



## ECJ on the incurrence of import VAT in cases of conduct contrary to customs law

### 1 Background

The importation of goods from a third country into the national territory, in terms of VAT, is subject to import VAT. As in customs law, importation is linked to the physical entry of the goods from a third country into the national territory. In addition, it requires the release of the goods for free circulation. In this respect, import VAT and customs duties are the same with regard to their main characteristics. For this reason, the VAT Directive authorises the Member States to link the incurrence of import VAT to the incurrence of a customs debt (Article 71 para 1 subpara 2 of the VAT Directive). Section 21 para. 2 of the German VAT Act provides for the application of the customs rules for the incurrence and the debtor of the import VAT. In the relevant case law, this has led to the practice of the customs debt automatically also entailing the import VAT debt. However, in cases of customs debt arising from customs infringements, this principle began to erode as a result of the ECJ decisions in the Eurogate II and DHL cases (C-226/14 and C-228/14 of 02.06.2016). One year later, the ruling in the Wallenborn case was handed down (C-571/15 of 01.06.2017). In these specific cases, the ECJ denied the incurrence of an import VAT debt in addition to the customs debt. Common to all of these cases was the fact that the goods had not entered the Union's economic network.

### 2 Questions referred

In the case at issue, the applicant (a logistics company) transported goods subject to import duties from various third countries to Greece. It initially transported the goods by air to Germany. At the airport, the goods were transhipped to another aircraft for further transport to Greece. It is undisputed that the goods reached Greece. However, the main customs office found that part of the consignments had not been presented to customs in Germany. Thus, the goods had



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been introduced into the customs territory of the European Union unlawfully. The remaining consignments were removed without authorisation from the place of storage in Germany and thus removed from customs supervision. The main customs office issued import VAT notices to the applicant and levied customs duties and German import VAT. In the subsequent legal dispute before the Tax Court in Hesse, the court referred the question to the ECJ of whether the mere risk of the goods entering the economic network of the Union was sufficient for the import VAT to arise. The Tax Court also asked whether conduct, contrary to customs law, was sufficient, in this case, for the assumption that the goods had entered the economic network of the Union in that Member State (in this case Germany). In contrast to the cases already decided, the goods were not always placed under a customs suspensive arrangement.

### 3 ECJ decision of 10.07.2019 (C-26/18)

The Advocate General stated in his opinion of 27 February 2019 that the mere risk of entry into the economic network of the European Union is not sufficient. Unfortunately, the ECJ did not address this question. In the present case, the goods had indisputably entered the economic network of the European Union, namely in Greece. According to the ECJ, the Tax Court's question was, therefore, only hypothetical and therefore inadmissible. With regard to the second question, the ECJ stated that the conduct contrary to customs law basically gives rise to the presumption that the goods have entered the economic network in the relevant member state (here, Germany). However, such a presumption can be refuted. If it can be proven that, despite the infringement of the customs legislation, the goods have entered the European Union's economic network in the territory of another Member State, the import VAT is levied in that other Member State. This is the final place of destination where the goods were intended for consumption. However, the ECJ emphasized that this finding applied only under the specific circumstances of the case being decided.

### 4 Consequences for the practice

Although the decision does not provide the legal certainty originally hoped for, it is no longer a matter of course that customs debt and import VAT debt will be incurred in parallel in the event of customs infringements. In principle, the judgment applies to all companies purchasing goods from third countries. However, it is likely to be of particular economic importance for logistics service providers. They are not entitled to deduct input VAT in respect of import VAT due to a lack of a right of disposal over the goods at the time of importation. The import VAT therefore represents a definitive cost burden for them. In the future, the customs authorities will not be permitted to assess the import VAT in such cases. If this is nevertheless the case, companies can now defend themselves more successfully against it. In any event, they should contest import duty notifications.

Operators must demonstrate and prove the consumption of the goods in another Member State or third country. In the case of foreign tax matters, increased obligations requiring the cooperation of customs participants exist. The judgment was based on the old Community Customs Code. The Union Customs Code in force since 1 May 2016 stipulates, in sec 124 para 1 lit. k) UCC, that customs debts are extinguished if it is proven that the goods have not been used or consumed but rather, have been removed from the customs territory of the European Union. According to sec 21 para 2 German VAT Act, in this instance, the import VAT debt expires. The re-export cases are thus mitigated. If the goods are merely taken out of the national territory, a decision must be taken as to whether the import VAT debt is extinguished. The issue will therefore continue to occupy the tax courts.