Changes To EU VAT Rules Affect Aircraft Importation (Part 2)

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Attorney Chris Younger continues his comments about recent revisions of European Union rules pertaining to customs duties and value-added taxes for Non-EU registered aircraft.

As discussed in last month's *Business Aviation and the Boardroom* section (p60-62), Board Members must consider whether their company's US-registered aircraft should be fully imported into the EU or if a duty and VAT-free temporary admission of the aircraft into a particular EU member country will be adequate.

We offered a general overview of the key concepts to be considered in connection with this analysis. Now we will take a closer look at the specific requirements for temporary admission of aircraft into the EU and the interpretation of those rules by individual EU member states.

'SIX MONTH' RULE

There is no specific guidance in the EU Customs Code (Code) regarding the method for applying the 'up to six months' rule. Each EU member state therefore determines how this six month period is measured. Ultimately, this situation leads to disparate treatment of an aircraft depending on the country into which it is flown. For example:

- Under the most restrictive interpretation, a country may determine that only one period of entry for six consecutive months is allowed for a particular aircraft.
- Another country may interpret the rule less restrictively to mean that the period is

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measured based on a total of six consecutive months in any calendar year.
- Yet another interpretation would hold that the rule applies based on six non-consecutive months in any calendar year.
- Finally, under the most liberal interpretation of this rule, a country may determine that a new six month measurement period begins each time the aircraft leaves and re-enters the EU.

Complicating this analysis is the additional requirement in the Code that the maximum overall period during which an aircraft may remain in the EU in connection with more than one temporary importation is 24 months (measured from the date of the aircraft's first entry into the EU). Therefore an aircraft owner must ensure it complies with each EU member country's interpretation of the meaning of the 'up to six months' rule and be certain not to violate the 24 month rule as well.

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PRIVATE VERSUS COMMERCIAL USE

Each EU member state ultimately makes its own determination as to whether a particular flight is treated as private or commercial. Commercial use is defined under the Code as the transport of persons or of goods for remuneration, or in the framework of an economic activity of an enterprise.

The definitions of commercial and private aircraft operations created and relied on by other regulatory agencies (such as the FAA distinction between commercial (Part 135) and private (Part 91) operations) are not relevant to this analysis.

This ambiguity may lead to the potentially disparate treatment of a flight depending on the country into which an aircraft is flown. For example, the United Kingdom has adopted a very broad definition of what constitutes a 'private flight' that includes most corporate flight operations conducted under FAR Part 91. This interpretation contrasts sharply with customs authorities in other EU member states that have consistently applied this definition to exclude FAR Part 91 corporate flight operations from the definition of a 'private flight' for purposes of applying their customs duties and VAT to a particular aircraft.

CARRIAGE OF EU RESIDENTS

Another important issue pertains to the carriage of European Union residents as passengers and crew members on a Non-EU-registered aircraft operating in the EU, and the effect thereof on temporary importation. The basic rule is that a U.S. registered aircraft may not carry an EU resident on board as a passenger or member of the aircraft's flight crew with respect to flights between locations within the EU. This issue falls under the general heading of Cabotage.

Unfortunately, the application of the rule and its exceptions in each EU member country is inconsistent. For example, under the Code, EU residents are allowed on such flights provided they are employed or authorized by the aircraft owner. However, it is not clear from existing guidance if

employment by an affiliate of the owner will be attributed to the owner to meet the requirements of the foregoing exception or if the required authorization from an employer must be obtained in advance, be in writing and/or be carried on board the aircraft to apply.

Furthermore, certain EU countries may interpret the rule to apply not just to carriage of EU residents but also to carriage of citizens of EU member states even though they are not EU residents.

The bottom line is that Board Members must carefully consider the issues described above before flying US-registered aircraft into or within the EU (preferably as soon as flight operations in the EU are contemplated) to ensure compliance with all EU customs duty and VAT requirements.

Consultation with an EU customs expert who has substantial experience working with the importation of aircraft into the EU is imperative. Only by engaging in thorough advance planning will aircraft owners be assured that they may avoid potential major inconvenience and substantial expense associated with an improper importation of an aircraft into the EU.

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