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KrakVet Marek Batko (Case C-276/18): Against All Odds, VAT Double Taxation Exists in the EU

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International double taxation should be to European VAT harmonization what tropical temperatures should be to the polar regions: a challenge of the natural laws of the universe and, at the same time, a wound inflicted to a fragile ecosystem. And yet, last June, both phenomena were officially recognized by international independent bodies: temperatures of 38 degrees Celsius were registered North of the Artic Pole, while the Court of Justice of the European Union (CJEU) delivered its judgment in ***KrakVet Marek Batko* (Case C-276/18)**.

Unfortunately, in both cases, no clear solutions in order to put an immediate halt to those phenomena have been devised. Thus, it appears that we will have to cope with the consequences of double taxation in the field of EU VAT in so much as we will have to cope with climate change: being ready for the inevitable, and trying to limit the damage on a case-by-case basis when it occurs, because there is no capacity or willingness to go for comprehensive and anticipative solutions.

But let's take a step back to ***KrakVet Marek Batko* (Case C-276/18).** The case at hand deals with the simultaneous and somehow opposite application of the distance-selling regime for cross-border supplies of goods by different Member States (in this case, Poland and Hungary) in general, and the notion of 'transported or dispatched by or on behalf of the supplier' set forth in **Article 33 of Council Directive 2006/112/EC** (the VAT Directive) in particular.

The facts are the following. KrakVet Marek Batko is a Polish company, specialized in the online sale of pet products, in particular animal food. The company, which operates under the commercial name of 'Zoofast', owns websites in several languages, each having a different local domain name (for example, for Hungary, the local website is 'www.zoofast.hu'). Although KrakVet does not have any establishment in Hungary, the company has several Hungarian customers.

KrakVet offers customers on its website the possibility of having the goods delivered by a separate transport company (that is, KBGT, a Polish company run by the brother of KrakVet's owner), with a price supplement. The total price (goods plus transport) was paid by the customer through a single payment. KBGT was to transport the goods from Poland to Hungary, while the subsequent transport within the territory of Hungary to the customer was made by two Hungarian courier companies. However, customers were also able to entrust the transport to another carrier or to personally collect the goods.

In order to secure its position towards the Polish tax authorities, Krakvet obtained an advance tax ruling from them, stating that VAT was due in Poland as the supply in question was a B2C supply of transported goods within the Polish territory. On that basis, the company charged its customers Polish VAT at 8% rate.

These circumstances, however, did not impede the Hungarian tax authorities from carrying out an inspection at the company's premises. Notably, after having made inquiries to the Polish tax authorities, by relying on EU instruments of administrative cooperation such as **Council Regulation (EU) No. 904/2010**, the Hungarian tax authorities considered that VAT was due in Hungary on the ground that the threshold for distance-selling arrangements, as set forth in Article 33 of the VAT Directive, in the version applicable before its modification by **Council Directive (EU) 2017/2455**, was exceeded, with the consequence that administrative penalties were imposed on the taxpayer (apparently, because the transactions at hand were found to be abusive).

The referring Hungarian Court put several questions before the CJEU, dealing with two main issues, i.e.:

1. the possibility for tax authorities of a Member State to apply VAT to a transaction that has been previously considered taxable in another Member State, without the former Member State necessarily having a duty to reach an agreement with the other Member State in order to avoid double taxation (i.e., the obligation for Member States to cooperate in order to ensure fiscal neutrality and prevent double taxation);
2. the correct interpretation of the terms 'transported or dispatched by or on behalf of the supplier' laid down in Article 33 of the VAT Directive and the fact that the distance selling business had apparently been put in place by the taxable person at hand to circumvent the application of Hungarian VAT (i.e., the application, in the case at hand, of the doctrine on abuse of rights).

The CJEU decided the case on 18 June 2020, after Advocate General Sharpston had delivered her Opinion on 6 February 2020.

As to the second of the aforementioned points, the CJEU clarified that a supply of goods falls within the scope of Article 33 of the VAT Directive 'where the role of that supplier is predominant in terms of initiating and organizing the essential stages of the dispatch or transport of those goods' (paragraph 63). That can be the case, according to the Court, even if the supplier is not a party to the transport contract, 'if, by means of [the contractual] terms, the purchasers merely endorse the choices made by the supplier' (paragraph 68).

It should be noted that, in order to allow a departure from the contractual terms, the CJEU refers to its precedent in ***Newey* (Case C-653/11)**, a case dealing with the doctrine on abuse of rights, although the Court eventually excluded the application of that doctrine in the case at hand (*see* comments hereinafter). There are, however, other cases where the CJEU had overstepped the contract stipulated between the parties and had recharacterized the relevant transaction, without, at the same time, invoking its doctrine on abuse of rights (for example, in ***Temco Europe*, Case C-284/03**).

In its analysis, the referring Court had also to take into account:

1. the 'commercial practices which characterize the activity', i.e. whether 'the organization by that supplier of the means enabling the goods concerned to be delivered to their purchasers

constitutes, in principle, an essential part of that activity' (paragraph 69);
2. the choices relating to the methods of dispatch or transport of the good, including the designation of the transport company, i.e. whether that choice is attributable to the supplier or the customer;
3. the burden of the risks associated with the dispatch and supply of the goods and the payment arrangements, i.e. the issue related to single vs. separate payments.

As for the first point, from the facts at hand, it appears quite clearly that the application of Article 33 of the VAT Directive, even in its version applicable at time of the facts, cannot be sidestepped and, therefore, that the Hungarian tax authorities were in their right to consider that Hungarian VAT was due.

The Court did, however, rule out, on the basis of the evidences submitted by the parties, that this circumstance could constitute an abuse of rights, since 'the supplier and the transport company recommended by it are independent companies which engage, on their own behalf, in genuine economic activities' (paragraph 96). According to Court, an abusive practice would instead require that 'the distinction between the supplier of the goods concerned and the carrier it recommends is a wholly artificial arrangement concealing the fact that those two companies in fact constitute a single economic entity' (paragraph 91).

As to the second point, the Court recalled that one of the goals enshrined in the VAT Directive is 'to avoid conflicts of jurisdiction which may result in double taxation or non-taxation' (paragraph 42) and that, by itself, 'the correct application of Directive 2006/112 makes it possible to avoid double taxation and to ensure fiscal neutrality' (paragraph 50). The Court, nevertheless, did not infer any positive obligation for the tax authorities from the aforementioned objectives. Nor did the Court consider that the existence of a 'common system of cooperation' established by **Regulation No. 904/2010** and the duty to cooperate set forth therein in order to ensure the correct application of the common VAT system could lead to any obligation to reach an agreement among EU Member States about the VAT treatment of a single taxable transaction. In other words, tax authorities may – or even, depending on the case, have to – tax cross-border transactions in 'splendid isolation' (as the late XIX Century British policy towards the European continent had been described) from the tax treatment applied to the same transaction by other Member States. From such a perspective, the CJEU's decision in ***KrakVet Marek Batko*** **(Case C-276/18)** can be seen as the natural pendant of ***RBS Deutschland*** **(Case C-277/09)**, a case dealing with, on the opposite, double non-taxation.

All in all, given the current framework of EU VAT, it can be concluded that it is only at the judicial stage that the issue of double taxation caused by the misapplication of the VAT Directive by one or more Member States might eventually be settled through the taxable person making use of the preliminary ruling procedure laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU). Moreover, only a decision to that effect by the CJEU may trigger 'the right to a refund of charges levied in a Member State in breach of rules of EU law' (paragraph 52).

The conclusion reached by the Court is understandable, although disappointing. It is, in fact, true that the current EU framework as regards cooperation in the field of VAT does not provide for a dispute resolution mechanism anyhow similar to the one recently adopted in the area of direct taxation (*see* **Council Directive (EU) 2017/1852**). However, it cannot be disputed that one of the main goals – if not the main goal itself inherent to the common VAT system – is to ensure (single) taxation of taxable transactions localized across the (single) EU territory. As regards the principle of prohibition of abusive practices, the Court did not hesitate to infer from it a positive obligation

for Member States to act (although such an obligation is not even mentioned in the VAT Directive). It is regrettable, nonetheless, that the Court did not take the opportunity to do the same for the principle of prohibition of double taxation. Of course, solving double taxation disputes would necessitate to identify, first, the correct interpretation of the applicable rules, before determining the State which has to relinquish its taxing rights. But, at the very least, I submit that a duty to cooperate as set forth in **Regulation No. 904/2010** should take the form of a procedural obligation to initiate a dialogue between the concerned Member States as a way to reach a common understanding on the applicable rules. As a matter of fact, waiting until the case is brought to a domestic court may be too late for the taxpayer. It risks transforming a victory by the taxpayer in a sort of 'Pyrrhic victory', considering the length and costs of judicial procedures in many Member States, which not every taxable person is willing to shoulder, even if it gets a refund of those costs in the end. Nevertheless, to conclude on a more optimistic note, cross-border double taxation in general remains high on the agenda of the European Commission (as the latest **EU Commission's Communication on 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy'**), and the breakthrough constituted by the Dispute Resolution Directive might have repercussions also on VAT, which is likely to become even further harmonized due to the pressure to adapt it to developments in the digital economy.

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