Double Dip, when the application of EU Customs and VAT provisions lead to double taxation

By: **Werner Engelen, European Fiscal Studies, Erasmus University, Post-Master in Customs Law, 2015**

Table of contents

1. Introduction

While considering that within the European Union the VAT and Customs provisions are governed by the Treaty, Directives and (Implementing) Council Regulations one would expect that the provisions governing the VAT and Customs would work seamlessly together.

On a first glance this impression is reinforced by the fact that the EU VAT Directive caters for many provisions aiming at the elimination of the gaps between the two fields. As an example: article 6 of the EU VAT Directive[1] defines the territorial scope as there are differences between the Community as defined in the EU Treaty (articles 52 TEU[2] and 355 TFEU[3]), the Customs Territory (article 3 of the Council Regulation 2913/92/EC) and the VAT territory as defined in article 5 of the EU VAT Directive.

These differences can also be used at the Member States benefits as proven by the EU accession of Finland to the European Union. The boats sailing between Finland and Sweden were generating most of their revenue with the tax free sales on board of these ships. The accession of Finland would have meant that the sales on board would have become subject to VAT and excise duties, which would have significantly reduced the number of passengers (as quite a lot of passengers never left the ship upon arrival!) and with that the corresponding revenue. The solution was relatively simple as on their journey the boat would pass a group of islands known as the Aland Islands[4] being part of Finland. Upon accession these islands were explicitly excluded from the VAT territory[5] (article 6 (1) (d) of the EU VAT Directive) and ever since the boats now make a (obligatory) stop in order to secure the continuation of tax-free sales on board!

Another example is the provision in the EU VAT Directive[6] which requires Member States to provide for measures preventing double taxation in case of installation- or assembly supplies, a provision which upon face value sounds quite promising.

Unfortunately over the years cases have arisen where it became clear that not in all situations double taxation could be prevented. This double taxation not necessarily will lead to issues, as long as the buyer has full right on deduction of its input VAT. However when this is not the case, double taxation will occur and unless the respective Member States have introduced mitigating measures, one of the governing principles of VAT, known as the neutrality principle, will be jeopardized. As this thesis will show, this might not be the only issue as even managing the regular VAT compliance can become somewhat of a challenge.

Unfortunately the topic is too wide to capture all situations where double taxation could arise. Therefore the investigation and study has been limited to the following areas:

- ➔ situations, where non-Community[7] goods are sold prior to customs clearance within the EU. Since the moment of transfer of ownership can play a role, various scenarios will have to be considered varying from: transfer of ownership before the goods have arrived in the territory of the EU, upon arrival of the goods in the EU, while goods are

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, hereafter referred to as the EU VAT Directive
[2] Treaty on the European Union
[3] Treaty on the functioning of the European Union
[4] Total inhabitants are less than 30.000
[5] Article 6 (1) (d) of the EU VAT Directive
[6] Article 36 of the Directive 2006/112/EC
[7] Article 4 (8) of the Directive 2913/92/EC

stored in a customs warehouse within the EU and when goods are shipped under the external customs transit regime[8];

➔ situations where goods subject to importation would also include service elements, whereby for customs purposes the value of the services will need to be included, while for VAT purposes the services might be qualified as separate service.

I will conclude this thesis with some recommendations, from which I do hope that these will be considered by the European Commission as they may help achieving one of the objectives of the Treaty: ensuring a proper functioning of the internal market!

1.1 Double taxation, an issue?

One could argue whether double taxation in the field of VAT is an issue worth writing about. I do believe the answer to this is yes. It was with the first Council Directive on VAT[9] that various existing multistage tax systems were being replaced with a common VAT system, laying the foundation for our current system within the European Union. When looking at the preamble[10] of this Directive the following is written[11]: "replacing the various existing multistage tax systems for a VAT system guaranteeing with the highest degree of **neutrality**, whereby in every country similar goods bear the same tax burden irrespective of the length of the production or distribution chain". Obviously when the same goods at the same stage will be taxed twice the objective of the system is not met. In practice the issue might be somewhat smaller as most parties involved in the production or distribution chain will be entitled to recover the (double) VAT. However when the goods are acquired for taxed transactions whereby there is no full right on deduction of VAT or where Member States have explicitly excluded or limited the deduction on certain expense categories then a situation will arise where the neutrality of the system is at stake and the objective of the Directive will not be met.

2.1 Taxable transactions

In order to assess the possible situations where double taxation may arise, it is important to know what transactions are considered taxable. Article 2 of the EU VAT Directive determines the following four taxable transactions:

(1) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
(2) the Intra-Community acquisition of goods for consideration within the territory of a Member State;
(3) the supply of services for consideration within the territory of a Member State;
(4) the importation of goods.

In order to avoid conflicts in the right of taxation the EU VAT Directive has specific place of supply rules. In the subsequent paragraphs we will have a closer look at the place of supply rules and what possible situations could lead to double taxation.

[8] Also referred to as T1 shipments
[9] First Council Directive of 11 April 1967 (67/227/EEC)
[10] Paragraph 8 of the preamble to the first Council Directive on VAT
[11] The present tense is explicitly used as this Directive is still in force

2.2 Supply of goods for consideration

The place of supply for goods is dependent on whether the goods are being transported and whether they are subject to assembly or installation. In the latter case article 36 of the EU VAT Directive determines the place of supply to be there where the goods are installed or assembled. When no installation or assembly takes place and the goods are also not transported, article 31 of the EU VAT Directive determines the place of supply there where the goods are located at the moment the supply takes place. In other cases where goods are transported article 32 of the Directive determines the place of supply there where the goods are located at the time when the dispatch or transport of the goods to the customer begins.

In my opinion the EU VAT Directive does not allow for a lot of room for double taxation to happen. However in practice double taxation does occur, which predominantly is caused by different interpretation of the EU VAT Directive by the different Member States. I will share an example to illustrate this:

When a sale would not only include the supply of goods but would include certain service elements, which can be qualified as assembly or installation services, the question arises whether these service elements are sufficient for a supply with installation to have taken place. Apparently different Member States apply different rules[12] in order to determine this. When considering a supply of goods by a Belgium supplier, including services in relation to installation or assembly amounting to 55% of the total cost price, provided for a Belgium customer while physically performed (in the sense of assembly or installation) in Spain, than this transaction will be taxable in both Belgium as a provision of services as well as in Spain as a supply with installation[13].

2.3 Intra-Community acquisition of goods for consideration

Article 20 of the EU VAT Directive defines the intra-Community acquisition of goods as the acquisition of the right to dispose as an owner of movable tangible property dispatched or transported by or on behalf of the vendor or the person acquiring the goods in a Member State other than in which the dispatch or transport of the goods began. According to article 40 of the EU VAT Directive the place of acquisition is there where the transport or the dispatch of the goods ends. Interestingly article 41 of the EU VAT Directive introduces a double place of acquisition when the goods are acquired under a different EU VAT number than of the country where transportation ends. On this second so-called number-acquisition VAT is due in addition to VAT due in the country of arrival of the goods. This double taxation has been confirmed by the Court of Justice of the European Union in the joined cases X and Facet Training[14] as there does not exist a right on immediate deduction of the VAT due on the number-acquisition[15]. Relief for this double tax can only be obtained when either the simplified triangulation[16] will be applied or when the acquisition in the country of arrival has been accounted for. Beside this “planned” double taxation, which is encouraging the proper reporting in the country of arrival. I am of the opinion that EU VAT Directive does allow a lot

[12] According to the study performed by Bianca van Varik under the title “De behandeling van installatieleveringen binnen de EU, tijd voor verandering”, Europese Fiscale Studies 2011/2012.
[13] It is rather interesting that Member States have introduced rules in terms if the minimum percentage of goods used in order to conclude on an installation supply as n the case before the Court of Justice EU, Aktiebolaget C-111/05, the Court concluded that even if the price of the goods make up 80-85% of the cost price, this only can be an indication.
[14] C-536/08 and C-539/08
[15] Paragraph 42: “…those transactions cannot be regarded as giving rise to ‘right to deduct’ within the meaning of article 17th of the Sixth Directive”
[16] Article 42 of Directive 2006/112/EC

of room for double taxation to happen. Again double taxation can always occur, when different Member States do have different interpretations[17]. I will share an example to illustrate this:

When goods are sold by A to B while to goods are transported by B from EU-country A to EU- country B, while making a stop-over in EU-country C this stopover, depending on the time, can in some Member States be seen as creating a separate leg in the supply chain. This will have the consequence that acquisition VAT needs to be accounted for in both country C (in which the stop-over has been made) as well as in country B.

2.4 The supply of services for consideration

The EU VAT Directive provides for a comprehensive set of rules in order to determine the place of supply. When dealing with taxable persons established within the EU the starting point[18] is for the services to be taxable in the country of the customer who is receiving the services. Exceptions do apply for services related to immovable property, passenger transport, restaurant- and catering services, short term hiring of means of transportation and the admission to cultural-, artistic, sporting, scientific, educational, entertainment and similar events.

The Directive 2008/8/EC[19],which came into force on January 1st 2010 significantly simplified the place of supply rules for B2B[20] transactions. Before this date the Court of Justice of the European Union issued a significant amount of rulings, whereby the Court consistently decided that the objective of the place of supply provisions are firstly to avoid conflicts of jurisdiction, which may result in double taxation and secondly non-taxation[21].

The concept of prevention of double taxation and non-taxation is still embedded within the EU VAT Directive and explicitly mentioned in article 59a which allow Member States to consider services, which based upon the application of articles 44, 45, 56, 58 and 59 would be deemed to be outside the Community, to be situated within their territory if the effective use and enjoyment takes place within their territory. According to the information at my disposal[22] most Member States have taken upon this possibility.

Although the EU VAT Directive would, in the current wording, provide for a clear set of rules, interpretation of these rules does remain a potential source of concerns whereby double taxation could arise. Hereunder I will provide another example to illustrate this:

If A would enter into a lease agreement for goods made available by a lessor in country B the question arises whether the remuneration is for a provision of a service or a sale of tangible property. When the transaction is to be qualified as a service it will be taxable in country where A is established while otherwise it would be taxable in country B, where the goods were located when they were made available. The answer to this question will be dependent whether A has transferred the right to dispose as an owner of the leased goods[23]. Especially

[17] Paragraph 53 C-419/14 WebMindLicences Kft.
[18] Article 44 of the Directive 2006/112/EC
[19] Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services
[20] B2B stands for business to business
[21] Court of Justice European Union in paragraph 14 of Gillan Beach, C-114/05
[22] Paragraph 4.3.1 of the EU VAT Compass: Effective Use and Enjoyment in a Member State
[23] Court of Justice European Union in the case Shipping and Forwarding Enterprise Safe C-320/88 the Court ruled that “supply of goods” is a community concept and is independent of the local civil laws around the transfer of legal ownership

with lease agreements this seem not always easy to answer, leading to disparities between Member States how similar transactions are being qualified[24].

2.5 The importation of goods

Article 30 of the EU VAT Directive defines importation as the entry into the Community of goods which are not in free circulation within the meaning of article 24 of the Treaty[25]. Although this may sound fairly simple, there are differences between:

- the collective territories of the Member States and the EU territory (where the Treaty is applicable). For example the Faroe Islands are part of Denmark but are not part of the EU territory;
- the EU territory and the Customs territory. For example Heligoland in Germany is part of the EU territory but not of the Customs territory, while Monaco is part of the Customs territory but not of the EU territory;
- the Customs territory and the VAT territory. For example the Aland Islands in Finland are part of the Customs territory but not part of the VAT territory.

Often an importation in the Customs territory will coincide with an importation in the VAT territory (and import VAT will be due), but as shown above this will not always be the case. At the same time it can happen that for customs purposes no importation will take place, while import VAT is due. The latter is happening for goods from “third territories” and as such defined in article 6 of the EU VAT Directive[26].

Article 60 of the Directive defines the place of importation in the Member State where the goods are located when they enter the Community. Article 61 provides for a derogation where, upon entry into the Community the goods, not being in free circulation, are intended to (not exhaustively listed) be:

- presented to customs and where applicable placed in temporary storage;
- placed in a free zone or free warehouse;
- placed under customs warehousing arrangements or inward processing relief;
- placed under temporary importation arrangements with total exemption from import duty;
- placed under external transit arrangements.

In those situations the place of importation shall be the Member State within whose territory the goods cease to be covered by above arrangements or situations.

3.1 Combination of different taxable activities

As described in the previous paragraphs the EU VAT Directive seems to provide for sufficient provisions, which upon uniform application should prevent double taxation taking place. Most issues will arise when Member States have deviating opinions in terms of how certain provisions needs to be interpreted. In terms of importation the EU VAT Directive seems to

[24] In the case RBS Deutschland Holdings GmbH, C-277/09, such a situation arose where Germany treated a lease as a sale of goods, while the UK treated the same transaction as a supply of services
[25] With effect from December 1st 2009 reference to article 24 of the Treaty establishing the European Community should be replaced by reference to article 29 of the Treaty on the functioning of the European Union.
[26] For a complete overview I would like to refer to annex 1

rely heavily on the customs legislation and the question arises till what extent the EU VAT Directive and Customs (implementing) Regulations[27] are working well together, preventing double taxation of taking place. This effectively means an assessment on the implications when goods subject to importation are being:

- sold within the territory of the Community[28];
- sold within the territory of the Community while covered under an external transit regime;
- being acquired in another Member State than where goods are shipped from (intra-Community acquisition);
- brought into free circulation within the territory of the Community, whereby the (accompanying) services are deemed to become part of the customs value.

3.2 Goods subject to importation sold within the territory of the Community

When goods, coming from a third country, are entering into the customs territory of the Community they will become subject to customs supervision, which basically means that the goods cannot be released from the customs office (or another approved place) until they are assigned a customs approved treatment or use. The customs approved treatment (or use) can consist of the placing of goods under a customs procedure such as[29]:

- customs warehousing;
- inward processing
- processing under customs control;
- temporary admission
- re-exportation;
- transit.

When considering article 156, 160 and 161 of the EU VAT Directive Member States may provide for an exemption in case of a supply of goods which:

- are intended to be presented to customs and where applicable are placed in temporary storage;
- are (intended to be placed) in a free zone or in a free warehouse;
- are (intended to be) placed under customs warehousing or inward processing arrangements;
- remain covered by arrangements for temporary importation with total exemption from import duty or by external transit arrangements.

It is interesting to notice that the EU VAT Directive clearly mentions that the exemption is an option to the Member States. This basically mean that when a Member State has not provided for an exemption, a sale of goods which are (still) in temporary storage, in a customs warehouse or which were placed under inward processing arrangements both that sale as well as a subsequent import would be subject to VAT. Such a situation has been referred to the Court of Justice of the European Union[30]. In this case a company called SSIM acquired goods coming from the Ukraine selling these onwards to Profitube, who place the goods in a (public) customs warehouse. Subsequently the goods were processed by

[27] Council Regulations 2913/92 (Community Customs Code) and 2454/93 (Implementing Provisions)
[28] Territory of the Community a defined in article 5 of the EU VAT Directive
[29] Article 4, paragraphs 15 and 16 of the Community Customs Code
[30] Profitube spol s.r.o., C-165/11

Profitube under the customs arrangement for inward processing relief. After processing was completed the goods were sold onwards to a company called Mercurius s.r.o while the goods were placed in (the same) public warehouse again. In this case a couple of important points were clarified:

- no importation takes place when goods are first placed in a customs warehouse, followed by inward processing after which placed in a customs warehouse again. As long as the goods are covered by the arrangements referred to in article 156 of the EU Directive no importation takes place, hence no import VAT can be due[31].
- a sale made within the territory[32] in line with the article 299 of the EC Treaty[33]. Therefore a public or private customs warehouse if situated "within the territory of the country" will be situated in the Member State as specified in article 17 (2) (a) of the EU VAT Directive. The Community Customs Code with regards to it scope, does not establish a special status for customs warehouses in the sense that these should be considered located outside the territory of the Member State[34];
- article 155 of the EU VAT Directive provides an option to the Member States allowing them to exempt the transactions listed in article 156 of the same Directive.

It has been for the referring court to establish whether the Slovakian Republic has introduced the exemption provided for in article 155 of the EU VAT Directive. In case the Slovakian Republic had introduced such a measure, the sales made by Profitube would have been exempted. One could still question whether the Slovakian Republic had fulfilled the requirements (for introducing the exemption) as mentioned in article 155 of the EU VAT Directive, which are the following:

- consultation of the VAT Committee;
- measures may not be aimed at final use or consumption;
- the VAT due on cessation of the arrangements should correspond to the amount of tax which would have been due had each of those transactions been taxes within the country.

This question might be purely academic as in the case before the Court of Justice of the European Union, Kolping[35] it was decided that a national authority may not rely, against an individual, upon a Council Directive, whose necessary implementation has not taken place. Nevertheless one could argue when the required consultation of the VAT Committee would not have taken place, whether such a provision would be rendered void. In the case before the Court of Justice of the European Union, Stradasfalti srl[36], the Court ruled that: "… as not authorizing a Member State to exclude goods from the system of deducting VAT…. without first consulting the advisory Committee on value added tax". Therefore the answer seems to me that a Member State is not allowed to introduce measures, like the exemption as provided for in article 155 of the EU VAT Directive, without having consulted the VAT Committee.

The third requirement to be met is for the Member State to take measures that the amount of VAT due on cessation of the arrangements corresponds with the taxes due, if the

[31] Paragraph 46 of Profitube spol s.r.o., C-165/11
[32] Article 17(2)(a) of Directive 2006/112/EC
[33] Now articles 52 of the Treaty on the European Union and article 355 of the Treaty Functioning of the European Union
[34] Paragraph 58 of Profitube spol s.r.o., C-165/11
[35] Case 80/86
[36] Case C-228/05

transactions would have been taxed. In the current case there were two transactions on which the value could be based:

(a) the sale between SSIM to Profitube or
(b) the sale between Profitube to Mercurius s.r.o.

In the given case, whereby the goods seem to remain stored in the customs warehouse, it is arguable whether from a customs valuation perspective the transactional value can be used as the goods are not "sold for export" which would create a disparity with the valuation for VAT and customs purposes.

It is probably more likely that the Slovakian Republic had not picked up on the exemption. This would have the consequence that the sale made by Profitube to be subject to VAT, while a possible subsequent importation of the same goods by Mercurius would trigger another taxable event (in the form of importation) for the same goods. The Court seems to validate a situation of double taxation. Although this might be true, article 163 of the EU VAT Directive imposes an obligation on the Member States avoiding double taxation of taking place when the goods cease to be covered by the before mentioned arrangements.

When double-clicking on the respective Member States[37], it seems that the vast majority of them have introduced an exemption for sales taking place in temporarily storage or in a customs warehouse. Only a few countries like: Austria, Czech Republic, Ireland and Slovakia have introduced no measures at all. Surprisingly[38] Cyprus, Hungary, Poland and Sweden have introduced an exemption for sales taking place in a customs warehouse, however have not catered for an exemption when sales are taking place while goods are in temporary storage.

According to the information at my disposal neither the Czech Republic nor Poland[39] has provided for a relief preventing double taxation. In the event a taxable person would see itself confronted with double taxation, I believe that in line with the case before the Court of Justice of the European Union, Van Gend & Loos[40], the provision in the EU VAT Directive are sufficiently clear and unconditional allowing a direct effect of the EU VAT Directive to be relied on.

Considering the amount of Member States not having introduced the exemption together with the obligation imposed by article 163 of the EU VAT Directive preventive measures for double taxation, one could argue what the intention has been for allowing Member States an option for exemption, contrary to the exemptions as mentioned in article 143, 144, 146,148, 151, 152 and 153 of the EU VAT Directive which require an obligatory exemption. It seems to me that some Member States are of the opinion that the VAT system is more controllable when taxing transactions which are covered by the customs arrangements. In my opinion the customs procedures should provide sufficient control for goods not to escape import VAT, whereby the taxation of such transactions is adding very little value, if adding value at all. Maybe even to the contrary as a missing exemption will lead to an obligation for non-established traders to become liable for VAT registration, creating obligations like issuing invoices with local VAT, together with the obligation to submit periodic VAT returns. Clearly an area which should deserve more attention reducing unneeded "red tape".

[37] An unpublished study conducted by Deloitte
[38] According to before mentioned study in some other countries the situation is not entirely clear.
[39] For the other Member States no information was at my disposal
[40] Case 26/62

Before concluding this paragraph it would be important to reiterate the place of supply rules as in my opinion (although Poland seems to have a deviating opinion) a sales transaction can only be caught by a missing exemption when the place of supply takes place within the country. For example: when goods are sold by a vendor in the USA to a customer (being a taxable person established in Poland) under the conditions DAP[41] terminal Gdansk, it will be the customer who has the obligation to fulfill the import formalities in Poland. Even though the right to dispose as an owner will be transferred at the terminal, while the goods are in temporary storage, the place of supply is still governed by article 32 of the EU VAT Directive, having the consequence that the transaction is taxable in the country where the transportation began, being the USA. Would however the US-vendor ship the goods to Poland, without selling the goods, until the moment the goods are placed in temporary storage, then the place of supply rules would be governed by article 31 of the EU VAT Directive, making the transaction taxable in Poland. In the latter situation the US-vendor would need to register himself in order to account for the Polish VAT and for fulfilling the local Polish compliance obligations.

3.3 Goods sold within the territory of the Community while covered under an external customs transit procedure

When non-Community goods are sold, while the goods are shipped or transported from a location in a Member State, the application of article 32 of the EU VAT Directive will deem this transaction to be taxable in the Member State where the goods are located at the time the supply takes place. Such a shipment should normally be managed under the external Community transit procedure[42], however depending on the situation other transit procedures may apply[43]. When the goods are shipped within the same country the same complexity will arise as described in the preceding paragraphs.

When the goods are dispatched or transported to a destination outside the Community, article 161 of the EU VAT Directive provides for a possible VAT exemption. In line with the exemption as provided for in article 156 of the EU VAT Directive it is left to the respective Member States to implement such an exemption. According to the information at my disposal[44] Austria, Ireland Slovakia and Sweden have not made use of this possibility. This not necessarily would mean that such transaction would lead to taxation in these countries as article 146 of the EU VAT Directive also caters for an exemption in case goods are exported. Contrary to the exemption provided for in article 156 and 161 of the EU VAT Directive this exemption is obligatory for the Member States to implement. When this exemption is not or not properly implemented a person could rely on the EU VAT Directive to have direct effect. The wording of article 146 of the EU VAT Directive is not very accommodating in case of chain transactions as the goods either:

- need to be transported to a destination outside the Community by or on behalf of the vendor or
- need to be transported to a destination outside the Community by or on behalf of a customer not established within their respective territory.

[41] DAP stands for Delivered at Place, being a commercial (delivery) term as defined in the Incoterms 2010 rules published by the International Chamber of Commerce
[42] Article 91 (2) (a) Council Regulation 2913/92
[43] Such as TIR, ATA, Rhine Manifest, Form 302 (Convention parties North Atlantic Treaty)
[44] An unpublished study conducted by Deloitte

Although this article provides for an exemption in case the goods are transported by the customer, it is not guaranteed that the exemption can also be applied when a customer further down in the supply chain is responsible for the transportation. Although the situation was not identical (in fact it dealt within an pick-up transaction for a supply of community-goods shipped within the EU) the case before the Court of Justice of the European Union, Eurotyre Holding B.V.[45], seems to indicate that the seller may rely on the exemption if he does not know (or could not have known) that the goods, prior to their shipment are sold onwards to another party in the chain.

Although in most Member States an export sale of goods under the external community transit procedure can benefit from a VAT exemption, it does not mean that the seller does not have any compliance obligations. In most EU Member States even transactions subject to an exemption are subject to reporting on the periodic VAT returns, for which a registration might be required. Except for Estonia, Finland, Denmark, Latvia and the Netherlands most Member States seem to have an obligation for taxable persons to register even if they have only exempted transactions[46]

For goods shipped under a TIR carnet it would be interesting to see whether a possible charge of VAT would be infringing article 4 of the TIR Convention, which imposes an obligation to participating countries not to impose any import or export taxes on the goods en route.

When goods are dispatched or transported to another Member State the most of what has been written in this paragraph is equally applicable, except that the exemption for intra-Community transaction is provided for in article 138 of the EU VAT Directive, whereby in addition it will be required, for the exemption to be effective, for the buyer to be a taxable person or a non-taxable person acting as such. Like for export scenario's this article is not very accommodating in case of chain transactions as for the exemption to be applicable the goods either needs to be transported:

- by or on behalf of the vendor or
- by or on behalf of the buyer.

In case of chain transactions (meaning the sale of the same goods by more than two parties) whereby the goods are only transported once (from the first seller to the last buyer) the VAT exemption for intra-Community transactions can only be applied once[47]. This will have the consequence that at least one transaction will either be taxable in the country where the goods are shipped from or in the country where the goods are shipped to[48], making the situation not more simple. The implications of these taxable transactions are described in paragraph 3.2.

Going back to the most straight forward situation of one buyer and one seller, both being taxable persons, while goods are shipped from one to another Member State within the EU, such a transaction can either be exempted based on the application of article 161 or article 138 of the EU VAT Directive. It seems straight forward that a Member State, not having implemented article 161, will have compliance obligations in terms of registration, periodic

[45] C-430/09
[46] An unpublished study conducted by Deloitte
[47] European Court of Justice, EMAG Handel Eder OHG, C-245/04, paragraph 47
[48] Disregarding a possible application of the simplified triangulation as provided for in articles 40, 141 and 197 of the EU VAT Directive.

filing of the VAT return as well as of the recapitulative statements[49]. The possible distortive effects of the obligatory submission of these recapitulative statements will be discussed in paragraph 3.4.

When a Member State has introduced an exemption based on article 161 of the EU VAT Directive it will give rise to the question what exemption will take precedence. Although this might sound somewhat academical, many Member States will issue fines in case the transactions are not properly reported on the VAT return and/or on the recapitulative statements. Since the EU VAT Directive does not provide for specific provisions in this regards one could argue for the lex specialis to take precedence over the (more) lex generalis, but I am not confident whether all Member States would see this the same way. In the next paragraph some more considerations will be provided in relation to this issue.

3.4 Intra Community acquisition of goods covered under an external transit regime

The intra-Community acquisition forms the mirror-side of the intra-Community supply of goods. This intra-Community acquisition is considered a taxable activity[50]. In most situations there will be an ordinary buy-sell transaction, meeting the requirements "for consideration" as mentioned in article 2(1)(b) of the EU VAT Directive, however even without a sale taking place, a taxable transaction may occur. Article 17(1) of the EU VAT Directive determines that: "the transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply for consideration, whereby the transfer to another Member State shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the Community. Paragraph two of the same article excludes from this deemed supply (amongst others) the following transactions:

- the supply of goods by the taxable person within the territory of the Member State in accordance with the conditions laid down in article 138, 146, 147, 148, 151, 152 of the EU VAT Directive;
- the temporary use of the goods, for a period not exceeding twenty-four months, within the territory of the Member State, in which the importation of the same goods from a third country would be covered by the arrangements for temporary importation with full exemption from import duties.

The first paragraph seems to make it explicitly clear that all transactions with an obligatory exemption, like for an intra-Community supply (article 138); export (article 146) etc, will not have to be preceded with a deemed supply of own goods. Considering that the transactions covered by the optional exemption (provided for in articles 156, 157, 160 and 161 of the EU VAT Directive) are not mentioned, it can be concluded that these transactions can be subject to VAT when the conditions for a deemed supply has been fulfilled. This means that for the intra-Community acquisition of goods covered under the external Community transit we will have to consider both the regular intra-Community acquisition as well as a deemed intra-Community acquisition.

[49] Recapitulative statements are obliged under article 262 of the EU VAT Directive
[50] Article 2(1)(b)(i) of the EU VAT Directive determines the intra-Community acquisition of goods for consideration within the territory of the Member State by a taxable person acting as such to be subject to VAT

In order not to differentiate between the domestic purchase of non-Community goods and the intra-Community acquisition of goods, article 162 of the EU VAT Directive obliges the Member States to treat both transactions identical. In other words, if the Member State, in which the intra-Community transaction is taxable, has implemented the exemption provided for in article 155, this exemption also will need to be provided for the intra-Community acquisitions. This should mean that depending on the Member State the intra-Community acquisition of non- Community goods is either exempted from VAT or otherwise the Member State will need to provide for measures, preventing double taxation taking place, when the goods are being imported. As we have seen before not all Member States have provided for this latter exemption, which is opening the door for double taxation.

There is another complexity which would deserve a closer look, which is around the administrative obligations. When a Member State has not introduced an exemption for the intra-Community acquisition of non-Community goods, the acquisition will have to be reported on the periodic VAT return. In the Member State of dispatch either the seller, or the owner if the shipment is covered under the provisions of article 17(1) of the EU VAT Directive, might have to submit the recapitulative statement reporting these transactions. The information of these statements are used by the respective Tax Authorities as a tool in order to check whether all intra-Community transactions have been reported. It does not require a lot of imagination to realize that the optional exemption, provided for in article 155 can become a source of mismatches in this control mechanism[51].

When the Member State of dispatch has not introduced the exemption, while the Member State of arrival has introduced the exemption, one should expect that the sale of non-Community goods will need to be reported on the recapitulative statements, giving a false indication towards the Tax Authorities in the Member State of arrival in terms of underreporting of acquisition VAT. In the opposite situation, questions from the Tax Authorities may arise as the control mechanism seems to suggest an over-reporting of acquisition VAT.

When zooming in on article 262 of the EU VAT Directive which is governing the obligations around the recapitulative statements it becomes clear that different logic applies for goods compared to services:

- paragraph (c) is explicitly excluding from the recapitulative listing all services, which are exempted in the Member State, where based on article 44 and 196 the service is taxable, while
- paragraph (a) requires all goods to be reported which are sold under the conditions of article 138, disregarding whether the acquisition in the country of arrival has introduced an exemption for the intra-Community acquisition.

It seems to me that upon introduction of the obligation of listing services (as per January 1st, 2010) the European Commission wished to prevent mismatches in the control mechanism. Whether the before mentioned provision has lead to that result is somewhat doubtful, as most taxable persons do not have access to the information assessing whether the provided services are covered by an exemption in the country of their customer.

[51] Also referred to as VIES, the VAT Information Exchange System of the European Union

3.5 Goods imported in the Community, whereby (accompanying) services are deemed to become part of the customs value

In order to determine the amount of VAT due at importation, the EU VAT Directive is relying on the customs provisions. Article 85 of the EU VAT Directive determines the taxable amount "to be the value for customs purposes". Subsequently article 86 provides a safety net for certain elements to be included, insofar they were not already included:

- taxes, duties, levies and other charges due outside the Member State of importation and those due by reason of importation, excluding the VAT to be levied;
- incidental expenses such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Community, if that place is known when the chargeable (read importation) event occurs.

Most of above elements can also be found in article 32 of the Community Customs Code[52] such as commissions (paragraph 1(a)i), packing (paragraph 1(a)iii), transport and insurance (1(a)iii and 1(e)i). There are a couple of elements which are specific for the determination of the taxable amount for VAT, which are the taxes, duties and levies and other charges due outside the Member State of importation, except the VAT to be levied. The latter element is preventing double taxation of taking place. The other element is: "the subsequent transport to another place of destination within the Community, if that place is known upon importation". Although I assume that this has been considered as a simplification for the importers, in practice it might not always be that easy to deal with this. A couple of issues could arise:

- the transportation costs might not be known by the person responsible for submitting the customs declaration, hence the amount of import VAT due will be underreported;
- the haulage company might not know whether his transport is covered by article 86 (1) (b) hence he will likely be treating this as transport service subject to VAT (according the standard place of supply rules) and not applying the exemption as provided for under article 144 of the EU VAT Directive.

Although the provisions are designed preventing double taxation of taking place a formal approach of the Tax Authorities could result in a correction of the import VAT and a denial of deduction of the VAT charged by the haulage company[53]

The comparison of the value for customs purposes and VAT purposes will be a study on its own and therefore I would like to limit my investigation to some cases whereby there is a service element, which for customs purposes needs to be considered for the valuation of the goods, while for VAT purposes a separate distinct service needs to be acknowledged or even more extreme, where for VAT purposes the entire transaction will be considered as a service.

In the case before the Court of Justice of the European Union, Dolland & Aitchison Ltd[54], the Court ruled that the principles which are applicable for VAT purposes cannot be used directly to determine the elements of the transaction to be taken into account for the purposes of applying article 29 of the Community Customs Code. This case seems to confirm that the customs rules and VAT rules not necessarily are working well together. In this case the company offered a combination of goods and services. The goods were shipped from Jersey

[52] Council Regulation 2913/92
[53] In Genius Holding, C-342/87 the Court of Justice ruled that incorrectly charged VAT is not deductible
[54] C-491/04

(being part of the Customs territory but for VAT purposes considered as a third territory) to the UK. The offering consisted of:

- contact lenses;
- cleaning solutions;
- soaking cases;
- a contact lens examination;
- a contact lens consultation;
- any on-going aftercare required by the customer.

The Court ruled that in order to determine the customs value, the services had to be considered as condition of sale[55] and consequently the customs value comprises of the total value charged, including the service element. At the same time VAT was accounted for as a domestic supply of services, hence VAT on the service element had to be accounted for twice!

In addition the case mentioned above, where the payment (for also the service element) was considered as a condition of sale articles 32 and 33 provide for other elements which has to be considered when determining the customs value. I will provide an example:

Article 32 (1) (b) (iv) deals with engineering, development, artwork, design work, etc undertaken elsewhere than in the Community. An EU based company who would acquire design services from a company established outside the Community, would be receiving services which based upon article 44[56] and 196 of the EU VAT Directive would lead to VAT to be paid based upon the reverse-charge mechanism. If these services are necessary and used for the production of goods subject to importation, article 32 would require these services to be included in the customs value on which import VAT will be due, leading to a situation whereby VAT over the same services will be accounted for twice.

Another, probably more extreme, case before the Court of Justice of the European Union was Levob, C-41/04. In this case a Dutch insurer acquired a standard software package, contained on a physical media carrier. In those days the customs value for such imports was limited to the value of the media carrier only, which was neglectable compared to the total value of the transaction. The media carrier was (albeit late) declared for customs purposes. The standard software was of very little use and Levob had agreed, that the software would be tailored, however after importation had taken place. The Court ruled that the transaction had to be qualified as a single service. The consequence of this ruling was that Levob (an insurance company with limited right on deduction of VAT) had to self-assess the VAT on the full value (both the purchase of the standard software as well as the tailoring). The effect of double taxation was fairly minimal (if not absent) thanks to the valuation rules in force at the time. In the meantime the valuation rules for standard software have changed and the full value will have to be considered for customs valuation purposes. It is needless to say that if the same case would have happened today, Levob would have seen itself confronted with a serious case of double taxation.

[55] Article 29 (3) (b) of the Customs Code

[56] Except if the Member State would have made use of the option offered under article 59a of the VAT Directive

4.1 Conclusion and recommendations

The main cause of double taxation for transactions taking place within the European Union seems to be caused by differences in interpretation and application of the EU VAT Directive. The recent change in the place of supply rules for services, definitely helped in reducing the number of cases.

A recent initiative of the EU VAT Forum[57] of setting up a pilot for Cross Border Rulings for VAT is definitely a good step in the right direction. Unfortunately only 16 countries[58] are participating and the application is only open for transactions which are envisaged. The question arises whether business do have the patience waiting for the outcome of such a procedure. Another concern is that there is no obligation for the participating Member States to come to a joint conclusion. Ideally this process would be further enhanced, ensuring all Member States to participate, whereby the involved Member States do need to come to a conclusion.

For the sales transactions involving (only) non-Community goods we have seen that the EU VAT Directive provides for a mechanism avoiding double taxation taking place, however these provisions does not seem to have been implemented in all Member States. Therefore at an absolute minimum countries, which have availed from an exemption should cater for provisions preventing double taxation of happening. In addition to the double taxation, managing the compliance can be extremely challenging. Ideally the optional exemption should be changed into an obligatory exemption, but since I expect that some Member States would feel quite strong about taxing non-Community goods, the chances that such a change can be realized might be quite small.

For the intra-Community sale of non-Community goods the alignment with how the default-services are reported would be a more realistic option. In addition to a slight change in the EU VAT Directive it would be important that the information per country is easily accessible as otherwise a proper reporting cannot be expected.

When the goods subject to importation have also certain service elements to be considered[59] risks of double taxation might be more eminent. Although article 86 of the EU VAT Directive could be extended with a paragraph containing elements, which should be excluded from the taxable amount for VAT purposes, this might not be practical as upon importation it might not be clear what elements would effectively lead to double taxation. More realistic would be for the EU VAT Directive to contain a refund mechanism in case it can be demonstrated that service elements, included in the customs value, have lead to taxation within the Community.

[57] The EU VAT Forum is an initiative of the EU Commission where business and tax authorities strive to improve the way VAT works in practice
[58] In January 2016,Italy has announced it will participate, making a total of 17 countries
[59] Either as a condition of sale (article 29 (3)(a) Directive 2913/92) or based on article 32

Annex 1: Overview territories, customs and VAT areas[60]

Country/area	Alpha Code	Territory[61]	Customs Area	VAT Area
Austria	AT	Yes	Yes	Yes
Belgium	BE	Yes	Yes	Yes
Bulgaria	BG	Yes	Yes	Yes
Cyprus	CY	Yes	Yes	Yes
Czech Republic	CZ	Yes	Yes	Yes
Croatia	HR	Yes	Yes	Yes
Denmark	DK	Yes	Yes	Yes
Faroes	FO	No	No	No
Greenland	GL	No	No	No
Germany	DE	Yes	Yes	Yes
Busingen[62]	CH	Yes	No	No
Heligoland	DE	Yes	No	No
Jungholz and Mittelberg	AT	Yes	Yes	Yes
Estonia	EE	Yes	Yes	Yes
Finland	FI	Yes	Yes	Yes
Aland Islands	FI	Yes	Yes	No
France	FR	Yes	Yes	Yes
New Caledonia	NC	No	No	No
Wallis and Fortuna	WF	No	No	No
French Polynesia	PF	No	No	No
Mayotte	YT	Yes	Yes	No
Saint Martin (FR)	FR	Yes	Yes	No
Saint Barthélémy	BL	No	No	No
Saint Pierre and Miquelon	PM	No	No	No
Guadeloupe	FR	Yes	Yes	No
Martinque	FR	Yes	Yes	No
French Guinea	FR	Yes	Yes	No
Réunion	FR	Yes	Yes	No
French Southern and -Antarctic	TF	No	No	No

[60] Source: TaxUD/1619/08 rev. 3.4
[61] Territory as defined in article 52 of the Treaty European Union ad article 255 of the Treaty on the functioning of the European Union.
[62] Busingen is located in Switzerland, but is German territory and in practice considered part of the Swiss Customs Area.

Monaco	FR	No	Yes	Yes
Greece	GR	Yes	Yes	Yes
Mount Athos	GR	Yes	Yes	No
Hungary	HU	Yes	Yes	Yes
Ireland	IE	Yes	Yes	Yes
Italy	IT	Yes	Yes	Yes
Campione d'Italia[63]	CH	Yes	No	No
Livigno	IT	Yes	No	No
Lake Lugano[64]	IT	Yes	No	No
San Marino[65]	SM	No	No	No
Latvia	LV	Yes	Yes	Yes
Lithuania	LT	Yes	Yes	Yes
Luxembourg	LU	Yes	Yes	Yes
Malta	MT	Yes	Yes	Yes
Netherlands	NL	Yes	Yes	Yes
Poland	PL	Yes	Yes	Yes
Portugal	PT	Yes	Yes	Yes
Romania	RO	Yes	Yes	Yes
Slovenia	SI	Yes	Yes	Yes
Slovakia	SK	Yes	Yes	Yes
Spain	ES	Yes	Yes	Yes
Canary Islands[66]	ES	Yes	Yes	No
Ceuta	XC	Yes	No	No
Melilla	XL	Yes	No	No
Andorra	AD	No	No	No
Sweden	SE	Yes	Yes	Yes
United Kingdom	GB	Yes	Yes	Yes
Isle of Man	GB	No	Yes	Yes
Gibraltar	GI	Yes	No	No
Channel Islands[67]	GB	No	Yes	Yes

[63] Campione d'Italia is geographically located in Switzerland.
[64] This applies only to the Italian waters of Lake Lugano. From the shore to the political border. The remaining area is Swiss territory.
[65] San Marino has established a customs union with the EU.
[66] The Canary Islands consist of Lanzarotte, Fuerteventura, Gran Canaria, Tenerife, La Gomera, El Hierro and La Palma.
[67] The Channel Islands consist of Alderney, Jersey, Guernsey, Sark, Herm and Les Minquires.

Literature list

BTW Jurisprudentie van het Hof van Justitie, Kluwer 2015/2016, Mr. Drs. WAP Nieuwenhuizen
BTW bij in- en uitvoer, de heffing van btw bij internationale transacties, Kluwer, Mr. D.G. van Vliet
Intracommunanautaire overbrenging van douangegoederen: is twee keer nul wel altijd nul, Weekblad fiscaal recht 6764, Mr. G.J. van Slooten,
Europees recht in kort bestek, W.E.J. Tjeenk Willink, R.H. Lauwaars, C.W.A. Timmermans
Europese BTW en Nederlandse omzetbelasting, Kluwer, Prof. mr. D.b. Bijl, Prof. Dr. Mariken E. van Hilten, Mr. D.G. van Vliet
Omzetbelasting, FED, Prof. Mr. J. Reugebrink, Prof dr. M.E. van Hilten
EU VAT Compass 2015/2016, IBFD, Fabiola Annacondia
Introduction to European VAT, IBFD, Volumes 1-4, Ben Terra, Julie Kajus
European Indirect Tax Law, Ars Aequi Libri, Ben Terra
The 2015 worldwide VAT, GST and sales tax guide, Ernst & Young
European Tax Law, FED 29, Ben J.M. Terra and Peter J. Wattel
The ABC of European Union Law, Prof Klaus Dieter Borchardt, Publication office EU