



VAT ON PORTUGUESE VEHICLE TAX

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On 28 July the Court of Justice of the European Union (CJEU) published its judgment in case n^o C-106/10 following a request for a “preliminary ruling” presented by Portugal’s Supreme Administrative Court. In essence, the request sought to establish whether a tax such as the Portuguese vehicle tax - *Imposto Sobre Veículos* (ISV) - should be included in the taxable amount for VAT as a tax, duty, or levy or whether, on the contrary, it should be excluded from this taxable amount. In the case at issue, the company had bought two motor vehicles, the invoices issued by the supplier included the basic price, the ISV and miscellaneous expenses and VAT was applied to the total amount at the applicable rate.

The VAT Directive provides that, in the supply of goods, the taxable amount includes taxes, duties, levies and other charges. However, it also provides that the taxable amount does not include any amounts that a taxable person receives from the customer as repayment for expenses incurred in the name and on behalf of that customer and entered in the customer’s books in a suspense account. Some doctrine had already been published on this issue (see Ferreira, Rogério M. Fernandes and Fernandes, Manuel Teixeira, “*Da (não) incidência do VAT sobre o IA: O Imposto Automóvel enquanto base tributável do Imposto sobre o Valor Acrescentado*”, in *Fisco*, no. 124/125, November 2007, Year XVIII), arguing that the chargeable event for the vehicle tax of that time -

Imposto Automóvel - which has since been substituted by ISV, takes place when the vehicle is registered and is, therefore, a true registration tax. According to that understanding, as argued by the customer in this case, the seller or importer of the motor vehicles is not the taxable person for ISV but rather the end consumer. The purchase of a motor vehicle and the seller’s request for its registration requires the identification of the customer acquiring the motor vehicle in the registration certificate and this means that the payment of the tax by the supplier of the motor vehicle is made in the name and on behalf of that customer. This being the case, the VAT should come within the ambit of the provision of the Directive which states that the taxable amount does not include amounts that the taxable person receives from the customer. The inclusion of ISV in the taxable amount would breach the provision of the VAT Directive.

Other doctrine maintains (see Afonso, António Brigas - “*Notas sobre o Código dos Impostos Especiais de Consumo*”, in *Ciência e Técnica Fiscal*, no. 402, Basto, José Xavier - “*A Tributação do Consumo e a sua Coordenação Internacional*”, in *Cadernos de Ciência e Técnica Fiscal*, no. 164, p. 24, and Vasques, Sérgio - “*A Reforma da Tributação Automóvel: Problemas e Perspectivas*”, in *Fiscalidade*, no. 10, April 2002), in support of the stance taken by the Portuguese State, that the chargeable event in respect of the tax takes place with the presentation of the customs declaration for vehicles itself.

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In other words, the chargeable event for ISV occurs prior to the transfer of the vehicle to the customer and, consequently, before liability for VAT arises. According to this latter position, the taxable person for the ISV is the seller of the motor vehicle and not the customer, on the basis that the ISV is chargeable before the transfer of the vehicle to the customer. This doctrine therefore concludes, as did the judgment of the CJEU, that the ISV forms part of the taxable amount for VAT purposes.

The CJEU points out that the taxable persons under the ISV Code are the licensed dealers, authorised dealers and private individuals engaged in the release for consumption of vehicles liable to the tax. In other words, they are persons in whose name the customs declaration for vehicles or the supplementary declaration for vehicles is issued. Private individuals are merely residuary taxable persons for the purposes of ISV. Therefore, the CJEU concluded that the amount paid by way of ISV was not paid in the name of the purchaser of the vehicle but rather by its supplier, there being a direct link between the supply transaction performed by the supplier and the said tax. The CJEU also held that no legal connection can be established between the chargeable event for ISV and the registration operation, unlike the circumstances of the tax at issue in the Danish case (Judgment in case C-98/05 of the CJEU). The CJEU also stated that the ISV Code provides for a number of cases in which ISV is not payable, even in the event of the registration of a vehicle falling within its ambit of application and it gave the example of vehicles belonging to persons moving their residence to Portugal. In this respect, the CJEU points out that both the chargeable event and the liability to pay ISV occur prior to the registration operation as provided by the ISV Code (under which a taxable vehicle may only be registered if all the relevant taxes and duties have been paid). The CJEU concludes that the ISV must be regarded

as being directly linked the supply of vehicles falling within its ambit and, as a consequence, must be included in the taxable amount for VAT. As a result of this understanding, in the case under analysis the CJEU held that a tax such as Portugal's ISV cannot be excluded from the taxable amount for VAT under the VAT Directive.

The decision on whether or not to include ISV in the taxable amount for VAT falls under the jurisdiction of the CJEU. In fact, in the current circumstances of tax harmonisation in the European Union, the applicability of VAT is defined at the EU level now that the harmonisation of the "structure" of the tax has been concluded at the same level. Although the European Commission had sent the Portuguese Government a reasoned opinion in July 2007 - the final stage of infringement proceedings before their submission to the Court by the Commission - the truth is that the Commission never brought any action on this issue against the Portuguese Government before the CJEU for infringement of EU law. Besides, it was under no obligation to do so in this case as the European Commission acts in accordance with the principle of "convenience", which means it can take whatever steps it sees fit to resolve the problem. Accordingly, it was only under the above mentioned judgment of Portugal's Supreme Administrative Court of 27 January 2010 that a decision was taken to refer the issue to the CJEU using the mechanism of a "reference for a preliminary ruling" and for the CJEU to make a ruling on "how EU law should be interpreted in this case and, ultimately, whether or not ISV should form part of the taxable amount for VAT.

In face of the allegations made by the Portuguese taxpayer that challenged the charging of VAT on ISV and the positions taken up by the European Commission, the Portuguese Government or by the rest of the Member States in other situations, as well as the applicable case

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law, it fell to the CJEU to say how EU law should be interpreted in this case.

The actual judgment is now in the hands of the Portuguese courts. We should point out, in this respect, that in June 2006, agreeing with the Danish tax authorities, the CJEU held that the Danish "registration tax" did not form part of the taxable amount for VAT but, on the contrary, in another later judgment in the Polish Case, the CJEU held that Poland's vehicle tax formed part of the taxable amount for VAT.

The conclusion is, therefore, that two lines of thought coexist at the CJEU on the problem of VAT being charged on vehicle tax. A first line, as established in the Polish case and now followed by the decision in the Portuguese case, holds

that ISV should form part of the taxable amount for the purposes of VAT. A second line, as established in the Danish and Austrian case, holds that the taxes of those countries that are charged on motor vehicles should be excluded from the taxable amount for VAT.

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Rogério M. Fernandes Ferreira
Francisco de Carvalho Furtado
Manuel Teixeira Fernandes
Sérgio Brigas Afonso

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17-08-2011
29/2011