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**The link between the incurrance of customs debt
and VAT - and the consequences and impact thereof**

by

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Abstract

The link between the incurrence of a customs debt and the incurrence of the Value Added Tax on importation, have a parallel nature, as they arise from the importation of goods into the territory of the Community. This link is a result of Article 71 (1) of the VAT Directive. This article authorises member states to link the chargeable event and the chargeability of VAT on importation of goods with those laid down for customs duties, under the customs legislations. This link can be seen obviously in the introduction of illegal, unlawful and stolen goods into the Community. Therefore, the incurrence/extinction of the customs debt will have an impact on the import VAT. The incurrence of the customs debt under the Articles 203 and 204 of the Community Customs Code, will be subject to changes under the Union Customs Code. This will have an impact on both the customs debt and the import VAT.

Abbreviation list

AG	Advocate General
CCC	Community Customs Code
CCIP	Implementing Provisions of the Community Code
DA	Derogation Act of the Union Customs Code
EC	European Commission
ECJ	European Court of Justice
EU	European Union
GATT	The General Agreement on Tariffs and Trade
MS	Member state(s)
UCC	Union Customs Code
VAT	Value Added Tax

1 Introduction

1.1 Background

The import VAT and customs duty have a parallel nature as both arise from a situation of a transaction that constitutes an importation of goods into the territory of the Community, and furthermore, the following integration of those goods into the economic channels of the Member States. This parallel nature has its origin in Article 71 (1) of the VAT Directive¹, which authorizes Member States to link the chargeable event of import VAT with the incurrence of customs duties.²

The consequence of the Article 71 (1) of VAT Directive, here specifically speaking of the second sentence of paragraph 1, may automatically give rise for VAT on imported goods that are liable to pay customs duties. The ECJ linked the chargeable event for VAT purposes on imported goods to the incurrence of customs duties on those goods, based that link on Article 71 (1) of the VAT Directive.

With regard to the incurrence of customs debt specially Article 203 (unlawful removal) and Article 204 (non- fulfilment) under the Community Customs Code established by COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992, in which the main objective of those two Articles is to prevent non-Community goods subject to supervisions procedures of being entered into the territory of the Community without being declared by the competent authority.³ The two Articles give rise to both customs debt and import value added taxes.

As Articles 203 and 204 of CCC seem similar, there is a difference between them in regard to the incurrence of customs debt. This matter will be presented throughout the thesis in the light of the relevant provisions of the CCC and its Implementing Regulation (Commission Regulation (EEC) No 2454/93 OF 2 July 1993 laying down provision for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code). However, those Articles will be altered under the Union Customs Code (REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code), in which it will repeal the CCC and become applicable from 1 of May 2016.⁴

¹ Council Directive 2006/112/EC of 28 November 2006.

² See the second sentence of Article 71 (1) of the VAT Directive.

³ Hans- Michael Wolfgang and Talke Ovie, Emerging Issues in European Customs Law, World Customs Journal, page 9.

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http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm. (on visit 26 May 2015)

The changes of the two Articles will have an impact on the incurrence of Customs debt and hence VAT. An analysis of the related provisions under the CCC and UCC will be discussed in relation to the incurrence of customs debt and the chargeability of VAT on the importation of goods into the Community.

1.2 Aim and research question

The aim of this thesis is to show to which extent the incurrence of VAT is parallel with the incurrence of the customs debt. Moreover, it is to determine the consequence of the problem, that the chargeable event of import VAT rely on the incurrence of customs duties, as a result of the link between two EU legislations, hereby meaning the customs legislations and the VAT Directive. Therefore, it is important to answer the following question by underlining the consequences of this link and by providing a proposal for solving the complexity of this link. To which extent is the incurrence of VAT linked to the incurrence of a customs debt, in relation to the importation of goods in the territory of the Community?

1.3 Method and materials

Regarding the purpose of this thesis, descriptive writing is the basis of indicating and providing definitions and information of the relevant EU legislations. In order to identify the strengths of the context provided and to show the influence on the outcome, an analytical approach is used throughout the paper. In addition, to explore the relationship of the incurrence of import VAT and customs debt, the paper compares and provides already occurred and potential incidents under the CCC and UCC in contrast to VAT. Nevertheless, a critical evaluation is given to outline the implications and solutions.

The mentioned methodologies have been chosen to draw a conclusion and put forth recommendations.

To reach the aim of this paper, different materials will be used in the analysis to state the problem and assist a solution. Therefore, the relevant EU legislation and ECJ judgments related to the topic, are used to clarify the problem of the link between the two EU legislations. In this case referring to the customs legislations (CCC and UCC) and the VAT Directive. Also, in order to obtain a significant and constructive theoretical basis for the paper, relevant books, articles and previous studies, which have been conducted by other scholars have been used as material.

Articles 203 and 204 CCC will be analysed in perspective of the new provisions under UCC, in order to reflect on the treatment of importation of goods for the purpose of customs duties and import VAT.

1.4 Delimitation

The thesis will have its focus on the link between the Custom legislations and the import VAT, regarding importation of goods into the community. Furthermore, the elements that causes this link to undermine the common system of VAT, along with relevant ECJ decisions will be discussed in depth to derive the essential factors which are crucial in determining the parallel nature of the EU legislation at issue. The consequence of the link of the above mentioned legislations, will also be discussed to state the problem caused by that same link.

The paper will therefore put forth a critique of this link in the order to give a constructive solution. Basically, the impact of the incurrence of customs debt on the incurrence of the chargeability of VAT will be the core issue of the discussion in this thesis, but it will also offer an overview of the applicability of the pending law of the UCC. Therefore, the incurrence of customs debt under Articles 203 and 204 will be discussed in detail in comparison with the corresponding articles in the UCC. A focus will be put on the consequences of the incurrence of the customs debt under the two mentioned articles and to highlight the objectives and the differences between them.

1.5 Outline

This thesis has been divided into five chapters where the purpose of the second chapter is to bring out the interaction between the incurrence of the customs debt and the VAT. The third chapter, will deal with the specific circumstances, in which customs debt may incur or be extinguished and the impact on the chargeability of VAT.

The impact of the principle of neutrality will also be dealt with in the third chapter in connection with the specific transactions of the matter of in question. After dealing with the incurrence of the customs debt and import VAT for stolen, unlawful introduction and importation of illegal goods, then the right to deduct input VAT in respect to the transactions will identified in the fourth chapter.

In the fifth and last chapter of this thesis a conclusion will be put forth to sum up previously discussed topics from the preceding chapters and the results of the research in resolving the problem of the link between EU customs legislations and the VAT Directive. Finally, it will be discussed whether or not a solution has been reached in regards to the issue.

2 The link between the customs duty and the import VAT

Importation of goods is subject to import VAT in accordance with article 2 (1) (d) of the VAT Directive. According to article 30 of the VAT Directive, which lay down the definition of importation of goods, it means the entry of goods into the Community, which are not in free circulation. The same article also state that the entry of goods into the Community, which are in free circulation, coming from a third territory forming part of the customs territory of the community, are to be regarded as importation of goods.⁵

The status of goods as Community or non-Community goods are defined in Article 4 (7) and (8) of CCC. Under the same Article in paragraph (7), the Community goods are goods when they are obtained in the customs territory of the Community under the condition laid down in Article 23 of the CCC, and not goods imported from a third country or territory which does not form part of the customs territory of the customs union. However, goods coming from countries not forming part of the customs territory, and that have been released for free circulation, obtain the status of community goods.⁶ In addition, goods that are produced in the customs territory of the community are considered community goods.

With regard to Article 4 (8) CCC “*Non-Community goods’ means goods other than those referred to in subparagraph 7.*” Under UCC the community and non-community goods are defined as Union and non-Union goods under Articles 5 (23) and (24) of UCC consecutively.⁷ Under Article 5 (23), Union goods are goods that are completely obtained in the territory of the Union, goods brought from outside the territory and released for free circulation and goods produced in the customs territory of the Union. With regard to non-Union goods, Article 5 (24) UCC states that goods other than those stated under paragraph 23 of Article 5 of UCC are non-Union goods. It is clear that the CCC and UCC have the same approach in determining the status of the goods for the customs purposes. For the purpose of import duties, it is very important to identify whether the goods are community or non-community goods.

The link between the incurrence of customs debt and incurrence of VAT for imported goods is present because of the determination of the taxable amount for import VAT.⁸ The basis for the import VAT is the valuation of the goods with regard to the valuations rules, which are established in the CCC. As a general rule according to Article 29 CCC, the transaction value is the price paid or payable by the buyer to the seller for the goods, when sold for export to the EC, and adjusted in accordance with

⁵ Article 30 of the VAT Directive.

⁶ COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code

⁷ REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code, recast, Article 5

⁸ Andrew Rimmer, *Trading Places? VAT and Customs Treatment of Imports, Exports and Intra- EC Trading*, p. 39, Spiramus 2010.

Articles 32 and 33 CCC. In other words, the total payment made or to be made by the buyer to the seller plus additional charges made or to be made by the buyer to the seller or to a third party to fulfil the commitment of the seller for the imported goods is the transaction value.⁹ The methods of valuation of the imported goods can be varied if the customs value cannot be determined under Article 29 CCC. Those methods are laid down in Article 30 CCC.¹⁰

The methods of valuation stated in the CCC are to ensure and emphasize a fair, common and unbiased system, which is to avoid the use of the arbitrary and fictitious customs valuation of the imported goods, as an objective of the European Union Legislation regarding the customs valuation.¹¹ The UCC in its Article 70 (1) states the general rule for customs valuation. Subparagraph 3 of Article 70 UCC, lay down the conditions for the transaction value which shall apply.¹²

Where the customs value of the imported goods cannot be determined under Article 70 UCC, the secondary methods of customs valuation under Article 74 UCC shall apply, in which the transaction value of identical goods, the value of similar goods, the unit price at which the imported goods or identical or similar goods are sold within the customs territory of the Union and the computed value.

The interaction between the import duties and import VAT is that the import duties shall be included in the taxable amount for the VAT purpose, which indicate the importance of the customs valuation of the imported goods for import duty and VAT purposes. The taxable amount according to Article 78 (a) of the VAT Directive shall include the taxes, duties, levies and charges, excluding the VAT itself. The customs valuation is the foundation of the determination of the import VAT within the meaning of Article 85 of the VAT Directive, stating that the taxable amount of the imported goods shall be the value for customs purposes.

In the next section, the interaction between the customs duties and the import VAT will be explained with another perspective. After the link between the two customs duty and import VAT has been shown with regard to the determination of taxable amount for the VAT purpose, the next section will then deal with the link between the incurrance of the customs debt and incurring of the VAT.

2.1 The incurrance of customs debt and VAT

The customs debt is defined in Article 4 (9) CCC as the obligation on a person to pay the import duties or the export duties which apply to the imported or exported goods under the community provisions in force. First, the cases where the customs debt incur will be discussed in the light of the CCC, and the impact of the incurrance or extinguishment of the customs debt on VAT

⁹ Andrew Rimmer, *Trading Places? VAT and Customs Treatment of Imports, Exports and Intra- EC Trading*, p. 40, Spiramus 2010.

¹⁰ Article 30 CCC, method of valuation.

¹¹ See Case C-354/09 *Gaston*, paragraph 27.

¹² REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code, recast, Article 70 (3).

on importation, will be shown through case-law and the relevant EU legislations.

In Article 201, the CCC states the circumstances in which the customs debt arise. According to that Article, customs debt on importation incur through the release of the imported goods liable to import duties for free circulation, or by placing of such goods under the temporary importation procedure with partial relief from import duties. The incurrance of customs debt occur at the time of the declaration of the imported goods has been accepted.¹³

Other circumstances that give arise to customs debt will be discussed in the following section.

2.1.1 Unlawful introduction of goods

With regard to Article 202 of CCC, the customs debt shall be incurred on the importation of goods when they have been unlawfully introduced into the customs territory of the Community, in violation of the provisions of Articles 38 to 41 and Article 177. The time of the incurrance of the customs debt shall be the time when the goods are unlawfully introduced.

Article 202 CCC states, a person shall be considered liable to pay the import duties for the goods which have been unlawfully introduced. According to that same Article, the debtor shall be the person who introduced or participated in introducing the goods unlawfully and any persons who hold the goods in question or who were aware or should have been aware at the time of acquiring the goods that they had been introduced unlawfully to the community.¹⁴

The consequence and the impact of that situation on the customs duties and import VAT in depth discussion takes place below in the coming chapter with a comparison between the imported goods that have been unlawfully introduced, which in its nature are legal goods, and illegal or prohibited goods.

2.1.2 Unlawful removal of goods from customs supervision

Unlawful removal of goods from customs supervision means any act or omission which result in preventing, if only for a short time, the competent customs authority from achieving access to goods under customs supervision and from practicing its obligations required by the customs regulation.¹⁵ Under Article 203 CCC, the incurrance of customs debt for importation shall

¹³ COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, Article 201 (2)

¹⁴ COUNCIL REGULATION (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, Article 202 (2) (3)

¹⁵ See the judgment of case C-273/12 *Harry Winston*, paragraph 29

be incurred when the concept of unlawful removal of such goods from customs supervision occur. The customs debt is incurred at the time when those goods are removed from customs supervision. The person who is liable to pay the duties (the debtor) is any person who removed or participated in such removal of the goods and being aware or should have been aware that the goods had been removed unlawfully from the customs supervision.

In addition to that, the debtor can be any person who held the goods in question and who was aware or should have been aware at the time of acquiring the goods, that those goods had been unlawfully removed from the customs supervision and the person who is responsible to fulfil the obligations arising from temporary storage of the goods or the use of the customs procedure, but this situation will not be discussed in details in relation of VAT, because it is not the main issue of this paper.

2.1.3 Non-fulfilment of the obligations and non-compliance with the conditions

Article 204 CCC states that failure to fulfil obligations and the conditions connected with different customs procedures give rise to customs debt to be incurred, under circumstances other than those referred to in Article 203 if it is not established that those failures have no significant effect on the correct operation of the temporary storage or the customs procedure in question. The customs debt incur at the time when the failure had been committed or when non-compliance with the conditions that are governing the placing of the goods have been met according to Article 204 (2) CCC. Under Article 204 (3) CCC, a debtor is considered to be

“the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed, or to comply with the conditions governing the placing of the goods under that procedure.”

However, a comparison between Articles 203 and 204 and the impact thereof which examines the incurrance of customs debt and so VAT under those two Articles will be discussed in the next section and chapter 2 in the light of ECJ decisions.

2.1.4 The consumption and disappearance or use of goods in a free zone or a free warehouse

The customs debt incur through the consumption or use of goods, which are liable to import duties, in a free zone or a free warehouse according to Article

205 (1) CCC. The disappearance of goods and where the disappearance cannot be justified to the satisfaction of the competent customs authorities, the goods may then be regarded as consumed or used goods in the free zone or the free warehouse. Under the same Article subparagraph (2), the debt shall be incurred at the time when the goods are consumed or used. According to subparagraph (3) the debtor is the person who consumed or participated in consuming or using the goods, or person who was aware or should have been aware that the goods were being consumed or used under conditions other than those laid down by the legislation in force.

The next section deals with the difference between unlawful removal and failure to comply in relation to the incurrence of customs debt and VAT.

2.2 The difference between Article 203 CCC and Article 204 CCC with regard to customs duties and VAT

As it is mentioned above under subtitles 2.1.2 (unlawful removal) and 2.1.3 (non-fulfilment of the obligations and non-compliance with the conditions), they are both described under CCC to give rise to customs debt. The objective of those Articles are to prevent the risk of the presence, on the customs territory of the European Union, of non-Community goods, in which those goods will end up forming a part of the economic networks of the Member States without having been cleared through customs.¹⁶ It might be seen that those two Articles are similar. However, it is very important to distinguish between them, for the purpose of import duties and import VAT.

The similarity between them is that both Articles give rise to a custom debt as it is described in CCC (Article 203 and 204). Thus, some differences between the two Articles exist in the impact they have on the incurrence of customs debt and hence import VAT.¹⁷ One of the main differences is the range of the debtor. For unlawful removal the range of the debtors are much broader than it is under failure to comply with obligations, with regard to the descriptions of the debtors under Article 203 and 204. As it is mentioned above the two Articles lead to customs debt and VAT.

However, not every failure to comply with the obligation give rise to customs debt. Failure to comply without significant effect lead to no customs debt is due nor import VAT. Under Article 859 CCIP it is listed that the failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure of goods from customs supervision within the meaning of Article 204 (1) CCC. The customs

¹⁶ See judgment of case C-28/11, *Eurogate*, paragraph 28, and case C-234/09, *DSV Road* [2010] ECR I-17333, paragraph 31.

¹⁷ Unlawful removal and failure to comply with obligations, Customs & Global Trade Newsletter, Deloitte, volume 1, number 1, 9 April 2013.

debt incur under Article 204 (1) unless the debtor establishes that the criterias set out in Article 859 CCIP are met or fulfilled.¹⁸

Such conditions under Article 859 CCIP do not exist for the unlawful removal of goods from customs supervision. Every unlawful removal of goods consequently ends directly in a customs debt (Article 203 CCC) and the goods are ceased to be covered by temporary importation arrangements and external transit arrangements, in which it will give arise to VAT to become chargeable (Article 71 (1) of the VAT Directive), regardless of the effect of such a removal, significant or insignificant.¹⁹

The concept of unlawful removal of goods from customs supervision is the same for the customs purpose and VAT purposes. The non-fulfilment of the obligations and non-compliance with the conditions does not lead to incurrence of the chargeable event for VAT purposes. However, VAT shall become chargeable in case that the non-fulfilment of the obligations and non-compliance with the conditions lead to the incurrence of customs debt as a result of the conditions set out under Article 859 CCIP are not fulfilled, within the meaning of the second subparagraph of paragraph 1 of Article 71 of the VAT Directive:

“However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, 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.”

The interpretation of unlawful removal and failure to comply in the light of the ECJs judgments and the future of the two concepts in UCC will be discussed below to indicate the importance of being qualified as one or the other. Therefore, the following section deals with the two terms from the ECJs perspective.

2.3 The findings of case C-28/11 Eurogate

This case concern the interpretation of Article 204(1) (a) CCC and the question, whether the delayed entry in stock records of information concerning the removal of goods from a customs warehouse constitute non-fulfilment of an obligation in which it then give arise to customs debt.

Eurogate has been authorised to operate a private customs warehouse since 2006. As the warehousekeeper, *Eurogate* took non-Community goods into its private customs warehouse, with the purpose of forwarding them outside the territory of the European Union. At the time of the removal of the goods from the customs warehouse, the customs declarations for their re-exportation were drawn up. During a customs inspection on 31 January 2007, it was established that the removals of the goods at issue were not entered in

¹⁸ Commission Regulation (EEC) No 2454/93 OF 2 July 1993 laying down provision for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, Article 860

¹⁹ Unlawful removal and failure to comply with obligations, Customs & Global Trade Newsletter, Deloitte, volume 1, number 1, 9 April 2013.

the stock records until 11 to 126 days after the removal took place, and were thus recorded late.

By a notice from 1 July 2008, the Hauptzollamt (Germany) took the view that the delay of entry in the stock record information concerning the removal of goods from a customs warehouse constitute non-fulfilment of an obligation, which give arise to customs debt within the meaning of Article 204(1) CCC, and *Eurogate* was considered to not meet the requirement of Article 859 of the implementing Regulation. Consequently, *Eurogate* was assessed for import duties.

Eurogate challenged the notice and brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg) claiming, that the delayed entries of the removals from the customs warehouse in the stock records do not constitute a failure to fulfil its obligations within the meaning of Article 204(1) (a) of the Customs Code inasmuch as, in accordance with Article 105 of the Customs Code and Article 530(3) CCIP, the obligation to record removals in the stock records has to be fulfilled only after the discharge of the customs warehousing procedure.

The referring court has doubts concerning the interpretation according to which the non-fulfilment of the obligation to immediately enter the removal of goods in the stock records gives rise to a customs debt. Therefore, the court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling on a proper interpretation of Article 204(1) (a) CCC,

“(…) does infringement of the obligation, in the case of non-Community goods which were in the customs warehousing procedure and have been assigned a new customs approved treatment or use upon discharge of that procedure, to record the removal of the goods from the customs warehouse in the appropriate computer program forthwith upon discharge of the customs warehousing procedure – rather than considerably later – cause a customs debt to arise in respect of the goods?”²⁰

The ECJ stated that customs warehousing procedure allows storage in a warehouse of non-Community goods with a suspension of import duties on those goods under Article 98 (1) (a) CCC. However, to benefit from such a procedure, certain obligations should be met which allow the customs authorities to prove the state of the stock at any time, in accordance with Article 529(1) of the Implementing Regulation. Among those obligations, the obligation to keep stock records of goods placed under the customs warehousing procedure, according to Article 105 CCC, is considered to be an essential obligation connected with the warehouse procedures.²¹

Eurogate argued that the obligation which it failed to fulfil falls to apply after the discharge of the customs procedure in the issue of the main proceeding does not constitute a substantive obligation connected with the

²⁰ See judgment of case C-28/11, paragraph 24.

²¹ See judgment of case C-28/11, paragraph 27, and the court referred to Case C-402/10 Groupe Limagrain Holding [2011] ECR I0000, paragraphs 33 and 37.

customs warehousing procedure, so that its non-fulfilment is simply customs irregularity.²²

With regard to that, the ECJ referred to case C262/10 *Döhler Neuenkirchen* [2012] ECR I0000, paragraph 38, and stated that there is no provision of the Customs Code or its Implementing Regulation to differentiate between an obligation which must be carried out before the discharge of the relevant customs procedure and an obligation which must be carried out after such discharge, or between a principal and secondary obligation with regard to the incurrance of customs debt within the meaning of Article 204 CCC.²³ As AG N. Jääskinen noted in point 47 of his opinion, that the responsibility to pay customs duties in the case at issue is not a criminal penalty, but the consequence of a fulfilling the conditions required for obtaining the advantage set out in customs warehousing procedure have not been met.²⁴

As the ECJ held that the delay of entry in the stock records is not contained within the list under Article 859 CCIP of failure is to be considered to have no significant effect on the correct operation of the customs procedure.²⁵

The ECJ answered the question referred to it in the case at issue as

“(…) Article 204(1) (a) of the Customs Code must be interpreted as meaning that, in the case of non-Community goods, non-fulfilment of the obligation to enter the removal of the goods from the customs warehouse in the appropriate stock records, at the latest when the goods leave the customs warehouse, gives rise to a customs debt in respect of those goods, even if they have been re-exported.”²⁶

In that case the ECJ interpreted the non-fulfilment broadly by not distinguishing between the requirements which must be carried out before the discharge of the warehouse customs procedure and the requirements which must be carried out after the discharge.

2.4 The impact of case C-480/12 X BV

This request for a preliminary ruling concerns the interpretation of Articles 203 and 204 CCC, and also the interpretation of Article 7 of the Sixth Council Directive 77/388/EEC of 17 May 1977 (Article 30 VAT Directive). In which X has placed non-Community goods (diesel engine) under the customs procedure (external transit). However, the time limit to present the goods to Customs was not observed, meaning that the customs procedure was not done in accordance with customs procedures in question.

The Supreme Court of the Netherlands referred two questions to the ECJ. First question is whether or not observing of the time limit of the

²² See judgment of case C-28/11, paragraph 30.

²³ See judgment of case C-28/11, paragraph 31.

²⁴ See judgment of case C-28/11, paragraph 32.

²⁵ See judgment of case C-28/11, paragraph 33.

²⁶ See judgment of case C-28/11, paragraph 35.

customs procedure under Article 356(1) of the Implementing Regulation or on the location of the goods during the period concerned, constitutes an unlawful removal, within the meaning of article 203 CCC, or whether it is a failure to comply with obligations under the transit procedure, as described in article 204 CCC. Second, must the Article 10 of the Sixth Directive (Article 71 VAT Directive), be interpreted as meaning that VAT is chargeable when a customs debt is incurred exclusively on the basis of Article 204 of the Customs Code?²⁷

In answering the first question the ECJ stated, that the situation at issue must be examined first in the light of Article 203 CCC in which there was an unlawful removal of goods, if the answer was in negative then it is likely that Article 204 CCC apply.²⁸

The reason that the ECJ gave the precedence for Article 203 over Article 204 CCC, is that the latter provide that the customs debt shall incur in circumstances other than those covered by Article 203 CCC.²⁹ In that regard, the ECJ referred to case *Liberexim* C-371/99 paragraph 56, and case C-300/02 *Honeywell* paragraph 20 as AG stated in his opinion point 42 and 43, that Article 203 CCC should apply in case of the disappearance of the goods caused a risk upon entry of the goods into the economic network of the EU³⁰, which is not the case at issue.

Therefore, the ECJ founded that the view by the referring court was unthinkable, and that Article 203 CCC may apply in the situation at issue. Accordingly, the ECJ examined the fact for that case within the meaning of Article 204 (1) (a) CCC.³¹ The ECJ reached the decision that Articles 203 and 204 CCC, read in conjunction with Article 859(2) (c) CCIP, must be interpreted as meaning that solely exceeding the time limit for presentation, set under Article 356(1) CCIP, does not lead to a customs debt being incurred in result of unlawful removal the goods in question within the meaning of Article 203 CCC.

However a customs debt being incurred on the basis of Article 204 CCC and a customs debt could be waived if the interested parties supply to the customs authorities information, on the reasons for exceeding the time-limit set under Article 356 CCIP or on the location of the goods in question, during the time which elapsed between that time limit and the time at which they were actually presented at the customs office of destination.³²

With regard to the second question, the ECJ interpreted Article 10 (3) (Article 71 VAT Directive) as meaning that VAT is due where the goods are ceased to be covered by the arrangements of customs procedures, even where a customs debt is incurred solely on the basis of Article 204 CCC, as amended by Regulation No 648/2005.³³

²⁷ See the judgment of case C-480/12, paragraph 29.

²⁸ See the judgment of case C-480/12, paragraph 29, the ECJ referred to *Hamann International* C-337/01, paragraph 30.

²⁹ Unlawful removal and failure to comply with obligations, *Customs & Global Trade Newsletter*, Deloitte, volume 1, number 1, 9 April 2013.

³⁰ See the judgment of case C-480/12, paragraph 35.

³¹ See the judgment of case C-480/12, paragraph 38.

³² See the judgment of case C-480/12, paragraph 45.

³³ See the judgment of case C-480/12, paragraph 55.

Issues that arise from that case

- The broad interpretation of the concept of unlawful removal of goods in which it would have an impact on the application of Article 203 CCC.

The ECJ interpreted the term unlawful removal as

“covering any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the Customs Code”.³⁴

And it followed that the goods remained unknown to the customs authority for more than two weeks, which it is not a short time according to AG and the ECJ.³⁵

- Article 203 CCC override Article 204 CCC and Article 859 CCIP

Even the exceeding of the time limit is listed under Article 859 CCIP which implement Article 204 CCC, as an act with no significant effect on the correct customs procedures, this time-limit was held by the concept of removal from the customs supervision.³⁶ This result in that this act will not be examined under Article 204 CCC and its implementing Article 859 CCIP.

- Article 204 CCC and the incurrence of import duty and import VAT

Here the ECJ in its interpretation of Articles 203 and 204 CCC with regard to customs duty and VAT, that the application of Article 203 (removal of goods) will result in customs duty and will therefore be directly incurred and hence VAT. But the application of Article 204 CCC will not result in incurrence of customs duty and VAT directly, if a person who should be the debtor proved that the non-fulfilment had no significant effect in accordance to Article 859 CCIP, on the correct customs procedures. That give arise to the importance of the distinguishing between Articles 203 and 204 CCC for the industries and importers.³⁷

2.5 The future of Articles 203 and 204 CCC in the UCC

The two articles on the incurrence of a customs debt for imported goods have been combined into one article. The distinction between a customs debt arising from Article 203 CCC (unlawful removal) and 204 CCC (failure to comply), will be combined into one Article³⁸ Under Article 79 (1) UCC, the incurrence of customs debt shall occur if one of the non-compliance with any

³⁴ See the judgment of case C-480/12, paragraph 34.

³⁵ See the judgment of case C-480/12, paragraph 35.

³⁶ See the judgment of case C-480/12, paragraph 42.

³⁷ Unlawful removal and failure to comply with obligations, Customs & Global Trade Newsletter, Deloitte, volume 1, number 1, 9 April 2013.

³⁸ Unlawful removal and failure to comply with obligations, Customs & Global Trade Newsletter, Deloitte, volume 1, number 1, 9 April 2013.

of following, which are laid down in the customs legislation, happened to be met:³⁹

One of the obligations regarding the introduction of non-union goods into the customs territory, is the removal of such goods from the customs supervision and disposal of that goods in the customs territory (Article 79 (1) (a) UCC).

The end-use of goods within the customs territory of the Union (Article 79 (1) (b) UCC).

A condition governing the placing of non-Union goods under a customs procedure or the granting, by virtue of the end-use of the goods, of duty exemption or a reduced rate of import duty (Article 79 (1) (c) UCC).

The exhaustive list under article 859 CCIP, which provide for non-compliance have no significant effect on the correct procedures laid down in the community legislation within the meaning of Article 204 CCC, resulting in waiver of the customs debt and VAT will not become chargeable as it was mentioned in the preceding chapter. However, this exhaustive list which in fact distinguish the Article 203 CCC from Article 204 CCC, as it apply only to acts that fall under Article 204 CCC. On the contrary, under Article 124 (1) (h) (i) UCC⁴⁰, relief of customs duty shall be applicable in cases where a customs debt is incurred according to Articles 79 or 82 of this Regulation, if the failure which led to the incurrence of a customs debt, did not establish an attempt of fraud.

The Delegation Acts of the UCC, Article DA-III-4-01 (1) states the exhaustive list, which have no significant effect on the procedures of the customs, concerning temporary storage, for the purpose of Article 124 (1) (h) (i) of the Code.⁴¹ In relation to this list, Article 126 of UCC empower the EC to implement delegated acts, to determine the list of failures with no significant effect on the correct procedure of the customs concerned and in respect to Article 124(1) (h) (i).⁴²

The changes under the UCC, in respect to Articles 203 and 204 of CCC, will have an impact on business and industries that are engaged in importing goods, which are stored under temporary storage and warehousing. The impact of being classified as removal of goods from the customs supervision or non-compliance with the customs procedures, will not be crucial under the new rules of the UCC. As it seems, from the provisions of the UCC, concerning the incurrence/extinction of the customs debt, the notion of removal of goods from the customs control will not give the same result as it does under the CCC.

³⁹ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code. OJ L 269, 10.10.2013, Article 79 (1).

⁴⁰ REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code, Article 124 (1) (h) (i).

⁴¹ TAXUD/UCC-DA/2014-4 of 04 March 2015, supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council with regard to detailed rules of specifying some of the provisions of the Union Customs Code.

⁴² Article 126 of UCC

The direct chargeability of the customs debt and import VAT that arise, when an act is caught by the concept of removal of goods from the customs control, will not take place under the application of the UCC's provisions. The relief or the extinction of the customs debt under Article 124 (1) with conjunction of the exhaustive list under the DA, do not differ between the concepts of non-compliance and removal of goods from the customs control, in regard to the applicability of the extinctions' provisions and the exhaustive list.

After putting forth the explanation of the situations of the incurrance of customs debt and the link between the import duties and VAT, the discussion continues in the next chapter, on whether the that link will still exist with regard to stolen, unlawful (illegal) and unlawful introduction of goods.

3 Customs debt and VAT on stolen, illegal and unlawful introduction of goods

3.1 Stolen goods

The discussion of this matter will take place through the analysis of the judgments of case C-435/03 *America Tobacco* and C-273/12 *Harry Winston*. The latter will be discussed in a comparable way with the first mentioned case. Therefore, in the regard that, it would be reasonable to begin with the *Harry Winston* case first.

In case C-273/12 *Harry Winston*, concerning the theft of jewellery, placed under customs warehousing arrangements, by armed robbery on 6 October 2007. On 16 November 2007, the French customs administration informed the taxpayer that VAT and customs duties were due on the value of €20 million of merchandise jewellery. The authority treated the theft of the goods at issue as an irretrievable loss within the meaning of Article 206 CCC, which result in exemption if the trader proved that the theft was the result of force majeure.

In this situation, the referring court asked the ECJ two essential questions on whether *Harry Winston* was liable to pay the customs duties and VAT. First question was whether the theft of goods placed under customs warehousing arrangements constitute loss of goods and a case of force majeure, within the meaning of Article 206 CCC, in which no customs debt arise? Second question is whether the theft of goods at issue give arise to the chargeable event for VAT purpose in regard to Article 71 of the VAT Directive?⁴³

The ECJ with regard to the first question stated that Article 206 CCC only apply in situations, where the customs debt was incurred in accordance with Articles 202 or 204 CCC.⁴⁴ The ECJ referred to the same approach of the above mentioned cases, where the situation should be examined first in the light of Article 203 CCC and if the theft has been caught by the concept of unlawful removal, then it is not possible that Article 204 CCC will apply to this case.⁴⁵ In that regard, the ECJ depend on the interpretation of the term unlawful removal and referred to previous case-law, in which the customs authorities could not get access to the goods placed under the customs supervision, where it will lead to the application of Article 203 CCC and customs duties will be due, which was the situation in case of theft.⁴⁶

Now for the chargeable event of VAT, which it was the second question referred to the ECJ. Under Article 70 VAT the chargeable event on importation occur when the goods are imported. However, first paragraph Article 71 (1) of the VAT Directive state that the chargeable event occurs at

⁴³ See judgment of C-273/12 *Harry Winston*, paragraph 23.

⁴⁴ See judgment of C-273/12 *Harry Winston*, paragraph 26.

⁴⁵ See judgment of C-273/12 *Harry Winston*, paragraph 28, when the ECJ referred to Case C-337/01 *Hamann International* [2004] ECR I-1791, paragraph 30.

⁴⁶ See judgment of C-273/12 *Harry Winston*, paragraph 29.

the time when the goods cease to be covered by the customs warehousing arrangements.⁴⁷

The ECJ relied on the second subparagraph of the above mentioned Article, which provide that for imported goods to be subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event occurs and the tax becomes chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable. That gives indication to that the chargeability of VAT is linked with the incurrence of the customs duties.⁴⁸ This resulting in that VAT become chargeable at the moment of the theft of those goods pursuant to the second subparagraph of Article 71 (1) VAT Directive, as an automatic result of those goods had been subject to customs duties within the meaning of Article 203 CCC,⁴⁹ as the ECJ ruled in that case.

After putting forth the description of what happened in the *Harry Winston* case, it seems to be that this judgment is unconceivable, and jeopardized the characteristics of import VAT, within the meaning of Article 2 of the VAT Directive, which state that the transactions shall be subject to VAT, supply of goods within the MSs by a taxable persons, supply of service, intra-community acquisitions and importation of goods. But it appears to be that the ECJ treated the theft as a taxable supply for VAT purpose. The parallel nature of import duties and import VAT has been noted, however this parallelism should not be absolute parallelism, with regard to the second subparagraph of Article 71 (1) of the VAT Directive.

The commentary and the criticism of that decision will be given in a comparable study between this decision and the decision in *America Tobacco* case with an over view of the impact of *Harry Winston* case in the author's view, in the next subtitle.

3.1.1 Theft does not constitute a taxable supply

In case C-435/03 *America Tobacco*, which concerns theft of goods from a customs warehouse in Belgium. Facts concerning this case is that Newman operates a tax warehouse in Antwerp, where manufactured tobacco is produced and packaged by *BATI*, who is the owner of the goods. On December 1995, 29 January 1996 and on 14 and 15 June 1998 the goods were stolen and were reported to the police. The Belgian customs authority assessed that *Newman* had to pay excise duty and VAT on the missing goods. *Newman* paid the duties and *BATI* subsequently paid back the sum.

Newman and *BATI* challenged the Belgian state and brought action against it at the Antwerp court (court of the first instance), to get the sum paid back. The Belgian court although dismissed the action and stated that the excise duty was due on the missing goods at the issue, and hence was VAT.⁵⁰ *Newman* and *BATI* appealed against this decision to the Court of Appeal, Antwerp. Here it was found that there was a need to examine whether or not the theft constituted a supply of goods within the meaning of the

⁴⁷ See judgment of C-273/12 *Harry Winston*, paragraph 38.

⁴⁸ See judgment of C-273/12 *Harry Winston*, paragraph 40.

⁴⁹ See judgment of C-273/12 *Harry Winston*, paragraph 40.

⁵⁰ See judgment of C-435/03 *America Tobacco*, paragraph 17.

Directive, therefore, the court decided to stay the proceedings and refer five questions to the ECJ for a preliminary ruling.

The referring court asked the ECJ whether the circumstances (theft) at issue can be regarded as a supply of goods within the meaning of the Directive, and if these goods are subject to VAT and excise duty.⁵¹

The ECJ noted that the theft of goods does not give rise to any economic benefits for the victim of the theft, therefore it cannot be considered as a supply of goods for consideration within the meaning of Article 2 of the sixth directive (Article 2 of VAT Directive). Moreover, the notion of supply of goods under the Directive does not cover the theft of goods.⁵²

The court went further and interpreted the concept of supply of goods as the transfer of rights of disposal of tangible property as owner. Accordingly, the theft where one party is not authorised to transfer the ownership of the tangible property to himself, but retain the property without a permit from the owner, cannot be regarded as a supply of goods. The disposal of the ownership of the goods by theft from the victim to the thief does not result in allowing him to dispose the ownership of the goods, under the same conditions as their owner (the victim).⁵³

From the above mentioned analysis, it is clear that the ECJ answered the referring courts questions and stated in its decision that the theft of goods cannot be regarded as a supply of goods for consideration within the meaning of Article 2 of the Sixth Council Directive 77/388/EEC of 17 May 1977 (now Article 2 of the VAT Directive), thus does not give rise to VAT.

3.1.2 Criticism of the link

The author believe that the theft does not constitute a disposal of the ownership of stolen goods because those goods, which have been involuntarily lost because of the robbery, this however does not result in that *Harry Winston* loose the status of being the legal owner of the goods. Moreover, the thieves did not acquire the full right of the stolen goods, which also does not allow them to practice the right to dispose, use and transfer these goods as a full right of the legal ownership, in accordance with the legal rules of concerning the rights of ownership.

This results in that *Harry Winston* legally still maintains ownership and should have the full ownership over the goods, when the authority concerned finds them. This particular situation can be viewed as asset freezing, which results in that *Harry Winston* maintain the ownership of the goods with a postponed right to practice the role of an owner.

Therefore, it seems that the VAT is not payable on stolen goods within the meaning of Art. 2 of the VAT Directive. But what actually happened was that VAT was payable as a result of the link between the incurrence of the custom debt and VAT with regard to the importation of goods into the Community.

⁵¹ See judgment of C-435/03 *America Tobacco*, paragraph 22.

⁵² See case C-435/03 *America tobacco*, paragraph 33.

⁵³ See case C-435/03 *America tobacco*, paragraph 36.

This can undermine the principle of neutrality, as it is inherited in the common system of the VAT.⁵⁴ This can take place through the changes that occur in the customs legislation, as it will happen in the coming UCC, which will be applicable from 1st of May 2016,⁵⁵ with regards to the incurrence of customs debt.

As discussed previously above, Art. 203 and 204 will be combined into one article which is Article 79 of the UCC, in which the outcome would be different in regards to the incurrence of the customs debt. For instance, in a situation as the in the case of *Harry Winston*, it may in other words result by extinguishing customs debt and consequently VAT.

In the analysis of a situation such as the *Harry Winston* case, it may be treated differently for VAT purposes under the same provision of the VAT Directive, when the change occur on other EU legislation (Custom legislation of EU). This is the main reason for the authors' criticism of the link between the VAT Directive and the customs legislation, which undermines the principle of fiscal neutrality of the common system of the VAT Directive. This will consequently also make the principle appear doubtful.

Therefore, it is highly recommended by the author to remove the second sentence of Art. 71 (1) of the VAT Directive.

3.1.3 The principle of equality

When one compare the ECJs decision in case C-273/12 *Harry Winston* and in case C-435/03 *America Tobacco*, one might think that the decision in *Harry Winston* is unthinkable. The approach the ECJ took in *America Tobacco* and with its analysis of the theft of goods in which does not constitute a taxable supply and consequently does not give rise to VAT as it is mentioned above, it can apply to the *Harry Winston* case in which the theft of goods does not give rise to any economic benefits for the victim of the theft. Therefore, it cannot be considered as a supply of goods for consideration within the meaning of Article 2 of the VAT Directive.

The ECJ in *Harry Winston* stated that the circumstances in *America Tobacco* are not comparable with the situation in *Harry Winston*. The ECJ based this statement on the transaction in *America Tobacco* was supply of goods for consideration in which the theft of goods cannot be covered by the concept, but in *Harry Winston* the chargeable event for customs duty and VAT is on importation of goods.⁵⁶

The decision by the ECJ in *America Tobacco*, that theft of goods does not constitute a taxable supply for consideration, is binding in all MS. The ECJ established under Article 19 TEU, to ensure a uniform application of the

⁵⁴ See Case C-481/98 *Commission v. France*, paragraph 21.

⁵⁵

http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm (On visit 26 May 2015)

⁵⁶ See case C-273-12 *Harry Winston*, paragraph 43.

Union law in all MS.⁵⁷ Therefore, preliminary rulings made by the ECJ are binding legal sources in all MS of EU. Accordingly, the theft of goods does not constitute a taxable supply and thus fall outside the scope of VAT. The ECJ conduct the term goods in its judgment as general, in which result in that the finding apply to any stolen goods. Thus, the taxpayer who has lost his goods by the reason of theft, will not bear the burden of VAT. This seem to be the treatment of theft in MS.

But the taxpayer who import from outside of the Community, if his goods have been stolen from the customs supervision, is liable to pay customs duty and import VAT. This is the result of the ECJ judgment in the *Harry Winston* case. The taxpayers will in case of supply of goods and importation, be treated differently in regard to the theft of the goods.

The principle of equality, as a fundamental principle of EU law, require the similar situations to be treated similarly, and no person get a preferential treatment than any other person in a similar circumstance.⁵⁸ In addition to that, Article III of the General Agreement on Tariff and Trade (GATT) requires that the contracting parties or the member of that agreement, may not use internal measures to discriminate between domestic goods and those imported from members.⁵⁹ Similar situations should not be treated differently.

The question is, whether the taxpayer in *Harry Winston* is under similar circumstances as the taxpayer in *America Tobacco*? The stolen goods in *Harry Winston* was jewellery and in *America Tobacco* it was cigarettes. Two different goods, but what really should be analysed is the theft itself, since the ECJ ruled on the basis of this act. Accordingly, the treatment of the theft of goods should be treated similarly, whether those goods are imported or domestic goods. The ECJ in *America Tobacco* examined the notion of theft and stated that theft cannot constitute a supply of goods for consideration within the meaning of Article 2 of the VAT Directive.⁶⁰

The similarity in the two cases is the theft, which the ECJ ruled on. Therefore, it is logical to argue that the theft in the both situations (*Harry Winston* and *America Tobacco*) should be treated similarly. Moreover, the principle of equality and Article III of GATT should be applicable in regard to the theft of goods, whether those goods are Community goods or imported goods.

From the above mentioned analysis, the taxpayers in *Harry Winston* and *America tobacco* are under similar circumstances. The ECJ maintained a different treatment for the theft of imported goods and domestic goods. It would be more convenient, if the ECJ treated the theft independently in both of the circumstances.

As it is mentioned, under Article 71 (1) of the VAT Directive, that the chargeable event shall occur and VAT shall become chargeable only, when the goods are ceased to be covered by the arrangements referred to, in Articles 156, 276 and 277 of the VAT Directive in which goods are placed under

⁵⁷ Klaus-Dieter Borchardt, *The ABC of European Union law*, European Union, 2010, page 66, pdf version.

⁵⁸ Victor thuronyi, *Tax Law Design and Drafting*, volume1, International Monetary Fund 1996, chapter 2, legal framework for Taxation, page 4, pdf version.

⁵⁹ Article III of GATT.

⁶⁰ See case C-435/03 *America tobacco*, paragraph 42.

customs warehousing arrangements. One of the situations, which postpone the chargeability of VAT is the case of *Harry Winston*. The incurrance of customs duty and import VAT, as a result of the removal of goods from customs warehousing supervision due to theft, as it is mentioned under subtitle 3.1 stolen goods, the fact of *Harry Winston* case.

Nevertheless, the chargeable event occurred by the reason of theft, however it does not constitute any taxable transaction for the VAT purposes, nor is it covered by the concept of “taxable transaction”. It was rather the court to conduct this approach in *Harry Winston* case instead of concluding that the circumstances in *Harry Winston* are not the same in *America Tobacco*, holding that the first concern importation but the latter is concerning supply of goods for consideration.

It seems that paying VAT for unwillingly loss of goods, is in contrary to community law, in which it can jeopardise the principle of legality. Imposing VAT on the stolen goods, creates doubt around the existence of the legal link between the occurrence of the chargeable event and the right to claim VAT by the authority.

The fact is that the ECJ in its decision in *Harry Winston* did not clarify that issue, instead it rather linked the incurrance of VAT as a result of the incurrance of the customs debt as consequence of the second paragraph of Article 71 (1) of VAT Directive.

In determining whether *Harry Winston* is liable for paying VAT or not, the ECJ in its judgment held that the theft of goods from the customs warehousing give rise to customs debt within the meaning of Article 203 of CCC.⁶¹ Putting forth this finding beside the second paragraph of Article 71 (1) of the VAT Directive, will directly give rise to VAT, regardless of Article 2 of the VAT Directive as it does not cover the theft as a taxable transaction. This is what actually happened in *Harry Winston* judgment.

The next section deals further with the link, between the incurrance of customs debt and VAT for the unlawful introduction of goods into the community, to view to what extent VAT runs parallel with the incurrance or the extinguishment of the customs debt, when the smuggled goods are seized by the customs authorities.

3.2 Confiscation of smuggled goods into the Community

This section will deal with the result of introducing of goods unlawfully to customs authorities, or smuggling goods into the Community, which are seized and simultaneously or subsequently confiscated by the customs authorities. The impact of unlawful introduction of goods on the incurrance of customs debt and VAT.

The concept of unlawful introduction of goods has been defined under subtitle 2.1.1 as the unlawful introduction of goods into the customs territory of the community, in violation of the provisions of Articles 38 to 41 and Article 177 within the meaning of Article 202 of CCC, which result in the

⁶¹ See case C-273-12 *Harry Winston*, paragraph 33 and 34.

incurrence of customs debt. Accordingly, the goods are not necessary illegal in its nature, but they are legal goods, that have been introduced to the Community that are not in accordance and compliance with the rules.

The judgment in case C-230/08 *Dansk Transport og Logistik* (hereinafter DTL) dealt with the matter of confiscated goods by the customs authorities of Denmark, and the impact of this procedure on the incurrence of customs debt and VAT. This case concern the illegal introduction of cigarettes into the territory of the community.

The main issue of this case is that the Danish customs and tax authorities discovered on 2 May 2000, two lorries crossed the Danish border on board a ferry from Klaipeda in Lithuania, which was not a member of the EU at that time.⁶² The above mentioned authority discovered a large quantity of cigarettes concealed in the semi-trailers which were not itemised in the TIR (Transit International Routs) carnets.

Another lorry arrived by land was discovered on 11 October 2000 in Frøslev, a Danish town on the border between Denmark and Germany. The lorries were inspected by the Danish authorities and a large quantity of cigarettes were found hidden in the semi-trailer.⁶³ Those goods were transported from Germany without being discovered by the German authority. The Danish authority held back the goods in accordance with Article 83 of the Danish customs Code. The cigarettes were confiscated and destroyed between November 2004 and March 2005.

The Østre Landsret referred the issue to the ECJ for a preliminary ruling on three disputes relating to customs duty and VAT with regard to the smuggled cigarettes. The essential matter, that the referring court seeks, is whether there are customs debt, excise and VAT exist on the unlawful introduced goods at issue, and the place of taxation.

The ECJ had given its decision with regard to the referring courts questions, and stated that:

1. Goods which are held by the local customs and tax authorities when they are introduced into the customs territory of the Community in the area, where the first customs office is situated at the external border of the Community, and then destroyed by those authorities, without having left their possession, are covered by the concept of goods which are ‘seized and simultaneously or subsequently confiscated’ in point (d) of the first paragraph of Article 233 CCC, in which result in the extinguishment of the customs debt.⁶⁴
2. With regard to VAT and excise duties on those goods at issue, when they have been seized by the first customs office, is situated at the external border of the Community, they must be regarded as not having been imported into the Community and no VAT and excise duties shall be due. But once the goods are confiscated after they have gone beyond the first customs office which is located inside the

⁶² See case C-230/08 *Dansk Transport og Logistik*, paragraph 37.

⁶³ See case C-230/08 *Dansk Transport og Logistik*, paragraph 38.

⁶⁴ See case C-230/08 *Dansk Transport og Logistik*, paragraph 66.

territory, then chargeable event for VAT and excise duties occur and consequently they become due.⁶⁵

3. The customs and VAT duties will be collected in the MS, which situated at the external border of the territory of the community. But, the excise duty will be recovered by the tax authority in MS, which is located inside the territory of the community, provided that those goods are held for commercial purposes.⁶⁶

The chargeable event for customs duty and VAT on the importation of goods will occur or extinguished in parallel as a result of Article 71 of VAT.⁶⁷

The next subtitle will deal with illegal goods, which are imported into the community, whether the chargeable event on the importation of these goods occur for customs duty and VAT purposes and then consequently become due, or they will be extinguished and the importation of these goods will be regarded as if it have not been happened.

3.3 Illegal goods

This part will deal with the importation of illegal goods into the community, whether the illegal transaction of such supply give rise to customs debt and VAT or if this supply fall outside the scope of the community legislation. It is very important to distinguish between illegal supply that integrate into the economic channels of the territory of the community and compete with the similar goods that are supplied legally, and illegal transaction of goods that have special character, in which they are illegal in their nature and therefore forbidden in all member states as an ordinary crime.

With regard to the importation of illegal goods, which are not possible to confine to the economic channel of the community, since they are strictly prohibited in all member states of the Community, the ECJ dealt with this issue in its judgment in case C-343/89 *Witzemann*.

The case concern the introduction of counterfeit banknotes into Germany. In 1981, Mr *Witzemann* brought a consignment of counterfeit United States currency, of which he had taken delivery in Italy, into Germany. The Hauptzollamt assessed him for customs duty and VAT on the imported counterfeit banknotes.⁶⁸ The national court referred its question to the ECJ concerning customs and VAT treatment of the importation of counterfeit currency.

The ECJ in answering the referring courts question, referred to its judgment in case C- 221/81 *WOLF v. Hauptzollamt Düsseldorf* and case c240/81 *Einberger*, that the importation of drugs does not give rise to customs debt, unless they confine to economic channels strictly controlled by the competent authority for medical and scientific purposes.⁶⁹

⁶⁵ See case C-230/08 *Dansk Transport og Logistik*, paragraph 86 and 99.

⁶⁶ See case C-230/08 *Dansk Transport og Logistik*, paragraph 106.

⁶⁷ See case C-230/08 *Dansk Transport og Logistik*, paragraph 89.

⁶⁸ See case C-343/89 *Witzemann*, paragraph 4.

⁶⁹ See case C-343/89 *Witzemann*, paragraph 11.

Moreover, the ECJ stated that the import of drugs fall outside the objective guidelines of the Common Customs Tariff.⁷⁰ The approach the ECJ held in its previous judgments, was founded by the court as an appropriate approach in the case of counterfeit banknotes, which are forbidden in all member states with a requirement to treat the counterfeiting currency as an ordinary crime and to punish the participants in introducing those currency into the community.⁷¹

For the above mentioned statement the ECJ gave its answer to the referring courts questions in respect to the customs treatment of the importation of counterfeit banknotes, stating that:

“(…) Community law must be interpreted as meaning that no customs debt can arise upon the importation of counterfeit currency into the customs territory of the Community.”⁷²

With regard to the import VAT treatment of the counterfeit currency, the ECJ has already dealt with this matter in many cases, and stated that the incurrence of import VAT is linked to the incurrence of customs debt, since they arise on the importation of goods into the Community.⁷³ Consequently, for the reason set out above, the extinguishment of the customs debt on importation of counterfeit currency into the Community, the ECJ interpreted Article 2 of the Sixth Council Directive (now Article 2 of VAT Directive) as a meaning that no import VAT will be collected on the importation of counterfeit currency into the territory of the community.⁷⁴

After the discussion of customs and VAT treatment of the illegal supply which is forbidden in all member states, the next part of the section will discuss the treatment of the illegal supply, which integrate into the economic channel of the Community. With regard to this transaction, the ECJ had dealt with this issue many previous cases. One of the crucial judgment in respect to this supply is the judgment in case C-3/97 *Goodwin and Unstead*.

This case concern the supply of counterfeit perfume products. Mr *Goodwin and Mr Unstead* were accused of having purchased, manufactured and distributed counterfeit perfume products and furthermore having sold them without being registered for VAT in the United Kingdom.⁷⁵

The referring court ask the ECJ whether the supply of counterfeit perfumes constitute a taxable supply within the meaning of Article 2 of the Sixth Council Directive (now Article 2 of VAT Directive).⁷⁶ The ECJ took the approach that those products may compete with the perfume products on the lawful market, by integrating it into the economic channels of the Community unlike narcotics and counterfeit banknotes.⁷⁷ Accordingly, the ECJ gave its answer on the referring courts question and stated that:

⁷⁰ See case C-343/89 *Witzemann*, paragraph 13.

⁷¹ See the International Convention for the Suppression of Counterfeiting Currency (League of Nations Treaty Series, 1930-31 Vol. CXII, p. 371) and Article 3 of that convention in the judgment of case C-343/89 *Witzemann*, paragraph 14.

⁷² See case C-343/89 *Witzemann*, paragraph 16.

⁷³ See case C-343/89 *Witzemann*, paragraph 18.

⁷⁴ See case C-343/89 *Witzemann*, paragraph 21.

⁷⁵ See case C-3/97 *Goodwin and Unstead*, paragraph 3.

⁷⁶ See case C-3/97 *Goodwin and Unstead*, paragraph 7.

⁷⁷ See case C-3/97 *Goodwin and Unstead*, paragraph 15.

“(…) on a proper construction of Article 2 of the Sixth Directive, VAT is payable on the supply of counterfeit perfumes.”⁷⁸

Following the discussion, the introduction of illegal goods and showing the differentiating between illegal goods, which are prohibited because their specific nature and other illegal goods in which may be put on the market and competing with similar goods on the lawful market, it is worth to mention that the principle of neutrality functions as a basis for the common system of VAT Directive.⁷⁹ Furthermore, it shows that it has an impact on the different treatment of levying VAT on those transactions.

The next section will discuss the criterias that characterise the supply of illegal goods, taxable supply and whether VAT should be payable or not.

3.4 The principle of fiscal neutrality

The common system of the VAT Directive is based on the principle of fiscal neutrality.⁸⁰ The principle which reflect the general principle of equal treatment of VAT. This principle require that similar situations should be treated similarly.

The principle has been expressed by the ECJ in many judgments regarding the treatment of lawful and unlawful transactions for import VAT purposes. In reference to the ECJ judgments on the matter the levying of VAT, the principle precludes a general differentiation between lawful and unlawful transactions.⁸¹

However, because of the special characteristics of certain goods which are prohibited in all MS as an ordinary crime and give rise to criminal penalties, such as importation of narcotics. For that reasons, the ECJ ruled in the case C-289/86 *Happy Family*, that unlawful supply of narcotics and drugs are excluded from being subject to VAT within the meaning of Article 2 (1) of the Sixth Directive (now Article 2 of the VAT Directive). This is unless the drugs are not confined within economic channels strictly controlled by the competent authorities for use for medical and scientific purposes.⁸²

Nevertheless, in regard to the importation, that constitute unlawful transaction, and compete with the similar goods that are lawfully traded within the territory of the Community, as it was discussed in *Goodwin and Unstead* case, these goods cannot be excluded from the scope of VAT. Therefore, for VAT purposes, the principle of fiscal neutrality prohibits the different treatment between the unlawful transactions that compete with the lawful activities.⁸³

⁷⁸ See case C-3/97 *Goodwin and Unstead*, paragraph 16.

⁷⁹ See case C-3/97 *Goodwin and Unstead*, paragraph 9.

⁸⁰ Ben Terra – Julie Kajus, A Guide to the European VAT Directiv. 2.5 Fiscal neutrality, page 80

⁸¹ See case C-269/86 *Mol*, paragraph 18.

⁸² See the judgment in case C-289-86 *Happy Family*, paragraph 23.

⁸³ See the judgment in case C-283-95 *Fischer*, paragraph 22.

The interaction between the incurrance of customs debt and the liability to pay VAT, in regard to the importation of goods, is established in the VAT Directive in Article 71 (1), which allow MS to link the chargeable event and the chargeability of VAT on importation with the chargeability of customs duties.

The next chapter discusses the right to deduct VAT in situations where the imported goods are illegal or have been unlawfully introduced to the territory of the Community. A special focus will be put forth in the case of the incurrance of VAT on the stolen goods from the customs warehouse, as in the *Harry Winston* case.

4 The right to deduct VAT

The right to deduct input VAT arise when the deductible VAT become chargeable according to Article 167 of VAT Directive. This right is set out in Article 168 of VAT, in which it allow a taxable person to deduct the VAT due or paid in respect of his supplies, when the tax invoiced to him on goods and services that were supplied, acquired or imported by him. Article 168 of VAT Directive set out the conditions that limit the right of deduction on goods and services that are used for the purposes of taxed transactions.⁸⁴

In regard to the exempt activities or the use of the goods and services in private use, that do not fulfil the requirement set out in Article 168, no deduction of input VAT will be allowed, except if this tax constitute general costs used for the purpose of the overall economic activities.⁸⁵

The above mentioned overview of the right of deduction, will be the basis of the discussion of the right to deduct VAT, as in the situations that were discussed in the previous chapter, concerning the liability to pay VAT on the stolen goods, unlawful introduction and illegal transaction of goods into the community.

In situations of unlawful activities, such as the supply of narcotics and drugs, and unlawful introduction of goods that has been confiscated by the competent authority and which fall outside the scope of the VAT Directive, as discussed in the previous chapter, does not give rise to the chargeability of VAT. Accordingly, no deduction of VAT within the meaning of Article 167 and 168 of VAT Directive. However, unlawful transaction as in case C-3/97 *Goodwin and Unstaed*, and case C-283/95 *Fischer*, where the ECJ ruled that the chargeability of VAT occur on the transactions, therefore its assumed that the tax payer may lose the right to deduct VAT. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are allowed to claim repayment of the deducted sums retroactively.⁸⁶

Does *Harry Winston* have right to deduct VAT paid on the stolen goods from customs warehousing?

To answer this question, it is assumed that it is necessary to determine if the input VAT is used for the purpose of specific output transaction, if so, it will give arise for the deduction of VAT.⁸⁷ The fact of the matter is that *Harry Winston*, as it was demonstrated in the previous chapter did not make taxed output transactions. Accordingly, the direct and immediate link between the input transactions and the output transactions are not established.

⁸⁴ Article 168 of the VAT Directive.

⁸⁵ Ben Terra – Julie Kajus, A Guide to the European VAT Directiv. Chapter 17, Deduction, page 855 and 856, E-book

⁸⁶ See Case C-268/83 *Rompelman*, paragraph 24 and Case C-110/94 *INZO*, paragraph 24.

⁸⁷ Dennis Ramsdahl Jensen and Henrik Stensgaard, The direct and immediate link test regarding deduction of input VAT: a consumption-based test versus an economic-based test? Page 72.

Therefore, *Harry Winston* have no right to deduct the direct cost within the meaning of Article 168 of VAT Directive.

In a situation that *Harry Winston* had already deducted the input VAT prior of receiving the goods, and did not make output taxable supply. Under Article 185 (2) VAT Directive, the adjustment shall not be made in the in cases such as transactions remain unpaid in the case of deduction, or when the property have been lost or stolen and this proved or confirmed.⁸⁸

In case C-37/95 *Ghent Coal*, the ECJ stated that the right to deduct, when it has arisen, continues to be obtained, even if the planned economic activity has not given rise to taxable transaction.⁸⁹ The taxable person remains enjoying this right, where he has been not capable to make a taxable transaction because of reasons outside his control.⁹⁰

However, the second sentence of Article 185 (2) VAT Directive states that MS may require that the adjustment to be made when the transactions remain totally or partially unpaid or in the case of theft of a property.⁹¹

The ECJ stated in *Ghent Coal* that the tax authority may claim repayment of the deducted sum, and the supply may be subject to the adjustment under detailed rules under Article 20 of the Sixth Directive (now Article 186 of the VAT Directive), lay down by MS to apply Articles 184 and 185 of VAT Directive.⁹²

It is assumed, that another alternative may apply in that case, which is to establish that the input VAT is used for the purpose of the overall economic activity, what is known as overhead cost. In that situation, we need to determine whether there is a direct and immediate link between the input transaction and the economic activity of the taxable person.⁹³

The ECJ in regard to the overhead cost stated in case C-408/98 *Abbey National* that:

“(…) their costs must be regarded as part of the economic activity of the business as a whole before the transfer. Any other interpretation of Article 17 of the Sixth Directive would be contrary to the principle that the VAT system must be completely neutral as regards the tax burden on all the economic activities of a business provided that they are themselves subject to VAT, and would make the economic operator liable to pay VAT in the context of his economic activity without giving him the possibility of deducting it (see, to that effect, *Gabalfrisa*, paragraph 45).”⁹⁴

For the foregoing discussion, it is assumed that *Harry Winston* may have had the right to deduct the VAT that was incurred on the stolen goods.

⁸⁸ Article 185 (2) of VAT Directive.

⁸⁹ See case C-37/95 *Ghent Coal*, paragraph 19.

⁹⁰ See case C-37/95 *Ghent Coal*, paragraph 20.

⁹¹ Article 185 (2) of VAT Directive.

⁹² See case C-37/95 *Ghent Coal*, paragraph 21.

⁹³ Dennis Ramsdahl Jensen and Henrik Stensgaard, The direct and immediate link test regarding deduction of input VAT: a consumption-based test versus an economic-based test? Page 73.

⁹⁴ See the judgment of case C-408/98 *Abbey National*, paragraph 35.

5 Conclusion

This study has reached to a conclusion, that the customs debt and import VAT are aligned with each other, in respect of importation of goods into the Community. This link exists between the incurrence of customs duties and VAT due to several reasons. Firstly, both customs duty and import VAT arise on the imported goods into the territory of the Community.⁹⁵ Secondly, art. 71 (1), in particular the second sentence, give the MS the right to relate the chargeability of import VAT to those laid down for customs duties.⁹⁶

Article 203 of CCC concerns the incurrence of customs debt, through unlawful removal of goods from the customs supervision, and Article 204 of CCC which conclude, that the customs debt incur through non-compliance with the customs procedures, in accordance with the conditions connected with different customs procedures.⁹⁷ The purpose of the two Articles is to prevent the risk of the existence on the customs territory of the European Union of non-Community goods. Consequently, these goods can end up integrating into the economic networks of the MS, without having been cleared through customs.⁹⁸

However, to be classified as one or the other, it may give a different result regarding the incurrence of customs debt and VAT.⁹⁹ Unlawful removal from the customs supervision give arise to customs debt and hence VAT. On the other hand, the application of Article 204 of CCC does not give arise to customs debt directly, if the failure to comply has no significant effect on the customs procedure within the meaning of Article 859 CCIP. Nevertheless, the difference between the applicability of those two Articles will not take place in the future under the UCC. Both Article have been combined under Article 79 of UCC, reading it in conjunction with Article 124 (1) (h) (i) of UCC which state that:

“(h) where the customs debt was incurred pursuant to Article 79 or 82 and where the following conditions are fulfilled:

(i) the failure which led to the incurrence of a customs debt had no significant effect on the correct operation of the customs procedure concerned and did not constitute an attempt at deception; that the failure which led to the incurrence of a customs debt did not constitute an attempt at deception.”¹⁰⁰

⁹⁵ See case C-343/89 *Witzemann*, paragraph 18.

⁹⁶ See in that regard Article 71 (1) of VAT Directive and C-343/89 *Witzemann*, paragraph 18.

⁹⁷ See case C-273-12 *Harry Winston*, paragraph 27.

⁹⁸ See judgment of case C-28/11, *Eurogate*, paragraph 28, and case C-234/09, *DSV Road* [2010] ECR 17333, paragraph 31.

⁹⁹ Unlawful removal and failure to comply with obligations, Customs & Global Trade Newsletter, Deloitte, volume 1, number 1, 9 April 2013.

¹⁰⁰ Article 124 (1) (h) (i) of the UCC.

Accordingly, the concept of removal and non-fulfilment or failure to comply with the conditions laid down in the customs legislation, will have an equivalent effect in regard to the incurrence/extinction of customs debt and hence VAT.

The exhaustive list under Article 859 CCIP, in which the list of non-compliance do not have a significant effect on the customs procedures, will have no presence in the same way under the UCC, as it is under the CCC. The exhaustive list in the DA will apply pursuant to Articles 79 and 82 of the UCC, if the conditions laid down under Article III-4-01 (1) of the DA, are fulfilled.¹⁰¹ Whether removal from customs supervision or non-fulfilment, give rise to customs debt, unless the debtor proves that those acts do not constitute an attempt of fraud, within the meaning of Article 124 (1) of UCC, reading it with conjunction with Article III-4-10 (1) OF the DA.

The ECJ ruled in the cases, discussed in this paper, on the incurrence of customs debt and import VAT. The court interpret the parallel nature between them. It seems from the ECJ's decisions, that the court examine the transactions under the Customs provisions, first to determine whether the customs duty is due or not, and accordingly, the chargeability of VAT.

In the light of foregoing discussion in chapter 3, regarding the smuggled goods into the Community, which have been seized by the competent authority will not give arise to customs debt and VAT become not payable, once the goods go beyond the first customs office in the territory of the Community as the ECJ ruled in case C-230/08 *Dansk Transport og Logistik*.

With regard to goods unlawfully introduced into the Community, they are not illegal in their nature, and can integrate into the economic channels of the Community, to compete with similar goods, give arise to the customs debt and the liability to pay VAT in accordance with the principle of neutrality, as the supply of counterfeit perfume products in case C-3/97 *Goodwin and Unstead*.

Illegal goods, which are prohibited in all member states as ordinary crimes and give rise to criminal punishment, as counterfeit banknotes in case C-343/89 *Witzemann* and the unlawful supply of narcotics and drugs in case C-289/86 *Happy Family*. Those transactions are excluded from being subject to VAT within the meaning of Article 2 of VAT Directive.

The link between the incurrence of customs debt and import VAT is not established because of the provisions that lay down the incurrence of customs debt in the customs legislation, but because of Article 71 (1) of VAT Directive in which allow MS to link the chargeable event and the chargeability of VAT on importation to the chargeability of customs duties on the imported goods into the Community. This link results in a situation such as in *Harry Winston* case, where stolen goods constitute a taxable transaction for VAT purposes, as a consequence of that link. Accordingly,

¹⁰¹ Article III-4-01 (1) of TAXUD/UCC-DA/2014-4 of 04 March 2015, supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council with regard to detailed rules of specifying some of the provisions of the Union Customs Code.

stolen goods from a customs warehousing are being subject to customs duty and import VAT.

Such a situation may be treated differently under the new rules in UCC, which do not differ between the concept of removal from the customs warehousing and non-compliance with the correct customs procedures. Consequently, an assumption has been made, that *Harry Winston* may be treated differently under the UCC. Resulting in that the customs duty would be extinguished, and there would be no liability to pay VAT. This although, depends on the conditions laid down in Articles 124 (1) (h) (i) and DA-III-4-01 (1) have been met.¹⁰²

The new changes under the UCC, in regard to the extinguishment of the customs debt, will have an impact on the business and industries that are involved in importation of goods into the territory of the Community. In other words, the apprehension of being caught by the concept of removal of goods from the customs supervision, will not have the same impact of the direct chargeability of customs duty.

¹⁰² See in that regard Article 124 (1) (h) (i) of REGULATION (EU) No 952/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 October 2013 laying down the Union Customs Code, and DA-III-4-01 (1) of TAXUD/UCC-DA/2014-4 of 04 March 2015, supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council with regard to detailed rules of specifying some of the provisions of the Union Customs Code.

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