Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

18 January 2024*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 30, first subparagraph – Article 60 – Article 71(1) – Place of taxable transactions – Goods brought into the customs territory of the European Union in a first Member State in breach of customs rules and subsequently transported to a second Member State – Place where import VAT is incurred – National provision referring to EU customs legislation)

In Case C-791/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Finance Court, Hamburg, Germany), made by decision of 6 December 2022, received at the Court on 28 December 2022, in the proceedings

G.A.

v

Hauptzollamt Braunschweig,

THE COURT (Ninth Chamber),

composed of O. Spineanu-Matei (Rapporteur), President of the Chamber, J.-C. Bonichot and L.S. Rossi, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– G.A., by A. Fetzer, Rechtsanwalt,

– the European Commission, by F. Behre, J. Jokubauskaitė and M. Salyková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 30 and 60 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between G.A. and the Hauptzollamt Braunschweig (Principal Customs Office, Brunswick, Germany) concerning the levying of value added tax (VAT) on the unlawful importation of cigarettes into the European Union.

Legal context

European Union law

Directive 2006/112

3 Article 2(1)(d) of Directive 2006/112 provides that the following transactions, among others, are subject to VAT:

'…

(d) the importation of goods.'

4 The first paragraph of Article 30 of that directive states:

'"Importation of goods" shall mean the entry into the [European Union] of goods which are not in free circulation within the meaning of Article [29] of the [FEU] Treaty.'

5 In Title V of that directive, headed 'Place of taxable transactions', Chapter 4, headed 'Place of importation of goods', includes Article 60, which provides:

'The place of importation of goods shall be the Member State within whose territory the goods are located when they enter the [European Union].'

6 In Title VI of that directive, headed 'Chargeable event and chargeability of VAT', Chapter 4, headed 'Importation of goods', includes Article 70, which is worded as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods are imported.'

7 Under that chapter, Article 71 of Directive 2006/112 provides:

'1. Where, on entry into the [European Union], goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.

However, where imported goods are subject to customs duties, … the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

2. Where imported goods are not subject to any of the duties referred to in the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties.'

The Customs Code

8 Under Article 202 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('the Customs Code'):

'1. A customs debt on importation shall be incurred through:

(a) the unlawful introduction into the customs territory of the [European Union] of goods liable to import duties, or

…

For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

– the person who introduced such goods unlawfully,

– any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and

– any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.'

9 Article 215(4) of that code provided:

'If a customs authority finds that a customs debt has been incurred under Article 202 in another Member State and the amount of that debt is lower than EUR 5 000, the debt shall be deemed to have been incurred in the Member State where the finding was made.'

German law

10 Paragraph 21(2) of the Umsatzsteuergesetz (Law on Turnover Tax), in the version published on 21 February 2005 (BGB1. 2005 I, p. 386), provides:

'The rules governing customs duties shall apply *mutatis mutandis* to import turnover tax;

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

11 On 29 September 2012 at a market in Poland, G.A., who is resident in that Member State, purchased a total of 43 760 cigarettes the packaging of which bore only Ukrainian and Belarusian tax stamps. Without informing the customs authorities, he transported those cigarettes to the region of Brunswick (Germany), where he delivered them to a German buyer on 2 October 2012. G.A. was arrested and the cigarettes were seized and subsequently destroyed.

12 Taking the view that the cigarettes had been unlawfully introduced into the customs territory of the European Union, the Principal Customs Office, Brunswick, found that a customs debt had been incurred under Article 202(1)(a) of the Customs Code and that G.A. was the debtor under the third indent of Article 202(3) of that code. It was also of the opinion that, in accordance with Paragraph 21(2) of the Law on Turnover Tax, the import VAT had been incurred in Germany. Consequently, on 3 February 2015, it issued a tax notice for VAT in the amount of EUR 2 006.38.

13 Having unsuccessfully objected to the tax notice, G.A. brought an action for its annulment before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany), the referring court.

14 Since the dispute before it concerns, inter alia, whether the import VAT at issue was incurred in Germany, that court seeks to ascertain which rules are applicable in the present case for the purposes of determining the place where that tax was incurred.

15 The referring court is of the view that the place of importation of the cigarettes is Poland, since they entered the economic network of the European Union via the territory of that Member State. Consequently, the German customs authorities would be competent to assess and collect import VAT only if that tax were deemed to have been incurred in Germany by virtue of a legal fiction as to its place of incurrence. It states that under Paragraph 21(2) of the Law on Turnover Tax, Article 215(4) of the Customs Code, which provides that a customs debt is deemed to have been incurred in the Member State where a finding as to the incurrence of the debt was made, if the amount of the debt is lower than EUR 5 000, is applicable *mutatis mutandis*. That being so, the referring court is unsure whether that provision is compatible with Directive 2006/112.

16 In that regard, the court considers that the reference to customs legislation in the second subparagraph of Article 71(1) of Directive 2006/112 does not relate to the place where the VAT debt is incurred. First, that provision does not refer to customs legislation for the purpose of all the conditions for the incurrence of VAT. Secondly, the place of importation is taken into account in Articles 60 and 61 of Directive 2006/112 in order to determine the place of transactions subject to VAT.

17 In those circumstances, the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Directive [2006/112] and, in particular, Articles 30 and 60 thereof, infringed where Article 215(4) of [the Customs Code] is declared under a national provision to be applicable *mutatis mutandis* to import VAT?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether the first paragraph of Article 30, Article 60 and the second subparagraph of Article 71(1) of Directive 2006/112 must be interpreted as precluding national legislation under which Article 215(4) of the Customs Code applies *mutatis mutandis* to import VAT as regards the determination of the place where import VAT is incurred.

19 Article 2(1)(d) of Directive 2006/112 provides that the importation of goods is a transaction subject to VAT. The first paragraph of Article 30 of that directive defines 'importation of goods' as the entry into the European Union of goods which are not in free circulation within the meaning of Article 29 TFEU.

20 Article 60 of Directive 2006/112 provides that the place of importation is the Member State within whose territory the goods are located on the date on which they enter the European Union.

21 Under Article 70 of that directive, the chargeable event for VAT occurs and VAT becomes chargeable when the goods are imported.

22 However, in accordance with the second subparagraph of Article 71(1) of Directive 2006/112, where imported goods are subject, inter alia, to customs duties, the chargeable event occurs and VAT becomes chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.

23 The Court has already held that the second subparagraph of Article 71(1) of Directive 2006/112 authorises Member States to link the chargeable event and the date on which the VAT on importation becomes chargeable with those laid down for customs duties. That link is due to the fact that import VAT and customs duties display comparable essential features since they arise from the fact of importation of goods into the European Union and the subsequent distribution of those goods through the economic channels of the Member States (judgment of 8 September 2022, *Hauptzollamt Hamburg (Place where VAT is incurred – II)*, C-368/21, EU:C:2022:647, paragraph 25 and the case-law cited).

24 In order to determine the link between customs legislation and VAT legislation, provided for in the second subparagraph of Article 71(1) of Directive 2006/112, in particular, in order to ascertain whether it also relates to the place of importation of goods subject to VAT on importation, it is necessary to examine the scope of the reference in that provision to customs legislation.

25 In that regard, first, it must be noted that the wording of the second subparagraph of Article 71(1) of Directive 2006/112 refers only to the point in time when the chargeable event occurs and VAT becomes chargeable. That provision makes no reference to customs legislation as regards the place of importation.

26 According to a literal interpretation, the reference to customs legislation therefore relates only to the determination of when the chargeable event occurs and VAT becomes chargeable, and not to the determination of the place of importation.

27 Secondly, with respect to the context of the second subparagraph of Article 71(1) of Directive 2006/112, it should be noted that that provision forms part of Title VI of that directive, concerning the 'chargeable event and chargeability of VAT'. By contrast, Article 60 of that directive appears in Title V, dealing exclusively with the 'place of taxable transactions', specifically in Chapter 4 of that title, headed 'Place of importation of goods'.

28 It follows from all of the foregoing that the second subparagraph of Article 71(1) of Directive 2006/112 must be interpreted as meaning that it does not establish a general link between Directive 2006/112 and the Customs Code, and, in particular, does not determine the place of importation of goods for the charging of VAT.

29 That interpretation finds support in the Court's case-law.

30 It is true that the Court has found that in view of the parallel nature of import VAT and customs duties, confirmed by the second subparagraph of Article 71(1) of Directive 2006/112 (see, to that effect, judgment of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, paragraph 41), in addition to the customs debt, there may also be a requirement to pay VAT where, on the basis of the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the European Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied (judgment of 8 September 2022, *Hauptzollamt Hamburg (Place where VAT is incurred – II)*, C-368/21, EU:C:2022:647, paragraph 26 and the case-law cited).

31 However, such a presumption may be rebutted if it is established that, despite failures to comply with customs legislation which result in the incurrence of a customs debt on importation in the Member State where those failures occurred, goods have been introduced into the economic network of the European Union via the territory of another Member State, where they were intended for consumption. In that case, the chargeable event for VAT on importation occurs in that other Member State (judgment of 8 September 2022, *Hauptzollamt Hamburg (Place where VAT is incurred – II)*, C-368/21, EU:C:2022:647, paragraph 27 and the case-law cited).

32 Finally, reference must be made to the principle of territorial application of VAT. Unlike customs duties, which accrue to the European Union irrespective of the Member State which collects them, revenue deriving from import VAT belongs, in accordance with that principle, to the Member State in which final consumption occurred (see, to that effect, judgment of 27 September 2007, *Collée*, C-146/05, EU:C:2007:549, paragraph 37).

33 In the present case, based on the information in the request for a preliminary ruling, the cigarettes at issue in the main proceedings entered the economic network of the European Union in Poland and were intended for consumption in that Member State, which it is nevertheless for the referring court to verify, having regard in particular to the quantity of goods unlawfully imported

into the European Union and the manner in which they were purchased and subsequently transferred. In accordance with the case-law referred to in paragraph 30 above, Poland should therefore be regarded as the place where import VAT was incurred on those cigarettes.

34 The consequence of determining the place of importation of goods not by applying the provisions of Directive 2006/112 but by applying Article 215(4) of the Customs Code *mutatis mutandis* would be that, in such a case, revenue deriving from import VAT would accrue to the Member State in which a finding as to the incurrence of the customs debt was made by virtue of the legal fiction established by that provision, namely the Federal Republic of Germany, which would be at odds with the scope of the principle of territorial application of VAT.

35 In that regard, it should also be pointed out that if the referring court were to find that the cigarettes at issue in the main proceedings were intended for consumption in Poland, the competent German authority would be required, without prior request, to forward the information relating to the seizure of those cigarettes to the competent Polish authority under Article 13(1) of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1), so as, inter alia, to avert the risk of tax loss in that other Member State.

36 In the light of all of the foregoing, the answer to the question referred is that the first paragraph of Article 30, Article 60 and the second subparagraph of Article 71(1) of Directive 2006/112 must be interpreted as precluding national legislation under which Article 215(4) of the Customs Code applies *mutatis mutandis* to import VAT as regards the determination of the place where that import VAT is incurred.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

The first paragraph of Article 30, Article 60 and the second subparagraph of Article 71(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as precluding national legislation under which Article 215(4) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, applies *mutatis mutandis* to import value added tax (VAT) as regards the determination of the place where that import VAT is incurred.

[Signatures]