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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 758

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**United Kingdom and Greece**
REFERENCE:	**Article 148(e) and (f)**
SUBJECT:	**Case C-33/11 *A Oy***

1. INTRODUCTION

The United Kingdom and the Greek authorities have asked the view of the European Commission and the other Member States regarding certain issues arising out of the ruling of the Court of Justice of the European Union (CJEU) in case C-33/11 *A Oy*[1]. These issues relate to the exemptions provided for in Article 148(e) and (f) of the VAT Directive[2].

The text of the questions is annexed to this document.

2. SUBJECT MATTER

Case A Oy involves three companies and a natural person who controls or at least has a significant stake in the shares of all three companies.

Natural person X owns all the shares in company A. A holds 25% of the shares in company C, which in turn owns 78% of the shares in company B.

A acquires two aircraft and is the registered owner of the aircraft. B is registered as the user of the aircraft. B is a company that organises international charter flights. A and B signed a contract by which B takes care of the maintenance of the aircraft and also has the option to lease them from A for its own commercial purposes. However, B invoices A for aircraft maintenance and flights, but there are no invoices from A to B for lease of the aircraft. Thus, it could be concluded that the lease of aircraft by B never took place.

The invoices issued by B to A are later passed on by A to X virtually unchanged. These are the only invoices issued by A as there were no other invoices linked to the hire of aircraft. Therefore, it seems that X was the only user of the aircraft.

The questions asked to the CJEU, and their replies, were the following ones:

1. Is Article 15(6) of the Sixth Directive to be interpreted as meaning that the concept "airline operating for reward chiefly on international routes" also refers to a commercial airline operating for reward chiefly on international charter routes to meet the requirements of companies and private persons?

The CJEU found that "*The wording 'operating for reward on international routes' within the meaning of Article 15(6) of the Sixth Council Directive… must be interpreted as encompassing also international charter flights to meet demand from undertakings and private persons"*.

2. Is Article 15(6) of the Sixth Directive to be interpreted as meaning that the exemption provided for therein applies only to a supply of aircraft made directly to an airline operating for reward chiefly on international routes, or does that exemption apply also to the supply of aircraft to an operator which does not itself operate for reward chiefly on international routes, but makes the aircraft available for the use of such an operator?

1 CJEU, judgment of 19 July 2012 in case C-33/11, *A Oy*.
2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

The CJEU found that "*Article 15(6) of Directive 77/388… must be interpreted as meaning that the exemption for which it provides also applies to the supply of an aircraft to an operator who is not itself an 'airline operating for reward chiefly on international routes'… but which acquires that aircraft for the purposes of exclusive use thereof by such an undertaking*".

3. Given that the airline may also have used the aircraft for other flights, does the fact that the owner passes on the charge for the use of the aircraft to an individual who is its shareholder and who uses the aircraft purchased chiefly for his own business and/or private purposes affect the answer to the second question?

The CJEU found that "*The circumstances referred to by the national court, namely the fact that the purchaser of the aircraft passes on the charge corresponding to its use to an individual who is its shareholder and who uses that aircraft essentially for his own business and/or private purposes, with the airline also having the opportunity to use it for other flights, are not such as to affect the answer to the second question*".

3. THE COMMISSION'S OPINION

The first question that the United Kingdom wants to clarify is whether the Court assumes that company A is considered as an airline operating chiefly on international routes.

From an analysis of the reply given to the first and second questions, it seems clear that international charter flights qualify as international routes within the meaning of Article 148(e) of the VAT Directive. The ruling of the CJEU also implies that an aircraft could benefit from the exemption even if the aircraft is not directly bought by the airline operating for reward chiefly on international routes. The CJEU understands that, as the VAT Directive uses the expression "used by", it is not a requirement that the airline directly owns the aircraft. It is sufficient for the exemption to be granted that the aircraft is bought by a leasing company for the purpose of transferring the use, under a leasing arrangement, to an airline operating for reward chiefly on international routes. It is worth mentioning at this point that this ruling is not consistent with the conclusion put forward at the 84th meeting of the VAT Committee [3].

In *A Oy*, the owner, A, gives to B the option to lease the aircraft. However, from the invoices issued we infer that this lease never took place. Therefore, the exemption could not rely upon that criterion. The only possibility for the exemption to apply is, as the United Kingdom has pointed out, that A itself is considered an airline operating chiefly on international routes. That seems to be the view of the CJEU as it is stated in paragraph 60 that "*the circumstances mentioned by the referring court in its third question are therefore prima facie irrelevant for the answer to the second question, since the purchaser is able to demonstrate that that criterion* (that it is an airline operating for reward chiefly on international routes) *is indeed satisfied*".

However, from the reading of the paragraphs related to the third question, it can be inferred that the CJEU leaves open the possibility to deny the exemption, if facts demonstrate that A is not really working as an airline:

[3] See Working paper No 571.

"*61. However, should the national court determine, on the basis of an overall assessment of the facts of the case in the main proceedings, that the aircraft are not intended for commercial use by an airline on international routes, then Article 15(6) of the Sixth Directive should not apply*.

62. … the application of the European Union rules cannot be extended to cover abusive practices by economic operators…that principle of prohibiting abusive practices also applies to the sphere of VAT.

63. The effect of that principle is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage.

…

66. ... the circumstances referred to by the national court, namely the fact that the purchaser of the aircraft passes on the charge corresponding to its use to an individual who is its shareholder and who uses that aircraft essentially for his own business and/or private purposes, with the airline also having the opportunity to use it for other flights, are not such as to affect the answer to the second question.".

In our view, the decisive element in this case is to determine if the company who owns the aircraft is really carrying out an economic activity or, on the contrary, is giving the appearance of carrying out an economic activity but in fact there is only the final consumption made by the owner of the company.

If the company runs an economic activity, it is not affected by the fact that the owner uses the aircraft, where he is invoiced by the airline in the same way as the other clients.

This is the view of the Advocate General who stated that "*only if it can be established that the aircraft are not genuinely intended to be exploited commercially by the airline and that instead they are solely for private use – in short, final consumption – by a natural or legal person, will it be possible to refuse the exemption on the ground that the conditions laid down in Article 15(6) of the Sixth Directive are not satisfied*".

In this case, it can be concluded that the airline was not exploiting commercially the aircraft, as there were no other clients apart from the owner of the company. Besides this, the invoices addressed to the owner included only the expenses for the maintenance and the flights, so there was no profit for the company. Furthermore the amortization of the aircraft was not invoiced. Therefore it could be concluded that there was an artificial arrangement to make final consumption (the use of the aircraft by the owner) appear as an economic activity, and the exemption should be denied.

If we accept that A was effectively running an economic activity, any final consumption could be easily transformed into an economic activity. Any individual could create a company and buy through it his house or car for example and deduct the VAT on the purchase. Later he will use these elements and pay to the company the expenses (repairs, petrol …). The result would be that individuals could avoid paying VAT on durable goods. In these cases we are clearly not facing an economic activity, and neither are we in the case presented to the Court.

Qualifying aircraft

The United Kingdom raises three questions asking whether all aircraft owned or run by an airline could benefit from the exemption.

In the first scenario presented, a company transports passengers chiefly on international routes. It adds to its fleet an aircraft which is used for flying school activities for reward.

We do not agree with the conclusion of the United Kingdom that this aircraft does not qualify for the exemption. The wording in Article 148(f) of the VAT Directive says "*the supply…of the aircraft referred to in point (e)*". Article 148(e) refers to "*aircraft used by airlines operating for reward chiefly on international routes*". Therefore, as the owner of the aircraft is an airline operating for reward chiefly on international routes, and the aircraft is used by it for commercial purposes, the wording of the VAT Directive leads to the conclusion that the exemption should be granted.

This solution does not provide a fiscally neutral result, but the exemption in Article 148(f) sacrifices fiscal neutrality to provide simplicity in the functioning of the exemption. If an airline that operates chiefly on international routes buys an aircraft for use on domestic flights, it will benefit from the exemption. However, an airline that only operates on domestic routes will not benefit from the exemption when buying an aircraft for use on the same route.

The turnover obtained from the teaching activities will count towards the total turnover of the airline and be used in determining whether or not it operates chiefly on international routes.

In the second scenario, an individual purchases an aircraft for his exclusive use and places it with a company that qualifies as an airline operating for reward chiefly on international routes. This company, as part of its activity, supplies management services to others and, in this case, carries out all of the activities necessary to fly the aircraft, including providing aircrew. However, no one but the owner could use the aircraft property of that individual.

In this case we agree with the analysis made by the United Kingdom. The airline does not run the aircraft. The services that it is providing consist in the supply of staff and of management and operational services that allow the owner to enjoy the use of his aircraft, but the aircraft is not used by an airline for its commercial activities. Therefore, this aircraft cannot benefit from the exemption.

In the third scenario, the same individual allows the airline to use the aircraft when he does not require it. In these cases, the company uses the aircraft as part of its fleet and pays the owner for the use of the aircraft.

We also agree in this case with the United Kingdom's analysis. The aircraft is being used by the individual for his private use, and that is its primary function. For this use, it employs the means of the company. When he does not use the aircraft, the company can use it and pay the owner for the use, but it does not mean that the airline is running the aircraft. The decision on the use of the aircraft falls within the sphere of the owner who,

when he does not use it, in order to achieve a profit that will reduce the burden of the cost of the aircraft, allows this company to rent it, and receives compensation for that use[4].

For the exemption to apply, it is not enough that the airline operating for reward chiefly on international routes uses the aircraft. This use has to be exclusive.

This requirement is pointed out by the CJEU when it states in its ruling that "*Article 15(6) of Directive 77/388 … must be interpreted as meaning that the exemption for which it provides also applies to the supply of an aircraft to an operator who is not itself an 'airline operating for reward chiefly on international routes' within the meaning of that provision but which acquires that aircraft for the purposes of the exclusive use thereof by such an undertaking*".

It must be taken into account that the CJEU has extended the scope of the exemption regarding aircraft as compared with the exemption regarding the provisioning of sea-going vessels and services performed to meet their direct needs. The CJEU states:

"*54. As evidenced, in particular, by paragraphs 23 to 25 of Elmeka[5], an extension of the exemption provided for in Article 15(4) and (8) of the Sixth Directive to stages prior to the final supply of goods or services made directly to the vessel operator was ruled out by the Court in those judgments, in particular because such an exemption would require Member States to set up means of supervision and monitoring in order to be sure of the ultimate use of the goods or services in question. Such means would give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the "correct and straightforward application of such exemptions" prescribed by the first sentence of Article 15 of the Sixth Directive (see also Velker International Oil Company[6], paragraph 24).*

55. As observed inter alia by the Advocate General in points 44 to 46 of his Opinion, it is difficult to apply such considerations to an exemption for the supply of an aircraft to a trader who intends to have it used solely by an undertaking operating for reward chiefly on international routes.

56. Making the exemption in such circumstances subject to the intended use being known and duly established as of the time of acquisition of the aircraft and to subsequent verification of the actual use of the aircraft by such an undertaking does not seem, in the light of the type of object at issue here and, inter alia, the registration and authorisation mechanisms in place for its use, to be liable to give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the correct and straightforward application of the exemptions prescribed by the Sixth Directive.

57. In the light of the foregoing, the answer to the second question is that Article 15(6) of the Sixth Directive must be interpreted as meaning that the exemption for which it provides also applies to the supply of an aircraft to an operator who is not itself an 'airline operating for reward chiefly on international routes' within the meaning of that

[4] However, even though the exemption on the acquisition of the aircraft does not apply, in this case the rent would be exempt in so far as the company is mainly engaged in international flight navigation.

[5] CJEU, judgment of 14 September 2006 in joined cases C-181/04 to C-183/04, *Elmeka*.

[6] CJEU, judgment of 26 June 1990 in case C-185/09, *Velker International Oil Company*.

provision but which acquires that aircraft for the purposes of exclusive use thereof by such an undertaking.".

Therefore, the extension of the exemption to aircraft which the airline operating chiefly on international routes does not own but leases, is allowed due to the fact that in these cases supervision and monitoring by the Member States of the effective use of the goods in question is possible. However, if the use of the aircraft is shared by the airline with other users which are not themselves airlines operating for reward chiefly on international routes, this supervision and monitoring cannot be carried out in an efficient way by Member States. Thus, the use of the aircraft has to be exclusively by the airline operating for reward chiefly on international routes and so any lease of an aircraft would need to take place immediately after the purchase. Otherwise, the exemption should be denied.

We have to conclude that in the case of shared use by the owner (unless he is also considered as an airline operating chiefly on international routes) and the airline the exemption cannot be granted.

Compatibility between the answers to second and third questions

The United Kingdom also asks if it is possible to reconcile the CJEU's ruling on the second question, related to the exclusive use by the airline, with the answer to the third question, in which the use by a shareholder of an aircraft operated by the airline does not affect the answer to the second question.

We think that compatibility between those replies is possible. The interpretation that the Commission services give to the ruling is that if the aircraft is used by the owner, but leased to the airline for periods when the owner does not use it, no exemption could be granted as regards the supply of the aircraft to the person who makes the lease, as concluded above when looking at the third scenario. However, the lease could be exempt if the lessee meets the relevant conditions.

If the aircraft is leased to the airline for its exclusive use and the owner only uses it on the same footing as any other client of the airline, the situation is however different. In this case, the exemption should apply. The fact that the owner of the aircraft uses it does not imply that the airline is not running the aircraft. The CJEU however leaves open the possibility to deny exemption on the basis of the factual findings of the case, if it can be proved that there is an abusive practice by the subjects involved. That should be the case if in reality the owner retains the privilege to use the aircraft whenever he wants. That would imply that he is making *de facto* the decisions on the use of the aircraft so, once again, the company would not run it. The only functions of this company would then be to provide the technical support and maintenance to allow the owner to enjoy the use of his aircraft, and undertake the search for clients for the periods when the aircraft is not used by the owner.

However, the exemption applies when the owner only uses the aircraft as any other client of the airline, even if special conditions (price …) are applied to him.

Other abusive schemes

The cases submitted by the United Kingdom under numbers 4A and 4B are for the Commission services variations of the same scheme analysed as that in which the aircraft is owned by the private individual and leased to the aircraft management company when not used by the owner.

The fact that the aircraft is not owned by the individual but by a company entirely owned by him does not change our conclusion. In all cases the result is the same, the aircraft is used primarily for the use of the owner and it is a final consumption. The interposition of companies could be understood as a wholly artificial arrangement which does not reflect the economic reality and it is set up with the sole aim of obtaining a tax advantage, as stated by the CJEU in case *A Oy*.

Application of the ruling to leasing companies

The Commission services agree with the interpretation suggested by the Greek authorities that the ruling could be applied to leasing companies which buy an aircraft with the purpose of leasing it to an airline company that meets the criteria of exemption according to the conditions imposed by each Member State.

That interpretation derives directly from the answer of the CJEU to the second question asked to it and by which it confirms that in the case of aircraft, contrary to the facts examined by the CJEU regarding Articles 15(4) and (8) of the Sixth Directive, an aircraft bought by a leasing company with the purpose of leasing that aircraft to an airline operating chiefly on international routes for its exclusive use, could benefit from the exemption in Article 148(f). How the different treatment conferred on aircraft as against supply operations for the provisioning of sea-going vessels and services performed to meet their direct needs can be justified is explained above, and relies on the fact that the application of the exemption in the case examined in *A Oy* does not give rise to constraints for Member States or the economic agents concerned so as to stand in the way of the correct and straightforward application of the exemption.

Exemption for works (modifications, repairs and maintenance services) made to the aircraft

As already said, the CJEU has extended the exemption in Article 148(f) to the acquisition of an aircraft when the acquirer leases it to an airline operating for reward chiefly on international routes for its exclusive use.

The reasoning for the exemption conferred on aircraft applies equally for the exemption conferred on related modifications, repairs and maintenance services. Moreover, the wording used in the VAT Directive for both exemptions is almost identical. Therefore, if an exemption is granted for the aircraft when the acquirer leases it to an airline operating for reward chiefly on international routes for its exclusive use, exemption also has to be granted for the related works made to that aircraft, whenever the rest of the conditions required under the VAT Directive are met.

Once again, the reason for the different treatment in this case in respect to previous ones is the ease of checking the effective use of the goods acquired in the case of aircraft. This facility is not met in the other cases dealt with by Article 148.

Thus, the exemption for works (modifications, repairs and maintenance services) made to the aircraft has to be applied in the same cases and to the same subjects as the exemption for the acquisition of the aircraft, so the exemption applies irrespective of whether the works are invoiced to the owner of the aircraft or to the company that runs that aircraft.

Exemption for supplies of goods for the fuelling and provisioning of aircraft

Regarding the implications of the ruling in the case *A Oy* on the exemption on the supply of goods for the fuelling and provisioning of aircraft, we would like to stress again that the CJEU itself has made clear that this ruling does not contradict but rather clarifies its previous rulings such as *Velker International Oil Company* and *Elmeka*.

Therefore, the analysis used in those cases put forward for the 93rd meeting of the VAT Committee[7] is still valid.

In the case of supplies of goods for the fuelling and provisioning of aircraft, the reasoning of the CJEU in *Elmeka* should be applied. In that case it was stated that "***the exemption*** *laid down in Article 15(4)* ***can only apply to the supply of goods to a vessel operator*** *who will use those goods for provisioning and it cannot therefore be extended to the supply of goods effected at an earlier stage in the commercial chain … extending the exemption to stages prior to the final supply of the goods to the vessel operator would require Member States to set up means of supervision and monitoring in order to be sure of the ultimate use of the goods supplied free of tax. Such means would give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the 'correct and straightforward application of such exemptions' prescribed by the first sentence of Article 15 of the Sixth Directive*".

Therefore, only the supplies of goods for the fuelling and provisioning of aircraft made directly to the airline that operates the aircraft (owner or lessee) shall benefit from the exemption. Services rendered at an earlier stage in the commercial chain, in particular to the services of sub-contractors, will not benefit from the exemption.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the matters raised by the UK and Greek authorities and the observations made by the Commission services.

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[7] Working paper No 696.

ANNEX 1

UK question

ECJ Case C-33/11 *A Oy* – for discussion at the VAT Committee

The ECJ was recently asked, in the case of A Oy (C-33/11), to rule on the scope of the exemption for aircraft and associated goods and services now provided for in Article 148 of the VAT Directive (Council Directive 2006/112/EC):

> *(e) the supply of goods for the fuelling and provisioning of aircraft used by airlines operating for reward chiefly on international routes;*
>
> *(f) the supply, modification, repair, maintenance, chartering and hiring of the aircraft referred to in point (e), and the supply, hiring, repair and maintenance of equipment incorporated or used therein;*

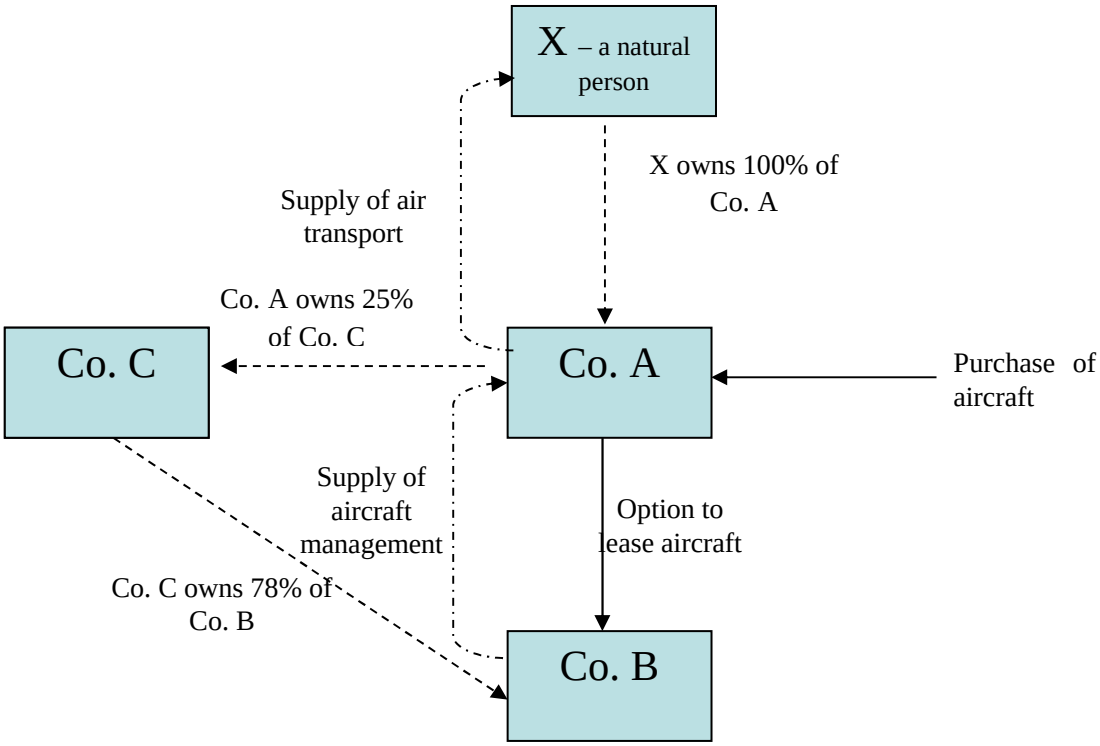
This reflects the provisions of Articles 15(6) and 15(7) of the 6th Directive, which were considered by the Court.

Overview of the case

Company A (100% owned by X – a natural person) acquired two aircraft and was the registered owner while Company B, which operates as an international charter airline, was the registered user. Under a contract between the two companies B would charge A for aircraft maintenance and flights.

Company B had an option to lease the aircraft from A (although, as all of A's turnover for the period in question related to invoices addressed to X for flights, it appears that no leasing actually took place).

As the diagram below shows, X had control of Company A which had a substantial shareholding in Company C (an international oil trader) which in turn had a controlling interest in Company B.



Questions

3 questions were referred to the Court and answered as follows:

(1) Whether the wording 'operating for reward on international routes' within the meaning of Article 15(6) of the Sixth Directive must be interpreted as encompassing also international charter flights to meet the requirements of companies and private persons.

The Court found that:

The wording 'operating for reward on international routes' within the meaning of Article 15(6) of Sixth Council Directive ……. must be interpreted as encompassing also international charter flights to meet demand from undertakings and private persons.

The UK agrees with this interpretation.

(2) Whether Article 15(6) of the Sixth Directive must be interpreted as meaning that the exemption for which it provides also applies to the supply of an aircraft to an operator which is not itself an 'airline operating for reward chiefly on international routes' within the meaning of that provision but which acquires that aircraft for the purposes of exclusive use thereof by such an undertaking.

The Court found that:

Article 15(6) of Directive 77/388, ……must be interpreted as meaning that the exemption for which it provides also applies to the supply of an aircraft to an operator who is not itself an 'airline operating for reward chiefly on international routes' ……. but which acquires that aircraft for the purposes of exclusive use thereof by such an undertaking.

The UK broadly agrees with this interpretation but has some questions on its practical application.

(3) Whether the answer to the second question may be influenced by the fact that the operator who acquired the aircraft then passes on the charge for the use of the aircraft to an individual who is its shareholder and who uses the aircraft purchased chiefly for his own business and/or private purposes, given that the airline can also use it for other flights.

The Court found that:

The circumstances referred to by the national court, namely the fact that the purchaser of the aircraft passes on the charge corresponding to its use to an individual who is its shareholder and who uses that aircraft essentially for his own business and/or private purposes, with the airline also having the opportunity to use it for other flights, are not such as to affect the answer to the second question.

The UK has concerns over the practical application of this interpretation and we have set out some specific questions below.

<u>UK analysis of the case</u>

The aircraft was purchased and retained by A. While it was envisaged that B could lease the aircraft from A for use in B's business it appears that no such leasing occurred. B on the other hand had the relevant skills to fly and maintain the aircraft and did so on behalf of A, making supplies of these services to A. A then recharged these to X (the only shareholder of A) and A's entire turnover is reported as being the charges to X. In practice, the aircraft was used solely to meet the personal transport needs of X

Given that X did not own the aircraft it does not seem to be possible for X to receive the invoiced supplies from B. The UK's view of the facts is that X is in effect paying a consideration for the flights supplied by A.

Assuming that is a correct understanding it seems that, in the view of the Court, A was operating as an airline in respect of the supplies of transportation to X. The aircraft were therefore for the **exclusive** use of an airline (A) whose only customer was X.

Question 1: Do other Member States agree with the UK's analysis of the case?

In our implementation of Article 148, the UK has always been concerned about the possibility of abusive arrangements. In applying the law the UK has therefore sought to

apply a strict interpretation, specifically to prevent non-business persons and entities using contrived structures from obtaining a tax advantage that the law did not envisage.

In relation to the second question both the Advocate General and the Court considered the concept of "abuse" in relation to the exemption.

The Advocate General made the following observations:

> *4. The different contractual and corporate relationships surrounding the acquisition and use of the aircraft could possibly give rise to the suspicion of fraud, but it should be noted that the assessment of those facts falls exclusively to the national court.*

and:

> *52. Only if it can be established that the aircraft are not genuinely intended to be exploited commercially by the airline and that instead they are solely for private use – in short, final consumption – by a natural or legal person, will it be possible to refuse the exemption on the ground that the conditions laid down in Article 15(6) of the Sixth Directive are not satisfied. In any event, it is for the national court seised of the main proceedings to assess all those matters.*

The Court also found similarly:

> *62, It should also be borne in mind, as pointed out by the Finnish Government in its observations, that it is common ground that the application of the European Union rules cannot be extended to cover abusive practices by economic operators, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by European Union law, and that that principle of prohibiting abusive practices also applies to the sphere of VAT (see, inter alia, Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraphs 69 and 70 and the case-law cited).*
>
> *63. The effect of that principle is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (Case C-162/07 Ampliscientifica and Amplifin [2008] ECR I-4019, paragraph 28).*
>
> *64. Thus, in the interpretation of the Sixth Directive, an abusive practice can be found to exist if, firstly, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of that directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, it is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain such a tax advantage (see Halifax and Others, paragraphs 74 and 75, and Case C-425/06 Part Service [2008] ECR I-897, paragraph 42).*
>
> *65. It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of European Union law is not*

undermined, whether action constituting such an abusive practice has taken place in the case before it (Halifax and Others, paragraph 76).

UK Policy

Definition of a Qualifying Airline[8]

In the first place the company operating the aircraft clearly needs to make a charge for its transportation services in order to qualify. In coming to a decision on whether it operates chiefly on international routes the UK allows a number of methods to estimate this, for example, the number of passengers transported on international routes compared to those transported on domestic routes.

Definition of a Qualifying Aircraft[9]

The UK has adopted a strict test so that only aircraft that are exclusively used to provide transport services (whether international or domestic) by a qualifying airline can be considered qualifying aircraft. In the UK's view this is fully in line with the judgment in Cimber Air (C-382/02).

From the AG's opinion:

28. The connecting factor for deciding whether the tax exemption should be applied in respect of the first kind is the company providing the transport, so that, if it operates for reward 'chiefly' on international routes, the tax advantage takes effect, whether the aircraft are used for domestic flights or for flights outside the country. There is no disagreement on this point in these proceedings.

From the judgment:

28 ...the exemption provided for in Article 15 of the Sixth Directive relates formally, both in paragraphs 7 and 9 and in paragraph 6 of that article, to domestic flights carried out by aircraft used by companies whose business is mainly international.

30 …Article 15(6), (7) and (9) of the Sixth Directive must be interpreted as meaning that the supplies of goods and services referred to in those provisions to aircraft which operate on domestic routes but are used by airlines chiefly operating for reward on international routes are exempt from VAT.

In other words, qualifying aircraft are only those used for the airline's transportation activity.

8 The term "qualifying airline" is shorthand for an airline that operates for reward chiefly on international routes and operates qualifying aircraft.

9 The UK legislation uses the term "qualifying aircraft" to describe aircraft that meet the Article 148 conditions.

Scenarios

In the context of the A Oy decision the UK would be grateful for the views of the Commission and other Member States on the following scenarios, especially as to whether they would see the arrangements as potentially abusive. The scenarios set out below are based on questions that the UK tax administration has been asked by aircraft owners and operators.

1 A company operates three aircraft, two are used by it on international flights for fare paying passengers but the third is used for flying school activities supplied by the company to third party private individuals.

The UK's view is that the first two aircraft used for the transportation business activity are qualifying aircraft. However, the third aircraft is not used for the transport of passengers or freight so does not qualify. In the UK's view this provides a fiscally neutral result when compared with a flying school that has no transportation activity.

Question 2: In this scenario is the third aircraft a qualifying aircraft or not, given that it is an aircraft used by a qualifying airline but not one used for international or domestic transport services?

2 A wealthy individual purchases an aircraft for his exclusive use and places it with an aircraft management company. The management company carries out all of the activities necessary to fly the plane, including providing aircrew, and charges the owner accordingly. The management company also operates a small fleet of aircraft which it uses to transport passengers chiefly on international routes. The managed aircraft is not available for use by the management company.

The UK's view is that the management company is making a supply of staff and other management/operational services that allows the owner to enjoy the use of his aircraft. No person is making a supply of transport services using the aircraft in question, which is a pre-requisite of the exemption.

Question 3: Do other Member States agree that this is not a qualifying aircraft as there is no supply of transport services?

3. In a variation of Scenario 2, the owner permits the aircraft management company to make use of the plane when he does not require it. On such occasions the company uses it as part of its fleet to provide passenger transport services to third parties (as an airline operating for reward chiefly on international routes). The company pays the owner each time it uses his plane.

The UK's view is that as there is joint use by the manager and the owner, the aircraft cannot be a qualifying aircraft. The ad-hoc loan of the aircraft to the management company is primarily a way for the owner to off-set some of the cost of ownership. The owner has not purchased the aircraft with a primary intention of leasing it as envisaged by the ECJ in A-Oy and it is not acquired by the owner for "exclusive use" by a qualifying airline (A-Oy paragraph 57).

Question 4: Is it possible to reconcile the ECJ's ruling on the second question (i.e. that exemption applies where an owner acquires an aircraft for the exclusive use of a qualifying airline) with the answer to the third question (that a shareholder having the use of the aircraft as well as the airline does not affect the answer to the second question)?

Question 5: Do other Member States agree that in this scenario the test of "exclusive use" by the airline, as set out in the Court's answer to the second question, is not met because of the dual use by the owner and the company?

4A. A wealthy individual sets up a wholly owned company to purchase an aircraft which generally operates for the convenience of the owner providing him with flights as and when required. An aircraft management company is employed to fly the aircraft. The use is charged at cost to the individual and the flights are chiefly on international routes. When the aircraft is not required by the individual the management company borrows the aircraft for use as part of its fleet to provide passenger transport services to third parties (as an airline operating for reward chiefly on international routes). The managing company credits the owning company with some of the income each time it uses the plane.

4B. Similar to 4A (above): a wealthy individual sets up a wholly owned company to purchase an aircraft. The owning company enters into a formal lease for a "qualifying airline" to use the aircraft. However, the terms of the lease permit the owning company to have first call on the use of the aircraft when required by the individual.

The UK's view is that 4A and 4B are generally arrangements intended to facilitate the private purchase and use of aircraft by owners but which enables some of the cost to be mitigated by allowing third parties restricted use at the discretion of the individual.

Question 6: Do other Member States share the UK's concern that such schemes – where an objective is to mitigate the costs to a private individual – are potentially abusive.

ANNEX 2

Greek question

We believe that the issue of exemption of airline companies should be discussed in the VAT Committee and in the context of the implications of CJEU Case C-33/11.

We would like to recall that the issue had been discussed in the 58th as well as the 84th VAT Committee (Working papers No 281 and No 571), where Member States were divided as regards the Commission's analysis and therefore no guidelines were issued on the subject.

Taking into account the ruling of the C-33/11 Case, we would like to discuss the following issues:

1. We believe that the ruling of the case is applied as well to leasing companies, which can buy an aircraft vessel with exemption and lease it to an airline company that meets the criteria of exemption, according to the conditions imposed by each Member State.

2. It should be discussed if the ruling of the case is applied only to the purchase of an aircraft vessel from a non airline company and not to the purchase of supplies. The purchase of supplies, according to C-181/04 and C-183/04 (ELMEKA NE) is not exempt, since the exemption "cannot include supplies of goods made to the former stage of commercial activity".

3. It should be discussed if the ruling of the case is applied as well to modifications, repairs, maintenance services when made by the non airline company for the aircraft vessel bought and leased to an airline company.

We would like to ask other Member State delegations and the Commission on their views on the above mentioned points.