



VAT alert

Belgium

CJEU confirms broad interpretation of “transport by or on behalf of the supplier” for distance sales rules

On 18 June 2020, the Court of Justice of the European Union (CJEU) ruled that, in applying the distance sales rules, even a supplier’s mere recommendation of a transporter on its website can constitute “transport by or on behalf of the supplier”. Consequently, the supplier has to pay VAT in the non-taxable customer’s country, rather than in their own.

Background

KrakVet Marek Batko sp.k. (KrakVet) is a Polish company that sold pet food on its website to private individuals located in Hungary. KrakVet offered its customers the possibility to conclude a contract with a transport company, without itself being a party to that contract. KrakVet also entrusted some of its own logistical needs to that transport company. By not delivering the goods itself in Hungary, KrakVet considered that it was not subject to the distance sales rules. Therefore, its sales to the Hungarian customers could benefit from the reduced Polish VAT rate.

By an advance tax ruling, the Polish tax authorities confirmed that the aforementioned supplies of KrakVet are located in Poland, and should therefore be subject to Polish VAT. However, the Hungarian tax authorities were of the opinion that the supplies are taxable in Hungary, under the distance sales rules. Based on Article 33 of the VAT Directive, goods

“dispatched or transported by or on behalf of the supplier” from one Member State to a non-taxable customer in another Member State are subject to VAT in the latter Member State, and when the supplier exceeds certain turnover thresholds.

The main question referred to the CJEU is whether goods must also be regarded as “dispatched or transported by or on behalf of the supplier” if these are delivered to customers by a company recommended by the supplier, but with which the customers are free to enter into a contract for that delivery.

Broad interpretation

In its judgment, the CJEU confirmed that when goods are sold by a supplier established in one Member State to customers residing in another, and these goods are delivered by a (logistics) company recommended by that supplier but where customers have free choice of logistics company, those goods must be regarded as dispatched or transported “by or on behalf of the supplier”.

Various factors might indicate such involvement of the supplier in the transport. For example, do the customers merely endorse the supplier’s choice of transport company? Is it normal commercial practice for the concerned goods to be delivered rather than be collected? Does the customer have to contact the transport company through a separate website? Who would the consumer look to if their goods were damaged in transit?

The CJEU thus confirms a broad interpretation of Article 33, where the transport is allocated to the supplier if that supplier’s role is deemed predominant in terms of initiating and organising the essential stages of the goods’ dispatch or transport. Consequently, the distance sales rules apply and VAT is in principle due in the country to which the goods are dispatched or transported.

In addition, the CJEU ruled that a Member State can unilaterally subject transactions to a VAT treatment that differs from the VAT treatment in the other Member State. This implies that there can be double taxation, regardless of the fact that (e.g.) an advance tax ruling was obtained by the supplier in its country of establishment.

New distance sales rules for 2021

The CJEU’s decision in this case is rather surprising given that the current text of Article 33 of the VAT Directive does not provide such a broad interpretation. Based on non-binding guidelines of the EU VAT Committee, several Member States, including Belgium, already applied this interpretation ([Adm. decision E.T. 128.714](#)).

This will change under the new rules for distance sales, which will enter into force on 1 July 2021. Article 14 of the VAT Directive will explicitly stipulate that the distance sales rules should be applied to supplies of goods transported by or on behalf of the supplier, “including where the supplier intervenes indirectly in the transport of the goods”. This clarification

should contribute to legal certainty and avoid double taxation in the future.

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