

Case C-276/18

KrakVet Marek Batko sp. K. Vs Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

Directive 2006/112/EC — Article 33 — Determination of where taxable transactions are carried out — Goods dispatched or transported by or on behalf of the supplier — Abusive practice — Regulation (EU) No 904/2010 — Articles 7, 13 and 28 to 30 — Administrative cooperation — Double taxation

AG Opinion — Feb 6, 2020

Facts

- **KrakVet Marek Batko sp. K. ('KrakVet')** is a company registered and established in Poland. It has no establishment, office or warehouse in Hungary.
- KrakVet sells products for animals through its various 'zoofast' websites. It has numerous clients in Hungary who effect their purchases through www.zoofast.hu.
- **KrakVet** offered on its website an option enabling customers to have goods that they **purchased transported** from KrakVet's premises in Poland to their chosen delivery address **under a contract to be agreed between the customer and Krzysztof Batko Global Trade ('KBGT')**, also a company registered and established in Poland.

Facts

- KBGT itself undertook the transportation from Poland to Hungary.
- KBGT subcontracted the onward transportation within Hungary to the customer's delivery address to two courier companies ('the Hungarian courier companies'): Sprinter Futárszolgálat Kft. ('Sprinter') and GLS General Logistics Systems Hungary Kft. ('GLS Hungary').
- Customers made a single payment to cover both the goods and the transportation costs. That payment was made, with roughly equal frequency, either to Sprinter and GLS Hungary upon delivery of the goods, or by bank transfer into an account at CIB Bank Zrt. in Hungary ('the CIB bank account') in the name of the owner of KBGT.

Binding ruling in Poland

- KrakVet submitted a 'binding inquiry' to the Polish tax authorities, who replied that VAT was due in Poland. KrakVet paid VAT in Poland at a rate of 8%, instead of paying VAT in Hungary at the rate of 27%.

Position Hungarian Tax Authorities

- Hungarian tax were informed that while KBGT packed and labelled the goods to be transported at the KrakVet warehouse, the goods were at that stage the property of KrakVet.
- On the basis of that material, the Hungarian tax authorities concluded that during the 2012 fiscal year, Sprinter had made deliveries on behalf of KBGT and for KrakVet to the value of HUF 217 087 988 (approximately EUR 751 039.57), with receipt of goods at Sprinter's central warehouse in Budapest.
- Likewise, the Hungarian tax authorities concluded that over the same period GLS Hungary, on behalf of GLS General Logistics Systems Slovakia s.r.o., had provided package delivery services to the value of HUF 64 011 046 (EUR 211 453.19), for which it had been reimbursed on behalf of KrakVet and KBGT.

Position Hungarian Tax Authorities

Hungarian VAT due on the supplies

- Hungarian tax authorities determined that KrakVet had exceeded the quantitative threshold of EUR 35 000 laid down in Article 34 of the VAT Directive
- and that it should therefore have made VAT payments in Hungary totalling HUF 58 910 000 (approximately EUR 190 087).
- The Hungarian tax authorities thereupon imposed a penalty of HUF 117 820 000 (approximately EUR 380 175), as well as interest at HUF 10 535 000 (approximately EUR 36 446), and a fine of HUF 500 000 (approximately EUR 1 730) in respect of the missing VAT declaration.

4th question

- **Fourth question:** How should the expression in the first sentence of Article 33(1) of [the VAT Directive], according to which the **transport is carried out “by or on behalf of the supplier”**, be interpreted? Does this expression include the case in which the taxable person offers as a seller, in an online shopping platform, the possibility for the buyer to enter into a contract with a logistics company, with which the seller collaborates for operations other than the sale, when the buyer can also freely choose a carrier other than the one proposed, and the transport contract is concluded by the buyer and the carrier, without the intervention of the seller?

Questions to ECJ/CJEU – VAT related

5th question

Fifth question:

- Should EU law, specifically [the VAT Directive], be interpreted as meaning that the facts mentioned below, taken as a whole or separately, are relevant to examine whether, among the independent companies that carry out a delivery, expedition or transport of goods the taxable person has arranged, to circumvent Article 33 of the [VAT Directive] and thereby infringe the law, legal relationships that seek to take advantage of the fact that the VAT is lower in the other Member State:
 - (5.1) **the logistics company carrying out the transport is linked to the taxable person and provides other services, independent of transport,**
 - (5.2) at the same time, the customer may at any time depart from the option proposed by the taxable person, which is to order the transport to the logistics company with which it maintains a contractual link, being able to **entrust the transport to another carrier or personally collect the goods?**

Questions to ECJ/CJEU – VAT related

The fourth and fifth questions raise three issues concerning the interpretation of **Article 33(1) of the VAT Directive**.

- First, what was meant by the phrase ‘goods dispatched or transported by or on behalf of the supplier’, in Article 33(1) of the VAT Directive **before its amendment by Directive 2017/2455**?
- Second, did the amendment made to that provision by Directive 2017/2455, which generated the **new version of Article 33(1)**, alter or merely confirm the previous legal situation?
- Third, should the type of operation described in the order for reference, having regard to the *original* version of Article 33(1), be regarded as an **abusive practice**?

Dispatch vs. transportation

- Any relevant difference between the terms ‘dispatched’ and ‘transported’?
- If the supplier, at his initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods, there has been **dispatch by the supplier**
- Transportation ‘*by*’ the supplier is perhaps less problematic, in that its natural meaning is that the supplier either himself or through his agent physically carries out the transport operation, or owns or controls the legal entity that does so

Art. 32(1) vs. Art. 33

- **Article 32(1)** states the general rule: ‘Where goods are dispatched or transported *by the supplier, or by the customer, or by a third person*, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins ...’ (emphasis added). **No distinction is drawn between the various actors who might be responsible for dispatch or transport.**
- However, **Article 33(1)** contains a derogation to that general rule. It provides that in certain specific circumstances **where goods are ‘dispatched or transported by or on behalf of the supplier’** (emphasis added) between Member States, the place of supply is ‘deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends’. Those specific circumstances include where ‘(a) the supply of goods is carried out for a taxable person, or a non-taxable legal person ... or for any other non-taxable person’.

Intention of the customers - Significant update "transport"

- KrakVet's customers were and are interested primarily in purchasing pet food.
- The transport service required to move the pet food from KrakVet's warehouse in Poland to the customers' delivery address in Hungary is an essential part of the transaction but unlikely, as such, to be the main focus of the customers' interest. Probably, the essential components **determining their choice of transportation method will have been convenience and cost.**
- Guidelines issued by the VAT Committee, which state that 'goods shall be considered to have been "dispatched or transported by or on behalf of the supplier" in any cases **where the supplier intervenes directly or indirectly in the transport or dispatch of the goods**'.

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- Against that background and applying the normal principles of construction to the text of the original version of **Article 33(1)**, I can find no basis for concluding ... that that provision also covers cases where the supplier intervenes ***indirectly***, in response to an instruction given by the customer, to dispatch or transport goods to a non-taxable person located in another Member State.

The amendments to the VAT Directive changes effective Jan 1, 2021

- Article 2(1) of Directive 2017/2455 specifies that a new fourth subparagraph was being ‘added’ to Article 14 of the VAT Directive. The addition provided a *new definition* of ‘intra-Community distance sales of goods’. Under that new definition, the concept covers certain specific situations of ‘supplies of goods dispatched or transported by or on behalf of the supplier, *including where the supplier intervenes indirectly in the transport or dispatch of the goods*, from a Member State other than that in which dispatch or transport of the goods to the customer ends’ (emphasis added). Amongst the situations covered is where ‘(a) the supply of goods is carried out ... for any other non-taxable person’.
- I therefore conclude that until the amendments introduced by Directive 2017/2455 take legal effect on 1 January 2021, Article 33(1) of the VAT Directive is to be given its literal interpretation. It is therefore *not* to be read in the light of the new definition of ‘intra-Community distance sales of goods’ which contains the words ‘including where the supplier intervenes “indirectly” in the transport or dispatch of the goods’, or as though it had already been replaced by Article 33(a), which refers to that new definition.

Question 4: AG Opinion

- Article 33(1) of the VAT Directive, is to be interpreted as covering only situations where goods are dispatched or transported by or on behalf of the supplier. **It does not address situations where the supplier intervenes only indirectly in the dispatch or transport of the goods.**
- If the supplier, at his initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods, there has been **'dispatch' by the supplier.**
- If the supplier either himself or through his agent physically carries out the transport operation, or owns or controls the legal entity that does so, there has been **'transportation' by the supplier.**
- Goods are dispatched or transported 'on behalf of' the supplier if the supplier, rather than the customer, effectively takes the decision governing how those goods are to be dispatched or transported.

Abusive practice

- KBGT is 'linked' to KrakVet (by which I take the national court to be referring to the fact that the owners of the two companies are brothers) and provides other services independent of transport (as I understand it, packing of goods for dispatch);
- but the customer is free to choose other options for transporting the goods he is purchasing. The referring court asks whether those two specific facts are relevant to determining whether KrakVet's conduct constitutes an abusive practice for the purposes of EU VAT law, thus justifying the imposition of severe financial sanctions on KrakVet.

Question 5: AG Opinion

- Where a taxpayer inquires of the competent authorities in the Member State in which he is registered for VAT as to the correct legal classification for VAT purposes of an intended course of action (setting out in detail the arrangements that he proposes to put in place), is given a response that is legally binding upon him and upon those tax authorities, and then conducts business in strict accordance with his inquiry (which is for the national court to verify), **the competent authorities in another Member State are precluded by the principle of sincere cooperation enshrined in Article 4(3) TEU and the principle of protection of legitimate expectations** from treating his actions as an abuse of rights under the test laid down in Case C-255/02 *Halifax*, and sanctioning that conduct accordingly.