Deloitte.

Belgium | Deloitte Tax | 24 June 2014

Customs Flash
Belgium

Irregularities in Transit Procedure leading to Customs debt and import VAT

Download the Deloitte Belgium mobile App
A wealth of information within your finger's reach

An Android version will be available at a later point in time

On 15 May 2014, the European Court of Justice ('ECJ') issued its decision in case C-480/12 with respect to the belated presentation of goods placed under the external Community Transit procedure as well as its potential implications on the incurrence of a customs debt and import VAT.

The ECJ was asked whether the mere failure to present the goods (which were placed under the NCTS Transit procedure) within the prescribed time limit to the office of destination is automatically considered as an "unlawful removal" or rather as a "non-fulfilment" of an obligation related to the customs procedure.

While an "unlawful removal" and a "non-fulfilment" of an obligation might seem very similar, the practical consequences can be very different. As you may know, a customs debt can in general be incurred in a variety of ways. The aforementioned ECJ case deals with two of these, namely the qualifications of "unlawful removal" of goods from customs supervision (article 203 of the Customs Code) and the "non-fulfilment" of an obligation related to the customs procedure (article 204 of the Customs Code). As those qualifications are mutually exclusive, an irregularity can only be considered as a "non-fulfilment" once it has been duly established that it does not qualify as an "unlawful removal".

As mentioned earlier, the main difference between both situations can be found in the consequences thereof. An "unlawful removal" will always lead to a customs debt, whereas for a "non-fulfilment" of an obligation, it is possible to avoid a customs debt when the irregularity has "*no significant effect on the correct operation of the customs procedure in question*". For this reason, it is very important to determine the nature of the irregularity that has taken place. In this specific case, the question brought before the ECJ asked if merely exceeding the prescribed time limits in the Transit procedure should be regarded as an "unlawful removal" or as a "non-fulfilment" of an obligation.

Due to previous ECJ case law, there was quite some discussion about what could qualify as an "unlawful removal" (and therefore be excluded from qualification as a "non-fulfilment"). Further to the recent case, the concept of "unlawful removal" should now be interpreted as (1) "*any act or omission the result of which is to prevent, only for a short time, the customs authorities from gaining access to goods under customs supervision and from carrying out the required monitoring*". Furthermore, the removal of the goods must (2) "*entail a risk of entry into the economic networks of the European Union*".

Only when those two conditions are fulfilled simultaneously, the disappearance of the goods can be qualified as an "unlawful removal", and a customs debt will arise based on article 203 of the Customs Code. As regards the belated presentation of goods placed under the external Community Transit procedure, the ECJ ruled that the goods were not at risk of ending up in the European economic market, as they were nevertheless presented at the office of destination, albeit delayed.

Only after duly considering the non-application of article 203 of the Customs Code, the ECJ could then review if a customs debt could be incurred on the basis of article 204 (i.e. the "non-fulfilment" of an obligation). As mentioned before, it is possible in "non-fulfilment" to prevent a customs debt if the irregularity has no significant effect on the correct operation of the customs procedure or if the irregularity is mentioned in one of

CCIP, as it is deemed not to have any “significant effect” on the correct operation of the customs procedure in question.

The conclusion is that with this verdict, the ECJ limits the definition of “unlawful removal” and finally gives “non-fulfilment” a distinctive role in the incurrence of a customs debt. Previously, most irregularities could qualify as a removal due to its broad definition. From now on, whenever the disappearance of goods does not entail a risk of entry into the economic networks of the EU, or whenever the irregularity is described in one of the escape clauses of article 859 CCIP, it should instead be qualified as “non-fulfilment”. When this is the case, and the irregularity has “no significant effect” on the correct operation of the customs procedure or it has been captured by the legally foreseen escape clauses, it becomes possible to prevent the incurrence of an actual customs debt.

Finally, the ECJ has also ruled that import VAT is due, both in the case when the customs debt is incurred based on article 203 as when the debt is based on article 204 of the Customs Code.

What does it mean for you?

The Belgian VAT instructions explicitly mention (contrary to some other EU Member States) that both a customs debt based on article 203 as well as a debt based on article 204 of the Customs code is a taxable event for VAT purposes. As such, the ECJ decision has no direct impact on the Belgian VAT situation. The importance of this case lies in the fact that if an irregularity is to be considered as an “unlawful removal”, a customs debt will always be incurred and import VAT will be due. If however an irregularity qualifies as a “non-fulfilment” and the irregularity has no significant effect on the operation of the customs procedure or is captured by an escape clause, then no customs debt will arise nor will import VAT be due.

What to do?

Whenever there is an irregularity which has “no significant impact” or is included in the escape clause of article 859 CCIP, the ECJ confirmed the possibility to prevent incurring customs debt and import VAT when it qualifies as “non-fulfilment”. Previously, this may have been qualified as removal and would have consequently led to inevitable customs debt and import VAT

Should an irregularity arise, it is recommended to check if this irregularity is included in the escape clause of article 859 CCIP. If it is included, the irregularity should qualify as a “non-fulfilment” rather than “removal” and there is still a possibility to prevent incurring customs debt and import VAT. This can be prevented by building a solid file for the Customs authorities. Solid control over your supply-chain is essential in accomplishing this.

Deloitte can assist with supply-chain control increase in order to reduce the risk of irregularities by setting up administration procedures and measurements of internal control.

Contacts

Any questions concerning the items in this publication? Please contact your usual tax consultant at our Deloitte office in Belgium or:

- Fernand Rutten, frutten@deloitte.com, + 32 2 600 66 06
- Nick Moris, nmoris@deloitte.com, + 32 2 600 66 03
- Julien Pauwels, jpauwels@deloitte.com, +32 2 600 66 25
- Tom Verbrugge, tverbrugge@deloitte.com, + 32 2 600 66 20
- Klaas Winters, klwinters@deloitte.nl, +31 (0)88 288 2125
- Johan Hollebeek, jhollebeek@deloitte.nl, +31 (0)88 288 1992

For general inquiries contact:
bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website: http://www.deloitte.com/be/tax

Deloitte Belgium
Berkenlaan 8A, 8B, 8C
1831 Diegem
Belgium

Deloitte Netherlands
Wilhelminakade 1
3072 AP Rotterdam
Netherlands