Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

17 December 2020 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Exemptions on exportation – Article 146(1)(b) – Goods dispatched or transported outside the European Union by a customer not established within the territory of the Member State concerned – Article 147 – ‘Goods to be carried in the personal luggage of travellers’ not established within the European Union – Concept – Goods which have actually left the territory of the European Union – Proof – Refusal of the exemption on exportation – Principles of fiscal neutrality and proportionality – Tax evasion)

In Case C?656/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary), made by decision of 22 August 2019, received at the Court on 4 September 2019, in the proceedings

BAKATI PLUS Kereskedelmi és Szolgáltató Kft.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ileši?, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BAKATI PLUS Kereskedelmi és Szolgáltató Kft., by A. Hajós, A.I. Dobos and L. Horváth, ügyvédek,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the European Commission, by L. Havas, L. Lozano Palacios and F. Clotuche-Duvieusart, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Articles 146 and 147 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive') and of the principles of fiscal neutrality and proportionality.

2 The request has been made in proceedings between BAKATI PLUS Kereskedelmi és Szolgáltató Kft. ('Bakati') and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary) ('the Appeals Directorate') concerning a decision refusing the exemption from value added tax (VAT) provided for goods to be carried in the personal luggage of travellers.

3 Since 1 April 2020, this dispute has come under the jurisdiction of the Szegedi Törvényszék (Szeged Court, Hungary), as that court informed the Court of Justice, but without withdrawing the questions which had been referred by the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary).

Legal context

EU law

The VAT Directive

4 Article 14(1) of the VAT Directive provides:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 Title IX of that directive concerns exemptions. Chapter 1 of Title IX consists solely of Article 131 of that directive, which provides:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

6 Chapter 6 of Title IX is entitled 'Exemptions on exportation' and contains Articles 146 and 147 of that directive. Article 146(1)(b) of the directive provides:

'Member States shall exempt the following transactions:

…

(b) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use'.

7 Article 147 of the VAT Directive states:

'1. Where the supply of goods referred to in point (b) of Article 146(1) relates to goods to be carried in the personal luggage of travellers, the exemption shall apply only if the following conditions are met:

(a) the traveller is not established within the Community;

(b) the goods are transported out of the Community before the end of the third month following that in which the supply takes place;

(c) the total value of the supply, including VAT, is more than EUR 175 or the equivalent in national currency, …

However, Member States may exempt a supply with a total value of less than the amount specified in point (c) of the first subparagraph.

2. For the purposes of paragraph 1, “a traveller who is not established within the Community” shall mean a traveller whose permanent address or habitual residence is not located within the Community. In that case “permanent address or habitual residence” means the place entered as such in a passport, identity card or other document recognised as an identity document by the Member State within whose territory the supply takes place.

Proof of exportation shall be furnished by means of the invoice or other document in lieu thereof, endorsed by the customs office of exit from the Community.

…’

8 Title XI of the VAT Directive concerns ‘Obligations of taxable persons and certain non-taxable persons’. Chapter 7 of Title XI, entitled ‘Miscellaneous provisions’, includes Article 273 of that directive, the first paragraph of which states:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

Delegated Regulation (EU) No 2015/2446

9 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 2015 L 343, p. 1) contains, in Article 1, definitions used for the purposes of the application of that delegated regulation.

10 According to Article 1(5), ‘“baggage” means all goods carried by whatever means in relation to a journey of a natural person’.

Hungarian law

11 The általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax; ‘the VAT Law’) provides, in Article 98:

‘(1) Supplies of goods dispatched by post or transported from the country to a country outside the Community shall be exempt from the tax, provided that the supply or transport:

…

(b) is carried out by the purchaser, or by a third party acting on his behalf if the additional conditions established in paragraphs 3 and 4 of this article or in Articles 99 and 100 of this Law are

met.

(2) Paragraph 1 is applicable if the following conditions are met:

(a) the authority dispatching the goods from the territory of the Community must have certified that they have left that territory at the time of supply or, at the latest, within 90 days of the date on which that supply took place, …

…

(3) Paragraph (1)(b) may apply, subject to the provisions of Articles 99 and 100, where, in this context, the purchaser is not established in Hungary or, in the absence of any establishment, does not have his permanent address or habitual residence there.

…'

12 Article 99 of the VAT Law reads as follows:

'(1) Where the customer is a foreign traveller and the goods supplied … form part of his personal luggage or his traveller's luggage, in order for the exemption provided for in Article 98(1) to apply:

(a) the value of the supply, including the tax, must exceed an amount equal to EUR 175;

(b) the foreign traveller must prove his status by means of travel or other documents issued by authorities recognised as competent in Hungary which identify the person …;

(c) at the point of departure of the goods from the Community, the authority must certify that the goods have left the territory by endorsing and stamping the form provided for this purpose by the State tax authorities …; the goods must be presented simultaneously with the original invoice which confirms that the goods have been supplied.

(2) In order to qualify for the exemption, the seller of the goods must, in addition to issuing an invoice, complete a tax refund application form, when asked to do so by the foreign traveller. … The tax refund application form shall be drawn up in three copies by the seller of the goods, who shall hand the first two copies to the traveller and retain the third copy in his own accounting documents.

(3) Where the customs authority certifies the exit of the goods referred to in paragraph 1(c), it shall collect from the traveller the second copy of the tax refund application form bearing an endorsement and a stamp.

(4) Exemption from tax shall be subject to the condition that:

(a) the seller of the goods is in possession of the first copy of the tax refund application form bearing an endorsement and a stamp referred to in paragraph 1(c), and

(b) if the tax has been levied at the time of supply of the goods, the seller shall refund the tax to the foreign traveller in accordance with paragraphs 5 to 8.

…

(6) In order to obtain a refund of tax, the foreign traveller or his agent:

(a) shall hand to the seller of the goods the first copy of the tax refund application form bearing

an endorsement and a stamp in accordance with paragraph 1(c), and

(b) shall present to the seller of the goods the original copy of the invoice proving the supply of the goods.

…

(9) Where the tax has been invoiced pursuant to paragraph 4(b) and the seller of the goods has previously established it and declared it as the tax payable, he shall be entitled … to reduce the tax payable … by the amount of tax refunded, provided that that amount is shown separately in his accounting records.

…’

13 Article 259(10) of the VAT Law defines the concept of a ‘foreign traveller’ as ‘a natural person who is not a national of a Member State … or a holder of a right of residence in a Member State … or a person who is a national of a Member State … but who resides outside Community territory’.

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

14 Until April 2015, Bakati’s business was wholesale trade in ornamental plants. Subsequently, it was involved in non-store retail trade. From 2015 onwards, its annual turnover increased significantly, from 50 million Hungarian forints (HUF) (approximately EUR 140 000) to HUF one billion (approximately EUR 2 784 000). In 2016, 95% of its business consisted in deliveries to twenty private individuals, related to three families, of large quantities of food products, cosmetics and cleaning products. Those purchases were made by telephone and took place several hundreds of times.

15 The goods concerned were transported on behalf of Bakati from its warehouse in Szeged (Hungary) to a warehouse rented by the customers in Tompa (Hungary), close to the Serbian-Hungarian border, where the invoices and application forms for VAT refunds for foreign travellers, drawn up by Bakati on the basis of the information provided by those customers, were handed over with the goods concerned in return for the purchase price. Those customers then transported those goods to Serbia, by private car, as personal luggage. In respect of those goods, the customers took advantage of the VAT exemption provided for goods to be carried in the personal luggage of foreign travellers, by sending back to Bakati the copy of the VAT refund application form stamped by the customs office of exit, stating that the goods had left the territory of the European Union at Tompa. On receipt of that form, Bakati refunded to the customers the VAT which they had paid on the purchase.

16 In its VAT returns for 2016, and in accordance with Article 99(9) of the VAT Law, Bakati included as the sum to be deducted from the tax payable the VAT refunded to those customers, in a total amount of HUF 339 788 000 (approximately EUR 946 000).

17 During a tax inspection, the Nemzeti Adó- és Vámhivatal Csongrád Megyei Adó- és Vámigazgatósága (Tax and Customs Directorate for the province of Csongrád (Hungary)) established that the purchases in question exceeded the customers’ individual and family needs and that the purchases had been made with a view to the resale of the goods acquired. According to that authority, this meant that those goods could not constitute personal luggage within the meaning of the applicable legislation. That authority also took the view that Bakati could not benefit from the VAT exemption in respect of exports, since that company had not initiated the customs exit procedure for those goods and did not have the necessary documents for that purpose.

Consequently, by a decision of 27 June 2018, the authority requested Bakati to pay a VAT difference of HUF 340 598 000 (approximately EUR 948 200), together with a tax penalty of HUF 163 261 000 (approximately EUR 454 500) and a late-payment surcharge of HUF 7 184 000 (approximately EUR 20 000).

18 That decision was upheld by a decision of the Appeals Directorate of 31 October 2018, following which Bakati brought an action before the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged) seeking annulment of the decision of the Appeals Directorate.

19 In support of that action, Bakati argues, inter alia, that, in the absence of a definition of 'personal luggage' or 'travel' in tax law, the customs authorities cannot refuse to endorse a stamp on a form in respect of goods which have left Hungarian territory on the sole ground that it can be presumed that the purchasers intend to resell them. Moreover, Bakati claims that it had no intention of avoiding the tax, since, under Article 98 of the VAT Law, it was entitled to exemption from VAT in respect of exports. Furthermore, Bakati argues that the tax treatment of the transactions at issue cannot depend on the rules of customs law, and the objective of the export exemption was respected because the goods in question actually left the territory of the European Union.

20 The Appeals Directorate contends that the action should be dismissed.

21 The referring court states that, without any doubt, Bakati was aware that the customers were buying the goods in question not for their individual or family use, but in order to resell them on the markets in Serbia, and that the members of three families were involved in the transactions at issue in order that the consideration for each supply would not exceed a certain amount, thereby facilitating the cross-border transit of the goods between Hungary and Serbia. The referring court states that it is common ground that the goods in question left Hungarian territory on each occasion.

22 As regards the substance of the dispute, that court states, as a preliminary point, that, in accordance with a judgment of the Kúria (Supreme Court, Hungary) of 8 December 2016, which formed the basis of the decision of the Appeals Directorate, it is appropriate, in circumstances similar to those at issue before it, to begin by examining whether the conditions for the application of Article 99 of the VAT Law have been met. According to that judgment, only goods purchased by a passenger for his own use or as a gift are regarded as coming within the concept of 'luggage' and, consequently, that Article 99 does not allow goods, the quantity of which reaches a commercial level, to be exported in the form of baggage. Since the supply of goods must, however, be taxed in the State in which the goods are ultimately used, the Kúria (Supreme Court) therefore requires the tax authority, if it is demonstrated that the goods in question have left the territory of the European Union, to examine whether another VAT exemption provided for in Article 98 of the VAT Law is applicable.

23 Since Articles 98 and 99 of the VAT Law correspond to the provisions of Articles 146 and 147 of the VAT Directive, the referring court asks, in the first place, in the light of that judgment, how the concept of 'personal luggage' should be defined. It is of the opinion that the ordinary meaning of those words should be relied on and that the purpose of the exportation is of decisive importance. This means that goods which are intended for resale cannot come within that concept. However, in the absence of relevant case-law of the Court of Justice, it is necessary to submit a request for a preliminary ruling.

24 In the second place, the referring court considers that, as the purchasers concerned did not change their intention to benefit from the VAT exemption for foreign travellers and since the goods

were not exported outside Hungary under the single customs procedure, the tax authority was not required to reclassify the supplies in question.

25 According to the referring court, since Bakati was aware that the conduct of the purchasers concerned was fraudulent and that the conditions for a VAT exemption for foreign travellers had not been met, that company was not entitled to issue a VAT refund application form for foreign travellers. In that court's view, the question whether those customers actually circumvented the Serbian tax legislation is irrelevant. All that matters is that, according to that court, Bakati, by its conduct, knowingly facilitated the fraudulent activity of those customers and deliberately breached the requirements of the VAT Law, thereby unduly reducing its tax base on the basis of the refund of the tax from which foreign travellers are exempt.

26 If, in such circumstances, the tax authorities were required to grant the VAT exemption on a legal basis other than that relating to the exemption for foreign travellers, by reclassifying the transactions under consideration, Bakati's conduct in bad faith would have no legal consequence. That would give Bakati an unlawfully acquired competitive advantage, would infringe the principle of fiscal neutrality and would run counter to the obligation on the Member States, laid down in Article 273 of the VAT Directive, to take measures to combat tax evasion and avoidance. In that regard, in the referring court's view, the solution adopted in the judgment of 17 May 2018, *Vámos* (C?566/16, EU:C:2018:321), from which it follows that a taxable person is not permitted to opt for a VAT exemption on expiry of the period prescribed for that purpose, can be applied to the present case.

27 Furthermore, by infringing the applicable formal requirements, Bakati and the purchasers concerned knowingly concealed their real economic activities from the tax and customs authorities. Such an infringement precludes a finding that the substantive conditions for the VAT exemption were satisfied. Bakati's assertion that the inclusion of the customs authorities' stamp on the VAT refund application form for foreign travellers justifies the application of the exemption for an export supply is incorrect. The VAT exemption for foreign travellers concerns a defined category of persons that differs from that covered by the exemption on exportation, and it is necessary to determine on what basis the purchaser concerned is entitled to a refund.

28 In those circumstances, the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with Article 147 of [the VAT Directive] for a Member State to operate a practice whereby the concept of "personal luggage", established as forming part of the concept of the supply of goods to foreign travellers, which is exempt from value added tax, is treated in the same way as both the concept of personal effects used in the Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954 [*United Nations Treaty Series*, vol. 276, p. 230], and the Additional Protocol thereto, and the concept of "luggage" defined in Article 1(5) of [Delegated Regulation 2015/2446]?

(2) In the event of a negative answer to the previous question, how is the concept of "personal luggage" in Article 147 of the VAT Directive to be defined, given that that directive does not define it? Is the national practice whereby the tax authorities of a Member State take into account only the "normal meaning of terms" compatible with the provisions of EU law?

(3) Must Articles 146 and 147 of the VAT Directive be interpreted as meaning that, where a taxable person does not qualify for the exemption for the supply of goods to foreign travellers under Article 147 of that directive, it must be examined, where appropriate, whether the exemption for the supply of goods for export under Article 146 of that directive is applicable, even if the

customs procedures laid down in the EU Customs Code and in delegated legislation have not been carried out?

(4) If the answer given to the previous question is that, where the exemption for foreign travellers is not applicable, the transaction qualifies for a VAT exemption on the ground that the goods are for export, can the legal transaction be classified as a supply of goods for export that is exempt from VAT contrary to the intention expressed by the customer at the time of placing the order?

(5) In the event of an affirmative answer to the third and fourth questions, in a situation such as that in the case at issue, in which the issuer of the invoice knew at the time of supplying the goods that they had been purchased for the purposes of resale but the foreign buyer nonetheless wished to remove them from the territory under the scheme applicable to foreign travellers, with the result that the issuer of the invoice acted in bad faith in issuing the tax refund application form available for that purpose under that scheme, and in refunding the output VAT pursuant to the exemption for foreign travellers, is it compatible with Articles 146 and 147 of the VAT Directive and the EU-law principles of fiscal neutrality and proportionality for a Member State to operate a practice whereby the tax authority refuses to refund tax incorrectly declared and paid on supplies of goods to foreign travellers without classifying such transactions as supplies of goods for export and without making a correction to that effect, notwithstanding that it is indisputable that the goods left Hungary as traveller's luggage?'

Consideration of the questions referred for a preliminary ruling

Preliminary observations

29 It should be noted, as a preliminary point, that Bakati disputes the presentation of the facts by the referring court on the ground that that presentation is incomplete or even incorrect. Consequently, Bakati asks the Court of Justice to answer two additional questions, which it sets out in its written observations, or to take into account of its own motion, in the context of the analysis of the questions raised by the referring court, the principles of legal certainty and the protection of legitimate expectations, the taking into account of those principles being, in Bakati's view, in any event necessary, in the light of the facts which it presents, in order to give a useful answer to the referring court.

30 According to the settled case-law of the Court of Justice, in the context of proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered to rule on the interpretation or validity of EU-law provisions only on the basis of the facts which the national court puts before it (judgment of 21 July 2016, *Argos Supply Trading*, C?4/15, EU:C:2016:580, paragraph 29 and the case-law cited).

31 Consequently, the additional facts alleged by Bakati cannot be taken into consideration by the Court. In addition, there is nothing in the case file submitted to the Court, apart from those arguments, to suggest that such consideration is necessary in order to provide a useful answer to the referring court.

32 Furthermore, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves

on the national court alone and the parties to the main proceedings may not change their tenor (judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 33 and the case-law cited).

33 Furthermore, to answer additional questions mentioned by the parties would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind the fact that, under that provision, only the decision of the referring court is notified to the interested parties (see, to that effect, judgment of 16 October 2014, *Welmory*, C?605/12, EU:C:2014:2298, paragraph 34 and the case-law cited).

34 It follows that the Court cannot accede to Bakati's request that it answer its additional questions.

The first and second questions

35 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether the exemption provided for in Article 147(1) of the VAT Directive in respect of 'goods to be carried in the personal luggage of travellers' must be interpreted as meaning that that exemption covers goods which an individual not established within the European Union takes with him or her outside the European Union for commercial purposes, with a view to resale in a third State.

36 Article 146(1)(b) of the VAT Directive provides that Member States are to exempt the supply of goods dispatched or transported to a destination outside the European Union by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use.

37 Article 147(1) of that directive states that, where the supply referred to in point (b) of Article 146(1) relates to goods to be carried in the personal luggage of travellers, the exemption applies only where the traveller is not established within the European Union, where the goods are transported out of the European Union before the end of the third month following that in which the supply takes place and where the total value of the supply, including VAT, is more than EUR 175 or the equivalent in national currency. Member States may, however, exempt a supply with a total value of less than that amount.

38 With regard to the question of whether the exemption for 'goods to be carried in the personal luggage of travellers, within the meaning of Article 147(1), is capable of applying to goods transported under conditions such as those at issue in the main proceedings, it should be recalled that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (judgments of 18 October 2011, *Brüstle*, C?34/10, EU:C:2011:669, paragraph 25 and the case-law cited, and of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C?507/18, EU:C:2020:289, paragraph 31 and the case-law cited).

39 In addition, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (judgments of 18 October 2011, *Brüstle*, C?34/10, EU:C:2011:669, paragraph 31 and the case-law

cited, and of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C?507/18, EU:C:2020:289, paragraph 32 and the case-law cited).

40 It should also be recalled that the exemptions provided for by the VAT Directive constitute, unless the EU legislature has conferred upon the Member States the task of defining certain terms, independent concepts of EU law which must be placed in the general context of the common system of VAT introduced by that directive (see, to that effect, judgments of 18 October 2007, *Navicon,* C?97/06, EU:C:2007:609, paragraph 20 and the case-law cited, and of 7 March 2013, *Wheels Common Investment Fund Trustees and Others*, C?424/11, EU:C:2013:144, paragraph 16 and the case-law cited).

41 Furthermore, those exemptions must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person (judgments of 18 October 2007, *Navicon*, C?97/06, EU:C:2007:609, paragraph 22 and the case-law cited, and of 29 June 2017, *L.?.*, C?288/16, EU:C:2017:502, paragraph 22 and the case-law cited).

42 In the light of those factors, and in the absence of any reference to the law of the Member States or of a relevant definition in the VAT Directive, the words ‘goods to be carried in the personal luggage of travellers’, within the meaning of Article 147(1) of that directive, must be interpreted in accordance with their usual meaning in everyday language, while taking into account the context in which they occur and the purposes of the rules of which they are part.

43 In that regard, in the light of the issues raised by the referring court in its first question and in the second part of its second question, it should be noted at the outset, first, that the term ‘personal luggage’, within the meaning of Article 147(1) of the VAT Directive, cannot be defined by the direct application of the concept of ‘personal effects’ used in the Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954, and in the Additional Protocol to that convention, to which, moreover, neither the European Union nor even all of the Member States are parties, since such an application would be at variance with the Court’s settled case-law referred to in paragraphs 38 to 40 of the present judgment, and, in particular, because the exemptions provided for by the VAT Directive are independent concepts of EU law. Furthermore, in the light of that settled case-law, the term ‘personal luggage’ also cannot be interpreted exclusively by reference to the ‘general meaning of the words’.

44 Second, those terms also cannot be treated as equivalent to ‘baggage’ within the definition in Article 1(5) of Delegated Regulation 2015/2446. In accordance with the case-law referred to in paragraph 40 of the present judgment, the exemptions provided for by the VAT Directive must be placed in the general context of the common system of VAT established by that directive. Furthermore, that common system and the EU rules on the levying of customs duties have differences in structure, object and purpose which mean, in principle, that the terms of an exemption coming within that common system cannot be defined by reference to the definitions laid down by and for the purposes of the EU rules on the levying of customs duties (see, to that effect, judgment of 21 February 2008, *Netto Supermarkt*, C?271/06, EU:C:2008:105, paragraph 28).

45 As regards the interpretation to be given to the phrase ‘goods to be carried in the personal luggage of travellers’, it must be noted that, in its usual meaning in everyday language, that phrase covers goods, generally small in size or quantity, which natural persons take with them during a journey, which they need during that journey and which are for their private use or for use by their family. Those goods may also include goods which the person acquires during that journey.

46 As regards the context of Article 147(1) of the VAT Directive, it must be noted that that

provision makes the application of the exemption provided for by that article conditional not only on the supply relating to ‘goods to be carried in the personal luggage of travellers’, but also on compliance with the cumulative conditions set out in points (a) to (c) of the first subparagraph of that provision, namely that the traveller is not established within the European Union, that the goods are transported out of the European Union before the end of the third month following that in which the supply takes place, and that the total value of the supply, including VAT, is more than EUR 175 or the equivalent in national currency.

47 The first subparagraph of Article 147(2) states that the concept of ‘a traveller who is not established within the [European Union]’ means ‘a traveller whose permanent address or habitual residence is not located within the [European Union]’ and that the concept of ‘permanent address or habitual residence’ refers to ‘the place entered as such in a passport, identity card or other document recognised as an identity document by the Member State within whose territory the supply takes place’.

48 Those factors set out in Article 147, in particular in point (a) of the first subparagraph of paragraph 1 thereof and in Article 147(2), thus envisage the potential beneficiary of the exemption provided for in that article as being a natural person, not acting as an economic operator, which means that that exemption is not intended for economic operators and, consequently, does not apply to exports of a commercial nature.

49 Thus, in view of that finding and the Court’s settled case-law, referred to in paragraph 41 above, according to which VAT exemptions must be interpreted strictly, the exemption provided for in Article 147(1) of that directive in respect of goods to be carried in the personal luggage of travellers cannot apply to goods carried by an individual outside the European Union for commercial purposes with a view to resale in a third State.

50 That interpretation is supported by the specific objective pursued by the exemption provided for in Article 147 of the VAT Directive. It is true that that directive seeks, in a general manner, and in the same way as that provided for in Article 146(1)(b) of that directive, to respect, in the context of international business, the principle that the relevant goods should be taxed at their place of destination and, thus, to ensure that the relevant transaction is taxed only in the place where the relevant goods are consumed (see, to that effect, judgments of 29 June 2017, *L.?.*, C?288/16, EU:C:2017:502, paragraph 18 and the case-law cited, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 20 and the case-law cited).

51 However, as stated, in essence, by the Advocate General in points 67 to 71 of his Opinion, Article 147 also pursues the specific objective of promoting tourism, as illustrated by the right given to Member States by the second subparagraph of paragraph 1 of that article to exempt supplies with a total value of less than the amount specified in point (c) of the first subparagraph. A grant of the exemption provided for in Article 147 to exports made for commercial purposes, with a view to the resale of the goods concerned in a third State, would have no connection with that objective of promoting tourism, which is closely linked to a non-economic activity on the part of the purchaser.

52 That interpretation is, moreover, supported by the legislative development of the provision now found in Article 147 of the VAT Directive. As the Advocate General also stated, in essence, in points 43 to 59 and 63 of his Opinion, that provision was initially associated with the exemptions for imports of goods contained in the personal luggage of travellers, which are not at all commercial in nature, and with supplies made at the retail stage. The EU legislature has not indicated that it wished to reconsider that association in the various amendments which it has made to that provision.

53 In the light of all the foregoing considerations, the answer to the first and second questions

is that the exemption provided for in Article 147(1) of the VAT Directive in respect of ‘goods to be carried in the personal luggage of travellers’ must be interpreted as meaning that that exemption does not cover goods which an individual not established within the European Union takes with him or her outside the European Union for commercial purposes, with a view to the resale of those goods in a third State.

The third and fourth questions

54 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 146(1)(b) and Article 147 of the VAT Directive must be interpreted as precluding national case-law under which, where the tax authority finds that the conditions for the VAT exemption for goods to be carried in the personal luggage of travellers have not been met, but that the goods concerned have actually been transported outside the European Union by the purchaser, that authority is required to examine whether the VAT exemption provided for under Article 146(1)(b) may be applied to the supply in question, even though the applicable customs formalities have not been carried out and even though, at the time of the purchase, the purchaser did not intend to have that exemption applied.

55 It should be noted that, under Article 146(1)(b) of the VAT Directive, Member States are required to exempt the supply of goods dispatched or transported outside the European Union by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of means of transport for private use. That provision must be read in conjunction with Article 14(1) of that directive, according to which the term ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner (judgments of 28 February 2018, *Pie?kowski*, C?307/16, EU:C:2018:124, paragraph 24, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 19 and the case-law cited).

56 It follows from those provisions and, in particular, from the term ‘dispatched’ in Article 146(1)(b) that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported outside the European Union and that, as a result of that dispatch or that transport, they have physically left the territory of the European Union (judgments of 28 February 2018, *Pie?kowski*, C?307/16, EU:C:2018:124, paragraph 25, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 21 and the case-law cited).

57 In the present case, it is common ground that supplies of goods, within the meaning of Article 14 of the VAT Directive, took place, that the goods concerned by the transactions at issue in the main proceedings were transported outside the European Union by their purchasers and that the actual exit of those goods from the territory of the European Union was, for each of the supplies at issue, certified by a stamp affixed by the customs office of exit to a form held by the taxable person.

58 Furthermore, where the supply of goods referred to in point (b) of Article 146(1) of the VAT Directive relates to goods to be carried in the personal luggage of travellers, the exemption is to apply only when certain additional conditions, laid down in Article 147 of that directive, are met (judgment of 28 February 2018, *Pie?kowski*, C?307/16, EU:C:2018:124, paragraph 27).

59 However, as follows explicitly from the wording of the first subparagraph of Article 147(1) of the VAT Directive and from the case-law referred to in the previous paragraph, Article 147 of the VAT Directive is merely a particular case of the application of the exemption provided for in Article 146(1)(b) of that directive and the conditions imposed in Article 147 are conditions which are

additional to those laid down in Article 146(1)(b). It follows that the fact that the conditions specifically laid down in Article 147 have not been met cannot mean the conditions laid down in Article 146(1)(b) alone have not been satisfied.

60 Moreover, first, Article 146(1)(b) of the VAT Directive does not lay down a condition under which the customs formalities applicable to exportation must be complied with in order for the exemption for exportation laid down in that provision to be applicable (see, by analogy, judgment of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 26).

61 Second, the Court has repeatedly held that that concept of ‘supply of goods’ is objective in nature and that it applies without regard to the purpose or results of the transactions concerned and without it 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 an operator other than that taxable person involved in the same chain of supply (judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 22 and the case-law cited).

62 It follows from those factors that a transaction such as that at issue in the main proceedings constitutes a supply of goods, within the meaning of Article 146(1)(a) and (b) of the VAT Directive, if it meets the objective criteria upon which that concept is based, set out in paragraph 56 of the present judgment (see, by analogy, judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 23).

63 Consequently, the classification of a transaction as a ‘supply for export’ under that provision cannot depend on compliance with the customs formalities applicable to exports (see, by analogy, judgment of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 27 and the case-law cited), nor on the fact that the purchaser’s intention at the time of the purchase was to seek application, not of the exemption provided for in that provision applied, but of the exemption provided for in Article 147 of the VAT Directive. Those circumstances do not prevent those objective criteria from being satisfied.

64 In the light of the foregoing considerations, the answer to the third and fourth questions is that Article 146(1)(b) and Article 147 of the VAT Directive must be interpreted as not precluding national case-law under which, where the tax authority finds that the conditions for the VAT exemption for goods to be carried in the personal luggage of travellers have not been satisfied, but that the goods concerned have actually been transported outside the European Union by the purchaser, that authority is required to examine whether the VAT exemption under Article 146(1)(b) may be applied to the supply in question even though the applicable customs formalities have not been completed and even though, at the time of the purchase, the purchaser did not intend to have that exemption applied.

The fifth question

65 By its fifth question, the referring court asks, in essence, whether Article 146(1)(b) and Article 147 of the VAT Directive, and the principles of fiscal neutrality and proportionality must be interpreted as precluding a national practice under which the tax authorities automatically deny a taxable person the benefit of the VAT exemption provided for by each of those provisions where it finds that that taxable person has, in bad faith, issued the form on the basis of which the purchaser has made use of the exemption provided for in Article 147, although it is established that the goods concerned have left the territory of the European Union.

66 As is apparent, in essence, from the analysis of the first and second questions, the VAT exemption provided for in Article 147 of the VAT Directive is not applicable to goods which are transported by the purchaser outside the European Union for commercial purposes with a view to

their resale in a third State. However, as has already been noted in paragraph 59 of the present judgment, the exemption provided for in Article 147 is merely a specific case of application of the exemption provided for in Article 146(1)(b) of that directive and the fact that the specific conditions laid down in Article 147 are not satisfied does not preclude the conditions laid down in Article 146(1)(b) from being satisfied.

67 Consequently, the fact that a tax authority finds that the export transaction in question was carried out for commercial purposes and cannot therefore benefit from the exemption provided for in Article 147 of the VAT Directive cannot automatically lead that authority to the conclusion that the exemption provided for in Article 146(1)(b) of that directive must also be refused.

68 Furthermore, as has also already been noted, in essence, in paragraphs 62 and 63 of the present judgment, the classification of a transaction as a ‘supply of goods’ within the meaning of Article 146(1)(b) of the VAT Directive depends on whether it meets the objective criteria on which that concept is based, referred to in paragraph 56 of the present judgment, and cannot depend on compliance with customs formalities or on the intention of the taxable person or of another operator involved in the same chain of supply.

69 However, as is apparent from Article 131 of the VAT Directive, the exemptions provided for in Chapters 2 to 9 of Title IX of that directive, of which Articles 146 and 147 are part, apply in accordance with the conditions which the Member States lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. In addition, Article 273 of the VAT Directive provides that Member States may impose other obligations which they deem necessary in order to ensure the correct collection of VAT and to prevent evasion.

70 In that regard, the Court has already ruled that, in the exercise of the powers conferred on them by Articles 131 and 273, the Member States must respect the general principles of law that form part of the legal order of the European Union, including, in particular, the principle of proportionality (see, to that effect, judgments of 28 February 2018, *Pie?kowski*, C?307/16, EU:C:2018:124, paragraph 33 and the case-law cited, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 26).

71 As regards that principle, it must be recalled that a national practice goes beyond what is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. Transactions must be taxed by taking into account their objective characteristics (see, by analogy, judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 27 and the case-law cited).

72 When those substantive requirements have been satisfied, the principle of fiscal neutrality requires the VAT exemption to be granted even if certain formal requirements have been omitted by the taxable persons (judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 28 and the case-law cited).

73 According to the Court’s case-law, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT (judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 29 and the case-law cited).

74 In the first place, a breach of a formal requirement may lead to the refusal of an exemption from VAT if the effect of that breach is to prevent the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 17 October 2019, *Unitel*, C?653/18,

EU:C:2019:876, paragraph 30 and the case-law cited).

75 In the light of the questions raised by the referring court, it should be noted in this regard that it is true that the exemption set out in Article 146(1)(b) of the VAT Directive constitutes an ‘exemption on exportation’ and that it is therefore necessary that the actual exportation be established to the satisfaction of the competent tax authorities. Such a requirement, which thus relates to the substantive conditions necessary for the granting of that exemption, cannot, therefore, be regarded as a purely formal obligation within the meaning of the case-law cited in paragraph 71 of the present judgment (see, to that effect, judgments of 8 November 2018, *Cartrans Spedition*, C?495/17, EU:C:2018:887, paragraphs 47 and 48, and of 28 March 2019, *Vinš* , C?275/18, EU:C:2019:265, paragraph 36).

76 However, a probative procedure that is to the exclusion of any other cannot be imposed and any other evidence capable of shoring up the conviction thus required by the competent tax authority must be accepted (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C?495/17, EU:C:2018:887, paragraphs 49 and 50).

77 In the present case, as has already been noted in paragraph 57 of the present judgment, it is nevertheless common ground that supplies of goods, within the meaning of Article 14 of the VAT Directive, took place, that the goods concerned by the transactions at issue in the main proceedings were transported outside the European Union by their purchasers and that the actual exit of those goods from the territory of the European Union was, for each of the supplies in question, certified by a stamp affixed by the customs office of exit to a form held by the taxable person.

78 The fact that the form at issue in the main proceedings was intended for the application of the exemption provided for in Article 147 of the VAT Directive does not mean that the stamp affixed to it cannot lead to the conclusion that the substantive requirement that the goods actually left the territory of the European Union was satisfied. First, the affixing of such a stamp to an invoice or document in lieu thereof is a means of proving the export of the goods concerned outside the European Union expressly accepted in Article 147(2) of the VAT Directive. Second, placing the goods concerned under the customs export system, whether done before or after the export, constitutes a formal obligation which, moreover, belongs not to the common system of VAT but to the customs system. Consequently, non-compliance with that obligation does not in itself mean that the substantive conditions for the grant of the exemption have not met (see, to that effect, judgment of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 39).

79 In those circumstances, it is not compatible with the principle of proportionality to preclude the grant of an exemption from VAT for a supply of goods for export on the ground that the taxable person concerned has not completed the export customs procedure for those goods and does not have the necessary documents, even though it is not disputed that those goods were actually exported in accordance with the criteria set out in paragraph 56 of the present judgment, evidenced by a stamp affixed by the customs office of exit, and that the supply therefore corresponds, by its objective criteria, to the conditions of exemption laid down in Article 146(1)(b) of the VAT Directive (see, by analogy, judgment of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 30). It is for the referring court to carry out the necessary verifications in that regard.

80 In the second place, the principle of fiscal neutrality cannot be relied on for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion jeopardising the operation of the common system of VAT. According to the Court’s case-law, it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of him to satisfy himself that the transaction which he is carrying out

does not result in his participation in tax evasion. If it were concluded that the taxable person concerned knew or ought to have known that the transaction which he carried out was part of a fraud committed by the person acquiring the goods and that he has not taken every step which could reasonably be asked of him to prevent that fraud from being committed, he would have to be refused the exemption (judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 33 and the case-law cited).

81 By contrast, the supplier cannot be held liable for the payment of the VAT irrespective of his involvement in the tax evasion committed by the person acquiring the goods. It would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever (judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 34 and the case-law cited).

82 In that regard, the Court has already held that, in circumstances where the conditions for the export exemption laid down in Article 146(1)(b) of the VAT Directive, in particular, the requirement that the goods concerned leave the customs territory of the European Union, are satisfied, no liability to pay VAT arises in respect of such a supply and, in those circumstances, there no longer exists, in principle, any risk of tax evasion or loss of tax which could justify the transaction concerned being taxed (judgments of 19 December 2013, *BDV Hungary Trading*, C?563/12, EU:C:2013:854, paragraph 40, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 35).

83 It should also be noted that the Court has already held that the fact that the fraudulent acts were committed in a third State is not sufficient to rule out the existence of tax evasion jeopardising the operation of the common system of VAT and that it is for the national court, in such circumstances, to verify that the transactions at issue were actually part of such fraud and, if they were, to assess whether the taxable person knew or ought to have known that that was the case (see, to that effect, judgment of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 37).

84 However, in the present case, the referring court has not provided any details of the nature of the evasion committed by Bakati, in particular the extent to which the latter’s conduct caused tax losses or jeopardised the operation of that common system. In that regard, the mere possibility that that company’s turnover increased, to the detriment of that of its competitors, cannot, a priori, constitute such a jeopardisation of the operation of the common system.

85 Furthermore, it should be noted that the application of an exemption on exportation under Article 146(1)(b) of the VAT Directive does not depend on the taxable person exercising an option, since the benefit of such an exemption is, in principle, automatic where the substantive conditions laid down for that purpose are satisfied, in accordance with the case-law referred to in paragraph 56 of the present judgment. Therefore, contrary to what the referring court appears to envisage, the guidance from the case-law resulting from the judgment of 17 May 2018, *Vámos* (C?566/16, EU:C:2018:321), relating to the possibility for a Member State to decide that the retroactive application of the special VAT scheme providing for an exemption for small enterprises cannot be granted to a taxable person which satisfies the substantive conditions necessary in that regard, but who has not exercised the option for the application of that scheme at the same time as declaring the start of its economic activities to the tax authorities, cannot be transposed to circumstances such as those in the main proceedings.

86 Nevertheless, it is apparent from the very wording of the fifth question referred for a preliminary ruling and from the grounds of the order for reference that Bakati participated in the infringement of Article 147(1) of the VAT Directive.

87 Such a specific infringement of a provision of the VAT Directive, which does not entail a loss of tax revenue for the European Union, cannot, however, be regarded as jeopardising the functioning of the common system of VAT.

88 Therefore, without excluding the possibility that such an infringement may, under national law, be subject to proportionate administrative penalties, such as the imposition of pecuniary fines, that infringement cannot be penalised by the refusal to grant the VAT exemption for exports that have actually taken place.

89 In the light of all the foregoing considerations, the answer to the fifth question is that Article 146(1)(b) and Article 147 of the VAT Directive, and the principles of fiscal neutrality and proportionality, must be interpreted as precluding a national practice under which the tax authority automatically denies a taxable person the benefit of the VAT exemption provided for by each of those provisions where they find that that taxable person has, in bad faith, issued the form on the basis of which the purchaser has made use of the exemption provided for in Article 147, where it is established that the goods concerned have left the territory of the European Union. In such circumstances, the VAT exemption provided for in Article 146(1)(b) must be refused if infringement of a formal requirement has the effect of preventing the production of conclusive evidence that the substantive requirements governing the application of that exemption have been satisfied or if it is established that that taxable person knew or should have known that the transaction in question was involved in fraud jeopardising the functioning of the common system of VAT.

Costs

90 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 (Fifth Chamber) hereby rules:

1. **The exemption provided for in Article 147(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in respect of ‘goods to be carried in the personal luggage of travellers’ must be interpreted as meaning that that exemption does not cover goods which an individual not established within the European Union takes with him or her outside the European Union for commercial purposes with a view to the resale of those goods in a third State.**

2. **Article 146(1)(b) and Article 147 of Directive 2006/112 must be interpreted as not precluding national case-law under which, where the tax authority finds that the conditions for the value added tax (VAT) exemption for goods to be carried in the personal luggage of travellers have not been satisfied, but that the goods concerned have actually been transported outside the European Union by the purchaser, that authority is required to examine whether the VAT exemption under Article 146(1)(b) may be applied to the supply in question even though the applicable customs formalities have not been completed and even though, at the time of the purchase, the purchaser did not intend to have that exemption applied.**

3. **Article 146(1)(b) and Article 147 of Directive 2006/112, and the principles of fiscal neutrality and proportionality, must be interpreted as precluding a national practice under which the tax authority automatically denies a taxable person the benefit of the value added tax (VAT) exemption provided for by each of those provisions where it finds that that taxable person has, in bad faith, issued the form on the basis of which the purchaser has made use of the exemption provided for in Article 147, where it is established that the goods concerned have left the territory of the European Union. In such circumstances, the**

VAT exemption provided for in Article 146(1)(b) must be refused if infringement of a formal requirement has the effect of preventing the production of conclusive evidence that the substantive requirements governing the application of that exemption have been satisfied or if it is established that that taxable person knew or should have known that the transaction in question was involved in fraud jeopardising the functioning of the common system of VAT.

[Signatures]

* Language of the case: Hungarian.