Case C-368/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

14 June 2021

Referring court or tribunal:

Finanzgericht Hamburg (Germany)

Date of the decision to refer:

2 June 2021

Applicant:

R.T.

Defendant:

Hauptzollamt Hamburg

Subject matter of the main proceedings

Value added tax Directive 2006/112/EC Place of importation of a means of transport registered in a third country and imported into the EU in breach of EU customs legislation Admissibility of the application *mutatis mutandis* of Article 87(4) of Regulation (EU) No 952/2013 to import VAT

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Articles 30 and 60 of Directive 2006/112/EC to be interpreted as meaning that the place of importation under VAT legislation of a means of transport registered in a third country and imported into the EU in breach of customs legislation is located in the Member State in which the customs legislation was infringed and the means of transport was first used as such in

the EU, or is it located in the Member State in which the person who failed to comply with customs obligations resides and uses the vehicle?

2. If the place of importation is located in a Member State other than Germany, is Directive 2006/112/EC and, in particular, Articles 30 and 60 thereof, infringed where Article 87(4) of Regulation (EU) No 952/2013 is declared under a national provision to be applicable *mutatis mutandis* to import VAT?

Provisions of EU law cited

Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, especially Article 1, point 6

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, especially Articles 30, 60 and 71(1), second subparagraph

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, especially Articles 79, 87(4) and 139

Provisions of national law cited

Umsatzsteuergesetz (Law on value added tax, 'the UStG') of 21 February 2005, especially Paragraph 21(2)

Brief summary of the facts and procedure in the main proceedings

1 The applicant is contesting the assessment of import VAT on a vehicle imported into the territory of the EU in breach of customs legislation.

2 The applicant, a Georgian national who has been resident and registered in Germany for several years, purchased and registered a vehicle in his name in January 2019. In March 2019, he drove the vehicle from Georgia to Germany via Turkey, Bulgaria, Serbia, Hungary and Austria without conveying and presenting it to a customs office of entry into the EU. In Germany, he used the vehicle both for private trips and – although the defendant Hauptzollamt (main customs office) contests this – for business trips. On 28 March 2019, he was stopped on one of those trips by one of the defendant's control teams.

3 By notice dated 13 May 2019, the defendant customs office assessed customs duty and import VAT of EUR 8 460.59 against the applicant. The defendant gave as its reason that the applicant had failed to present the vehicle to the first customs office in the territory of the Union, in breach of his obligation under Article 139 of Regulation No 952/2013; that, therefore, the vehicle had been imported into the

customs territory of the Union in breach of the legislation, thereby giving rise to a customs debt on import pursuant to Article 79(1)(a) of Regulation No 952/2013; that the applicant had a customs debt pursuant to Article 79(3)(a) of Regulation No 952/2013 because he had an obligation to present the vehicle; and that the import VAT was owed in application *mutatis mutandis* of the said customs legislation pursuant to Paragraph 21(2) of the UStG.

4 Following an unsuccessful appeal procedure, the applicant lodged an action against that notice.

Brief summary of the reasoning in the request for a preliminary ruling

5 The referring court takes the view that it is beyond doubt that the customs debt accrued pursuant to Article 79(1)(a) of Regulation No 952/2013. However, it does have doubts as to whether Germany has jurisdiction to assess the import VAT as well. It would, if an interpretation of Articles 30 and 60 of Directive 2006/112 showed that the place of importation is located in Germany, even though the applicant drove the vehicle through several Member States prior to his arrival in Germany. That is the subject matter of the first question referred. Otherwise, it would be necessary to consider whether Article 87(4) of Regulation No 952/2013 should apply *mutatis mutandis*. That is the subject matter of the second question referred.

The first question referred

6 According to the case-law of the Court, in addition to the customs debt, there may also be a requirement to pay VAT where, based on the particular unlawful conduct which gave rise to the customs debt, it can be presumed that the goods entered the economic network of the Union and, consequently, that they may have undergone consumption, that is, the act on which VAT is levied (judgments of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig*, C-226/14 and C-228/14, EU:C:2016:405, paragraph 65; of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417, paragraph 54; of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, paragraph 44; and of 3 March 2021, *VS*, C-7/20, EU:C:2021:161, paragraph 30). However, such a presumption may be rebutted if it is established that, despite failures to comply with customs legislation which result in the incurrence of a customs debt on importation in the Member State where those failures occurred, goods have been introduced into the economic network of the Union via the territory of another Member State, where they were intended for consumption. In such cases, VAT on importation is payable in the latter Member State (judgments of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, paragraph 48, and of 3 March 2021, *VS*, C-7/20, EU:C:2021:161, paragraph 30).

7 Those judgments of the Court were delivered in respect of goods transported through various Member States in breach of customs legislation. However, this

case does not concern transported goods; it concerns an item (vehicle) which was itself used as the means of transport. With regard to means of transport, various German finance courts have understood the case-law of the Court cited above to mean that a means of transport enters the economic network of the Union in the Member State in which it was first actually used as a means of transport. Although they are not 'consumed' within the meaning of paragraph 44 of the judgment in *Federal Express*, they are used, which is a necessary interim stage prior to consumption. Furthermore, third-country goods used in the EU as a means of transport compete with transport and rental services available in the EU.

8 The referring court is inclined, in keeping with that, to find that the applicant's vehicle entered the economic network of the Union in Bulgaria, as that is where it was first used as a means of transport within the EU. Therefore, that is where the place of importation would be located within the meaning of Article 60 of Directive 2006/112.

9 However, the judgment of 3 March 2021, *VS*, C-7/20, EU:C:2021:161, calls that legal understanding into question. That case was identical to this in terms of enabling the referring court to give judgment. The Court starts by describing, at paragraphs 32 and 33, the situation with regard to parcels, the taxation of which was the subject matter in *Federal Express*. It stated that, although customs legislation had been infringed in Germany in that case, the parcels were then transhipped to their final destination in Greece, where they entered the economic network, and that, according to the finding in the judgment in *Federal Express*, despite the breach of customs legislation in Germany, the import VAT was therefore first incurred not there, but in Greece.

10 The Court then compared the facts in *Federal Express* with the facts in *VS*. Having done so, it came to what was, in the view of the referring court, the unexpected conclusion that the two cases were similar. It found that, although the vehicle in *VS* 'physically entered the territory of the Union through Bulgaria', so that it was there that there was a failure to comply with customs obligations (paragraph 34), the vehicle was 'actually used in Germany, VS' Member State of residence'. Thus, as concluded by the Court at paragraph 35 of its judgment in *VS*, the vehicle first entered the economic network of the Union in Germany and therefore that is where the import VAT was first incurred.

11 In light of the definition of entry into the economic network set out above (paragraph 6), the referring court seeks clarification as to whether it has understood the Court correctly and that, where a vehicle is used as a means of transport in order to transit a Member State, it only enters the economic network of the Union once it reaches the Member State of residence of the driver of the vehicle, not in the Member State of transit. The Court based its judgment in *VS* (paragraph 35) on the fact that, although the vehicle at issue first entered the customs territory of the Union in Bulgaria (est d'abord entré), it was actually used (a été utilisé effectivement) in Germany.

12 The referring court takes the view that the vehicle at issue in the main proceedings had already been used in Bulgaria and it was *there that it first* entered the economic network of the Union. That is because the applicant used the vehicle to transit Bulgaria. The referring court fails to see how that use of the vehicle as a means of transport – which, according to the judgment of the Court in *VS*, did not establish entry into the economic network of the Union – differs from the journeys subsequently completed in Germany, as a result of which, according to the finding of the Court in *VS*, the vehicle (first) entered the economic network there.

13 The Court found at paragraph 35 of its judgment in *VS* that Germany was VS' Member State of residence. That might give the impression that the Court regards the place of residence of the person who uses the goods as the criterion for entry into the economic network. However, the referring court is not aware of any judgments of the Court in which the Member State of residence of the person concerned was of relevance to the entry of goods into the economic network of the Union.

The second question referred

14 The second question only arises if the place of importation within the meaning of Articles 30 and 60 of Directive 2006/112 was located in a Member State other than Germany, as only then is the question of whether the German customs authorities had jurisdiction to assess that tax under Article 87(4) of Regulation No 952/2013, which applies *mutatis mutandis* to import VAT pursuant to Paragraph 21(2) of the UStG, of relevance. The requirements of Article 87(4) of Regulation No 952/2013 would be satisfied here: according to Article 79(1)(a) of the Regulation, applied *mutatis mutandis*, the import VAT debt would be regarded as having been incurred in Bulgaria at the time of importation there. The import VAT chargeable in Germany is lower than EUR 10 000. Therefore, the only question that arises is whether the application *mutatis mutandis* of Article 87(4) of the Regulation infringes Directive 2006/112.

15 There would be no objection to the application *mutatis mutandis* of Article 87(4) of Regulation No 952/2013 under EU law if EU law itself prescribed the application of that provision of customs legislation in these circumstances (see (a)). Even if Directive 2006/112 does not require the application *mutatis mutandis* of Article 87(4), it would be allowed under EU law unless prohibited by the Directive (see (b)).

a) Interpretation of Article 71(1), second subparagraph, of Directive 2006/112

16 The only provision of Directive 2006/112 that might prescribe the application of Article 87(4) of Regulation No 952/2013 to import VAT in this case is the second subparagraph of Article 71(1) of the Directive. In contrast to Article 71(2) of the Directive, that rule presupposes that the goods are actually subject to customs duty, which is the case here. The second subparagraph of Article 71(1) stipulates

that ‘the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable’, including in a case such as this. The chargeable event is defined in Article 62, point 1, of Directive 2006/112 as the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. According to Article 62, point 2, of the Directive, VAT becomes chargeable when payment of the VAT can be claimed.

17 The referring court is of the opinion that the reference to customs legislation in the second subparagraph of Article 71(1) of Directive 2006/112/EC can be understood in one of two ways. Understood broadly, the provision refers to customs legislation for the purpose of all the preconditions to the incurrence of VAT. Understood narrowly, the rule refers to customs legislation only for the time at which the chargeable event occurs and the VAT becomes chargeable. The Court has not yet made an unequivocal pronouncement on this point.

18 The Bundesfinanzhof (Federal Finance Court) understands the second subparagraph of Article 71(1) of Directive 2006/112 to be a comprehensive reference to customs legislation. That would ensure that the duties chargeable on importation can be charged by one and the same authority. Based on that understanding, the second subparagraph of Article 71(1) would explicitly prescribe the application *mutatis mutandis* of Article 87(4) of Regulation No 952/2013, in which case the answer to the second question referred would be in the negative.

19 However, the referring court understands the second subparagraph of Article 71(1) of Directive 2006/112 to mean that it refers to customs legislation only for the *time* at which the chargeable event occurs and the VAT becomes chargeable. That is corroborated by the wording, history and scheme of the rule.

20 The wording of the second subparagraph of Article 71(1) of Directive 2006/112 links the occurrence of the chargeable event and the VAT becoming chargeable to customs legislation only with regard to their timing. The wording of the rule presupposes that a chargeable event has occurred and that the VAT has become chargeable

21 Under the precursor provisions to the second subparagraph of Article 71(1) of Directive 2006/112, the incurrence *and* the due date of the customs debt and the VAT debt were initially explicitly linked to one another. It was not until it was amended by Directive 91/680 that the link between the chargeable event and the chargeability of import tax and duty was restricted to the time of their incurrence.

22 The systematic positioning of the second subparagraph of Article 71(1) of Directive 2006/112 also suggests that the reference does not extend to customs legislation that addresses aspects other than the time at which the duty is incurred. For example, the place of importation is addressed in Chapter 4 of Title V of the Directive (Articles 60 and 61). That title explicitly regulates the ‘place of taxable

transactions'. The second subparagraph of Article 71(1) of the Directive, on the other hand, falls under Title VI of the Directive, which addresses the 'chargeable event and chargeability of VAT'.

23 The positioning of Article 71 within Chapter 4 of Title VI of Directive 2006/112 also suggests that the rule only addresses the time at which, but not the place in which, the VAT becomes chargeable. That chapter comprises two articles (Article 70 and Article 71). Article 70 of the Directive establishes when the chargeable event and the chargeability of VAT occur in the case of importation, while Article 71 sets out the exceptions to the rule in Article 70.

24 Lastly, the fact that the provisions of the Directive on import VAT would be obsolete if that provision did in fact contain a comprehensive reference to customs legislation suggests that the second subparagraph of Article 71(1) of Directive 2006/112 is not to be understood broadly.

25 The referring court is unable to deduce clearly from the case-law of the Court (especially the judgments of 29 April 2010, *Dansk Transport og Logistik*, C-230/08, EU:C:2010:231, paragraphs 91 and 102; of 11 July 2013, *Harry Winston*, C-273/12, EU:C:2013:466, paragraph 41; of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig*, C-226/14 and C-228/14, EU:C:2016:405; of 1 June 2017, *Wallenborn Transports*, C-571/15, EU:C:2017:417; and of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, paragraph 41) whether the second subparagraph of Article 71(1) of Directive 2006/112 refers to customs legislation with regard also to the place in which the VAT becomes chargeable.

26 Nor did the Court answer the second question referred here in its judgment of 3 March 2021, *VS*, C-7/20, EU:C:2021:161. Although the referring court raised the question in that case of the application *mutatis mutandis* of Article 87(4) of Regulation No 952/2013, the Court did not give a ruling on it.

b) No definitive rule on jurisdiction in Directive 2006/112

27 As Directive 2006/112 does not prescribe the application *mutatis mutandis* of Article 87(4), the question then arises as to whether it prohibits its application *mutatis mutandis*. The fact that Articles 60 and 61 of Directive 2006/112 regulate the place of importation suggests that it might. However, the referring court understands the judgments of 2 June 2016, *Eurogate Distribution and DHL Hub Leipzig*, C-226/14 and C-228/14, EU:C:2016:405, and of 10 July 2019, *Federal Express Corporation Deutsche Niederlassung*, C-26/18, EU:C:2019:579, to mean that the consequences under VAT law of a breach of customs legislation have not been regulated definitively in Directive 2006/112. Thus the Court was able in those cases to make importation for the purposes of VAT legislation dependent upon an unwritten element of the chargeable event, namely entry into the economic network.

28 The wording of Article 60 of Directive 2006/112 leaves latitude for that. Article 87(4) of Regulation No 952/2013, applied *mutatis mutandis*, does not stipulate a place of importation that contradicts Article 60 of the Directive; it simply establishes the fictitious jurisdiction of a different Member State to charge VAT where the debt is lower than EUR 10 000 in order to ensure the effective collection of the chargeable VAT. Otherwise, there would be a danger, in the view of the referring court, that the import VAT would not be claimed at all. If Germany does not have jurisdiction to charge the import VAT in this case, it would have to be charged in the Member State in which it was originally incurred. The defendant main customs office has noted that this is often likely to be impossible in practice.