
Opinion Statement FC 2/2020 concerning the deduction of import VAT on the import of goods

Prepared by the CFE Fiscal Committee

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This Opinion Statement discusses the implications of the decision of the Court of Justice of the EU in the case of C-187/14 *Skatteministeriet v DSV Road A/S*.

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In case C-187/14 *Skatteministeriet v DSV Road A/S* the Court of Justice took the view that a haulier had no entitlement to deduct VAT incurred on the import of goods it was transporting for its customers. The Court took the view that the mere fact that the haulier transported the goods was not sufficient to mean that the goods were “used” for the purposes of the haulier’s taxed transactions, and therefore did not give rise to a right to deduct import VAT under Article 168 of the Principal VAT Directive 2006/112/EC. At paragraph 50, the Court observed that “the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration”. Subject to the comments below and assuming that any recharge by the haulier is not considered taxable consideration, this is clearly a sensible view, since it would be distorting of the VAT system to allow a haulier to recover import VAT on the import of goods belonging to another when the owner will not be using them for purposes that confer a right of deduction.

However, an even more restrictive view has now been taken by HMRC in the United Kingdom in HMRC Brief 2/2019. HMRC would appear to be taking the view that it is only the owner of the goods who can deduct the VAT charged on the import of the goods and the owner needs to have paid that import VAT in order to secure that right. On this basis, HMRC suggest that a former owner who passes ownership of the goods immediately before import cannot recover the import VAT. They also suggest that toll operators who process goods that they do not own have no entitlement to recover import VAT.

It is also clear that that is the view of the Slovak authorities since a similar approach has been taken by them in a reference to the Court of Justice in C-621/19 *Weindel Logistik Service SR v Finančné riaditeľstvo Slovenskej Republiky*, lodged on 20 August 2019. In that case the taxpayer was liable for import VAT on goods that belonged to another which it repackaged in the Slovak Republic prior to their sale in other countries. The Slovak tax authorities and courts took the view that it has no right to deduct under Articles 167 and 168 of the Principal Directive because it was not the owner of the goods and was not making a supply of the goods. It is possible that some other Member States may also take this restrictive view. However, it is our understanding that a number of other Member States take a broader view, which for the reasons outlined below is to be preferred.

In reaching its view in HMRC Brief 2/2019, HMRC evidently took account of the non-binding conclusions expressed by the European Union VAT Committee on 19 October 2011¹ which stated:

‘The VAT Committee almost unanimously confirms that a taxable person designated as liable for the payment of import VAT pursuant to Article 201 of the VAT Directive shall not be entitled to deduct if both of the following conditions are met:

he does not obtain the right to dispose of the goods as owner;

the cost of the goods has no direct and immediate link with his economic activity.

This shall be the case even if that taxable person holds a document fulfilling the conditions for exercising the right of deduction as laid down by Article 178(e) of that Directive.’

¹ There were also discussions on the issue on 5 May 2011.

However, unlike the Brief, this guidance is not just focused on the ownership of the assets but also focuses on the lack of any direct and immediate link between the goods and the claimant's taxable activities. It is only when both these conditions are not satisfied that the VAT Committee states that no right of deduction arises. The opening words of Article 168 of the Principal VAT Directive requires the goods to be "used" for the purposes of the taxable activities. Nothing in the wording suggests that this always requires ownership of the goods before a right of deduction arises. This conclusion is fortified by Article 178(e) of the Principal Directive, which clearly envisages that the person who has the right to deduct is the "consignee or importer" of the goods, rather than the owner of the goods. As we note below, we do not consider that the owner of the goods will always be the "consignee or importer".

For example, it would seem surprising if a lessee of an asset should have no right of deduction, even though the asset is directly used in its business. An example would be a haulier who leases a lorry. Although the haulier never becomes the owner of the lorry, the asset is then being directly used in the business to make its supplies, so it becomes difficult to see why any import VAT the lessee pays on the lorry should not be deductible since the lorry is clearly "used" in his business and, on account of the rent paid for its use, it constitutes a cost component of the business. The lessee would also be naturally described as a "consignee or importer" and is therefore the person who Article 178(e) of the Principal Directive envisages having a right of deduction. In this regard we observe that we do not consider that the owner of the lorry would be described as the "consignee or importer" of the goods when the decision to move the lorry was taken by the lessee and the owner therefore played no role in the movement. Support for this conclusion is also provided by the decision of the Dutch Supreme Court no 11/03207 of 4 October 2013. That case concerned a yacht which the lessee chartered. The Dutch legislation in relation to import VAT provides for it to be due and recoverable on goods "intended for an entrepreneur": see Article 15(1)(c)(1) and 23 of the Turnover Tax Act 1968. Although the decision was focusing on the payment of import VAT, the Dutch Supreme Court considered that the lessee should be regarded as such an entrepreneur even though it did not own the yacht but merely leased it. It follows from its reasoning, and the relevantly identical wording of the Dutch legislation conferring a right of deduction, that it would also have considered that there was also a right of deduction.

Similar considerations apply to a person who only acquires ownership of goods for the purposes of his business shortly after the import occurs. It is very common in practice, for purely commercial reasons, for contracts to contain a retention of title clause and also make the supplier liable for the insurance of the goods with the customer paying for the goods on delivery, but the customer is made liable for the import VAT (this will be the position if DDU Incoterms are used). Assuming the supply did not occur prior to the import, is the customer to have no right to deduct the import VAT in such circumstances even though he subsequently uses the goods for the purposes of his business and paid the import VAT? Surely the right to acquire title to the goods and the subsequent payment for the goods means that the relevant nexus between the costs of the goods and the economic activities exists, so that a right of deduction arises even though ownership passes after the importation of the goods. Such a customer is in a different position to the haulier considered in C-187/14 *Skatteministeriet v DSV Road A/S*, since the cost of the goods clearly then also forms a cost component of his activities. The customer in such a case would also be naturally described as a "consignee or importer" for the purposes of Article 178(e) of the Principal Directive, since the goods are being sent to the customer, which again suggests the customer should have a right of recovery.

We also consider that similar considerations apply when goods are returned to a supplier under a warranty claim for repairs. The prior ownership of the goods means that there is a link between the cost of the goods and the taxable person's economic activity. Because the goods are being shipped back to the supplier, the supplier would also naturally be described as a "consignee or importer" for the purposes of Article 178(e) of the Principal Directive. The supplier who sells goods and transfers title immediately prior to their import is also in a different position to the haulier considered in C-187/14 *Skatteministeriet v DSV Road A/S*, since the cost of the goods clearly then also forms a cost component of his activities. If he incurs the import VAT, we therefore have difficulty in seeing why he should not be regarded as a relevant importer with a right of deduction. Another similar case may be a commissionaire or agent who contracts in his own name and is treated as both receiving and making a supply but never obtains ownership of the goods.

For these reasons, it is considered that a test that purely focuses on ownership is unduly restrictive, and a right of recovery should exist in these cases.

In this regard it is significant that in C-132/16 *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia v 'Iberdrola Inmobiliaria Real Estate Investments' EOOD* the Court of Justice considered that input tax could be deducted on a sewerage plant belonging to a local authority because the expenditure was incurred on account of the taxpayer's taxable activities. If ownership of an asset is not a precondition to generally deducting input tax, it would be surprising if it is always a condition to deducting import VAT on the importation of goods. It is also significant that the Court, in C-320/88 *Staatssecretaris van Financiën v Shipping & Forwarding Enterprise (SAFE) BBV*, considered that what constituted a supply of goods was a Community law concept, and therefore could not be determined solely by reference to national law. In that case the Court considered that a supply of goods occurred when a person acquired a right to dispose of tangible property as owner, even if there was no legal ownership of the goods. It would therefore be very surprising if rights to recover import VAT were dependent on ownership as a matter of national law. It is considered that even making the right dependent on possession of a current right to dispose as owner is unduly restrictive. Cases such as C-29/08 *Skatteverket v AB SKF* suggest that a right of deduction should arise if there is a direct and immediate link between the import and the taxable person's economic activities, and it is unduly restrictive to suggest that such a link always requires current ownership.

As we have highlighted above, we agree the decision in C-187/14 *Skatteministeriet v DSV Road A/S* is correctly decided. However, it would undermine the neutrality of the tax if a haulier's customers cannot deduct the import VAT paid by a haulier when the goods are used in its customer's business. This is particularly true, and is likely to be the position, when the import VAT is recharged to the customer as a disbursement. The Court of Justice in case C-414/10 *Veileclair SA v Ministre du budget, des comptes publics et de la Réforme de l'Etat* held that input tax could be deducted on an importation even though it has not been paid by the person importing the goods providing they have import documentation showing that they are the importer or consignee. It follows that an importer or consignee must have a right of deduction even though another person, such as the haulier, has paid the import VAT. However, it is a matter of concern that some States, for example the United Kingdom, require a person seeking to deduct the import VAT to be in possession of documentary proof that they can only obtain by the tax being explicitly paid by them or on their behalf. Such a requirement is inconsistent with the reasoning of the Court in *Veileclair SA v Ministre du budget, des comptes publics et de la Réforme de l'Etat*. Article 178(e) of the Principal Directive makes it clear that the right to deduct

is dependent on a person having import documents showing that they are the consignee or importer and also proving “the amount of the VAT due and enabling that amount to be calculated”. It does not require proof that that person or a person acting on his behalf paid the import VAT or even that the import VAT has been paid. Particularly when it has been recharged to them, the neutrality of the tax makes it essential that the national rules should ensure that a consignee or importer should have a right to deduct the import VAT, even if it has been paid by another not specifically in their name, if it is used in the importer’s or consignee’s taxable activities. National rules of proof should not be framed in a manner that effectively frustrates that right unless the taxable person has directly paid the import VAT, or it has been explicitly paid in their name.

If a restrictive interpretation of the current rules is considered correct, we would suggest that consideration should also be given to changing the rules so that the import documentation can be used to nominate that either the supplier or customer should be the person with a right to recover import VAT irrespective of the precise ownership of the goods at the time, provided the person nominated uses the goods to make taxable supplies. We understand that this is the basis upon which recovery is allowed in the United Arab Emirates. We consider that such an approach is consistent with the long-term European Union policy of trying to stimulate imports of foreign goods to be processed in the EU and subsequently exported from the EU, as reflected with inward processing and similar reliefs. Restricting the right of deduction on imports is likely to discourage people from sending goods to the Union. Indeed, we would suggest that this is a reason why a less restrictive interpretation is to be preferred.

The CFE Tax Advisers Europe considers that these are issues that warrant review by both the Commission and the States concerned. Having a rule that seeks to limit the right of recovery of import VAT to the owner of goods is liable to discourage people bringing goods into the EU for business purposes, for example for leased aircraft, and is undesirable for that reason.