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VAT ON AUTOMOBILE TAX (IA)

1. Increasing references are being made to the possible lack of conformity with community law of the VAT on Automobile Tax (IA), which has recently been replaced by Vehicle Tax (ISV).

We will now provide a brief description of the regime applicable to the IA, characterising how IA liability and VAT liability arise. We will also look at the 2006 decision of the Court of Justice (ECJ) on the conflict with community law of VAT on Danish Registration Tax (RT), seeking to find whether the arguments relied upon in this case are also applicable in Portugal in respect of VAT on IA.

The recent replacement of the IA by the ISV in no way affects the current relevance of this issue, given the reaction periods established in the Administrative and Judicial Procedure Code and in the General Taxation Law. It is still a case of a tax levied in respect of the allocation of a national licence registration number to motor vehicles.

2. The taxation of motor vehicles at the moment of acquisition, while applicable in about half of the Member States of the European Community (EC), has not yet had been subjected to harmonisation at a community level, either in terms of structure, exemptions or rates, unlike the duties on petroleum products, tobacco, alcohol and alcoholic beverages.

The community basis for this lies in Council Directive 92/12/EC of 25 February: "Member States shall retain the right to introduce or maintain taxes on other products [besides petroleum products, tobacco, alcohol and alcoholic beverages provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States"

Furthermore, the intracommunity circulation of products which are subject to unharmonised excise duties is carried out in accordance with the "tax suspension" regime, under which the tax is payable in the Member State where the product was introduced.

3. The transfer of vehicles between Portugal and the various Member States is carried out under commercial documents, with the end users in the national territory having to comply with the legally required declaration obligations, which are also applicable to importations from third countries and to vehicles manufactured in Portugal.

New motor vehicles are presented at Customs and it is only at the time they are sold to the final consumer that the payment of IA becomes necessary, at the same time as the registration application; in relation to used vehicles to be registered in Portugal, this presentation is carried out by the private individuals at the same time as the applications for payment of the IA and registration.

In order for liability to IA to arise, the vehicles must destined to be released for consumption in Portugal, a fact supported by the registration application made at the same time as the application for the assessment of the tax.

4. In studies conducted by the EC, IA is designated as a "tax on registration", which is simply just another way of saying "licensing" (which means, among other things, official registration). According to the legislation in question - Decree-Law 40/93 - "[the automobile tax (IA) is an internal tax levied on the vehicles listed below, admitted or imported as new or used vehicles, including those manufactured in Portugal, which are destined for registration …". The expression "registration tax" is also used by the ECJ.

The registration appears to be the event which gives rise to the obligation to pay the tax: if the vehicle is sold but no registration application is made (e.g. collectors' vehicles), liability to IA does not arise (as a result of the non-inclusion in the list contained in the decree-law), while registration is also the event that gives rise to the tax liability in the case of used vehicles acquired in another Member State.

5. Yet, if the liability to IA arises as a result of the registration of the vehicle, as is apparently the case, it must be determined whether such a liability arises prior to or subsequent to the sale of the vehicle to the final consumer. It will then be clearer whether the amount of IA should be liable to VAT.

In relation to new vehicles sold to the final consumers, the standard practice is that these are handed over to the purchaser already licensed, and the car stands pass on the IA to the State and charge VAT at the applicable rate. The same procedure is used by companies dealing in second-hand vehicles acquired in other Member States.

However, although the registration application is made by the stands, they must provide the authorities with the name and address of the acquirer of the vehicle, as stated in the Licensing Certificate. Vehicles may only be registered after they have been sold, as registration is unique to the person who acquired the vehicle, as is clear from the Registration Certificate (the document containing details of the registration and ownership of the vehicle). Since registration may only be applied for in the name of any specific person if this person has previously acquired the vehicle, it would appear, at least from a conceptual viewpoint, that the act of registration arises subsequently to the act of sale to the final consumer.

In the case of used vehicles acquired by private individuals in other Member States, these individuals apply for the registration themselves. In such cases, it is accepted that the acquisition precedes the registration and VAT is not levied on IA. Yet this is

also the case in other situations, such as to cylinder changes, new chassis and vehicle transformation, with the common denominator of all of these being the fact that liability to IA is in no way connected with the sale of the vehicle. In brief, liability to IA seems to arise independently of liability to VAT, which in itself is a result of the conceptual differences between the two taxes.

6. In a preliminary ruling referred to the ECJ in 2006 by a Danish court with a view to clarifying whether Registration Duty (IM) - which is levied on motor vehicles in Denmark - could attract VAT, the ECJ analysed in some detail the event that gave rise to liability to the Danish IM, and its conclusion as to whether this coincided with the VAT chargeable event was in the negative.

In reaching its decision, the Court took into account that (i) the event that gave rise to the IM liability stemmed from the presentation of the vehicle for registration, while the event which gave rise to a liability to VAT was the delivery of the vehicle; (ii) a vehicle can be acquired by a final consumer and such an acquisition constitutes a VAT chargeable event, but since the vehicle is not destined for registration (in the case of collectors' items) no liability to IM arises; (iii) conversely, there are situations in which the liability to IM arises even though the vehicle is not sold, such as, for example, in the rebuilding of accident-damaged vehicles; and (iv) it is usually the car stands that present the vehicles for registration, but there are situations in which this is not the case and the vehicles are presented for registration by the final consumer, who also pays the tax. The ECJ also examined cases in which the IM liability arose prior to the VAT liability and concluded in favour of the "existence of a conceptual difference between the respective chargeable events which makes the first tax independent of the second". According to the ECJ, while it is the registered distributor who is liable for the payment of IM, it is also the case that "the person by whom the obligation is owed is the person who acquires the vehicle, as attested by the fact that the distributor collects the amount of the registration tax in due course from the acquirer", and considering that the "registered distributor who pays the registration tax prior to delivering the vehicle does so not in his own interest but in the interest of the person who acquires it, and who wishes to take possession of a new vehicle registered in his own name and ready to circulate legally on the public roads of Denmark", the Court came to the conclusion that VAT should not be levied on IM.

7. Given our characterisation of the IA chargeable event and the demonstration that it is dependent apparently not on the delivery of the vehicle but on its registration, we could well be in a situation with many parallels to the one already examined by the ECJ, in which it was concluded that VAT is not due on IM – as this conflicted with Community law. In Portugal, just as the case with the Danish IM, IA is not levied if the vehicle is not destined for circulation, despite the fact that an asset has been delivered in national territory and, consequently, the registration has no "direct link with such a delivery". In Portugal too, there are many situations where the application for registration is made by the purchasers of the vehicles, such as in intracommunity acquisitions or the rebuilding of accident-damaged vehicles. Furthermore, the IA payments made to the State by the car stands are made in the interest of the customers to whom they then hand over the vehicles, already licensed and ready to drive on Portuguese roads. The amounts which they receive from their customers for this purpose are considered as a reimbursement of expenses and will (should) probably be recorded under "third-party accounts". The fact that this is not the practice followed by the stands is not even to be wondered at, since it is the result of general guidelines issued by the tax authorities, yet which cannot contradict community law.

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