

ECJ Advocate General Issues Opinion in French VAT Case

by Sophie Borenstein

Reprinted from *Tax Notes Int'l*, December 5, 2011, p. 697

COUNTRY DIGEST

ECJ Advocate General Issues Opinion In French VAT Case

On November 17 European Court of Justice Advocate General Juliane Kokott delivered her opinion in *Société Veleclair v. Ministre du budget* (C-414/10), holding that article 17, section 2(b) of the Sixth VAT Directive does not allow a member state to make the right to deduct import VAT contingent on its actual payment by the taxpayer, even if the person liable for the tax and the owner of the right to deduction are the same person. She said a member state is, however, authorized to maintain such a rule on a temporary basis. Further, the taxpayer is not entitled to deduct import VAT that has not yet been paid when there is no civil obligation to pay the VAT, she said.

Case Background

Between 1992 and 1995 Veleclair had imported in the European Community bicycles from third countries for resale. On the grounds that Veleclair had not properly declared the origin of the bicycles, the French customs authority reassessed the company for €4 million in customs and anti-dumping duties and €735,437 in import VAT.

Veleclair had claimed the reimbursement of the VAT even though it had not paid it. The tax authorities rejected the claim, and Veleclair filed a claim with the Administrative Court of Orleans and then the Administrative Appeal Court of Nantes to obtain the VAT reimbursement. Both courts dismissed the claim, so Veleclair lodged an appeal with the French Supreme Administrative Court.

It should also be noted that after insolvency proceedings against Veleclair, France did not make its claim related to the company's VAT debt within the time limit prescribed by the insolvency proceedings.

The French Administrative Supreme Court referred the case to the ECJ for a preliminary ruling on whether article 17, section 2(b) of the Sixth VAT Directive allows a member state to make the right to deduct the import VAT dependent on the taxpayer's actual payment of the VAT. (For the ECJ referral, see *Doc 2010-22950* or *2010 WTD 205-22*.)

Advocate General's Opinion

In her opinion, Kokott said that the right to deduct VAT, to the extent that it should apply similarly to all member states, cannot be limited except when specifically provided for by the directive. Neither paragraph 1 nor 2 of article 17 of the Sixth VAT Directive provides that the taxable person must have previously paid the import VAT in order to have the right to deduct it later. According to Kokott, the article provides exactly the opposite, stating that it is only necessary that the VAT on importation be due.

Further, the term "due or paid" used by the directive does not refer to an option left to the member states, as the directive always specifies the situations in which such options exist, Kokott said.

The advocate general also rejected the interpretation of some European governments that in the absence of actual payment, the right to deduct VAT is maintained only if the state has exercised the option to that effect in article 23, section 2 of the directive and if the import is mentioned in a return. She added that article 18, which does not require the taxpayer to produce evidence of payment, also conflicts with the interpretation put forward by the French tax administration.

Finally, Kokott said the principle of economic neutrality of VAT conflicts with the deduction of VAT being dependent on its actual payment. In fact, the cash flow disadvantage suffered by the state is offset by the VAT due at the time of the resale immediately upon delivery, she said. The French government stressed that there are situations, such as the case of the taxpayer's insolvency proceedings, where such compensation is not possible. The advocate general, describing this hypothesis as a "specific case," said the interpretation of neutrality by the states is a real threat because it can create differences between the rules governing domestic transactions and those governing intra-Community transactions.

Further, the risk of fraud alleged by the states cannot justify the government's position because "the physical introduction of goods into the EU is an at-tested fact that is easily verifiable," notably as the taxpayer has to produce the import certificate allowing the deduction of the VAT, Kokott said.

Also, the advocate general confirmed that the national rules that make the tax deduction dependent on its actual payment can be considered “provisionally legal” under article 2, section 3(d) of the Sixth VAT Directive. This article expressly allows a deferred deduction when such deferral is provided for by a domestic rule that was in force before January 1, 1978. Kokott said that in this case, the French national courts must verify that article 271-II, section 1 of the French Tax Code meets the conditions governing this transitional application.

Kokott concluded that the right to deduct VAT arises in the absence of actual payment only if the claim of the state is not extinguished or unenforceable. ◆

◆ *Sophie Borenstein, partner, Reed Smith, Paris*