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Fuel Consumption Tax Cannot Be Included in VAT Base, ECJ Says

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COUNTRY DIGEST

Fuel Consumption Tax Cannot Be Included in VAT Base, ECJ Says

The European Court of Justice on December 22, 2010, had yet another chance to clarify one aspect of the VAT base. The issue at stake in *European Commission v. Republic of Austria* (C-433/09) was whether Austria's standard fuel consumption tax (SFCT), which is levied when a buyer acquires and registers a vehicle, is actually a tax or a registration fee. Taxes are included in the VAT base, while registration fees generally are not included.

The legal background is not as straightforward as it seems: The EU VAT directive explicitly states that the tax base for VAT purposes has to include ''taxes, duties, levies and charges, excluding VAT itself.''[1] Further, the directive provides that ''amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account'' must not be included in the tax base.[2]

Arguments in the Case

The commission took the position that the SFCT is a charge due upon registration of a vehicle, not imposed because of the delivery of a vehicle as would be the case for a tax as defined under article 78 of the VAT directive. The commission rejected the Austrian government's counterargument that the SFCT is not formally linked to the registration of a vehicle, saying that argument was based merely on a ''technical detail'' of how the tax is imposed, leaving aside its economic impact.[3]

The commission's view was strengthened by another ECJ judgment involving the SFCT. In *Weigel* (C-387/01),[4] the Court held that the SFCT is a charge incurred upon first registration of a car in Austria.[5] That position is backed by the statute in question, which provides for a refund of the tax if a vehicle is delivered but then is registered abroad.[6] Further, the SFCT is not charged again upon a secondary delivery following the first delivery, even though a new registration takes place.

Finally, the commission's position was supported by Austrian officials' request to include the SFCT in a list of registration fees in the commission's proposal for a directive on the taxation of passenger cars.[7]

The Austrian government claimed that despite the commission's argument to the contrary, the legal context of the Danish tax at stake in *De Danske Bilimportører* (C-98/05)[8] is different from the legal context of the SFCT. Unlike the Danish vehicle registration duty, which is not imposed if a vehicle is used for purposes other than public transportation, Austria's SFCT is imposed regardless of the vehicle's later use, the government said.

Further, the triggering event for the SFCT is the delivery of a vehicle, not its registration, the government said. The exception to this rule — an import by a private person, in which case the registration, instead of the import itself, is the triggering event — is rare (accounting for only 10 percent of cases) and should not be decisive for characterizing the consumption tax as a registration charge, according to the government.[9]

Another argument made by the government is that it is the trader (or entrepreneur), and not the customer, who pays the SFTC. The trader has to impose the tax and remit it to the authorities in his own name and for

[1]Article 78(a), VAT directive (2006/112/EC of Nov. 28, 2006).

[2]Article 79(c), VAT directive.

[3]*European Commission v. Republic of Austria*, para. 18.

[4]For prior coverage of the ECJ judgment in *Weigel* (C-387/01), see *Doc 2004-11544* or *2004 WTD 107-7*.

[5]*Weigel*, April 29, 2004, para. 40.

[6]Section 12a, Standard Fuel Consumption Tax Act.

[7]*European Commission v. Republic of Austria*, para. 23.

[8]For the ECJ judgment in *De Danske Bilimportører*, see *Doc 2006-10640* or *2006 WTD 107-7*.

[9]*European Commission v. Republic of Austria*, para. 27.

his own account, the government said. This argument was supported by an ECJ judgment from May 2010 in which the Court stated that it is in line with the VAT directive that the Polish vehicle registration charge is part of the VAT base.[10]

The ECJ's Judgment

The ECJ started its analysis of the legal background of the Austrian case by pointing out that as a general rule, a tax has to be part of the VAT base. Referring to case law, however, the ECJ clarified that a tax can be included in the VAT base only if the tax is directly linked to the delivery of the underlying goods.[11] The reason for this direct link is that a tax can be included in the tax basis only if it is imposed because of the delivery, even though the tax itself does not add any value to the delivered good.[12] It follows from the requirement of a direct link to the delivery of a good that a tax imposed upon the first registration of a vehicle, rather than upon the vehicle's delivery, is not a tax to be included in the tax base, the Court said.[13]

The ECJ disregarded the commission's argument regarding the inclusion of the SFCT in the list of registration taxes for the proposed directive, saying that the objective criteria of the tax in question have to be determined. In that context, the government's argument that the triggering event is clearly the delivery of a vehicle cannot be deduced from the wording of the statute, according to the ECJ. While section 1(1) of the Standard Fuel Consumption Tax Act states that a delivery is the triggering event for the imposition of the tax, it also states that one requirement for taxation is the registration of the vehicle.[14] As a result, a delivery of a vehicle that will not be registered is not subject to the SFCT, just as in the Danish *De Danske Bilimportører* case, the Court said. This conclusion is also found in Austrian literature regarding this issue.[15]

Addressing the question of who the taxpayer is, the ECJ took a substance-over-form approach: Although the trader is the formal taxpayer, he will roll that cost over to the customer, who is therefore the economic taxpayer, the Court said.[16] It also pointed out that according to Austrian law, the person who is entitled to a refund of the tax is the recipient of the delivery (the customer), not the trader who paid the tax. Following that line of reasoning, the ECJ also rejected the government's argument that the trader has to impose and remit the tax regardless of whether the vehicle is actually registered. That argument was not considered valid because the refund that is due if no registration takes place is paid to the customer.[17] For those reasons, the ECJ ruled that the SFCT is a registration charge and as such, cannot be included in the VAT base.

The Court explicitly stated that Austria had violated article 78, and not article 79, of the VAT directive.[18] Because an ECJ judgment generally overturns a measure that violates EU law with retroactive effect from the time of adoption of the domestic measure (unless the Court states otherwise),[19] one would think that this judgment could have a substantial impact on Austrian tax revenues. According to a statement by the Austrian Finance Ministry,[20] however, the consequences are canceled out because a provision of the SFCT law states that if the tax is not part of the VAT base, it will automatically be increased by 20 percent.[21]

Comments

Due to the nature of the VAT system in particular, and in light of the fact that if VAT is charged in business-to-business transactions, a VAT input claim arises, the Finance Ministry faces some difficulty explaining how the SFCT increase will affect former VAT charges that were too high, as well as the related VAT input claims. The solution offered by the ministry is to allow a VAT charge adjustment only if the corresponding VAT input claim is reduced.[22] It might be noted in this context that an input VAT claim relating to passenger cars often is disallowed even if the buyer is a business.

Another issue arises in a business-to-consumer transaction since the VAT taxpayer is the trader but the economic burden is on the consumer. Because a refund of the VAT imposed on the SFCT would lead to an unjustified enrichment of the trader (who did not actually bear the burden of the higher tax), according to the Finance Ministry, the refund would be disallowed in line with a procedural rule that prohibits unjust enrichment. This reasoning is not in line with the law, but is

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[10] *European Commission v. Republic of Poland* (C-228/09), May 20, 2010. (For prior coverage, see *Doc 2010-11556* or *2010 WTD 101-4*.)

[11] *European Commission v. Republic of Austria*, para. 33.

[12] *Id.*, para. 34.

[13] *Id.*, para. 35.

[14] *Id.*, paras. 37 and 38.

[15] Kühbacher, *Steuer und Wirtschaft International 2008*, p. 221, pp. 226-27.

[16] *European Commission v. Republic of Austria*, para. 41 referring to *De Danske Bilimportører* (C-98/05), June 1, 2006, para. 27; *see also* Kühbacher, *Steuer und Wirtschaft International 2008*, pp. 221 and 226.

[17] *European Commission v. Republic of Austria*, para. 45.

[18] *Id.*, paras. 47 and 48.

[19] Craig and de Búrca, *EU Law*, p. 453; Lindmann and Hackemann, *IStR* 2005, pp. 786, 787.

[20] BMF (Federal Finance Ministry), Jan. 10, 2011, BMF-010219/0001-VI/4/2011.

[21] Section 6(6), Standard Fuel Consumption Tax Act.

[22] *Id*.

based on the economic conclusion that the trader passes VAT charges on to the consumer.

Finally, the Finance Ministry has concluded that if no VAT adjustment is requested, the SFCT and the VAT charge will remain as imposed under the original domestic law. This is more beneficial for businesses because the input VAT claims (and refunds) remain as high as they were before.

In effect, the ECJ's judgment does not change the tax burden private consumers bear upon a vehicle's delivery, but it increases the tax burden for businesses, as the higher VAT charge previously resulted in a corresponding input VAT claim. Following the ECJ's judgment, the SFCT is increased and no corresponding claim arises for the business using the vehicle. It seems odd that the ECJ's conclusion that a particular charge due on the registration of a vehicle must not be part of the VAT base leads to no change of the tax burden for consumers and to an increased tax burden for businesses.

Finally, the provision cited by the Finance Ministry in order to increase the SFCT by 20 percent is meant to apply to the import of a vehicle if the import is not a ''delivery'' of the vehicle and, as a consequence, does not trigger VAT. For imports from the EU, the ECJ found the 20 percent increase to be a violation of article 90 of the EC Treaty because it is considered to be a charge on the import of goods.

The 20 percent increase will now apply to any delivery or import of vehicles, so it will no longer be considered an import charge, at least according to the Finance Ministry. Nevertheless, the purpose of the increase is not to compensate for the exclusion of the SFCT from the VAT base, the Finance Ministry says.

Based on the wording of the provision that applies the 20 percent increase, it is evident — at least from a policy perspective — that it should not apply following the ECJ judgment for the following reason: The provision states that the SFCT will be ''increased by 20 percent in cases in which the fuel consumption tax is not part of the VAT base.'' This should be understood as an exception to the rule as it stood before the ECJ's judgment and must be interpreted as saying that ''if, different from the general concept, the fuel consumption tax is not part of the VAT base, it shall be increased by 20 percent.''

Because of the ECJ's judgment in this case, the general concept prohibits the inclusion of the SFCT in the VAT base. Therefore, the exception provided for by the 20 percent increase has no purpose anymore and should not be applied. Its only purpose would be to compensate for the revenue loss caused by the ECJ's judgment. Therefore, from a policy standpoint, it would be questionable to apply a 20 percent increase that is meant to be an exception to a general concept overthrown by the ECJ. ◆

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