



International Association of Tax Judges

# IATJ – 6th Assembly in Luzern September 4 and 5 2015

Recent Case Law (VAT)

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# Introduction

- Judgment of the ECJ 18. 12. 2014  
„Schoenimport Italmoda“ C-131/13 etc. deals with the problem of VAT-fraud in the EU
- In the EU the abuse of VAT causes an enormous loss of budget
- The abuse of VAT furthermore leads to a considerable distortion of competition

# Legal background: Abuse and fraud of Input-VAT

- Common regulation of Input-VAT:  
Art. 167 ff. VAT-Directive
- The taxable person has the right to deduct input-VAT if he is going to carry out a taxable supply or service afterwards
- This right in principle may not be limited
- The right to deduct input-VAT ensures neutrality of taxation for all economic activities

# Abuse of exemption for an intracommunity supply

- Common regulation in Art. 138 VAT-Directive
- MS 1                                      MS 2



supply of goods

**A** : Exemption for supply of goods in MS 1

**B** : Taxation for acquisition of goods and right to deduct input-VAT in MS 2 and taxation for the supply of goods to C in MS 2 (MS of destination of the goods)

# Solution of these problems in the Jurisdiction of the ECJ - Principles

- If a taxable person knew or should have known that he is participating in a transaction connected with VAT-fraud, the MS may – under certain conditions – deny the right to deduct input-VAT or refuse the exemption for an intracommunity supply of goods
- Whether the taxable person had this knowledge or not is a decision which must be taken by the national tax court
- The tax authorities have to carry the burden of proof

## **ECJ judgment 18. 12. 2014 C-131/13 etc.**

### **„Schoenimport Italmoda“ The facts of the case**

- „Schoenimport Italmoda“ (S) is a taxable person established in the Netherlands
- S carried out transactions relating to computer hardware:
  - S acquired the hardware in the Netherlands and in Germany
  - S supplied the hardware to customers subject to VAT in Italy and applied the exemption for an intracommunity supply
  - the taxable persons in Italy did not pay VAT to the tax authorities

**ECJ judgment 18. 12. 2014 C-131/13 etc.**  
**„Schoenimport Italmoda“ – The attitude of the tax authorities**

- The tax authorities thought that S had knowingly participated in fraudulent activity designed to evade VAT in Italy
- They refused S the exemption in respect of intracommunity supplies effected in the NL, the right to deduct input tax and the right to a refund of the VAT paid in respect of the goods originating in another MS of the EU
- The tax authorities therefore issued three additional assessments to S, who brought action against them...

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – Following dispute**

Regional Court of Appeal in Amsterdam:

- No justification for departing from the normal system of VAT collection and for refusing to apply the exemption or the right to deduct input- VAT
- Essential observations: Tax evasion had taken place not in NL but in Italy and S had – in the NL – satisfied all the formal statutory conditions for the exemptions to be applied



## ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – Questions of the Hoge Raad

The Hoge Raad of the Netherlands decided to stay the proceedings and referred some questions to the ECJ:

- 1. Should the national tax authorities and courts refuse to apply the exemption for an intracommunity supply, the right to deduct input-VAT or the refund of VAT if national law does not make provision for refusal of the exemption, the deduction or the refund under those circumstances?

## ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – Questions of the Hoge Raad

- 2. If question 1. is answered in the affirmative, should the refusals also take place, if the tax evasion occurred in another MS (other than the MS from which the goods were dispatched) and the taxable person was, or should have been, aware of the tax evasion, while the taxable person in the MS from which the goods were dispatched has met all the (formal) conditions which national provisions impose on the exemption, the deduction or the refund, and has given all required information to the tax authorities?

## **ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – 1. Question: Essential Considerations of the ECJ**

- Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT-directive: EU-Law cannot be relied on by individuals for abusive and fraudulent ends
- Therefore in principle the right to deduct input VAT, the exemption for an intracommunity supply and the right to a VAT refund is to be refused in case of an abuse or fraud of VAT
- It is in principle the responsibility of the national authorities and courts to refuse the benefit of these rights under these circumstances

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – 1. Question: Essential  
Considerations of the ECJ**

- The national courts have to interpret the national law in the light of the wording and the purpose of the VAT-directive and have to take the whole body of domestic law into consideration
- A directive cannot of itself impose obligations on an individual and cannot therefore be relied on such, by the MS, against the individual
- Result: The refusal of the benefit is the consequence of the finding, that the objective conditions required for obtaining the advantage sought have in fact not been satisfied

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – Answer to 1. Question**

- The VAT-directives must be interpreted that it is for the national authorities and national courts to refuse a taxable person the benefits of rights of deduction or exemption or refund of VAT, even in the absence of national law providing for such refusal, if it is established, in the light of objective factors, that the taxable person was participating in an evasion of VAT committed in the context of a chain of supplies...

## **ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – 2. Question: Essential Considerations of the ECJ**

- There is no objective reason that the position of the ECJ should be different merely because the chain of supply affected by fraud extends to two or more MS's or that the transaction by which the tax evasion was committed took place in a MS other than that in which the taxable person seeks to benefit from a right under the VAT-directive
- Typical for „Carousel fraud“ to be committed in a combination carried out in several MS's
- Any other interpretation would not comply with the aim of preventing tax evasion

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – Answer to 2. Question**

- A taxable person who knew, or should have known, that he was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefits of his rights, notwithstanding the fact that the evasion was carried out in a MS other than that in which the benefit of those rights has been sought and that taxable person has complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights

# ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – General Consequences

MS 1

MS 2

A->--supply-->--**B**-->-----C->-----D

If **B** knows or should have known, that his transactions are connected with VAT-fraud committed in the MS of destination of the goods (MS 2) he has no right to deduct input VAT and the tax authorities of the MS of origin of the goods (MS 1) may also deny the exemption for the intracommunity supply of the goods.



# Judgment of the ECJ „Schoenimport Italmoda“ as consequence of the jurisdiction up to now

- 12.1.2006 C-354/03 etc. „*Optigen/Fulcrum Electronics/Bond House*“
- 6.7.2006 C-440/04 „*Axel Kittel and Recolta*“
- 7.12.2010 C-285/09 „*R*“
- 21.6.2012 C-80/11, C-142/11 „*Mahagében and Dávid*“
- 6.12.2012 C-285/11 „*Bonik EOOD*“
- 31.1.2013 C-642/11 „*Stroy trans EOOD*“ ; C-643/11 „*LVK-56 EOOD*“

# ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – Jurisdiction of the German Supreme Tax Court

## I. Judgments about the denial of Input-VAT

19. 4. 2007 V R 48/04; 19. 5. 2010 XI R 78/07;  
19. 12. 2014 XI B 12/14

- The right to deduct Input-VAT may be refused if the taxable person knew or should have known that he participated in a turn-over being part of a tax-evasion
- The tax-courts of first instance are obliged to find out the relevant facts of that knowledge
- Problem: Burden of proof...

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – Jurisdiction of the  
German Supreme Tax Court**

**II. Judgment about the refusal of exemption for  
an intracommunity supply:**

**27. 2. 2011 V R 30/10**

- The exemption for an intracommunity supply has to be denied if the taxable person deceives about the identity of the purchaser of the goods and knew or should have known that there might be no taxation of the acquisition of the goods in the MS of destination

# Different Problem : Abuse of VAT by contractual terms

- More general issue
- Transactions with the sole aim to obtain a tax advantage (deduction of input-tax or exemption of VAT for a supply of goods or services) within the existing legal rules but without the knowledge or intention to participate at a VAT-fraud ...

# Judgments and principles of the ECJ about the abuse of contractual terms

- F.ex.: 21.2.2006 C-255/02 *Halifax*; 22. 12. 2010 C-277/09 *RBS Deutschland Holdings*; 20.6.2013 C-653/11 *Paul Newey*
- Contractual terms may be disregarded if they do not reflect economic reality, but constitute a wholly artificial arrangement which was set up with the sole aim of obtaining a tax advantage
- Where an abusive practice has been found to exist, the transactions involved must be redefined so as to reestablish the situation that would have prevailed in the absence of the transactions constituting that abusive practice...
- Regulation in German Tax Law: § 42 AO

## **ECJ judgment 18. 12. 2014 C-131/13 etc. „Schoenimport Italmoda“ – German VAT-Law**

- § 13b UStG: More cases of reverse-charge-mecanism
- § 25d UStG: Provision for liability since 1.1.2002:  
The taxable person is liable for the VAT of a turnover earlier in the chain of supply if the issuer of the invoice did not pay his VAT owed to the tax authorities on purpose - under the condition that the taxable person knew or should have known that such VAT- evasion was intended (problem: Principle of proportionality!)
- § 27b UStG: (Unannounced) sales tax audit visit

**ECJ judgment 18. 12. 2014 C-131/13 etc.  
„Schoenimport Italmoda“ – German VAT-Law**

Protection for taxable persons acting in good faith and in due diligence

- § 6a Abs. 4 UStG
- If the taxable person thought that all conditions of the exemption for an intracommunity supply were fulfilled although this was not the case, this taxable person may as well use the exemption, if his error was due to wrong informations of the purchaser of the goods and he himself was acting in good faith and in due diligence...



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**Thank you for your attention!**