Deduction of Import VAT: Relevance of Ownership as of Importation?

Some tax administrations and tax courts of EU Member States require that taxable persons claiming import VAT deduction had power of disposal over the goods as of their importation. Based on recent case law of the Court of Justice of the European Union, the authors demonstrate that, contrary to this view, any taxable person presenting customs import documents specifying him as consignee or importer of goods should be entitled to import VAT deduction if he is either the owner of the goods (or obtains the right to dispose of the goods as owner) or, alternatively, can prove that “the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities”.

1. Introduction

It is a generally accepted principle of VAT law that the right to deduction provided for in article 167 et seq. of the VAT Directive is an integral part of the VAT system and may not, in principle, be limited. That deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. Consequently, the common system of VAT ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

Looking at the importation of goods, some Member States (e.g. Austria, Germany) stipulate that only the owner of the goods or the person having the right to dispose of the goods as an owner – i.e. the person having so-called power of disposal (in German, Verfügungsmacht) over the goods – as of their importation, is entitled to deduct import VAT. Supposedly, the requirement to fulfil such a criterion has been clarified by the Court of Justice of the European Union (ECJ) in DSV Road A/S. According to this view, any taxable person who becomes liable to import VAT as importer or consignee of the goods may be denied deducting the relevant input tax if another person had power of disposal of the goods as of their importation into the European Union. In practice, this situation may be particularly relevant in cases of international chain transactions with several supplies of the same goods between several parties, subject to a single transport directly from the first supplier to the final customer.


Thomas Bieber and Lars Gläser*

* Dr Thomas Bieber is Professor of Tax Law at the Institute of Fiscal Law, Tax Law and Tax Policy at the Johannes Kepler University Linz, Austria. Dr Lars Gläser is attorney-at-law in Vienna, Austria, and founder of the international law firm GLAESER LAW specialized in Austrian and international tax law, including tax arbitration and tax litigation. The author regularly advises international groups of companies on indirect and direct tax aspects of international trading structures.


5. Following the VAT guidelines of the Austrian tax authorities from 2000 last updated on 30 Nov. 2021 (paras. 1846 and 1848), only the entrepreneur who had the power of disposal (in German, Verfügungsmacht) over the imported goods under VAT law as of their importation may claim the import VAT as input tax.

6. Following the VAT guidelines of the German tax authorities from 1 Oct. 2010 last updated on 7 Feb. 2022 (sec. 15.8, para. 4), an import for the enterprise is given if the entrepreneur clears the imported good in the country for release for free circulation under customs and tax law and then uses it in the course of his entrepreneurial activity to carry out transactions. This requirement is met by the trader who has the power of disposal over the goods at the time of release for free circulation for customs and tax purposes.

7. As to periods before Brexit, see also UK: HM Revenue & Customs, VAT – Conclusion of review of Import VAT deducted as input tax by non-owners (HMRC 11 Apr. 2019).

8. In the rest of the article, the authors use the terms "ownership" and "power of disposal" synonymously as both indicate the right to dispose as an owner.

9. See DE: Federal Finance Court (BFH), 11 Nov. 2015, V R 68/14, referring to DK: ECJ, 25 June 2015, Case C-187/14, Skatteemnerestyret v. DSV Road A/S, Case Law IBFD. The German Federal Finance Court takes the view that the decision of the ECJ in the DSV Road case does not give rise to relinquishing the power of disposal criterion. Rather, this criterion must be specified to the effect that the import for the business of the taxpayer exists if the import VAT is included in the price of the outgoing supplies or the price of the supplied goods or services that are supplied by the taxpayer in the course of its business. As to this statement, it was noted in legal doctrine that the Supreme Tax Court likely mistakenly referred to the inclusion of the "import VAT (Einzugsumsatzsteuer)" instead of the cost of the acquired goods (see DE: Looks/ Menzel, Comment on BFH 11. Nov. 2015, V R 68/14, MwStStV 2016, 167 [169]); see also, recently, DE: FG Hamburg 18 Dec. 2020, 5 K 175/18). In respect of the difference between the "value of goods imported" and the "cost of importation" (likely including import VAT), see also sec. 5.4.
In this article, the authors first examine the relevant provisions of the VAT Directive regarding the deduction of input VAT on the importation of goods (section 2.), refer to the view of the VAT Committee (section 3.) and take a look at the relevant case law of the ECJ, in particular the judgments in DSV Road A/S10 and Weindel Logistik11 (section 4.) in order to conclude that ownership may be relevant in certain cases but should not, contrary to national case law and national administrative practice, be considered a mandatory criterion for the deduction of VAT (section 5.).

2. Legal Framework of the VAT Directive for Deduction of Import VAT

2.1. Persons liable to VAT on importation

According to article 201 of the VAT Directive, VAT on importation shall be payable by any person or persons designated or recognized as liable by the Member State of importation.

2.2. Origin and scope of right to input VAT deduction

According to article 168(e) of the VAT Directive, to the extent that the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled to deduct the VAT due or paid in respect of the importation of goods into the Member State in which he carries out these transactions.

Article 169(a) of the VAT Directive states that, in addition to the deduction referred to in article 168 of the VAT Directive, the taxable person shall be entitled to deduct the VAT referred to therein as far as the goods and services are used for transactions relating to the activities referred to in the second subparagraph of article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if those transactions had been carried out within that Member State.

In this respect, the second subparagraph of article 9(1) of the VAT Directive refers to the term “economic activity” as any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions.

2.3. Rules governing the exercise of the right to deduction

According to article 178(e) of the VAT Directive, in order to exercise the right to input VAT deduction for the purposes of deduction pursuant to article 168(e) of the VAT Directive on the importation of goods, the taxable person must hold an import document specifying him as consignee or importer and stating the amount of VAT due or enabling that amount to be calculated.

In general, import duty notices12 as well as decisions on the repayment/remission of customs duties within the meaning of article 116 of the UCC13 or formal decisions on appeal14 can be considered as import documents.15

3. View of the VAT Committee

In its 94th meeting on 19 October 2011,16 the VAT Committee almost unanimously confirmed that a taxable person designated as liable for the payment of import VAT pursuant to article 201 of the VAT Directive shall not be entitled to deduct such import VAT as input VAT if both of the following conditions are met:

1. the taxable person does not obtain the right to dispose of the goods as owner; and
2. the cost of the goods has no direct and immediate link with the taxable person’s economic activity.

This shall be the case even if that taxable person holds a document fulfilling the conditions for exercising the right of deduction laid down in article 178(e) of the VAT Directive.17

4. ECJ Case Law

4.1. General rule

Interpreting the requirement of article 168 of the VAT Directive that “goods and services are used for the purposes of the taxed transactions of a taxable person”, the ECJ regularly stated in respect of the input VAT deduction regarding VAT on supplies that

there is a right to deduct when the input transaction subject to VAT has a direct and immediate link with or more output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs linked to the taxable person’s overall economic activity. In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of

10. DSV Road (C-187/14).
11. SK: ECJ, 8 Oct. 2020, Case C-621/19, Weindel Logistik Service SR spol. s r.o. v. Finančné riaditeľstvo Slovenskej republiky, Case Law IBFD.
15. Where the Member State of importation has introduced an electronic system for completing customs formalities, according to art. 52 Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, the term “import document” in art. 178(e) of the VAT Directive shall cover electronic versions of such documents, provided that they allow for the exercise of the right of deduction to be checked. Neither art. 178(e) VAT Directive nor art. 52 Council Implementing Regulation (EU) 282/2011 defines which documents can be considered as import documents.
16. Guidelines resulting from meetings of the VAT Committee, Guidelines resulting from the 94th meeting of 19 Oct. 2011, Document C- taxad c 1(2012)243615 – 716 (Deduction of import VAT paid by representatives). According to the VAT Committee, this guideline shall be without prejudice to situations where the importation is related to the supply of goods covered by art. 14(2)(c) VAT Directive (i.e. the transfer of goods pursuant to a contract under which commission is payable on purchase or sale).
17. It was noted that this guideline shall be without prejudice to situations where the importation is related to the supply of goods covered by art. 14(2)(c) VAT Directive.
4.2. DSV Road A/S

DSV, a carrier, transported goods under the external transit procedure from Denmark to Sweden. The goods had not been accepted by the recipient in Sweden, thus DSV carried them back to Denmark but without having cancelled the transit documentation nor having presented the goods at the Swedish customs office. Subsequently, these goods, together with other goods, were included in another shipment, starting a second external transit procedure. However, according to the tax authorities, it had not been shown that the same goods were included in the second shipment, and they therefore levied import duties and import VAT to DSV and refused the deduction of import VAT at the same time.

In its judgment of 25 June 2015 in DSV Road A/S (Case C-187/14), the ECJ confirmed that also in respect of import VAT, “a right to deduct exists only in so far as the goods imported are used for the purposes of the taxed transactions of a taxable person”. In reference to settled case law, the ECJ continued to hold that such a condition is satisfied only where the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities.

Since the value of the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration, the conditions for application of Article 168(e) of the VAT Directive are not satisfied in the present case.

In summary, the ECJ concluded from the foregoing considerations that Article 168(e) of the VAT Directive must be interpreted as not precluding national legislation which excludes the deduction of VAT on import which the carrier, who is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT, is required to pay.

4.3. Weindel Logistik

Weindel is a service provider who is mainly active in repackaging services. In this capacity, Weindel imported goods from China, Hong Kong and Switzerland into the Slovak Republic in order to bring them into conformity. Once repackaged on Slovak territory, the goods were delivered to other Member States or exported to third countries. The repackaging service was billed to the customer, a Swiss company, which retained the owner of the goods during this process. The invoices issued by Weindel therefore only related to repackaging services and not to imported goods. Weindel paid import VAT that, in turn, was claimed as an input VAT deduction. The Slovak tax authorities challenged the input VAT deduction on the basis that Weindel was not the owner of the imported goods, did not incur any costs that could be reflected in the price of output taxable supplies and did not use imported goods for its economic activity as a taxable person. Weindel appealed, and the Slovak tax authorities referred the question on the recoverability of the import VAT to the ECJ.

In its judgment of 8 October 2020 in Weindel Logistik Service (Case C-621/19), the ECJ again noted that a taxable person may deduct from the amount of VAT that he is liable to pay, the tax due on imported goods where those goods are used for the purposes of his taxable actions. According to settled case law, this generally requires input transactions to be directly linked to the output transactions. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct. In the absence of a direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, a taxable person shall also have a right to deduct where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services that he supplies. Such costs have a direct and immediate link with the taxable person’s economic activity as a whole.

As to the case at hand, the referring court pointed out that Weindel Logistik only intervened as a supplier of services, without having acquired the imported goods or bearing the cost of importation, which suggests that, in the main proceedings, the link between the payment of the VAT resulting from the importation and the price of the services provided by Weindel is lacking. The ECJ referred to the national court to ascertain whether such a link is lacking in the present case.

As to the interpretation of Article 168(e) of the VAT Directive, the ECJ recalls that the right of deduction exists only in so far as the imported goods are used for the purposes of the taxable person’s transactions. According to the case law issued regarding the right to deduct VAT on the acqui-
sition of goods or services, that condition is fulfilled only if the costs of carrying out input transactions are included either in the price of specific output transactions or in the price of goods and services supplied or supplied by a taxable person in the course of his economic activity.27

In finding that the value of the goods transported does not form part of the costs constituting the prices invoiced by a carrier whose activity is limited to transporting those goods for remuneration, the conditions for the application of article 168(e) of the VAT Directive are not satisfied. The ECJ has clarified that persons who import goods without owning them are not in a position to benefit from the right to deduct VAT, unless they are able to establish that the cost of importation is incorporated in the price of particular output transactions or in the price of goods or services supplied by the taxable person in the course of his economic activities.28

Furthermore, the ECJ referred to the guidelines of the VAT Committee (see section 3.). According to those guidelines, a taxable person designated as liable for payment of VAT on importation is not entitled to deduct VAT if two conditions are fulfilled – namely, on the one hand, where the taxable person does not acquire the right to dispose of the goods as owner and, on the other hand, if the costs of the goods are not directly and immediately linked to his economic activity.29 Although those guidelines have no binding value, they nevertheless constitute an aid to the interpretation of the VAT Directive.30

In summary, the ECJ concluded from the foregoing considerations that article 168(e) of the VAT Directive must be interpreted as precluding the granting of a right to deduct VAT to an importer where he does not dispose of the goods in the same way as an owner and where the input import costs are non-existent or are not incorporated in the prices of particular output transactions or in the price of goods and services supplied by the taxable person in the course of his economic activities.31

5. Analysis

5.1. “Ownership”, “right to dispose of goods as an owner” and “power of disposal”

In respect of the following analysis, it should be pointed out that the understanding of the terms “ownership”, the “right to dispose of goods as an owner” and “power of disposal” (in German, Verfügungsmacht) is not necessarily congruent. In this respect, the ECJ has pointed out that the transfer of “the right to dispose of tangible property as owner” does not necessarily require the transfer of legal ownership of the property.32 Equally, legal doctrine and case law have pointed out that the transfer of power of disposal does not necessarily require the transfer of owner-

ship.33 However, since the objective of this article is not to analyse the potential differences between ownership, the right to dispose of goods as an owner and power of disposal, the term ownership is used as synonym for those different terms.

5.2. “Ownership over the goods” as of their importation is no criterion required by the VAT Directive

The chapeau of article 168 of the VAT Directive requires that “the goods and services are used for the purposes of the taxed transactions of a taxable person”. This wording does not require ownership of the goods as of importation in order to obtain the right to deduct import VAT.34 Furthermore, article 168(e) of the VAT Directive refers to “the VAT due or paid in respect of the importation of goods into that Member State”, thus only referring to the import VAT to be deducted, not to a specific person (being the owner of the goods) paying such import VAT nor a specific person (being the owner of the goods) claiming input VAT deduction.

This conclusion is supported by article 178(e) of the VAT Directive, which clearly provides that the person who has the right to deduct is the “consignee or importer” of the goods, rather than the owner of the goods. Also, in respect of this provision, it cannot be assumed that the owner of the goods will always be the “consignee or importer”.35

Furthermore, article 168(e) in connection with article 169(a) of the VAT Directive do not require that the taxable person claiming the deduction of import VAT in the Member State of importation carries out taxable supplies of goods or services in this Member State of importation. Rather, since the output supply of the taxable person claiming the deduction of import VAT may also be taxable outside the Member State of importation,36 ownership of the goods as of their importation should also not be a systematic or implicit requirement of the VAT Directive.37 It follows that such a taxable person may either have already transferred ownership before the transportation or may receive ownership itself only after importation, i.e. in both scenarios not be the owner of goods as of their importation and still fulfil the criteria of article 168(e) in connection with article 169(a) of the VAT Directive.
5.3. “Ownership over the goods” as of their importation is only an alternative criterion under ECJ case law

First, it should be noted that in neither DSV Road A/S nor Weindel Logistik has the deduction of import VAT been rejected due to a lack of ownership over the goods as of their importation.

Rather, in DSV Road A/S, the deduction of import VAT has been rejected because “the value of the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration.” In respect of ownership, the ECJ concluded that a carrier, “who is neither the importer nor the owner of the goods in question” shall not be entitled to import VAT deduction. Since the ECJ refers alternatively to the owner or the importer (who is apparently not the owner), it can already be concluded from DSV Road A/S that even taxable persons who do not have ownership over the goods may be entitled to import VAT deduction. This, however, may only be done if “the value of the goods transported … form part of the costs making up the prices” invoiced by such taxable person.

This understanding is further supported by the ECJ’s decision in Weindel Logistik. Although not available in English, the translation of both original wordings in Slovak and French should read that persons who import goods without owning them are not in a position to benefit from the right to deduct import VAT, unless they are able to establish that the cost of importation is incorporated in the price of particular output transactions or in the price of goods or services supplied by the taxable person in the course of his economic activities [emphasis added]. In other words, a taxable person who is not the owner of the goods may be entitled to import VAT deduction provided that the cost of importation is incorporated in the price of particular output transactions or in the price of goods or services supplied in the course of the economic activities of the taxable person.

Such an understanding was even emphasized by the ECJ’s reference to the statement of the VAT Committee cited above, pursuant to which the deduction of VAT should only be rejected if the following two conditions are met cumulatively, i.e. (i) that the taxable person does not obtain the right to dispose of the goods as owner and (ii) that the cost of the goods has no direct and immediate link with the taxable person’s economic activity. Consequently, the ECJ’s reference should be interpreted as meaning that it is insufficient to reject import VAT deduction solely on the ground of not being the owner of the goods as of importation.

5.4. “Value of goods imported” versus “cost of importation”

As to the Weindel Logistik case, it should be noted that the ECJ has not decided in the form of a judgment but in the form of a reasoned order. According to article 99 of the Rules of Procedure of the ECJ, this is the case “where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt”.

This is particularly interesting as the ECJ seems to use different terminology in DSV Road A/S and Weindel Logistik regarding what needs to be included in the invoice of the output transactions of the taxable person claiming import VAT deduction. Looking at the original language versions of the reasoned order in Weindel Logistik, the ECJ ultimately referred to “le coût de l’importation” (in French) or “náklady na dovoz” (in Slovak), which can be translated into English as the “costs of importation”. Such costs typically include import VAT, customs and excise duties, as well as administration and handling fees, i.e. costs typically depending on the value of the imported goods, but not necessarily including the “value of the goods transported” itself as referred to by the ECJ in DSV Road A/S.

From a practical point of view, such a distinction could make a significant difference because it could allow for the deduction of import VAT by certain logistic providers even if their outgoing invoices do not include the value of the imported goods but (only) the typical costs of importation, as mentioned above. However, taking into account the very clear decision in DSV Road A/S and the overall considerations in Weindel Logistik, as well as the respective reference to the statement of the VAT Committee, it may be questionable whether such different terminology and its practical consequences were actually intended.

6. Conclusions and Practical Implications

In respect of the entitlement to deduct import VAT, it was clarified in DSV Road A/S that the imported goods must be used for the purposes of the taxed transactions of the taxable person claiming such a deduction, i.e. that existing case law regarding VAT on the supply of goods and services can also be applied for the purposes of import VAT deduction.

The mere fact that a taxable person provides services in connection with the importation of goods or would not be able to provide its services without the importation of goods (e.g. the transportation of goods, as in DSV Road A/S, or repackaging, as in Weindel Logistik) does not result

38. DSV Road (C-187/14), para. 50.
39. However, as to such criterion, see also sec. 5.4.
40. As to the term “cost of importation”, see sec. 5.4.
41. Weindel Logistik Service (C-621/19), para. 46 in reference to DSV Road (C-187/14), para. 50.
42. See also Glaeser, supra n. 37, at p. 638 et seq.
43. In this respect, see also W. Summersberger & T. Bieber, Der Eusteu/zum Vorsteuerabzug bei der Einfuhrumsatzsteuer, 93 SWK 36, p. 1683 et seq. (2020).
44. DSV Road (C-187/14), para. 50.
45. In this respect, see J. Gesinn, The Logistics Service Providers’ Pre-tax Deduction of Import VAT Is Still a Pipe Dream and the Recent ECJ Decision Hasn’t Changed That: Or Has It?, 17 GTCJ 3, p. 131 (2022).
in such a person’s entitlement to the deduction of import VAT. However, neither in *DSV Road A/S* nor *Weindel Logistik* was the deduction of import VAT rejected due to the lack of ownership as of importation.

Rather, as already stated in *DSV Road A/S*, the ECJ seems to distinguish between the owner, on the one hand, and other persons (such as the importer), on the other hand, who are potentially entitled to import VAT deduction. This understanding was supported by the ECJ in *Weindel Logistik* by stating that persons who import goods without being their owner are not entitled to the deduction of import VAT, *unless* they are able to establish that the costs of importation are incorporated in the price of particular output transactions or in the price of goods or services supplied by the taxable person in the course of his economic activities. Consequently, it follows that not only the owner of goods as of importation but also other taxable persons, who do not have ownership over the goods, should be entitled to the deduction of import VAT if the costs of importation are incorporated in the price of their particular output transactions or in the price of goods or services supplied by the taxable person in the course of his economic activities. This understanding is also supported by the ECJ’s reference to respective statements of the VAT Committee.

In conclusion, it should not comply with article 168(e) of the VAT Directive if a taxable person is denied deducting import VAT because of not being the owner or not having power of disposal over the goods if the price of the output transaction either includes the “costs of importation” or the “value of goods imported”.