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KMLZ VAT NEWSLETTER

Exemption from import VAT under the so-called "Procedure 42"

ECJ again on the meaning of a VAT-ID-No.

In the *Enteco Baltic* case, the ECJ once again examined the significance of VAT-ID-Nos. for the application of a VAT exemption. On this occasion, it concerned the exemption from import VAT in case of a subsequent intra-Community supply (so-called “procedure 42”). In consistent continuation of its previous case law, the ECJ ruled that the disclosure of the purchaser's VAT-ID-No. is merely a formal requirement and not a substantive prerequisite for exemption from import VAT. In addition, the judgment contains statements on good faith and evidential value of documents issued in the excise tax suspension procedure.

Imports of goods may be import VAT exempt if the debtor of the import VAT (usually the importer) uses these goods to render intra-Community supplies. The importer must indicate the application of the exemption in the import declaration. This is done by specifying process code 42 (hence the term "procedure 42"). In addition, the importer must inform the customs authorities, inter alia, of the recipient’s VAT identification number issued by another Member State. *Enteco Baltic* (C-108/17 of 20.06.2018) dealt with the conditions for import VAT exemption when stating a different VAT-ID-No. from that of the actual purchaser.

1. Facts

Enteco Baltic imported fuels from Belarus into Lithuania. It released the fuel for free circulation in accordance with "Procedure 42", exempting it from the import VAT. In the import declarations, *Enteco Baltic* indicated the VAT-ID-No. of the purchaser, established in another Member State, to whom it intended to supply the fuel. In some cases, however, *Enteco Baltic* supplied the fuel to customers other than the customer originally specified. *Enteco Baltic* always informed the customs authorities of the identities of the actual purchasers, including their VAT-ID-Nos., on a monthly basis. *Enteco Baltic* handed over the fuel to the purchasers in Lithuania. They were responsible for the further transport to the Member States of destination. The transport of excisable goods, from a VAT warehouse in Lithuania, to VAT warehouses in the other Member States, was carried out by forwarding agents under the so-called “excise tax suspension procedure”. *Enteco Baltic* received duly issued electronic documents, as well as CMR bills of lading confirming the transport and receipt of fuel in the receiving VAT warehouse. In this specific case, the VAT warehouse operators were not the actual purchasers.

2. Problem

According to the tax authorities of the countries of destination, abuses may have occurred in the course of procedure

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42. The purchasers would not have declared the VAT in the country of destination. Furthermore, it was unclear whether they had actually received the fuel.

As a result, the Lithuanian customs authority denied the exemption from the import VAT, on the basis that *Enteco Baltic* had not delivered the fuel to the purchasers indicated in the import declarations. There was no evidence that the fuel had been transported and the right to dispose of it, as owner, had been transferred to the persons named in the invoices. *Enteco Baltic* was therefore required to pay VAT, interest and fines.

3. Central statement of the ECJ

The ECJ held, in the specific case, that the exemption from VAT on imports cannot be refused, even if the importer has not indicated the VAT-ID-No. of the actual purchaser. This applies, in particular, if the importer always duly informed the authority about changes in the identity of the purchaser. The ECJ reiterates its view that this is only a formal requirement. Importation is VAT-exempt if the importer then carries out a zero-rated intra-Community supply. An intra-Community supply is zero-rated if the material requirements are fulfilled (see KMLZ-Newsletter 05/2017). The disclosure of the purchaser's VAT-ID-No. is neither part of the material requirements for exemption from import VAT nor for exemption from VAT on intra-Community supplies.

However, as in the past, the ECJ stresses two restrictions: Firstly, there must be no concrete evidence of tax evasion. The importer must have acted in good faith. On the other hand, the violation of the formal requirements must not prevent reliable proof to the effect that the material requirements have been met. A proof is required in any case. The required proof results from the VAT regulations of the country of importation. The ECJ considers CMR bills of lading and electronically issued documents, in the excise tax suspension procedure, as sufficient, if these documents prove the material conditions of the tax exemption. This means that at the time of importation the goods must be intended to be transported to another Member State. Furthermore, this transport must actually take place within the subsequent intra-Community supply. Whether the exact address of the purchaser results from the documents is not relevant. Confirmation of receipt by the excise tax warehouse is sufficient.

4. Practical information

The ruling continues the line taken by the ECJ, which continues to reduce the significance of the VAT-ID-No. Nevertheless, companies should still provide a valid VAT-ID-No. of the purchaser, which they have (qualified) verified and documented. This is particularly important in order to avoid accusations of bad faith. Experience has shown that "procedure 42" is particularly susceptible to fraud. In addition, a change to the VAT Directive is expected to take effect on 01.01.2020. Accordingly, the purchaser's VAT-ID-No. is to become a material condition for tax exemption for intra-Community supplies. This must also apply consistently to tax exemption for imports. In addition, a uniform framework for supporting documents is to be created. The previous case law of the ECJ will then no longer be applicable. Companies should therefore now start preparing for the planned changes.