

'Booze cruises' are here to stay
BF Joustra (C-5/05)

Summary

The ECJ has ruled that private individuals will still have to travel and transport excise goods personally in order to take advantage of lower duty rates.

Background

A group of 70 food and wine enthusiasts had previously bought wine directly from vineyards whilst holidaying in France. They decided to group their orders together and have the wine transported home to the Netherlands by a Dutch transportation company.

The Taxpayer ordered wine from France in the name of the group; on behalf of himself and the other members of the group as private individuals. He also arranged for the Dutch transport company to collect and deliver the wine to his home, where he kept it in his garage until the other members of the group collected their shares. All the wine was used for the members' personal use.

Excise duty on the wine was paid in France where it was released for consumption and the amounts of wine ordered were within the provisions of Article 9(2) of Directive 92/12 which covers wine purchased for personal use.

The Taxpayer paid for the wine and transport costs and was reimbursed by the other members for the cost of their individual share plus a proportionate part of the transportation costs. This service was carried out by the taxpayer on a personal basis and was not intended to make a profit.

Back in 1997, the Taxpayer applied for non-registered trading based on his declaration of wine received. The Netherlands tax authorities levied excise duty on the consignment. The Taxpayer appealed against the levy before the Netherlands courts (who ruled in his favour) on the grounds that the wine was purchased for personal use and not intended for commercial purposes whilst it was in his garage, which was within the meaning of the Netherlands law implementing Directive 92/12.

The tax authorities appealed to the Netherlands Supreme Court contending that the meaning of "commercial purposes" in Articles 7 and 9 of the Directive 92/12 was not evident. They were of the opinion that only goods held by individuals for personal requirements which they had themselves transported fell outside the scope of that term.

The Netherlands Supreme Court referred the following questions to the ECJ:

1. "Must Article 8 of Directive 92/12 be construed as meaning that excise duty may not be levied other than in the Member State of acquisition in the case where an individual purchases goods subject to excise duty personally and for his own use in one Member State and has them transported by a transport undertaking to another Member State?
2. Must Article 8 of Directive 92/12 be construed as meaning that excise duty may not be levied other than in the Member State of acquisition where, as in the present case, individuals arrange for goods subject to excise duty to be purchased in one Member State by another individual who is acting neither in a business capacity nor with a view to making a profit and who arranges for the goods to be transported on behalf of the purchasers by a transport undertaking to another Member State?
3. If the answer to (one of) those questions should be in the negative: must Articles 7 and 9 of Directive 92/12 be construed as meaning that, if an individual arranges for goods subject to excise duty which have been released for consumption in one Member State to be transported by a third party operating on his behalf to another Member State, where they are intended for his own personal requirements and for the personal requirements of others whom that individual also represents, that individual holds in that other

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Member State those goods subject to excise duty, that is to say, both those intended for his own use and those intended for the use of those other individuals, for commercial purposes within the terms of Articles 7 and 9 of the Directive, even if he is not acting commercially or with a view to making a profit?

If the answer to Question 3 should be in the negative, does it follow from any other provision of Directive 92/12 that the individual referred to in Question 3 owes excise duty in the other Member State?"

The Advocate General opined that where a private individual acquires excise goods and personally arranges for their transport, but does not transport them himself, to another Member State, duty should only be chargeable in the first Member State.

In the case of grouped orders as in the instant case, the AG considered that the holding of the goods was for commercial purposes and as such duty should be chargeable in the second Member State, with the initial duty paid being reimbursed.

Judgment

The ECJ ruled that in the circumstances above where a private individual purchases excise goods, for his own personal use and those of other private individuals, that have been released for consumption in that Member State and arranges for them to be transported to another Member State on his behalf, excise duty is also to be levied in the second Member State. The excise duty paid in the first Member State is to be reimbursed.

Implications

Despite much speculation following the earlier decision of the Advocate General in this matter, there is no change to the current interpretation on the law and private individuals will still have to travel and transport excise goods themselves to take advantage of lower excise duty rates.

Interestingly, the European Commission did submit an argument requiring private individuals (not situations involving grouped orders as above) to accompany the products being transported and not allowing them to use an agent for this under the current interpretation of Article 8 breached single-market principles. Consequently, the Commission has already submitted an amendment to the Directive to the Council of the European Union, proposing to extend the benefit of Art 8 to products transported on behalf of private individuals.

A number of Governments objected to this submission, citing the fact that the Commission felt the need to propose extending the existing law as confirming that the current interpretation was indeed correct. The ECJ agreed with this and restated its decision (held in EMU Tabac) that the Community legislature did not intend Art 8 to apply where the transport of goods was effected through an agent.

This decision has provoked a lot of press attention as is often the case when cigarettes and alcohol are involved. Had the Taxpayer won, it could have led to big changes in the way consumers shopped for such goods. It would also have hit the Treasury hard in terms of lost tax revenues (at an estimated cost to the Revenue of £5bn a year). As it is, booze cruises are here to stay unless the Council adopts the proposed changes to the legislation put forward by the Commission. However, given the amount of objections to this by Member States, this would seem unlikely.