Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

15 May 2019 (*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Article 135(1)(b) — Supply of goods — Exemptions for other activities — Granting and negotiation of credit — Fuel cards)

In Case C?235/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 23 November 2017, received at the Court on 28 March 2018, in the proceedings

Vega International Car Transport and Logistic — Trading GmbH

v

Dyrektor Izby Skarbowej w Warszawie,

THE COURT (Eighth Chamber),

composed of F. Biltgen, President of the Chamber, C.G. Fernlund and L.S. Rossi (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Vega International Car Transport and Logistic — Trading GmbH, by J. Pomorska-Por?bska, tax adviser,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by R. Lyal and J. Hottiaux, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 135(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Vega International Car Transport and Logistic — Trading GmbH, whose registered office is in Austria (‘Vega International’), and the Dyrektor Izby Skarbowej w Warszawie (Director of the Tax Chamber in Warsaw, Poland) concerning the latter’s refusal to reimburse Vega International the value added tax (VAT) relating to fuel purchase transactions carried out by means of fuel cards.

Legal context

European Union law

3 Article 2(1)(a) and (c) of Directive 2006/112 provides:

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

4 Article 14(1) and (2) of that directive provides:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

...

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.’

5 Article 24(1) of that directive is worded as follows:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

6 Under Article 135(1)(b) of that directive:

‘Member States shall exempt the following transactions:

...

(b) the granting and the negotiation of credit and the management of credit by the person granting it’.

Polish law

7 Directive 2006/112 was transposed into Polish law by the ustawa o podatku od towaru i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2011, No 177, item 1054), as amended (‘the Law on VAT’).

8 Under Article 5(1)(1) of the Law on VAT:

‘[The following shall be subject to VAT]: the supply of goods or services for consideration within the territory of the country.’

9 Article 7(1) and (8) of that law provides:

‘(1) The supply of goods referred to in Article 5(1)(1) shall mean the transfer of the right to dispose of property as owner ...

...

(8) In the event that several entities supply the same goods in such a manner that the first entity releases those goods directly to the last entity acquiring the goods, the supply of goods is considered to have been made by each of the entities involved in those transactions.’

10 Article 8(1) of that law provides:

‘The supply of services referred to in Article 5(1)(1) shall mean any supply to a natural person, legal person or organisational unit without legal personality which does not constitute a supply of goods within the meaning of Article 7 ...’

11 Article 43(1)(38) of that law, which transposes Article 135(1)(b) of Directive 2006/112, states:

‘The granting and the negotiation of credit and cash loans and the management of credit or cash loans by the person granting them [shall be exempt from VAT].’

12 Under Article 86(1) of the Law on VAT:

‘To the extent that the goods and services are used to perform taxable transactions, the taxable person referred to in Article 15 shall have the right to deduct the amount of input tax from the amount of tax due ...’

The dispute in the main proceedings and the question referred for a preliminary ruling

13 It is apparent from the order for reference that Vega International engages in the transport of commercial vehicles of well-known manufacturers from the factory directly to the customer. That service is provided via several subsidiaries of Vega International whose registered offices are in different Member States, including the subsidiary Vega Poland sp. z o.o., established in Poland.

14 Vega International organises and manages the supply of fuel cards, issued by different fuel suppliers, to all its subsidiaries. The vehicles transported by Vega Poland are refuelled using personal fuel cards, which are issued to drivers. For organisational reasons and having regard to the level of costs, all the transactions carried out by means of fuel cards are centralised by the parent company in Austria, which receives invoices from the fuel suppliers establishing, in particular, the purchase of fuel with VAT. Next, at the end of each month, Vega International passes on the costs of the fuel made available for the purpose of the supply of the vehicle transportation service, together with a surcharge of 2%, to its subsidiaries, including Vega Poland. Those subsidiaries are permitted to offset the invoices relating to the use of the fuel cards with invoices issued to the Austrian company or to settle those invoices within one to three months of their receipt.

15 By decision of 11 August 2014, the Naczelnik Drugiego Urz?du Skarbowego Warszawa-

?ródmie?cie (Head of the Second Tax Office for Warsaw-?ródmie?cie, Poland) refused to reimburse Vega International VAT for the period from April to June 2012 in the amount of 106 031.44 Polish zlotys (PLN) (around EUR 24 735.82). That decision was confirmed by the Director of the Tax Chamber in Warsaw by decision of 28 November 2014.

16 Vega International brought an action for annulment of that decision before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland). By judgment of 26 June 2015, that court dismissed Vega International's action as unfounded.

17 Vega International then brought an appeal on a point of law against that judgment before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland). That court, like the Polish tax authorities and the court of first instance, considered the possibility, in the present case, of applying the principles laid down by the Court of Justice in its judgment of 6 February 2003, *Auto Lease Holland* (C?185/01, EU:C:2003:73), according to which a fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. According to the findings of the Court in the case giving rise to that judgment, the leasing company does not purchase the fuel in order subsequently to resell it to the lessee; it is the lessee who has a free choice as to the quality and quantity, as well as the date of purchase of the fuel and thus disposes of that fuel as if it were the owner.

18 In the present case, according to that judgment, it must be held that Vega International does not carry out 'supplies of goods' (fuel) for the purposes of Article 7(8) of the Law on VAT, in respect of which VAT may be recovered, but supplies financing services to Vega Poland which would not be taxable in Poland inasmuch as they are exempt from VAT under Article 43(1)(38) of that law.

19 However, the referring court notes that the judgment of 6 February 2003, *Auto Lease Holland* (C?185/01, EU:C:2003:73), was not delivered on the basis of Directive 2006/112, but concerns the interpretation of the provisions previously in force of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive').

20 In those circumstances, the referring court has doubts concerning the interpretation, in the light of that judgment, of the new provision set out in Article 135(1)(b) of Directive 2006/112, which refers to transactions such as the granting or the negotiation of credit and the management of credit by the person granting it. The question therefore arises as to whether the transactions carried out by Vega International in Austria in connection with the provision and settlement of fuel cards used to purchase fuel by its subsidiaries within the group can be regarded as such transactions. Those doubts are, moreover, increased by the diverging lines of case-law within the national courts, which have referred to that precedent in order to assess the nature of transactions concluded in the context of the provision of fuel cards.

21 Consequently, the referring court considers that, in order for it to give a ruling on the appeal on a point of law lodged by Vega International, it is necessary that the Court of Justice itself interpret Article 135(1)(b) of Directive 2006/112.

22 In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the concept referred to in Article 135(1)(b) of [Directive 2006/112] include transactions consisting in the provision of fuel cards and in negotiating, financing and accounting for the

purchase of fuel using those cards, or can such complex transactions be considered to be chain transactions the primary purpose of which is the supply of fuel?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 135(1)(b) of Directive 2006/112 is to be interpreted as meaning that, in circumstances such as those of the case in the main proceedings, the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, may be classified as a service granting credit which is exempt from VAT as referred to in that provision, or as a complex transaction the main objective of which is the supply of fuel and thus the supply of goods as defined in Article 14(1) of that directive, in respect of which it is possible to recover the VAT paid in Poland.

24 As a preliminary point, it should be noted that the provisions of Directive 2006/112 which are relevant in the context of the case in the main proceedings are, in essence, identical to the equivalent provisions of the Sixth Directive. In those circumstances, the case-law relating to those provisions of the Sixth Directive is still relevant in interpreting the equivalent provisions of Directive 2006/112 (see, in particular, judgment of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 27).

25 In order to answer the question raised by the referring court, it should be borne in mind that, according to Article 2(1)(a) of Directive 2006/112, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

26 Under Article 14(1) of that directive, 'supply of goods' means, as a rule, the transfer of the right to dispose of tangible property as owner.

27 In that regard, according to settled case-law, the concept of a 'supply of goods' referred to in Article 5(1) of the Sixth Directive and Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (judgments of 8 February 1990, *Shipping and Forwarding Enterprise Safe*, C?320/88, EU:C:1990:61, paragraph 7; of 14 July 2005, *British American Tobacco and Newman Shipping*, C?435/03, EU:C:2005:464, paragraph 35; of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 51; of 3 June 2010, *De Fruytier*, C?237/09, EU:C:2010:316, paragraph 24; and of 18 July 2013, *Evita-K*, C?78/12, EU:C:2013:486, paragraph 33).

28 The Court has also held that that concept is objective in nature and that it applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person in question or for them to take account of the intention of a trader other than that taxable person involved in the same chain of supply (judgment of 21 November 2013, *Dixons Retail*, C?494/12, EU:C:2013:758, paragraph 21 and the case-law cited).

29 In the present case, it is apparent from the order for reference that the provision of fuel cards by Vega International to its subsidiaries, including Vega Poland, enables those subsidiaries, inter alia, to refuel at petrol stations. Those subsidiaries then issue the invoices establishing the purchase of fuel with VAT, which was the subject of a request for reimbursement sent by Vega International to the Polish tax authorities, directly to Vega International.

30 In those circumstances, in order to answer the question raised by the referring court, it is necessary to determine whether, in the case in the main proceedings, the oil companies actually

transferred to Vega International or Vega Poland the right to dispose of the fuel as owner (see, to that effect, judgment of 6 February 2003, *Auto Lease Holland*, C?185/01, EU:C:2003:73, paragraph 33).

31 In that regard, it should be borne in mind that, in the judgment of 6 February 2003, *Auto Lease Holland* (C?185/01, EU:C:2003:73), the Court analysed whether, in the context of a contract for leasing a motor vehicle, there is a supply of goods, namely fuel, by oil companies to a leasing company where the lessee refuels its vehicle in the name and on behalf of that company, which then requests the national tax authorities to reimburse the VAT levied on that fuel.

32 In that judgment, the Court considered that it is common ground that it is indeed the lessee who is empowered to dispose of the fuel as if he were its owner, because he obtains the fuel directly at filling stations and the lessor does not at any time have the right to decide either the way in which the fuel must be used or the purposes of that use (see, to that effect, judgment of 6 February 2003, *Auto Lease Holland*, C?185/01, EU:C:2003:73, paragraph 34).

33 In addition, according to the Court, in such a scenario, the supplies have been effected at the leasing company's expense only ostensibly. The monthly payments made to that company constitute only an advance, and the actual consumption, established at the end of the year, is the financial responsibility of the lessee, who, consequently, wholly bears the costs of the supply of fuel (judgment of 6 February 2003, *Auto Lease Holland*, C?185/01, EU:C:2003:73, paragraph 35).

34 The Court concluded from this that the fuel management agreement concluded between the leasing company and the lessee is not a contract for the supply of goods, namely fuel, by the leasing company, but rather a contract to finance the purchase thereof. According to the Court, the leasing company does not purchase the fuel in order subsequently to resell it to the lessee; the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the date of purchase. Accordingly, the leasing company acts, in fact, as a supplier of credit vis-à-vis the lessee (judgment of 6 February 2003, *Auto Lease Holland*, C?185/01, EU:C:2003:73, paragraph 36).

35 In accordance with the case-law recalled in paragraph 24 above, the foregoing considerations, developed by the Court in the light of Article 5(1) of the Sixth Directive, can be transposed to the circumstances of the present case regarding the interpretation of the concept of a 'supply of goods' as defined in Article 14(1) of Directive 2006/112.

36 In particular, it should be pointed out that, in the present case, Vega International does not dispose of the fuel in respect of the purchase of which it seeks reimbursement of VAT as if it were the owner. That fuel is purchased by Vega Poland directly from the suppliers and at its sole discretion. Accordingly, Vega Poland decides on, in particular, the fuel purchasing arrangements in so far as it may choose, from among the service stations of the suppliers indicated by Vega International, which service station to refuel at and may freely decide on the quality, quantity and type of fuel, as well as when to purchase and how to use it (see, to that effect, judgment of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C?42/14, EU:C:2015:299, paragraph 26).

37 In addition, it is common ground that Vega Poland also wholly bears the costs connected with such refuelling in so far as Vega International passes on the costs of that fuel to Vega Poland. Next, the Polish subsidiary may either offset the invoices relating to the use of fuel cards with invoices issued to the Austrian company or settle those invoices directly within one to three months of their receipt.

38 In those circumstances, as is maintained by the Polish Government and the European Commission, it is not appropriate to consider that, in the case in the main proceedings, the supply

of fuel is made to Vega International and that that company then resells that product to Vega Poland by making, in its turn, a supply of fuel to that company. Instead, as is emphasised by the Commission, it should be noted that Vega International confines itself to providing its Polish subsidiary, by means of fuel cards, with a simple instrument enabling it to purchase that fuel, thereby playing no more than an intermediary role in the purchase transaction concerning that product.

39 Consequently, since no supply of goods, namely fuel, has been made, in the case in the main proceedings, by Vega International, that company cannot claim reimbursement of the VAT paid on the invoices issued to it and relating to the refuelling carried out by Vega Poland at petrol stations.

40 That being said, it should be noted that, pursuant to Article 24(1) of Directive 2006/112, any transaction which does not constitute a supply of goods must be regarded as being a ‘supply of services’.

41 It is common ground that the transaction carried out by Vega International with regard to its Polish subsidiary, consisting in the provision of fuel cards for the purpose of, inter alia, refuelling the vehicles that subsidiary transports, does not constitute a ‘supply of goods’ as defined in Article 14(1) of Directive 2006/112. Consequently, it constitutes a ‘supply of services’ as defined in Article 24(1) of that directive.

42 Thus, in order to provide the referring court with a useful answer, it must still be ascertained whether such a supply of services may be classified as a service granting credit which is exempt from VAT for the purposes of Article 135(1)(b) of Directive 2006/112.

43 In that regard, it should be borne in mind that the transactions exempted under that provision are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service, so that the application of those exemptions is not dependent on the status of the entity providing those services (see, to that effect, judgments of 4 May 2006, *Abbey National*, C?169/04, EU:C:2006:289, paragraph 66, and of 21 June 2007, *Ludwig*, C?453/05, EU:C:2007:369, paragraph 25).

44 Regarding, in particular, the expression ‘the granting and the negotiation of credit’ used in that provision, that expression must be interpreted broadly, so that its scope cannot be limited only to loans and credit granted by banking and financial institutions (see, to that effect, judgments of 27 October 1993, *Muys’ en De Winter’s Bouw- en Aannemingsbedrijf*, C?281/91, EU:C:1993:855, paragraph 13; of 22 October 2015, *Hedqvist*, C?264/14, EU:C:2015:718, paragraph 37; and of 18 October 2018, *Volkswagen Financial Services (UK)*, C?153/17, EU:C:2018:845, paragraph 35).

45 That interpretation is borne out by the objective of the common system introduced by Directive 2006/112, which aims, in particular, to secure equal treatment for taxable persons (see, in particular, judgment of 27 October 1993, *Muys’ en De Winter’s Bouw- en Aannemingsbedrijf*, C?281/91, EU:C:1993:855, paragraph 14).

46 Consequently, an interpretation whereby the granting by a bank of financing for a purchase would be exempt from VAT, while the financing provided by an economic operator not having the particular status of a financial or banking sector entity for the same purchase would be subject to VAT, would infringe one of the fundamental principles of the common system of VAT, namely the equal treatment of taxable persons.

47 In the present case, as has been recalled in paragraph 14 above, it is common ground that all the transactions carried out by means of fuel cards provided by Vega International to its

subsidiaries, including Vega Poland, are centralised by the parent company in Austria, which receives invoices from the fuel suppliers establishing, in particular, the purchase of fuel with VAT. Next, at the end of each month, Vega International passes on the costs of the fuel made available for the purpose of the supply of the vehicle transportation service, together with a surcharge of 2%, to its subsidiaries. Lastly, it is for its subsidiaries either to offset the invoices relating to the use of the fuel cards with invoices issued to the Austrian company or to settle those invoices within one to three months of their receipt.

48 It must be held that, by applying that surcharge of 2% to Vega Poland, Vega International receives a payment for the service provided to its Polish subsidiary. Vega International thus provides a financial service to Vega Poland by financing in advance the purchase of fuel and therefore acts, for that purpose, in the same way as an ordinary financial or credit institution.

49 In those circumstances, it must be found that the provision, by Vega International, of fuel cards to Vega Poland constitutes a genuine financial transaction which is akin, more specifically, to the granting of credit for the purposes of Article 135(1)(b) of Directive 2006/112 (see, to that effect, judgment of 18 October 2018, *Volkswagen Financial Services (UK)*, C?153/17, EU:C:2018:845, paragraph 36).

50 It follows that services such as those provided by Vega International to Vega Poland are eligible for the exemption provided for in Article 135(1)(b) of Directive 2006/112.

51 Having regard to the foregoing, the answer to the question referred is that Article 135(1)(b) of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those of the case in the main proceedings, the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, may be classified as a service granting credit which is exempt from VAT as referred to in that provision.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 135(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those of the case in the main proceedings, the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, may be classified as a service granting credit which is exempt from value added tax as referred to in that provision.

[Signatures]

* Language of the case: Polish.