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**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 852**

**QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

ORIGIN: France

REFERENCES: Articles 86(1)(a) and 211

SUBJECT: Chargeability and payment of import VAT on goods
subject to excise duty in case of excise duty suspension

1. INTRODUCTION

In accordance with Articles 85 and 86 of the VAT Directive¹, in respect of the importation of goods, the taxable amount shall be the value for customs purposes, determined in accordance with the EU customs regulations (Union Customs Code). The taxable amount shall include taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied. In cases where goods subject to excise duty are placed under excise suspension in accordance with the rules laid down in the Excise Directive², the excise duty is calculated only where the goods are released for consumption.

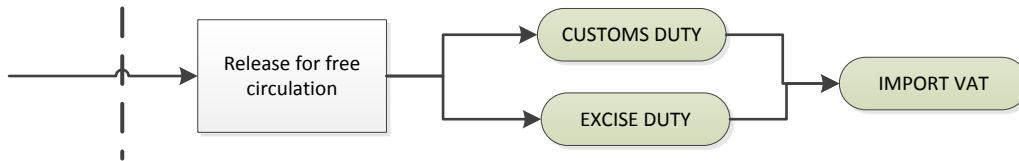
France has questions about the calculation of the taxable amount upon importation of goods subject to excise duties placed under excise duty suspension.

The questions put by France and its analysis can be found in annex.

2. SUBJECT MATTER

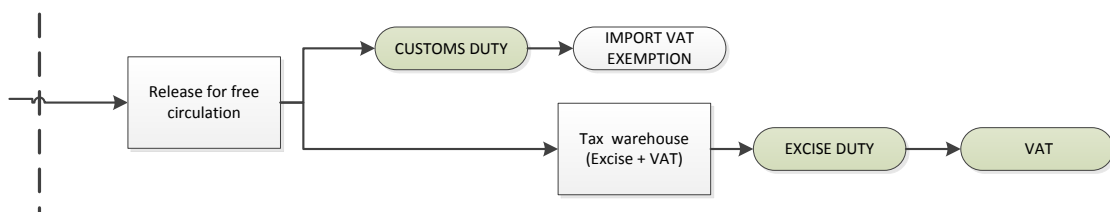
As a general rule import taxes become payable when the goods are released for free circulation (see graph 1 below).

Graph 1



However, when goods subject to excise duties enter the territory of the EU and are released for free circulation the taxable person may decide, subject to certain conditions, to simultaneously place them under excise duty suspension arrangements. Based on Article 157 of the VAT Directive Member States may provide for VAT warehousing arrangements and to exempt such goods from import VAT³ (see graph 2 below).

Graph 2



¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

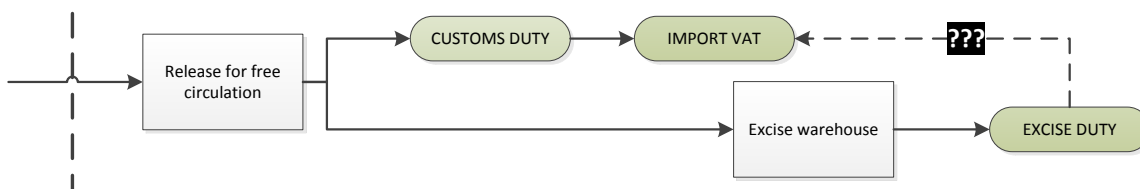
² Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12).

³ In such a case fiscal neutrality for VAT purposes is preserved by calculating VAT upon removal of goods from the said arrangements.

However, the import VAT exemption is optional for Member States whereas excise duty suspension arrangements apply in all Member States and are subject to business decision⁴.

The situation may therefore arise where imported goods are released for free circulation in a Member State thus triggering the chargeability of import VAT and are simultaneously placed under excise duty suspension arrangements (see graph 3 below).

Graph 3



This raises the following questions:

- Should Article 86(1)(a) of the VAT Directive be understood as requiring to include excise duty into the taxable amount on which import VAT is computed given that its payment is suspended and the amount of excise duty is not yet calculated at the time of importation;
- if so, how should this provision be applied in practice?

According to France, this is a significant issue: depending on the solution chosen, import VAT might not be charged on the excise duty due at the time of importation if the duty is deferred because the goods are placed under a duty suspension arrangement. Given the amount of duty involved, this could constitute an advantage likely to undermine economic neutrality between operators, not to mention the potential risks of a shortfall in budget revenue.

3. THE COMMISSION SERVICES' OPINION

According to point (a) of Article 86(1) of the VAT Directive, the taxable amount shall include, in so far as they are not already included, taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied.

Following this provision, the excise duty shall be included in the taxable amount only in cases where it is due outside the Member State of importation or where it is due by reason of importation.

To answer the question whether excise duty can be said to be due by reason of importation in cases where it is not actually paid at the time of importation, as a result of the

⁴ Only if the person moving the goods from the place of importation has a registered consignor authorisation in that Member State.

application of excise duty suspension, the relevant provisions of the Excise Directive must be analysed.

Point (b) of Article 2 of the Excise Directive provides that excise goods shall be subject to excise duty at the time of their importation into the territory of the EU.

For that purpose, in accordance with point (8) of Article 4 of the Excise Directive ‘importation of excise goods’ means the entry into the territory of the EU of excise goods unless the goods upon their entry into the EU are placed under a customs suspensive procedure or arrangement, as well as their release from a customs suspensive procedure or arrangement.

Furthermore, Article 7 of the Excise Directive provides that excise duty shall become chargeable at the time, and in the Member State, of release for consumption. For the purposes of the said Directive, ‘release for consumption’ shall mean any of the following:

- (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
- (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
- (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

The analysis of those provisions therefore confirms that in accordance with the Excise Directive:

- the chargeable event for excise duty purposes is the production or the importation of the excise goods;
- this is still the case where excise goods, immediately upon importation, are placed under a duty suspension arrangement but chargeability is postponed and takes place only upon release for consumption.

This view is confirmed by the Court of Justice of the European Union (CJEU) which explained that the suspension arrangement defined in Article 4(c) of the Excise Duty Directive⁵ is the tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended. It is a feature of that arrangement that the excise duty on the products covered by it is not yet payable, although the chargeable event for taxation purposes has already taken place. Consequently, as regards

⁵ The CJEU made reference to Council Directive 92/12/EEC which is relevant to the judgment.

the products subject to excise duty, that arrangement postpones the chargeability of excise duty until one of the conditions of chargeability is met⁶.

Furthermore, as France correctly noted, this view is in line with Article 84 of the VAT Directive, which requires Member States to ensure that the excise duty due from or paid by the person making an intra-EU acquisition of goods subject to excise duties is included in the taxable amount. In such a way, the equal treatment of goods, whether acquired from third countries or from other EU Member States, is ensured.

This interpretation raises practical issues, as outlined by France, stemming from the difference in time between the moment that import VAT and excise duty respectively becomes chargeable.

Due to this difference in time the exact amount of excise duty to be paid on goods placed under duty suspension may not be calculated with any precision at the time of importation. It must be noted, however, that the amount of excise duty payable under normal circumstances can already be assessed. Further adjustments may be needed in case if, for example, the goods are destroyed while under suspension.

The VAT Directive does not provide for common rules on how import VAT shall be calculated in such cases. More specifically, Article 211 of the VAT Directive provides that Member States shall lay down the detailed rules for payment in respect of the importation of goods.

From this, it follows that the practical implementation of this provision may be different. Member States may for example make use of rules for later adjustment of the amount to be paid or defer payment of import VAT with or without guarantee.

In the Commission services' view a reasonable solution could be to oblige the taxable person upon importation of the goods to include in the taxable amount the estimated amount of excise duties which, under normal circumstances, would become payable upon release of the goods from the duty suspension arrangements and provide for subsequent adjustment if the final amount of excise duty actually due turns out to be different.

4. DELEGATIONS' OPINION

The delegations are requested to share best practises and to give their opinion on this matter.

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⁶ See Case C-230/08 *Dansk Transport og Logistik*, EU:C:2010:231, paragraph 78.

Question from France

Subject: Value added tax (VAT). Procedures for calculating the taxable amount for VAT for excise goods that have been imported and placed under a duty suspension arrangement.

The French authorities wish to draw the Commission's attention to the procedures for calculating the taxable amount for value added tax (VAT) for excise goods that have been imported and placed under a duty suspension arrangement and request that the Commission include this point on the agenda of a future VAT Committee meeting.

Notwithstanding the petroleum products for which France has a specific derogation, and given the existence of a very large number of excise warehouses for alcoholic beverages on its territory and a higher risk of fraud, France has decided not to exercise the option provided for in Article 157 of Directive 2006/112/EC, which would have enabled it to exempt from VAT transactions involving excise goods placed under a duty suspension arrangement within the meaning of Article 4(7) of Directive 2008/118/EC of 16 December 2008.

As a result of this decision, the placing under a duty suspension arrangement of excise goods (manufactured tobacco, alcohol and alcoholic beverages) when they are imported from a third country does not exempt them from VAT due as a result of the transaction. In the same way, French law does not provide for any exemptions for the supply of services involving the same goods for the duration of the duty suspension arrangement.

This raises the question of how the taxable amount for import VAT should be calculated when excise goods are placed under a duty suspension arrangement.

This is a significant issue: depending on the chosen solution, import VAT might not be charged on the excise duty due at the time of importation if the duty is deferred because the goods are placed under a duty suspension arrangement. Given the amount of duty involved, this could constitute an advantage likely to undermine economic neutrality between operators, not to mention the potential risks of a shortfall in budget revenue.

I - Applicable law and issues raised

In accordance with Article 70 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive'), the chargeable event occurs and VAT becomes chargeable when the goods are imported.

As laid down in Article 86 of the VAT Directive, the VAT taxable amount includes taxes, duties, levies and other charges due by reason of importation.

Furthermore, Article 2 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (the 'Excise Directive') provides that excise goods are subject to excise duty at the time of their production or, if being imported, at the time of their importation into the territory of the Community. The chargeable event occurs and excise duty becomes chargeable at the time of production or importation (Article [7](2)(d) of the Excise Directive).

Article 4(8) defines ‘importation of excise goods’ as the entry into the territory of the Community of excise goods, unless the goods upon their entry into the Community are placed under a customs suspensive procedure or arrangement, as defined in paragraph 6 of the same article. In the latter case, importation is deemed to take place when the goods are removed from said suspensive procedure or arrangement.

In terms of VAT, Articles 70 and 71 of the VAT Directive have the same purpose, namely to establish the chargeable event and chargeability of VAT at the time the goods are imported, i.e. upon their entry into the Community, except where the goods, upon their entry into the Community, are placed under one of the customs suspensive procedures or arrangements referred to in Articles 156, 276 and 277 of the same Directive.

Although worded differently, the concept of importation, for both excise duty and VAT purposes, refers to the same legal situation. It seems that the difference relates to the precise scope of the customs suspensive procedures or arrangements taken into account by the VAT or excise duty systems in order to apply tax suspension.

Problems arise when the goods, at the time of their importation, are subject to VAT but are placed under a duty suspension arrangement within the meaning of Article 4(7) of the Excise Directive because, for VAT, the chargeable event has occurred and VAT has become chargeable, but for excise duty only the chargeable event has occurred.

Indeed, Article 7 of the Excise Directive stipulates that excise duty is chargeable when the goods are released for consumption, which, in this specific case, means when the excise goods cease to be covered by a duty suspension arrangement.

The combination of the above-mentioned articles means that, when goods are placed under a duty suspension arrangement, the excise duty that would normally be due and chargeable at the time of importation becomes chargeable only when the goods cease to be covered by a duty suspension arrangement. However, VAT must be paid at the time of importation since the chargeable event has occurred and VAT has become chargeable because the duty suspension arrangement in question does not exempt the person liable to pay VAT.

Given that excise duty represents a significant amount of money, this situation is causing uncertainty for the French authorities and is also leading to disagreements and disputes with importers who believe that excise duty should not be included in the VAT taxable amount due on importation because it does not become chargeable until the goods are released for consumption.

II - Analysis suggested by France and put before the Committee

The wording of Article 86(1)(a) of the VAT Directive: ‘*taxes, duties, levies and other charges ... due by reason of importation, excluding the VAT to be levied*’ can be interpreted in two different ways.

1 - Either, as maintained by some French importers, the expression refers only to the taxes, duties or charges that have actually been paid by reason of importation. In this case, the excise duty for which chargeability is deferred due to the goods being placed in a tax warehouse should not be included in the calculation of the VAT taxable amount paid on importation.

2 - Or the expression *'taxes, duties, levies and other charges ... due by reason of importation ...'* must apply to all taxes, duties, levies or charges for which the chargeable event occurred at the time of importation, irrespective of the conditions specific to their chargeability. If this is indeed the case, excise duty must be taken into account when calculating the VAT taxable amount, even though it will be paid only when the goods are released for consumption.

The French authorities take the view that the latter interpretation should prevail, in so far as deferring the chargeability of a tax does not affect the chargeable event relating to that tax; it is through the chargeable event that all the required legal conditions are met for the State to establish the claim it holds against the person liable to pay the tax.

In this particular situation, because it is the importation of the goods that constitutes the chargeable event for both VAT and excise duty, it seems that the duty in question is due only by reason of importation. Were this not the case, the chargeable event would occur and excise duty would become chargeable when the goods are released for consumption, but there would be little or no point in suspending duty in the terms used in the provisions of the Excise Directive by placing the goods in question under a suspensive arrangement.

Furthermore, interpretation No 1 creates a significant problem. When the goods are released from a duty suspension arrangement, if excise duty is to be paid correctly, it is not possible to levy VAT in accordance with Article 155 of the VAT Directive because the chargeable event will already have taken place and there will therefore be no legal basis for charging VAT when the goods are released from a duty suspension arrangement.

If interpretation No 1 were to prevail, it would also have to be applied to intra-Community acquisitions. However, for these transactions, Article 84 of the VAT Directive specifically stresses that Member States must take the measures necessary to ensure that the excise duty due from or paid by the person making the intra-Community acquisition of a product subject to excise duty is included in the taxable amount. The expression 'due from or paid by' does seem to suggest that excise duty is always included in the VAT taxable amount, even if the duty is not yet chargeable. This ensures the equal tax treatment of goods released for consumption immediately following their acquisition or after they have been placed in a tax warehouse.

As the value of excise duty represents a significant proportion of the value of taxable goods, there would be no justification for using different methods to calculate the VAT taxable amount for products brought into France, depending on whether these products are imported from a third country or acquired in another Member State, as this would give a competitive advantage to operators dealing with products imported from third countries as opposed to products in the internal market.

Furthermore, if the importer benefiting from duty suspension was not a taxable person eligible to deduct any charges paid, interpretation No 1 would result in a permanent loss of revenue for the Treasury.

The French authorities would be grateful if the Commission would include this topic on the agenda of a future VAT Committee meeting and thereby accept or reject this argument.