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Highlights & Insights on European Taxation

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Year 2022, no. 12

TABLE OF CONTENTS

INDIRECT TAXATION, CASE LAW

– ***DuoDecad* (C-596/20)**. Lack of jurisdiction. VAT rules for cross-border IT services. Court of Justice

(comments by **Giorgio Beretta**) (H&I 2022/366)

– ***Hauptzollamt Hamburg* (C-368/21)**. Place of importation. Import of vehicle into EU territory in breach of customs legislation. Court of Justice

(comments by **John Gruson and Nikhil Mediratta**) (H&I 2022/368)

– ***Finanzamt R* (C-98/21)**. No Input VAT recovery by holding for services to subsidiaries. Court of Justice

(comments by **Herman van Kesteren**) (H&I 2022/367)

CUSTOMS AND EXCISE

– ***Gräfendorfer Geflügel und Tiefkühlfeinkost* (C-415/20)**. Repayment. Right to payment of interest. Court of Justice

(comments by **Yassine El Bojaddaini**) (H&I 2022/339)

– ***Council adopts EU single window for customs***

(comments by **Piet Jan de Jonge**) (H&I 2022/355)

– ***New customs agreement between the EU and Moldova enters into force on 1 November 2022***

(comments by **Piet Jan de Jonge**) (H&I 2022/338)

– ***Publication of a new Combined Nomenclature***

(comments by **Piet Jan de Jonge**) (H&I 2022/337)

ECHR

– ***De Legé v the Netherlands* (Application no. 58342/15)**. Forced disclosure of foreign bank account documents. No violation of right to a fair trial. ECHR

(comments by **Edwin Thomas**) (H&I 2022/350)

– ***Vegotex International v Belgium* (Application no. 49812/09)**. Excessive length of proceedings. Legislature's intervention during tax assessment proceedings. ECHR

(comments by **Edwin Thomas**) (H&I 2022/349)

STATE AID

– ***Fiat Chrysler Finance Europe v Commission* (C-885/19 P)**. Annulment of Commission decision finding Luxembourg tax ruling constituted State aid. Court of Justice

(comments by **Raymond Luja**) (H&I 2022/352)

FREE ARTICLE

– ***Hauptzollamt Hamburg* (C-368/21)**. Place of importation. Import of vehicle into EU territory in breach of customs legislation. Court of Justice

(comments by **John Gruson and Nikhil Mediratta**) (H&I 2022/368)

Introduction

A 'tax on final consumption' can probably be a concise yet accurate way to define the intent behind the levy of VAT within the EU VAT framework. It is no longer *res integra* that the EU VAT system aims to tax final consumers, and by extension, final consumption (CJ 24 October

1996, C-317/94 *Elida Gibbs Ltd v Commissioners of Customs and Excise*, ECLI:EU:C:1996:400, para. 19). With the said principles at heart and the VAT Directive in hand, we are well-equipped to examine the judgment of the CJ in the matter of *R.T.*(CJ 8 September 2022, C-368/21 *R.T. v Hauptzollamt Hamburg*, ECLI:EU:C:2022:647).

Under the EU VAT framework, the importation of goods, *inter alia*, is a taxable transaction that is subject to VAT (Article 2(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive')). The judgment above is not the first on the question of which EU Member State would be entitled to claim jurisdiction over import VAT in a similar fact pattern. The question, therefore, might sound straightforward but becomes complicated upon examination of the relevant framework. The complication stems from the fact that the express legislative provisions do not unequivocally point to the EU Member State which would have jurisdiction to collect the import VAT. Another complication is that the trigger point for levying import VAT is somehow intertwined with the application of customs duty. In *VS* (CJ 3 March 2021, C-7/20 *VS v Hauptzollamt Münster*, ECLI:EU:C:2021:161, paras 27 to 30), the CJ observed that a link exists between customs duties and import VAT when it comes to the importation of goods into the EU. This link is also evident from specific provisions in the VAT Directive that refer to customs-related procedures (e.g., Article 71 of the VAT Directive). Further, the connection between the levy of import VAT and the levy of customs duties might, at times, collide with the consumption principle (mentioned *supra*) followed for the levy of VAT. At this juncture, it is relevant to discuss the legislative provisions around the application of import VAT.

Legislative provisions on the levy of import VAT

Article 2(1)(d) of the VAT Directive provides that the importation of goods is subject to VAT. Article 70 of the VAT Directive provides that the chargeable event apropos importation of goods shall be when the goods are 'imported'. 'Importation of goods' has been defined under Article 30 of the VAT Directive to mean the entry of goods into the EU which are not in free circulation. Lastly, Article 60 of the VAT Directive defines the place of importation of goods as the EU Member State within whose territory goods are 'located' when they enter the community.

A perusal of the abovementioned legislative framework would undoubtedly demonstrate that the importation of goods into the EU is subject to the levy of VAT. However, a point for consideration remains as to which EU Member State's jurisdiction VAT is required to be paid. In cases where import is made by the end consumer (such as in a fact pattern of the *R.T.* case), the jurisdictional aspects become all the more critical for the EU Member States because VAT cannot be claimed by the end customer as an input deduction.

The question here revolves mainly around the interpretation of Article 60 in conjunction with Article 70 of the VAT Directive. A two-fold interpretational requirement would be as follows:

- In Article 60, what does 'located' mean?; and
- What would be the exact point in time to determine where the goods are 'located' when they enter the EU? Will there be a requirement to examine the point in time when the goods physically entered the EU or do some additional factors need to be considered to determine 'where' the goods were located after they physically entered the EU?

An answer to the above questions may not lie expressly in the VAT Directive but can be

deciphered from the CJ's case law.

Rulings from the CJ on the jurisdictional aspects of import VAT

While the legislative provisions might leave some greys for divergent interpretations, the CJ has ruled that the jurisdiction where import VAT will need to be paid, would be in the EU Member State where the goods were intended to be finally consumed. This *ratio decidendi* from the existing CJ case law (*VS*, C-7/20, para 29-31; *R.T.*, C-368/21, para. 33) factors in the fundamental aspect for levying of VAT, being taxing final consumption.

As a *sequitur*, even if goods enter the EU in one EU Member State triggering the levy of customs duties, the levy of import VAT will be in the EU Member State where the intended final consumption lies. As a corollary, possible practical situations cannot be ruled out where the EU Member State of the first entry of imported goods differs from the EU Member State where the intended final consumption occurs.

In the case at hand, the CJ, following its previous judgment in *VS*, held that even though the entry of the vehicle for transit purposes into the EU was in Bulgaria, it was intended for final consumption in the EU Member State of its final destination, which in the said case was Germany. Accordingly, VAT collection rights would lie with Germany and not Bulgaria. The referring Court in Germany attempted to make a distinction from the previous judgments of the CJ on this subject, raising doubts on the applicability of the judicial dictum to cases where the goods (the car) were actually used by the importer in the EU Member State where the goods were physically imported (although not intended for final consumption therein). According to the referring court in Germany, the previous dictum of the CJ was about 'goods imported as goods' without being used when transiting from the jurisdiction of one EU Member State to another. Whereas, in the facts of *R.T.* referred by the German court, the goods (the car) were put to use (although not intended for final consumption) in the EU Member State of first import (Bulgaria). Despite the referring court's attempt, the CJ maintained that its previous dictum would continue to apply.

This judgment is very much in line with the previous decisions of the CJ, including that in the *Federal Express* case (CJ 10 July 2019, C-26/18 *Federal Express Corporation Deutsche Niederlassung v Hauptzollamt Frankfurt am Main*, ECLI:EU:C:2019:579). In this case, certain goods were, *inter alia,* sent from third countries with their final destination to an EU Member State (Greece) by aircraft. The goods, however, first landed in another EU Member State (Germany), where they were loaded onto another plane for onward transportation to Greece. It was undisputed that the goods were meant for final consumption in that EU Member State. Noting final consumption as the trigger point for the levy of VAT, the CJ made the following critical situational observations (*Federal Express*, C-26/18, paras 46-48):

- For goods that were*unlawfully* imported into the EU – they will be presumed to have entered the economic network of the EU for consumption in the EU Member State where the customs debt is incurred (Germany in the present case). Accordingly, as VAT follows end consumption and consumption is presumed in Germany, VAT will be payable in Germany. The same presumption above would apply to goods *lawfully* imported into the EU. Similarly, as VAT follows consumption and consumption is presumed in Germany, VAT will be payable in Germany.
- The above presumptions are rebuttable if it is shown that the goods that enter the EU (on which customs debt is incurred) were intended for final consumption in another EU Member State. In such cases, VAT, following final consumption, would need to be paid in that other EU Member

State and not the EU Member State where the customs debt was incurred.

Following the abovementioned considerations of the CJ, there can be situations where customs duties are paid in one Member State. The applicable import VAT on the very same goods is paid in another EU Member State (subject to the provisions of Article 87 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1-101)). Accordingly, the gravitation point for customs duties becomes the EU Member State of physical entry in the EU for free circulation within the economic network of the EU, whereas that for VAT becomes the EU Member State of intended final consumption. Ideally, this interpretation should put a hard stop on the interpretation of the provisions of the VAT Directive concerning import VAT. Still, we note an exciting observation discussed in the next part.

Did the CJ leave a window open for an alternative interpretation?

Having discussed the foregoing, it is appropriate to mention that in *R.T.*, in our opinion, the CJ leaves a window open under which the VAT collection rights may lie with the EU Member State in which the physical import took place, i.e., Bulgaria. In paragraphs 31 and 32 of its judgment, the CJ observes that the finding about the 'first use of the vehicle' within the EU as a means of transport amounting to consumption or at least constituting a step towards consumption, was not called into question in the hypothesis set by the referring court in Germany. Delving into the interpretational question, had the referring court questioned the usage of the vehicle in Bulgaria as amounting to consumption or for that matter the first step in consumption, would such a question have resulted in a different judgment from the CJ? Given that consumption or the first step in consumption had already taken place in Bulgaria, would Bulgaria have had the VAT collection rights as opposed to Germany? This becomes all the more important for Bulgaria as VAT would not have been deductible and would have been a source of VAT revenue. Should the trigger point for the levy of VAT not end the very moment when the vehicle was used as a means of transport in Bulgaria?

Even if one looks at *VS* (*VS*, C-7/20, para 24), the question referred to the CJ was not whether the usage of the vehicle in a jurisdiction other than the jurisdiction of intended final consumption could trigger the levy of VAT. The question was more on the intertwining relationship between the levy of customs duties and VAT. Furthermore, in the *Federal Express* (*Federal Express*, C-26/18), it was undisputed that the relevant goods that were loaded from one aircraft to another for an onward final journey to Greece were not meant to be consumed in Germany. Accordingly, the question is, can distinctions in terms of the usage of the goods lead to different results? Assume, in the said case, a situation where the car is loaded onto a truck and transported to Germany versus a situation where it was driven by the owner all the way to Germany. Should the usage (steering of the vehicle by the owner) not be treated as consumption?

The abovementioned observation of the CJ might raise some eyebrows but may not survive the test of intended final consumption, which can only be in one EU Member State. It might be interesting to apply the concept of pro-rating/splitting the VAT collection between EU Member States where proportionate consumption takes place. However, we leave that for another time and place.

Conclusion

It can be concluded that the determinative factor for the levy of customs duty and VAT may not

coincide in all importation cases. This is even though the CJ's interpretation of the law presumes that the liability to pay import VAT is attracted simultaneously when the customs debt is incurred. While it is clear that customs debt would be incurred in the EU Member State where the goods arrive from a third country to a place within the EU, the same is not the case with import VAT. Given that VAT is a tax on intended final consumption, the presumption mentioned above can be rebutted. Where the final intended consumption is to take place in an EU Member State other than the EU Member State in which customs debt was incurred, the former EU Member State will acquire the taxing rights.

John Gruson and Nikhil Mediratta

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