



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

taxud.c.1(2017)6158402 – EN

Brussels, 9 November 2017

**VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 934**

CASE LAW

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

ORIGIN: Denmark

REFERENCES: Articles 14(1) and (2)(c), 24(1) and 148(a)

SUBJECT: CJEU Case C-526/13 *Fast Bunkering Klaipėda* – follow up

1. INTRODUCTION

During its 107th meeting, the VAT Committee discussed the case *Fast Bunkering Klaipėda*¹. Working paper No 907 had been drawn up with a view to facilitate these discussions.

The problem analysed concerned the scope of the exemption of supplies made in relation to vessels operating in international transport, in accordance with Article 148(a) of the VAT Directive².

As a result, unanimous VAT Committee guidelines were agreed³.

For the sake of completeness it should be mentioned that the VAT Committee dealt with the scope of Article 148 of the VAT Directive a number of times. Several VAT Committee guidelines were agreed in this respect⁴.

Nevertheless, the Danish Customs and tax administration has been contacted by business representatives who fear that there is a danger that the judgment of the Court of Justice of the European Union (CJEU) is being applied in a different manner in Member States. The Danish delegation requests that this issue be once again discussed in the VAT Committee. The letter from the Danish delegation is attached in the annex.

2. THE SUBJECT MATTER

2.1. Issues raised by the Danish delegation

The Danish delegation in its letter raises concerns linked with the possible lack of a harmonised application of the exemption provided for in Article 148(a) of the VAT Directive.

In particular the Danish delegation points out that there is a risk that at the core of the problem are varying interpretations between Member States of the relevant rules. They believe that the lack of uniform application of the concerned provision does not provide for a level playing field in the EU internal market.

At the same time the Danish delegation goes on to point out that after an additional analysis performed, they did not change their position concerning the interpretation of Article 148(a) of the VAT Directive. It was confirmed that their interpretation is still the

¹ CJEU, judgment of 3 September 2015, *Fast Bunkering Klaipėda*, C-526/13, EU:C:2015:536.

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).

³ Guidelines resulting from the 107th meeting of 8 July 2016; Document B – taxud.c.1(2016)7297391 – 911.

⁴ Guidelines resulting from the 93rd meeting of 1 July 2011; Document E – taxud.c.1(2012)553296 – 722 REV; Guidelines resulting from the 96th meeting of 12 March 2012; Document B – taxud.c.1(2012)916513 – 729; Guidelines resulting from the 98th meeting of 18 March 2013; Document D – taxud.c.1(2014)2717057 – 770 ADD; Guidelines resulting from the 100th meeting of 24-25 February 2014; Document D – taxud.c.1(2014)2716782 – 803; Guidelines resulting from the 103rd meeting of 20 April 2015; Document A – taxud.c.1(2015)3366194 – 868.

same: i.e. the exemption provided for in that provision is not applicable to supplies of goods for the fueling and provisioning to intermediaries acting in their own name. The assessment of the transactions provided to the intermediary must take into account the fact whether the supply is made in accordance with Article 14(2)(c) according to which the transfer of goods is made pursuant to a contract under which commission is payable on purchase or sale.

Finally, the Danish delegation raises concerns in the context of the opinion of the Advocate General in case C-33/16, *A Oy*⁵ which referred in paragraph 40 to the question of invoking in the case *Fast Bunkering Klaipėda*.

2.2. Main elements discussed in Working paper No 907 in relation to the exemption from Article 148(a) of the VAT Directive

The main elements referred to in Working paper No 907 and in the VAT Committee guidelines that followed the discussions during the 107th meeting, relevant for the interpretation of Article 148(a) of the VAT Directive are listed below.

1) The VAT Committee guidelines resulting from the 100th meeting of 24-25 February 2014⁶ state in paragraph 2 in respect of Article 148(a) that *the VAT Committee almost unanimously agrees that the exemption shall only apply to the supply of goods made directly to the taxable person operating the vessel, and shall not cover supplies made at an earlier stage in the commercial chain.*

2) In the case *Fast Bunkering Klaipėda* the CJEU confirmed that the exemption laid down in Article 148(a) of the VAT Directive applies only to the supply of goods to a vessel operator who will use those goods for fuelling and provisioning and it cannot be extended to the supply of those goods effected at a previous stage in the commercial chain.

3) Furthermore the CJEU concluded in the context of the particular circumstances of this case that where there is a difference as to whom the goods are supplied from the point of view of the transfer of ownership on the one hand and the actual supply of goods on the other hand, the latter should be decisive. In other words the qualification of the transactions in contractual terms could be irrelevant for the application of the VAT Directive if the economic reality points in another direction. This approach could lead to situations where the supply chain needs to be redefined and as a consequence an intermediary could be removed from the chain of supplies of goods.

4) As a result of the discussions during the 107th meeting of the VAT Committee, guidelines were unanimously agreed that taking into account the particular circumstances of the case (where an intermediary in the supply chain was not in a position to know how much fuel he is to sell before the final recipient had already taken physical possession of it) the interpretation flowing from the *Fast Bunkering Klaipėda* judgment should be applied narrowly.

5) In addition, with the acceptance identified by the CJEU in its judgment, of the possibility to redefine in particular circumstances, the qualification of the transactions consisting of supply of goods involving the intermediary, Article 14 of the VAT Directive

⁵ CJEU, Opinion of 7 December 2016, *A Oy*, C-33/16, EU:C:2016:929.

⁶ Document D – taxud.c.1(2014)2716782 – 803.

was analysed and in particular paragraphs 1 and 2(c) of this provision. The VAT Committee recognised that apart from Article 14(1) defining the concept of "supply of goods", Article 14(2)(c) extending this concept to a transfer of goods pursuant to a contract under which commission is payable on purchase or sale, also has to be taken into account.

6) As a result the VAT Committee unanimously agreed guidelines whereby for goods supplied via intermediaries (chain transactions), where there is a transfer of goods pursuant to a contract under which commission is payable on purchase or sale, the transfer to the intermediary is, in accordance with Article 14(2)(c) of the VAT Directive, to be regarded as a supply of goods in its own right.

7) Therefore where commission as referred to in Article 14(2)(c) is not paid and particular circumstances comparable to those from the *Fast Bunkering Klaipėda* case exist, this could lead to the conclusion that the intermediaries are not in a position to have supplied the goods (fuel) to the operators of vessels. Therefore they could only be regarded as having supplied services – in accordance with Article 24(1) of the VAT Directive whereby the supply of services ‘shall mean any transaction which does not constitute a supply of goods’.

8) The ensuing possible change in qualification of the supplies made by intermediaries in the particular circumstances of the *Fast Bunkering Klaipėda* case above would have to be based on the facts which are left for the national court/tax administration to ascertain for each individual case.

3. THE COMMISSION SERVICES’ ANALYSIS

The focus of this Working paper is the exemption laid down in Article 148(a) of the VAT Directive for the supply of goods for the fuelling and provisioning of vessels used for international transport.

The Commission services support/ stand by the analysis developed up to now, as endorsed by the VAT Committee, in particular in Working paper No 907, followed by the guidelines dealing with the case *Fast Bunkering Klaipėda* as summarised under point 2.2 of this document.

Furthermore it is the position of the Commission services that the recent judgment of the CJEU in case C-33/16 *A Oy* does not influence the analysis of the scope of the exemption for the supplies of goods covered by Article 148(a) of the VAT Directive as it deals with the exemption for the supply of services.

Therefore in the opinion of the Commissions services, the purpose of the discussion should concentrate on the identification of possible divergences in the application of Article 148(a) and possible ways of finding a common ground in this respect between Member States.

3.1. The question of invoicing mentioned in the opinion of the Advocate General in case C-33/16, *A Oy*

In respect of the concerns raised by the Danish delegation in the context of paragraph 40 of the Opinion of the Advocate General in case C-33/16, *A Oy*, the Commission services would like to underline that invoices must accurately reflect the actual supplies of goods and services.

Therefore in a situation where supplies are reclassified/redefined because of the factual circumstances of the case, the documents issued in relation to these supplies should be modified accordingly.

It is up to each taxable person to ensure that the invoice information accurately reflects the actual supply. How this is done is the choice of the taxable person, provided he respects the rules set up regarding the content of invoices.

3.2. Issues to be discussed with a view of ensuring the harmonised application of Article 148(a)

With a view to identifying possible divergences in interpretation of the application of Article 148(a) in the context of the *Fast Bunkering Klaipėda* judgment, the Commission services invite Member States to present their stance on the following elements/questions:

- 1) Do you apply the exemption from Article 148(a) only to the supply of goods made directly to the taxable person operating the vessel, and not to supplies made at an earlier stage in the commercial chain?
- 2) Do you treat the supplies of goods made through intermediaries acting in their own name where commission is payable on purchase or sale as supplies of goods made in accordance with Article 14(2)(c) of the VAT Directive (i.e. the recipient of the first supply of goods is seen as the intermediary acting in his own name)?
- 3) Do you treat the supplies of goods referred to under point 2) in the same way also when particular circumstances as described in the *Fast Bunkering Klaipėda* judgment take place? If not, how do you proceed?
- 4) Are you often faced in practice with situations where, in relation to supplies made *via* an intermediary, commission is not paid?
- 5) In case you are confronted with the situations referred to under point 4):
 - a) Do you analyse the situation on a case-by-case basis?
 - b) Do you have any guidelines/more general approach developed at administrative or legislative level?

4. DELEGATIONS' OPINION

The delegations are invited to give their opinion on the issues/questions raised in the Working paper, in particular those listed under point 3.2 above. The delegations are asked to consider the need to have a harmonised application of the rules on exemption specified in Article 148(a) in the context of assuring a level playing field for businesses in the internal market.

*

* *

Question from Denmark

The Danish Customs and Tax Administration has from business representatives received information that there is a danger that the judgment of the CJEU in case 526/13, Fast Bunkering, is being applied in a different manner in Member States. We were at same time asked to reconsider our interpretation of the judgment. We have just finished our reconsideration of the correct application of the judgment. This has not lead to a change in our position.

Our position

It continues to be our reading of the judgment that Article 148(1)(a) of Directive 2006/112 must be interpreted as meaning that the exemption provided for in that provision is not applicable to supplies of goods for the fueling and provisioning to intermediaries acting in their own name .

This applies even if, at the date on which the supply is made, the ultimate use of the goods is known and duly established and evidence confirming that is submitted to the tax authority in accordance with the national legislation .

This applies even in the case where the transactions carried out by an economic operator, such as Fast Bunkering, cannot be classified as supplies made to intermediaries acting in their own name, but should be regarded as being supplies made directly to the operators of vessels . In that case, there exist for VAT purposes no supply of oil from Fast Bunkering to the intermediary. Which means that the intermediary receives no supply which can benefit from the exemption laid down in Article 148(1)(a).

This also means that invoices issued in accordance with Articles 220 and 226 of the VAT Directive by suppliers such as Fast Bunkering or on their behalf should be issued to the operators of vessels, not the intermediaries, the operators of vessels being the customers for VAT purposes, not the intermediaries . Which means that the observation made by advocate general Bot in the last sentence of paragraph 40 in the opinion in case C-33/16, A Oy, in our view must be considered contra legem unless you read it as only referring to invoices issued under civil law.

One has to remember that whether the transactions carried out by an economic operator, such as Fast Bunkering, should be classified as supplies made to intermediaries acting in their own name or should be regarded as being supplies made directly to the operators of vessels should be decided not only on the basis of Article 14(1) of the VAT Directive but also on the basis of Article 14(2)(c). We here refer to the guidelines of the VAT Committee resulting from the 107th meeting of the committee (document B) (WP 911) and the preceding Working paper No 907 from DG Taxud. We also refer to the Commission's Explanatory Memorandum regarding the proposal to the second VAT Directive, which states that the provision which is now Article 14(2)(c) also applies to cases where the goods are handled directly over from the first seller to the last buyer . The number of cases where the transactions carried out by an economic operator, such as Fast Bunkering, cannot be classified as supplies made to intermediaries acting in their own name, but

should be regarded as being supplies made directly to the operators of vessels, could therefore be very low. This may very well be a rare occurrence.

Consultation of the VAT Committee

Even though our reconsideration of the subject has not lead to a change in our position, we do agree with the business representatives that there is a danger that the judgment of the CJEU in case 526/13, Fast Bunkering, could be applied in Member States in a manner that is not uniform. In order to ensure a level playing field in the internal market we would therefore like to know the view of the Commission services and of other Member States.

We therefore hereby request that the subject will be discussed in the VAT Committee at the earliest possible opportunity.