



Taxation of substitutes for manufactured tobacco that are considered “old goods”

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1 Background

Substitutes for manufactured tobacco (so-called “liquids”) have been subject to tobacco tax since 1 July 2022 (see KMLZ Customs Newsletter 03 | 2022). Trade in untaxed “old goods” was still permitted up until 12 February 2023. Untaxed old goods are goods that were already “in trade” i. e. released for consumption on 1 July 2022. The customs authorities granted a “sell-off period” as a transitional regulation. The law on tobacco tax (*TabStG*) does not provide for subsequent taxation in this case. To sell the old goods after 12 February 2023, the only option available was a prior subsequent taxation. Otherwise, the tobacco tax for the old goods still being held would be due as from 13 February 2023, in accordance with sec. 23f para. 1 no. 4, 2. alt. of the *TabStG*. The tax debtor is, inter alia, the possessor of the goods. The customs authorities subsequently carried out numerous inspections at the premises of tobacco retailers, confiscated any goods found without tax stamps and assessed tobacco tax against the retailers. It also initiated criminal proceedings for tax fraud against the persons concerned.

2 Decision of the Fiscal Court of Düsseldorf of 29 September 2023 (Ref.: 4 V 1068/23 A (VTa))

The Fiscal Court of Düsseldorf was required to decide on a tobacco retailer’s application for suspension of execution of a tobacco tax assessment issued against him. On 15 February 2023, customs officials inspected the retailer’s business premises. They found a significant quantity of substitutes in a van, located on company premises, and registered to the retailer, and seized them. The main customs office assessed the tobacco tax on the seized substitutes pursuant to sec. 23f para. 1 no. 4, 2. alt. of the *TabStG*. The retailer lodged an appeal against the decision and applied for suspension of execution. After the main customs office rejected the application, the retailer lodged the application with the Fiscal Court



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of Düsseldorf, which expressed serious legal doubts as to the legality of the assessment and suspended its execution. The retailer is therefore not required to pay the tobacco tax for the time being pending the conclusion of the appeal proceedings.

3 Decision of the Fiscal Court

The court dealt with several questions, some of which were only relevant to the specific case. Of great importance, beyond the individual case, however, are the court's statements on the scope of the provision as to when tax is incurred pursuant to sec. 23f para. 1 no. 4 2. alt. of the TabStG. According to this provision, tobacco tax is incurred "if manufactured tobacco already released for consumption in another Member State, in cases other than those specified in sec. 22 para. 1 and sec. 23 para. 1 contrary to sec. 17 para. 1, is introduced into the tax territory from this other Member State: with the first possession in the tax territory; **in all other cases: with the possession of manufactured tobacco released for consumption, if the tax has not yet been levied in the tax territory**". The second alternative (in bold) was decisive here. In particular, the court questioned the interpretation of the requirement "if the tax has not yet been levied in the tax territory". According to the customs authorities, this regulation covers all goods that are subject to tobacco tax and have not yet been taxed. The provision is a catch-all provision for the taxation of all substitutes without a tax stamp. Therefore, the customs authority does not require that the goods have previously been subject to a tax and that the tax has not been levied.

However, the court considers a different interpretation to be possible. Only the possession of such goods would lead to the accrual of tax, which have already been a subject to a tax, but have not yet been taxed. Sec. 23f para. 1 no. 4 of the TabStG could be a catch-all provision only for cases in which a tax has arisen but, due to the unclear origin of the goods, it is not possible to determine the provisions according to which the accrual of tax and the tax debtor are to be determined. Substitutes for manufactured tobacco were not subject to taxation prior to 1 July 2022. Even after this date, no taxation is envisaged concerning old goods that have already been released for consumption. The legislator has not foreseen a subsequent taxation for old goods. Due to the lack of a relevant taxation provision, it is also not necessary to obtain tax stamps, consequently there is also no violation of sec. 17 of the TabStG. This interpretation is also in line with the underlying Union provision of Art. 6 para. 3b, para. 2 of the Council Directive (EU) 2020/262. Therefore, sec. 23f para. 1 no. 4 2. alt. of the TabStG would not be applicable to the old goods at issue and taxation should not take place.

The Fiscal Court further doubts whether the regulation covers the possession of all untaxed substitutes regardless of their origin. However, in view of the wording and the systematic position in chapter 4 of the TabStG, only goods that were transported to Germany from another Member State could be covered. Goods manufactured in Germany or imported from third countries would not be affected.

4 Practical recommendation

The court has, for the first time, put a stop to the customs authorities' taxation of substitutes as old goods. At first instance, this is only a summary preliminary procedure. The outcome of the main proceedings remains to be seen, which could take up to two years. However, taxable persons affected should appeal against such tobacco tax assessments to keep their assessments open and, if necessary, apply for suspension of execution. This is also imperative due to the short assessment period of one year under excise duty law. It will also be crucial to see how the customs authority reacts to this decision whether it will continue to initiate criminal proceedings without exception. After all, tax cannot be evaded in the absence of a tax liability. The legal basis for criminal proceedings would be missing.