



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

taxud.c.1(2019)1739230 – EN

Brussels, 4 March 2019

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 963

CASE LAW

**ISSUES ARISING FROM RECENT JUDGMENTS OF THE
COURT OF JUSTICE OF THE EUROPEAN UNION**

ORIGIN: Denmark
REFERENCE: Article 146(1)(e)
SUBJECT: Case C-288/16 ‘*L.Č.*’ *IK*

1. INTRODUCTION

With its letter of 11 February 2019, the Danish Tax Agency asked the view of the Commission Services and the VAT Committee regarding the correct application on the judgment of the Court of Justice of the European Union (CJEU) in case C 288/16, *‘L.Č.’ IK*¹.

The text of the letter is attached in the annex.

2. THE CIRCUMSTANCES OF CASE C-288/16

Based on contracts concluded with several consignors, ‘Atek’ SIA undertook to ensure the transport of goods placed under a transit procedure, from the port of Riga (Latvia) to Belarus. Under another contract, it assigned the effective performance of that freight transport to ‘L.Č.’.

While ‘L.Č.’ carried out the transport using vehicles leased from ‘Atek’ to whom the vehicles belonged, ‘Atek’ acted as the carrier *vis-à-vis* the consignors of those goods. For its part, ‘L.Č.’ was responsible for driving the vehicle, repairs, refuelling, customs formalities at border points, surveillance of the goods, transferring the goods to the consignee and the necessary loading and unloading tasks.

‘L.Č.’, considering that it had supplied services connected with transit, applied a VAT rate of 0% to those services. Following a tax inspection covering the period from January 2008 to December 2010, the tax authorities disputed this and ordered the company to pay an additional VAT assessment, a fine and late payment interest.

By decision of 21 September 2011 the tax authorities confirmed that assessment, on the ground that ‘L.Č.’ was not entitled to apply a VAT rate of 0% to the services that it had provided in the context of its contract concluded with ‘Atek’. It was a decision based on the following reasons: (i) in the absence of a legal connection with the consignor or the consignee of the transported goods, those services could not be equated with the services of a carrier or a freight forwarder, and (ii) since it did not hold the requisite licence under Latvian law, ‘L.Č.’ could not be regarded as a carrier and was therefore not authorised to transport freight.

‘L.Č.’ brought an appeal against that decision before the Administratīvā rajona tiesa (District Administrative Court, Latvia) which upheld that appeal by judgment of 11 December 2012.

Ruling on an appeal brought against that judgment, the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), by a judgment of 29 May 2014, partly upheld and partly dismissed that appeal. In particular, that court considered that, since there was no legal connection between the consignor or the consignee of the goods and ‘L.Č.’, the services supplied by the latter could not be regarded as consignment or freight-forwarding services, but rather constituted the supply of driver services consisting in providing a driver for a vehicle owned by a carrier which holds an international carriage licence,

¹ Judgment of 29 June 2017, *L.Č.*, C-288/16, EU:C:2017:502.

namely ‘Atek’, and that, since it lacks such a licence, ‘L.Č.’ also could not be regarded as a carrier. Consequently, according to that court, the VAT rate of 0% could not be applied to the services supplied by ‘L.Č.’.

‘L.Č.’ brought an appeal in cassation against that judgment before the Augstākā tiesa (Supreme Court, Latvia), in so far as, by that judgment, the Regional Administrative Court had dismissed its appeal.

The Supreme Court considered that there were doubts concerning the interpretation of Article 146(1)(e) of the VAT Directive². In particular, it was uncertain whether, despite the fact that the services supplied by ‘L.Č.’ were connected with the goods transported in transit through Latvia, the circumstance that those services were supplied, not directly to the consignee or the consignor of those goods, with which ‘L.Č.’ had no legal connection, but to their contractual counterparty in Latvia, namely ‘Atek’, affected the application of the exemption laid down in that provision, which requires the existence of a direct connection between the supply of services and the exportation or importation of the goods in question.

3. THE QUESTIONS REFERRED TO THE CJEU IN CASE C-288/16

In those circumstances, the Latvian Supreme Court decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

- (1) Must Article 146(1)(e) of the VAT Directive be interpreted as meaning that the exemption laid down therein is applicable only where there is a direct legal connection, that is to say a reciprocal contractual relationship between the services provider and the consignee or the consignor of the goods?
- (2) What criteria must be met by the direct connection referred to in the abovementioned provision in order for a service connected with the importation or exportation of goods to be exempt?

4. THE CJEU’S CONSIDERATIONS AND ITS JUDGMENT IN CASE C-288/16

Considerations

The CJEU decided to examine these questions together. In essence, it found that the Supreme Court was looking to determine whether the exemption laid down in Article 146(1)(e) of the VAT Directive applies to a transaction such as that at issue in the main proceedings, namely a supply of services consisting in the transport of goods to a third country, where those services are not supplied directly to the consignor or the consignee of those goods.

That exemption requires that the supply of services concerned must be ‘directly connected’ with the exportations or importations of goods. With that in mind, the Supreme Court wanted to know, in particular, whether the application of the exemption is subject to the

² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

existence of a direct legal connection, such as a reciprocal contractual relationship, between the service provider and the consignor or the consignee of the goods concerned.

In that respect, the CJEU recalled that Article 146 of the VAT Directive concerns the exemption of exports outside the European Union from VAT. In the context of international business, such an exemption seeks to respect the principle that the relevant goods or services should be taxed at their place of destination. Every export and equivalent transaction should thus be exempt from VAT in order to ensure that the relevant transaction is taxed only in the place where the relevant products are consumed.

The exemption set out in Article 146(1)(e) of the VAT Directive supplements that set out in Article 146(1)(a), and is intended, like the latter exemption, to ensure that the supply of services concerned is taxed at the place of destination of those services, that is to say the place where the goods being exported are consumed. To that end, Article 146(1)(e) provides, *inter alia*, that transport services directly connected with the exportation of goods outside the European Union are exempt from VAT.

A broad interpretation of that provision, seeking to include services that are not supplied directly to the exporter, the importer or the consignee of such goods, might lead, for the Member States and for the operators concerned, to constraints that are irreconcilable with the correct and straightforward application of the exemptions laid down in Article 131 of the VAT Directive.

Furthermore, according to settled case-law of the CJEU, VAT exemptions are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

Accordingly, from the wording and its objective, it follows that Article 146(1)(e) of the VAT Directive must be interpreted as meaning that the existence of a direct connection entails not only that, by their subject matter, the supply of services in question contributes to the actual performance of an importation or exportation transaction, but also that those services are supplied directly to, as the case may be, the exporter, the importer or the consignee of the goods referred to in that provision.

In the case that the CJEU was facing, the services supplied by ‘L.Č.’ were indeed necessary to the actual performance of the exportation transaction at issue. However, those services were not supplied directly to the consignee or to the exporter of those goods, but to a contractual counterparty of the latter, namely ‘Atek’. In fact, those services were supplied using vehicles owned by ‘Atek’, which acted as carrier as regards the consignors of those goods.

Consequently, the services supplied by ‘L.Č.’ could not fall within the scope of the exemption laid down in Article 146(1)(e) of the VAT Directive.

Judgment

The CJEU thus ruled that Article 146(1)(e) of the VAT Directive must be interpreted as meaning that the exemption laid down in that provision does not apply to a supply of services, such as that at issue in the main proceedings, relating to a transaction consisting

in the transport of goods to a third country, where those services are not provided directly to the consignor or the consignee of those goods.

5. ISSUES RAISED BY THE DANISH TAX AGENCY

The Danish Tax Agency is considering the implications of the judgment for the application of Article 146(1)(e). Until now, the view taken has been that the exemption for the supply of services, including transport and ancillary transactions, could apply to subcontractors as well as to the principal supplier of a transport service where the services supplied are directly connected with the exportation or importation of goods. The reason being that Article 146(1)(e) does not refer to a particular stage of the commercial chain and does not mention any person to whom those services are to be invoiced.

Based on the judgment thought is given to changing policy with the effect that the exemption in the future can only be applied to the principal supplier of a transport service but not to the services supplied to the principal supplier by its subcontractors.

In that regard, business has pointed to a number of problems concerning a change of policy and suggested that the judgment should be considered only to affect the application of the exemption to the business model at hand and not that of other business models.

As regards other business models, it is normal practice in the transport sector that suppliers use subcontractors. *E.g.*, a transport provider supplying transport of goods from point A to point D may himself transport the goods from point A to point B and from point C to point D, but a subcontractor carries out the transport from point B to point C. An example of this could be the transport provider being a haulage contractor and the subcontractor being a shipping line. There are also models where the transport provider himself carries out the transport from point A to point B and uses a subcontractor in connection to the transport from point B to point D. The subcontractor performing the transport from point B to point C but using a sub-subcontractor from point C to point D.

According to business, it is the transport provider, not the customer of the transport provider that – also in civil law – is considered as the consignor as regards the contract between the transport provider and the subcontractor. As regards the example with the haulage contractor and the shipping line the haulage contractor will be considered as both the consignor and the consignee in the contract with the shipping line.

As regards the practical implications of a change in policy, business representatives have maintained that a change in policy will require costly changes in IT-systems and an increase in compliance costs. According to business, an important contributing factor to the increase in compliance costs is a non-uniform application of the judgment in Member States.

The question is to identify the implications of the judgment in case C-288/16 when it comes to the correct VAT treatment of transport of goods in connection with export of goods from the EU in situations where the principal supplier of the transport service uses a subcontractor to perform a part of the transport. In particular, it is necessary to determine if the principal supplier can be regarded as the consignor or consignee – also for VAT purposes – in relation to the part of the transport performed by the subcontractor. Should

that be so, the exemption in Article 146(1)(e) could also be applied to the service supplied by the subcontractor to the principal supplier.

6. THE COMMISSION SERVICES' ANALYSIS

The judgment states that the exemption laid down in Article 146(1)(e) of the VAT Directive does not apply to a supply of services, such as that at issue in the main proceedings, relating to a transaction consisting in the transport of goods to a third country, **where those services are not provided directly to the consignor or the consignee of those goods.**

Even though reference is made "to a supply of services, such as that at issue in the main proceedings", it is clear that the CJEU interprets the words "**directly connected** with the exportation" in Article 146(1)(e) as meaning that the transport or ancillary services have to be provided directly to the consignor or the consignee of the goods. This excludes transport or ancillary services provided by subcontractors of the main contractor supplying the services.

The Commission services are of the view that this is the correct interpretation of the words "directly connected". Indeed, a subcontractor will very often not be in possession of proof allowing him to substantiate the exemption of the services supplied to the principal contractor. For example, a ferry company carrying out an intra-EU sea-crossing as part of a transport of goods to a third country will not be in possession of documentation, such as customs documentation, a transport contract with the consignor or consignee, etc., allowing him to prove that its transport services are part of a transport service of goods transported to a third country.

The Danish delegation is suggesting to interpret Article 146(1)(e) as applying to services of subcontractors in case of exportation only if the subcontractor performs the part of the transport during which the goods leave the EU. This would however not be in line with the judgments requiring the services to be supplied directly to the consignor or consignee of the goods.

The Danish delegation also observed that it is necessary to determine if the principal supplier (of the transport service) can be regarded as the consignor or consignee – also for VAT purposes – in relation to the part of the transport performed by the subcontractor. Danish business argued that it is the transport provider, not the customer of the transport provider that – also in civil law – is considered as the consignor as regards the contract between the transport provider and the subcontractor. This reasoning can however not be followed as the terms 'consignor' and 'consignee' commonly used refer, respectively, to the person shipping or receiving the goods and not to the person transporting them. These terms are defined in EU customs legislation in [Commission Delegated Regulation \(EU\) 2015/2446](#)³ when used in customs declarations:

- 'Consignor' is defined as the "Party consigning goods as stipulated in the transport contract by the party ordering the transport" (see p. 264 in the English version);

³ Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29.12.2015, p. 1).

- ‘Consignee’ is defined as the "Party to whom goods are actually consigned" (see p. 265 in the English version).

The impact of the judgment would be that supplies of transport services and ancillary transactions carried out by a subcontractor of the principal contractor supplying those services to the consignor or the consignee of the goods cannot be exempt and are subject to VAT in accordance with Articles 2(1)(c), 44 and 196 of the VAT Directive. This means that they are subject to VAT where the principal contractor ordering the services of the subcontractor is established. Where the principal contractor is established in another Member State than the subcontractor, VAT will be payable by the principal contractor in his periodic VAT return. Where the principal contractor is established outside the EU (e.g., a transport company established in a third country acting on behalf of the consignee), the supply of the services by the subcontractor will be out of scope and thus not subject to VAT in the EU.

7. DELEGATIONS' OPINION

Delegations are asked to explain how they apply the exemption of Article 146(1)(e) to transport services and ancillary transactions connected with exportation of goods and to express their opinion on the Commission services' analysis.

*
* *

Question from the Danish delegation

Background

In its judgment the court ruled that article 146(1)(e) of Council Directive 2006/112/EC must be interpreted as meaning that the exemption laid down in that provision does not apply to a supply of services, such as that at issue in the main proceedings, relating to a transaction consisting in the transport of goods to a third country, where those services are not provided directly to the consignor or the con-signee of those goods.

The Danish Tax Agency has been considering the implications of the judgment for the application of article 146(1)(e) in Denmark. It has until now been the policy (administrative practice) of the agency as expressed in our guidance to business that the exemption for the supply of services, including transport and ancillary transactions, where these are directly connected with the exportation or importation of goods, could apply to subcontractors as well to the principal supplier of a transport service. The reason being that article 146(1)(e) does not refer to a particular stage of the commercial chain and does not mention any person to whom those services are to be invoiced.

Based on the judgment we have been considering changing our policy with the effect that the exemption in the future can only be applied to the principal supplier of a transport service but not to the services to the principal supplier from the subcontractors used by the principal supplier.

Response from business

Before the envisaged change of policy, we have been engaged in a dialogue with business representatives.

Business representatives has pointed out a number of problems concerning the envisaged change of policy. Firstly, they have pointed out that in case C-288/16 the transport was carried out with vehicles belonging to the principal supplier (Atek) and leased to the subcontractor (L.Č.). As regards the consignors of transported goods, Atek acted as the carrier. For its part, L.Č. was responsible for driving the vehicle, repairs, refuelling, customs formalities at border points, surveillance of the goods, transferring the goods to the consignee and the necessary loading and un-loading tasks. Business representatives has suggested that the judgment should be considered only to affect the application of the exemption to this business model and not to other business models.

As regards other business models, business representatives have informed us that it is normal practice in the transport sector that suppliers use subcontractors. E.g., a transport provider supplying transport of a good from point A to point D, where the transport provider himself carries out the transport from point A to point B and from C to D, but a subcontractor carries out the transport from point B to C. An example of this could be the transport provider being a haulage contractor and the subcontractor being a shipping line. You can also see models where the transport provider himself carries out the transport from point A to point B and uses a subcontractor in connection to the transport from point

B to point D. The subcontractor performing the transport from point B to C but using a sub subcontractor from point C to D.

As we understand business representatives then it is the transport provider, not the customer of the transport provider that - also in civil law - is considered as the consignor as regards the contract between the transport provider and the subcontractor. As regards the example with the haulage contractor and the shipping line then the haulage contractor will be considered as both the consignor and the consignee in the contract with the shipping line.

The other problems mentioned by business representatives concerns the terminology used by the court in the judgment. What is meant by exporter, the person selling the goods or the person considered the exporter in customs provisions? What is meant by importer, the person buying the goods or the person who is the declarant and/or consignee for customs purposes?

As regards the practical implications of a change in policy business representatives has led us to understand that a change in policy will require costly changes in it-systems and an increase in compliance costs. As we understand business then an important contributing factor to the increase in compliance costs is a non-uniform application of the judgment in member states.

Issues at hand

Looking strictly at the legal issues then the question as we see it is the following: What is the correct VAT treatment of transport of goods in connection with export of goods from the EU in situations where the principal supplier of the transport service uses a subcontractor to perform a part of the transport? Can the principal supplier be considered the consignor or consignee - also for VAT purposes - in relation to the part of the transport performed by the subcontractor with the effect that the exemption in article 146 (1) (e) can also be applied to the service supplied by the subcontractor to the principal supplier?

Our analysis

In our view then the issues raised should not only be seen in the light of the judgment in case C 288/16, ‘L.Č.’ IK, but also in the light of the judgment in case C-33/16, A Oy. One of the questions examined in that case were whether Article 148(1)(d) of Directive 2006/112 must be interpreted as meaning that only the loading and unloading of cargo carried out at the end of the commercial chain of such services covered by Article 148(1)(a) thereof are exempt, or whether services performed at an earlier stage, such as services supplied by the subcontractor of an economic operator which then re-invoices them to a freight forwarder or a transporter are also exempt.

In the judgment in case C-33/16 the Court stated in paragraphs 32-34:

“31 In such a context, the Court held, in paragraph 24 of the judgment of 14 September 2006, Elmeka (C-181/04 to C-183/04, EU:C:2006:563) to which the national court refers, that the exemption laid down in Article 15(8) of the Sixth Directive, whose wording is repeated in Article 148(d) of Directive 2006/112, applies only to operations made at the end of the commercial chain concerned.

32 However, it must be recalled that the circumstances of the joined cases which gave rise to the judgment of 14 September 2006, *Elmeka* (C-181/04 to C-183/04, EU:C:2006:563) were very specific, concerning services for the transport of petroleum products for provisioning vessels which were then sold on to ship owners. Therefore, several transactions had to physically take place before the services supplied could be used to meet the needs referred to in Article 15(8) of the Sixth Directive, such use only being guaranteed once the fuel was delivered to the operators of the vessels which would use it. Therefore, in that judgment, the Court held that the extension of the exemption provided for to earlier stages of the commercial chain of those services would require the putting in place of guarding and surveillance services in order to ensure the ultimate use of that fuel. Those mechanisms would amount to constraints which would be impossible to reconcile with the correct and straightforward application of the exemptions.

33 Such case-law, adapted to the specificities of the cases which gave rise to that judgment, concerning supplies of services liable to be diverted and used for purposes other than those originally intended, cannot be transposed to situations in which, having regard to its nature, the purpose of a supply of services may be guaranteed once it is agreed. In such situations the correct and straightforward application of the exemption laid down in Article 148(d) of Directive 2006/1112 is guaranteed without the need for guarding and surveillance services.

34 Such is the situation with services of loading and unloading of cargo, such as those at issue in the main proceedings. It is clear from the answer to the first question that the verification of whether those services fulfil the conditions for the application of the exemption laid down in Article 148(d) of Directive 2006/112 depends solely on the type of vessels onto or from which the loading and unloading is to be carried out. Therefore, the use which is made of those services may be guaranteed once the implementation is agreed.“

In paragraph 42 the Court stated:

“Third, as far as concerns the applicability of the exemption laid down by Article 148(d) of Directive 2006/112 to loading and unloading services supplied to the holders of the cargo concerned, in so far as, as stated above, that it may apply to loading and unloading of cargo irrespective of the stage of the commercial chain in which the supply at issue is made, such supplies of services may be exempt if they are part of that commercial chain.“

As mentioned then article 146 (1) (e) does not refer to a particular stage of the commercial chain and does not mention any person to whom those services are to be invoiced. The wording of the directive does not preclude the application of the exemption to subcontractors. We find that the purpose of the supply of services can be guaranteed once it is agreed. There is an agreement to transport goods from an EU Member State to a third country. Therefore, the correct and straightforward application of the exemption laid down in Article 146 (1) (e) of the directive is guaranteed without the need for guarding and surveillance services. The transport service performed by the subcontractor is a part of the commercial chain as it is the same service that is supplied from the subcontractor to the principal supplier and from the principal supplier to the customer of the principal supplier. Unlike the facts in in case C 288/16, ‘L.Č.’ IK, as we understand them.

We find however that the exemption can only be applied to the services of the subcontractor if it is the subcontractor that performs the part of the transport during which the good leaves the EU. If the subcontractor performs only a transport within the EU, then the services of that subcontractor cannot be seen as being directly connected with the exportation.

But if the subcontractor performs the part of the transport during which the good leaves the EU then we find that the wording “directly connected with the exportation or importation of goods covered by Article 61 and Article 157(1)(a)” does not preclude that the exemption is applied even though the consignor is the principal supplier of the transport service and not the exporter or the importer.

Consultation of the VAT Committee

As stated above we would like to know the view of the Commission services and of other Member States regarding the correct application on the judgment of the CJEU in case C 288/16, ‘L.Č.’ IK, in order to have a more enlightened basis for our decision process regarding the implications of the judgment. We therefore hereby request that the subject will be discussed in the VAT Committee at the earliest possible opportunity.