Legal certainty concerning import value in Switzerland reestablished - Assessment of 100 million swiftly overruled by the Federal Supreme Court

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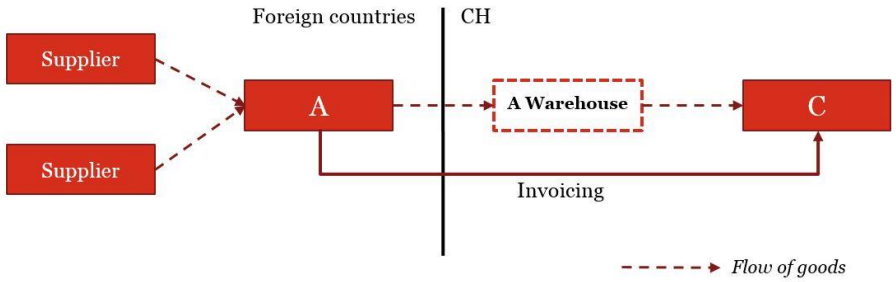
In understanding of the business impacts, the Federal Supreme Court clarified the uncertainty on determination of the import VAT value for foreign companies involved in supplies of goods to Switzerland resulting from the recent decision of the Federal Administrative Court.

Background

A., a purchasing company of C. group established outside of Switzerland, however registered for Swiss VAT purposes, was acquiring goods from foreign third party suppliers. The goods were shipped to a Swiss warehouse of A. from where those were subsequently sold to C. (a Swiss established and VAT registered distribution company of the C. group), or other third party customers.

For customs clearance, the import value of the goods declared by A. was based on the price invoiced by the foreign suppliers to A. (i.e. on the purchase price). Further to their investigation, the Swiss Federal Customs Authorities ("SFCA") claimed that A. underestimated the import VAT base, which should have been the sales price to C. minus 10%.



In the first instance, the Federal Administrative Court ("FAC") also denied determination of the import VAT value of the goods based on the price paid by the (foreign) importer to its foreign suppliers and supported the post-assessment of the SFCA of 100 mio CHF import VAT and almost 1 mio late interests. The position of the Court was held on slightly different grounds than the one of SFCA. The FAC ruled that (i) the transaction with foreign suppliers occurred already abroad as the importer had the power to dispose of the goods abroad since he was in charge of the transport of goods to Switzerland and therefore the purchase price paid by A. should not have been determinant for the import value, and (ii) it should have then been the market value, which however in the view of FAC corresponded to the value paid by the final Swiss customer to third party suppliers minus 10%. Thus in practice, FAC actually accepted for the case at hand that the value should have been the sales price to C. minus 10%, which was the original position of SFCA.

Decision of the Federal Supreme Court

The Federal Supreme Court ("FSC") overruled in its decision 2C_1079/2016 issued on 7. March 2017, the decision of the FAC. In this surprisingly short period after the first instance decision, FSC held that the transaction relevant for the determination of the import VAT value is the transaction which led to the import, i.e. the price paid by A. to

its foreign suppliers and clearly not the market value related to the subsequent transaction with C., as at the moment of the import the contract with the final customer was not yet in place.

The FSC ruled that the fact who is the person in charge of the transport (i.e. supplier v. importer) has no impact on identifying the transaction relevant to determine the import VAT value of goods. Indeed, the FSC considered that the import value should be based on the agreement which gave rise to the transaction leading to import and that the transport is only a modality of the execution of the agreement.

The Court also considered that the characteristic feature of the purchase was the acquisition of goods abroad intended for sale in Switzerland and therefore the final destination was already known at the time of purchase from A. to their suppliers. Consequently, based on article 54, al.1, let. a of the Swiss VAT law which provides that import value is the consideration where goods are imported under sales or commission agreement (and not the market value), the Court ruled that such consideration is the purchase price paid by A. to its foreign suppliers.

This decision removes the uncertainty resulting from the previous position of Customs Authorities in this case and following decision of the FAC, and confirms our standpoint on this subject matter. Fortunately, the Federal Supreme Court brought back the clarity into operations of many businesses, which is not only in line with the Swiss VAT law but also with the international standards. The FSC decision removes a certain inequality between foreign and Swiss based importers and gives necessary comfort to (foreign) companies involved in similar supply chain scenarios for the purpose of their customs reporting obligations. Companies importing goods in Switzerland for further sale via their local stock should ensure that their reporting is in line with this final decision of the FSC. The federal customs, as well as tax authorities will now need to review their practice and amend written guidelines in order to align with the legal grounds.

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