Trade Facilitation for Increased Market Access: A South African Perspective* (LLM-dissertation University of the Western Cape 2015)

Bakker and Levey *Transfer Pricing and Intra-Group Financing*

Bakker A and Levey MM *Transfer Pricing and Intra-Group Financing: The Entangled World of Financial Markets and Transfer Pricing* (IBFD The Netherlands 2012)

Bakker and Oosterhoff *Transfer Pricing and Customs Valuation*

Bakker A and Oosterhoff D *Transfer Pricing and Customs Valuation: two worlds to tax as one* (IBFD The Netherlands 2009)

Beger *Transfer Pricing considerations for intra-group services*

Beger RS *Transfer Pricing considerations for intra-group services a study of specific challenges which have caused disputes between taxpayer and tax authorities from a Transfer Pricing and International Tax perspective* (Mcom-dissertation University of Witwatersrand 2015)

Bekker “Cross-Border Transactions and the Tale of Valuation” in Oosterhoff D et al (eds) *Transfer Pricing and Customs Valuation: two worlds to tax as one*

Bekker A “Cross-Border Transactions and the Tale of Valuation” in Oosterhoff D et al *Transfer Pricing and Customs Valuation: two worlds to tax as one* (IBFD The Netherlands 2009) 647-662

Bulana O 2016 *Munich Personal RePEc Archive*

Bulana O “Transfer Pricing and Customs Valuation: Key Differences and Mitigation of Potential Risks” *Munich Personal Repec Archive* 2015 1-25

Bonturi and Kiichiro 1993 *OECD Economic Studies* 1

Bonturi M and Kiichiro F “Globalisation and intra-Firm Trade” 1993 *OECD Economic Studies* 145-159

Calderón 2007 *Intertax*

Calderón J “The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?” 2007 *Intertax* 4-29

Clarete Customs Valuation Reform in the Philippines

Clarete RL *Customs Valuation Reform in the Philippines* (University of the Philippines School of Economics 2004 Background paper prepared for the World Development Report 2005)

Claeys The Convergence Between Customs, VAT, and Transfer Pricing

Claeys S *The Convergence Between Customs, VAT, and Transfer Pricing in a Global Supply Chain* (LLM-dissertation in EU Customs Law European Fiscal Studies 2018)

Cottani Transfer Pricing

Cottani G *Transfer Pricing* (IBFD Amsterdam 2011)

Danuta 2014 University of Economics in Katowice Journal Economics and Management

Danuta k "Transfer Pricing Optimization in Complex Capital Structures" 2014 Vol18 *University of Economics in Katowice Journal Economics and Management* 74-89

Desiderio and Desiderio 2010 World Customs Journal

Desiderio D and Desiderio FJ "Thoughts on the 'first sale' rule" 2010 *World Customs Journal* 39-44

De Wet, Hestermey and Wolfrum The Implementation of International Law

De Wet E, Hestermey H and Wolfrum R *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press South Africa 2015)

De Wit 2017 EC Tax Review

De Wit W "Customs valuation under the UCC: further guidance needed?" 2017 *EC Tax Review* 317-322

De Wulf and Sokol *Customs Modernization Handbook*

De Wulf L and Sokol JB *Customs Modernization Handbook* (The World Bank Washington, DC 2005)

Eden in Rugman (ed) *Business and Management*

Eden L in Rugman M (ed) *Business and Management, Finance and Economics, International Business Transfer Pricing, and the Multinational Enterprise* (Oxford University Press Great Clarendon St 2009)

Els 2017 *Deloitte*

Els M “Arm’s Length Standard Transfer Pricing Disputes on the Rise” 2017 *Deloitte* 1-5

Feinschreiber *Transfer Pricing Methods an Applications Guide*

Feinschreiber R *Transfer Pricing Methods an Applications Guide* (John Wiley & Sons Inc Hoboken New Jersey 2004)

Friedhoff *The treatment of transfer pricing adjustments*

Friedhoff M *The treatment of transfer pricing adjustments for the purpose of customs valuation* (LLM European Fiscal Studies 2017)

Fritz *An Appraisal of selected Tax-Enforcement powers*

Fritz C *An Appraisal of selected Tax-Enforcement Powers of the South African Revenue Services in the South African Constitutional Context* (LLD-dissertation University of Pretoria 2016)

Fyfe *Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules*

Fyfe KJ *Understanding and Managing Risks at the Intersection of Transfer Pricing and Customs Valuation Rules* (LLM-dissertation University of Pretoria 2016)

Gaarlandt Ramathodi and Rheeder "*Indirect Tax Alert*

Gaarlandt F, Ramathodi O and Rheeder C "South African Tax Authorities Increase Scrutiny of Retroactive Transfer Pricing Adjustments" *Indirect Tax Alert* (26 February 2015) 1

Gallezot and Aussilloux 2006 *TradeAG*

Gallezot J and Aussilloux V "Collected customs duties: A comparative analysis of the protection applied by the US and the EU" 2006 *TradeAG* 1-17

Gałaszka J 2013 *University of Economics in Katowice*

Gałaszka J "Transfer Pricing as a Problem of Multinational Corporation" 2013 *University of Economics in Katowice* 181-200

Grace, Toro and Caballero 2012 *International Tax Review*

Grace D, Toro E and Caballero M "An opportunity to support US Customs Valuations" 2012 *International Tax Review* 46-48

Gray *A Critical Analysis from a South African Perspective of Advance Pricing Agreements*

Gray M *A Critical Analysis from A South African Perspective of Advance Pricing Agreements for Multinational Enterprises* (MCOM-Dissertation University of the Witwatersrand 2017)

Gunnlaugsdóttir *The WTO Trade Facilitation Agreement*

Gunnlaugsdóttir S *The WTO Trade Facilitation Agreement, Anti-Corruption And Customs: A New Type of Anti-Corruption Instrument* (Master of Law Lagadeild School of Law 2017)

Harmse and van der Zwan 2016 *De Jure*

Harmse L and van der Zwan “Alternatives for the treatment of transfer pricing adjustments in South Africa” 2016 Vol 49 *De Jure* 288-306

Helland *Application of transfer pricing- efficiency and taxation*

Helland AT *Application of transfer pricing- efficiency and taxation* (Masterthesis in Industrial Economics, University of Stavanger 2010)

Hjertberg and Pettersson *Strategic Transfer Pricing*

Hjertberg I and Pettersson S *Strategic Transfer Pricing - The Art of Pricing Inter-company Transactions between Sweden and China* (Master Thesis 2010)

Honibal 2018 *Tax Professional*

Honibal M “Are You Aware of The Master File, The Local File and Other Transfer Pricing Documentation Requirements?” 2018 *Tax Professional* 28-29

Ielyzaveta *The Role of the OECD Transfer Pricing Guidelines*

Ielyzaveta G *The Role of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations for OECD and non-OECD countries* (Master Thesis in European and International Tax Law Lund University 2013)

Joubert 2019 *Deloitte*

Joubert B “Transfer Pricing: Taxpayers should brace for attention from SARS” 2019 *Deloitte* 1-2

Jovanovich *Customs Valuation and Transfer Pricing*

Jovanovich JM *Customs Valuation and Transfer Pricing: Is It Possible to Harmonize Customs and Tax Rules?* (Kluwer Law International Ltd London 2002)

Jovanovich *Customs Valuation and Transfer Pricing*

Jovanovich MJ *Customs Valuation and Transfer Pricing. Is It Possible to Harmonize Customs and Tax Rules?* (Llm-thesis McGill University, Montreal 2000)

Kamdar M 2018 *Sabinet African Journals*

Kamdar M “Acceptable Methods for Determining an Arm’s Length Price for Transfer Pricing” 2018 *Sabinet African Journals* 18-27

Kerschmer and Stiasny 2013 *Intertax*

Kerschmer I and Stiasny M “The experience with Advanced Pricing Agreements” 588-593

Klang *Possible VAT implications*

Klang A *Possible VAT implications due to voluntary and involuntary transfer pricing adjustments in the EU* (Master of Laws Graduate Thesis Lund University 2013)

Kim 2013 *Tax Notes International*

Kim B “How to Bridge the Gap Between Transfer Pricing and Customs Valuation” 2013 *Tax Notes International* 103-1041

Kiluma R *Transfer Pricing in Tanzania*

Kiluma R *Transfer Pricing in Tanzania: Regulating Foreign Investors' Transparency Obligations* (LLM-dissertation University of Pretoria 2017)

Levendal A *case study of the Customs Administrative Penalty Provision*

Levendal J *A case study of the Customs Administrative Penalty Provision as contained in the Customs & Excise Act, No.91 of 1964 of South Africa, and a comparison of the South African regime with selected foreign Customs Penalty Regimes* (LLM-dissertation University of Cape Town)

Lord *Transfer Pricing in South African Income Tax Law*

Lord TS *Transfer Pricing in South African Income Tax Law* (Dissertation: Postgraduate Diploma in Income Tax Law at University of Cape Town 2014)

Lyons *EC Customs Law*

Lyons T *EC Customs Law* (Oxford University Press New York 2001)

Manyaka *prescriptive of the South African tax legislation*

Manyaka PO *prescriptive of the South African tax legislation in providing guidance on how to transact at an arm's length price* (Mcom University of Witwatersrand 2010)

Maria *Customs Valuation and Transfer Pricing*

Maria M *Customs Valuation and Transfer Pricing: Two Sides of the Same Coin* (LLM-dissertation in Commercial Law Jönköping University 2009)

Markham *The Transfer Price of Intangibles*

Markham M *The Transfer Price of Intangibles* (Kluwer Law International The Netherlands 2005)

Marsilla *World Customs Journal*

Marsilla SI "Towards Customs Valuation Compliance through Corporate Income Tax" 2011 *World Customs Journal* 73-74

Marsilla 2008 *ERA*

Marsilla SI "Customs valuation and transfer pricing" 2008 *ERA* 399-399

Massimo *Customs Law of the European Union*

Massimo F *Customs Law of the European Union* (Kluwer Law International BV, The Netherlands 2009)

Masui 1996 *50 Bulletin for International Fiscal Documentation*

Masui Y "Transfer Pricing and Customs Duties" 1996 *50 Bulletin for International Fiscal Documentation* 315-321

Maurício *Transfer pricing and the arm's length principle in the European Union law and domestic law*

Maurício MJ *Transfer pricing and the arm's length principle in the European Union law and domestic law* (LLM-desertion Universidade do Minho 2013)

Malevu *The Possible Introduction of Advance Pricing Agreements*

Malevu SM *The Possible Introduction of Advance Pricing Agreements in South African Income Tax Legislation* (Mcom Nelson Mandela Metropolitan University 2011)

Mberi FC *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing*

Mberi FC *Addressing Challenges Facing SARS Relating to the Application of Transfer Pricing in Business Restructurings* (LIm-dissertation Potchefstroom Campus of the North-West University 2012)

Melnychenko Pugachevska and Kasianok "2017 *Tax control of transfer pricing. Investment Management and Financial Innovations*

Melnychenko R, Pugachevska K and Kasianok K "Tax control of transfer pricing" 2017 *Tax control of transfer pricing. Investment Management and Financial Innovations* 40-49

Mercurio 2006 *Melbourne Journal of International Law*

Mercurio B “Reflections on the World Trade Organization and the Prospects for Its Future” 2006 Vol 10 *Melbourne Journal of International Law* 1-8

Michaletos *News and Press TaxTalk*

Michaletos “More Holistic Planning Around Custom Valuation and Transfer Pricing” *News and Press TaxTalk* (15 November 2013) 44-45

Monsenego J *Introduction to Transfer Pricing*

Monsenego J *Introduction to Transfer Pricing* (Vienna Wolters Kluwer Law & Business 2015,)

Moyo A *comparative analysis of the legislative requirements of Transfer Pricing documentation*

Moyo LM *A comparative analysis of the legislative requirements of Transfer Pricing documentation* (Mcom- dissertation University of Johannesburg 2015)

Muljee *South African transfer pricing income tax legislation*

Muljee TGB *South African transfer pricing income tax legislation: is there still a gap?* (Research Report-Master of Commerce University of the Witwatersrand 2017)

Ngotho *The Organisation of Economic Cooperation and Development (OECD) Transfer Pricing Guidelines*

Ngotho CP *The Organisation of Economic Cooperation and Development (OECD) Transfer Pricing Guidelines: An Evaluation of Their Effectiveness in The Kenya's Tax Regime* (LLM- Thesis University of Nairobi 2011)

Oxley 1994 *A Journal of Policy Analysis and Reform*

Oxley A “The achievement of GATT Uruguay Round” 1994 *A Journal of Policy Analysis and Reform* 45-53

Pagter and Van Raan *The Valuation of Goods for Customs Purposes*

Pagter H and Van Raan R *The Valuation of Goods for Customs Purposes* (Springer Science and Business Media New York 2013)

Perčević and Hladika 2017 *Economic Research-Ekonomska Istraživanja*

Perčević H and Hladika M “Application of transfer pricing methods in related companies in Croatia” 2017 Vol 30 No. 1 *Economic Research-Ekonomska Istraživanja* 611-628

Peterson 2017 *Journal of International Commerce and Economics*

Peterson J “An Overview of Customs Reforms to Facilitate Trade” 2017 *Journal of International Commerce and Economics* 1-30.

Pichhadze 2015 *World Tax Journal*

Pichhadze A “The Arm’s Length Comparable in Transfer Pricing: A Search for an “Actual” or a “Hypothetical” Transaction?” 2015 Vol 7 No. 3 *World Tax Journal* 1-28.

Ping and Silbertrtzein 2007 *World Commerce Review*

Ping L and Silbertrtzein C “Transfer Pricing, Customs Duties and VAT Rules: Can we bridge the Gap?” 2007 *World Commerce Review* 36-38

Preece 2008 *World Customs Journal*

Preece R “Key Controls in the Administration of Excise Duty” 2008 *World Customs Journal* 72-92

Rabby and Verlinden 2015 *PWC*

Rabby and Verlinden “International Transfer Pricing 2015/16” 2015 *PWC* 1-1162

Ragvald *Uncertain Transfer Pricing Rules*

Ragvald S *Uncertain Transfer Pricing Rules – A Comparison of Three Jurisdictions* (LLM-thesis University of Lund 2007)

Reis *The Tension Between Transfer Pricing and Customs Valuation*

Reis DNFT *The tension between Transfer Pricing and Customs Valuation*
(Master's thesis Technical University of Lisbon 2012)

Rosenow and O'Shea *A Handbook on the WTO Customs Valuation Agreement*
Rosenow S and O'Shea BJ *A Handbook on the WTO Customs Valuation Agreement* (Cambridge University Press New York 2010)

Rosholt and Dhabi 2015 *Trade Watch World*
Rosholt A and Dhabi A "Customs Organization publishes guide to customs valuation and transfer pricing" 2015 Vol 14, Issue 3 *Trade Watch World* 1-37

Schoenborn 2015 *International Transfer Pricing Journal* 153
Schoenborn F "outcome testing: why year-end Adjustments cannot be the first choice to bring Intercompany margins to an Arm's Length level" 2015 *International Transfer Pricing Journal* 153-155

Sieberts *The impact of the amendments to the VAT Act*
Sieberts ZC *The Impact of The Amendments to the VAT Act in respect of Indirect Export Transactions by Road or Rail* (LLM-dissertation University of Pretoria 2014)

Snoden 2010 *International Tax Review*
Snoden C "Clinging to the changing face of APA's" 2010 *International Tax Review* 8-17

Steiss and Blanchette 1995 *Canadian Tax Journal*
Steiss C.F and Blanchette L "The International Transfer-Pricing Debate" 1995 *Canadian Tax Journal* 1566-1579

Subban 2009 *Tax Insight*
Subban V "Draft Customs Control Bill and Draft Customs Duty Bill Released for Public Comment" 2009 *Tax Insight* 1-11

Subban 2013 *Without Prejudice*

Subban V “Customs and transfer pricing – what is SARS up to?” 2013 *Without Prejudice* 44-45

Supanimitkulkit *Trade Globalisation and The Reform of Customs Valuation and VAT on Importation of Goods*

Supanimitkulkit P *Trade Globalisation and The Reform of Customs Valuation and VAT on Importation of Goods: The Example of Thailand* (Thesis: Degree of Doctor of Philosophy The University of London 2000)

Tanzi V *Globalisation, Technological Developments*

Tanzi V *Globalisation, Technological Developments, and the work of Fiscal Terminals* (International Monetary Fund 2010)

Thersby 2005 *Tax Breaks Newsletter*

Thersby K “Transfer pricing case: no place to hide” 2005 *Tax Breaks Newsletter* 7-7

The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation*

The South African Institute of Tax Practitioners *SAIT Compendium of Tax Legislation* (Juta Cleremont 2010)

Tuominen *The link between transfer pricing and the EU customs valuation law*

Tuominen J *The link between transfer pricing and the EU customs valuation law: Is there any and how could it be strengthened?* (Master Thesis, Master’s Programme in European and International Tax Law Lund University 2018)

Van der Westhuizen *The impact of section 31(2) of the Income Tax Act*

Van der Westhuizen M *The impact of section 31(2) of the Income Tax Act on the South African Tax Practice* (Mcom- dissertation University of Johannesburg 1998)

van Haarren *Accounting for transfer pricing adjustments in customs valuation*

van Haarren M.I *Accounting for transfer pricing adjustments in customs valuation* (LLM, EU customs Law, European Fiscal Studies 2015/2016)

van der Lith *Transfer pricing*

van der Lith C *Transfer pricing: Possible implications of the amendments to the Income Tax Act* [Mini dissertation for the degree Magister Commercii (Taxation) at the Potchefstroom Campus of the North-West University 2011]

Vickers 2014 *Strategic Review for Southern Africa*

Vickers B “Towards A Trade Policy For Development: The Political Economy Of South Africa's External Trade, 1994-2014” 2014 *Strategic Review for Southern Africa* 57-79

Widdowson 2007 *World Customs Journal*

Widdowson D “The Changing Role of Customs: Evolution or Revolution?” 2007 Vol 1, No. 1 *World Customs Journal* 31-37

Wittendorff *Transfer Pricing and the Arm's Length Principle*

Wittendorff J *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Kluwer Law International the Netherlands 2010)

Xiling D 2010 *International Business Research*

Xiling D “Study on Transferring Price Problem of Multinational Corporations” 2010 Vol 3 No. 3 *International Business Research* 122-125

Yanai 2013 *Institute of Developing Economies, Japan External Trade Organization*

Yanai A “South African Trade Policy: Interactions between Trade Policy and the WTO Negotiations” 2013 *Institute of Developing Economies, Japan External Trade Organization* 69-86

Zuvich *et al Tax Management Transfer Pricing Report*

Zuvich D *et al* “The nexus between Customs Valuation and Transfer Pricing”
2010 *Tax Management Transfer Pricing Report* 365-367

Case law

Commissioner for the South African Revenue Service v Prudence Forwarding (Pty) Ltd and Another (A406/14) [2015] ZAGPPHC 1104

Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 (3) SA 771 (SCA)

Commissioner, SARS v Trend Finance (Pty) Ltd [2007] SCA 59 (RSA)

Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München 2017 (C-529/16)

Henta's Verspreiders CC v The Commissioner for the South African Revenue Services (unreported) case number 22826/11

Levi Strauss SA (Pty) Ltd v The Commissioner for the South African Revenue Service (unreported) 20923/2015

Patrick Lorenz Martin Gaertner v The South African Revenue Service (unreported) case number 12632/12

Samcor Manufacturing (Pty) Ltd v Commissioner SARS 2002 (4) SA 823 (SCA)

The Commissioner of the South African Services v Formalito Pty Ltd 2005 4 ALL SA 16 (SCA)

Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another 2006 (2) BCLR 304 (C)

Legislation

Customs Control Act 31 of 2014

Customs Duty Act 30 of 2014

Customs and Excise Act 91 of 1964

Customs and Excise Amendment Act 23 of 2014

Income Tax Act 58 of 1962

Revenue Laws Second Amendment Act 61 of 2008

Tax Administration Act 28 of 2011

Value Added Tax Act 89 of 1991

Internet Sources

Deloitte 2018 *The Link Between Transfer Pricing and Customs Valuation 2018 Country Guide* date accessed 07 June 2018

Deloitte 2018 *The Link Between Transfer Pricing and Customs Valuation 2018 Country Guide*
<https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-the-link-between-transfer-pricing-and-customs-valuation.pdf06> date accessed 07 June 2018

Ernst & Young 2013 Transfer Pricing 2167 Customs value of imported goods <https://www.saica.co.za/integritax/2013/2167>. Customs value of imported goods 1.htm date accessed 28 September 2018.

Ernst & Young 2013 Transfer Pricing 2167 Customs value of imported goods <https://www.saica.co.za/integritax/2013/2167>. Customs value of imported goods 1.htm date accessed 28 September 2018.

WTO *Technical Information on Customs Valuation*
https://www.wto.org/english/Tratop_e/cusval_e/cusval_info_e.htm accessed 03 May 2018

WTO *Technical Information on Customs Valuation*
https://www.wto.org/english/Tratop_e/cusval_e/cusval_info_e.htm accessed 03 May 2018

World Customs Organisation Monale des Douanes 2017 Second Case Study on Transfer Pricing and Customs Valuation
<http://www.wcoomd.org/en/media/newsroom/2017/october/second-case-study-on-transfer-pricing-and-customs-valuation.aspx> accessed 25 September 2018

World Customs Organisation Monale des Douanes 2017 Second Case Study on Transfer Pricing and Customs Valuation
<http://www.wcoomd.org/en/media/newsroom/2017/october/second-case-study-on-transfer-pricing-and-customs-valuation.aspx> accessed 25 September 2018.

SARS 2018 Valuation what is Valuation
<http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Valuation.asp>

SARS 2018 *Valuation what is Valuation*
<http://www.sars.gov.za/ClientSegments/Customs-Excise/Pages/Valuation.asp>

International Instruments

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (1994)

Convention on the Valuation of Goods for Customs Purposes (1953)

General Agreement on Tariffs and Trade (1948)

International Convention on the Simplification and Harmonization of Customs Procedures (1999).

OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD (2010)

Organisation for Economic Co-operation and Development Model Tax Convention Treaty (1948)

WCO Guide to Customs Valuation and Transfer Pricing Version 1.0 (2015)

Conference Contributions

Belli Finger Ballivian “South Africa: A Review of Trade Policies”

Belli P, Finger M, Ballivian A “South Africa: A Review of Trade Policies” *Informal Discussion Papers on Aspects of The Economy of South Africa* (1993 The World Bank Southern Africa Department)

Cheng and Zhang “The Arm’s Length Principle, Transfer Pricing and Foreclosure under Imperfect Competition”

Cheng W and Zhang D “The Arm’s Length Principle, Transfer Pricing and Foreclosure under Imperfect Competition” *Monash University Department of Economics Discussion Paper* (2010 Monash University)

Levy “Sanctions on South Africa: What did they do?”

Levy PI “Sanctions on South Africa: What did they do?” *Centre Discussion Paper No. 796* (1999 Yale University).

Liu Schmidt-Eisenlohr and Guo “International Transfer Pricing and Tax Avoidance: Evidence from Linked Trade-Tax Statistics in the UK”

Liu L, Schmidt-Eisenlohr T, and Guo D “International Transfer Pricing and Tax Avoidance: Evidence from Linked Trade-Tax Statistics in the UK” *Board of Governors of the Federal Reserve System International Finance Discussion Papers (October 2017)*

Munyadziwa and Roy “The challenges faced by Developing Countries regarding Transfer Pricing”

Munyadziwa R and Roy B “The challenges faced by Developing Countries regarding Transfer Pricing” *Southern African Accounting Association Biennial International Conference Proceedings (2017 University of Witwatersrand)*

Rajkarnikar “Implementation of The WTO Customs Valuation Agreement in Nepal: An Ex Ante Impact Assessment”

Rajkarnikar PR “Implementation of The WTO Customs Valuation Agreement in Nepal: An Ex Ante Impact Assessment” *Asia-Pacific Research and Training Network on Trade Working Paper (August 2006)*

LIST OF ABBREVIATIONS

APA	Advanced Pricing Agreements
BVD	Brussels Definition of Value
CEA	Customs and Excise Act
CJEU	Court of Justice of the European Union
EU	European Union
EREKI	Economic Research <i>Ekonoska Intrazaivania</i>
IFBD	International Bureau of Fiscal Documentation
LLM	Legum Magister
MCom	Master of Commerce
MNEs	Multinational Enterprises
MPRA	Munich Personal <i>RePEc</i> Archive
OECD	Organisation for Economic Co-operation and Development
PER	Potchefstroom Electronic Law Journal
PWC	PricewaterhouseCoopers
SARS	South African Revenue Authority
SCA	Supreme Court of Appeal
TAA	Tax Administration Act
UEK	University of Economics in Katowice
VAT	Value Added Tax
WCR	World Commerce Review

WCO World Customs Organisation

WTO World Trade Organisation

WTJ World Tax Journal