

## Place of supply of intra-Community goods

### [X \(C-536/08\) and Facet Trading BV \(C-539/08\)](#)

*The recent ECJ case of X and Facet Trading BV has potentially cast doubt on the UK rules for the deduction of acquisition tax, and could cause problems for businesses that currently account for and recover acquisition tax in the UK if the UK is not the Member State where the dispatch to the acquirer ends, using the easement of s13 (3) VATA 94 (Art 28b A 2 Sixth Directive). This issue could also have wider application if other Member States also apply the UK policy of allowing input tax credit in these circumstances. Essentially the ECJ is suggesting that acquisition tax accounted for in a Member State other than the one where the dispatch to the acquirer ends is not deductible as input tax.*

The two Dutch VAT registered companies bought goods from suppliers in other EU countries and used their Dutch VAT numbers to zero rate the purchases, even though the goods did not enter the Netherlands and ended up in Spain. The Dutch authorities assessed for Dutch acquisition tax and denied the right to deduct that tax because under Dutch law, any deduction was only permitted where the acquisition tax had been declared in the Member State where the dispatch to the acquirer ends.

The question referred asked whether the companies had the immediate right to deduct the tax declared. The answer the ECJ gave was that not only was there no immediate right of deduction, it would appear that there was no right of deduction in the Netherlands at all. As the goods had not entered the Netherlands the ECJ did not see that the goods were to be used for the purpose of the companies' taxable supplies.

The ECJ said that if a right of deduction was allowed in the Netherlands, there would be no incentive to ensure that tax was declared in the Member State where the dispatch ended, which is the basic place of supply rule for acquisitions. The correct approach therefore, if the Dutch VAT number was used to zero rate the intra EU purchase but the goods did not enter the Netherlands, was to account for acquisition tax in the Netherlands, identify where the dispatch ended, ensure acquisition tax was accounted for there, claim a refund of the tax accounted for in the Netherlands (not an input tax credit) and then deduct as input tax the acquisition tax accounted for in the Member State where the acquired goods were 'consumed'. This rule, as set out in Art 28b A 2, second para, overrode the general right to deduct of Art 17.

### ***Comment***

It is not wholly clear from the decision but it seems that the conditions to use the triangulation simplification were not met, as if they had been the acquisition by the Dutch companies would

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have been ignored, and their customers would have declared (and claimed) the acquisition tax due in the end Member State.

The ECJ is keen that the basic place of supply rule is complied with so that the goods are taxed in the Member State where they are consumed, as the Directive intends. However, this rigid application of Art 28 rather than Art 17 could cause some problems for businesses that have not been declaring acquisition tax in the final destination Member State (or ensuring that their customer declares it). Instead, they may have simply been relying on the principle that if a UK VAT number is used to zero rate an intra EU purchase, the UK acquisition tax is deductible as long as the goods are used in the making of supplies outside the UK which would be taxable in the UK.

It is likely that HMRC will comment further on this decision.

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