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TAXATION AND CUSTOMS UNION
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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1067

CASE LAW

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

ORIGIN:	**Commission**
REFERENCES:	**Article 14(1) and (2)(c)**
SUBJECT:	**CJEU Case C-235/18 *Vega International*: Fuel cards – follow-up**

1. INTRODUCTION

The case C-235/18 *Vega International*[1] of the Court of Justice of the European Union (CJEU) is a specific case about the treatment of transactions covered by fuel card schemes under the VAT Directive[2].

While a comprehensive analysis was needed to assess the consequences of this CJEU decision, the Commission services now wish to finalise the discussions arising from the ruling of the CJEU in that case. This paper is exclusively focussed on suplies of fuel and should not have wider implications.

In order to reach a common and consistent position on the consequences derived from the *Vega International* case, it was agreed at the 121st meeting of the VAT Committee to define the scope of the situations diverging from the *Vega International* case.

Member States were invited to provide their views and further to that, a group of designated stakeholders guided by members of the VAT Expert Group took up the task of proposing a set of criteria.

Based on the feedback received, the discussion now aims at agreeing on the criteria to objectively differentiate between transactions covered by fuel card schemes that fall within the remit of the *Vega International* case and those that do not.

2. BACKGROUND

During the discussion at the 121st meeting[3], it was noted that the two mainstream business models in the fuel card sector are the buy and sell model and the commissionaire model.

In the buy and sell model, the fuel card issuer does not seem to dispose of the fuel as if it were its owner. The fuel instead seems to be purchased by the fuel cardholders at their discretion directly from the mineral oil companies. Therefore the fuel is not delivered to the fuel card issuer and the latter cannot transfer it further to the fuel cardholder which means, as the concept of a "supply of goods" is objective in nature and applies without regard to the purpose or results of the transactions concerned, that no supply of fuel occurs as far as the fuel card issuer is concerned. What the fuel card issuer therefore does is to finance the purchase of fuel by the fuel cardholders.

In the commissionaire model, which is an EU concept defined by the VAT Directive[4], the fuel card issuer does not seem to be required to dispose of the fuel as if it were its owner either but from the VAT point of view, a fiction[5] applies so that despite the objective nature of the concept of "suppy of goods", the fuel card issuer is treated as if it were

1 CJEU, judgment of 15 May 2019 in case C-235/18 *Vega International Car Transport and Logistic,* EU:C:2019:412.
2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).
3 Working paper No 1057 *Minutes of the 121st meeting.*
4 As such, this is a concept that is not reliant upon national law.
5 Article 14(2)(c) of the VAT Directive.

receiving the fuel and supplying it[6] even if the fuel is handed over directly by the mineral oil company to the fuel cardholder. The conditions for the supplies to and from the fuel card issuer to qualify as supplies of goods (fuel) and not as financial services are that the commissionaire acts in its own name, but on behalf of a principal and that a commission is payable on either the purchase or the sale.

3. THE COMMISSION SERVICES' ANALYSIS

The analysis of the CJEU in the case *Vega International* dealt with the transfer of the right to dispose of the fuel as owner. In its assessment, focus was on the basic rule of Article 14(1) of the VAT Directive. This Article defines the concept of "supply of goods" which, as indicated supra, is objective in nature. The CJEU found that in the factual circumstances of the case at hand the fuel card issuer did not dispose of the fuel as if it were the owner but rather that the fuel was purchased by the fuel cardholder from the mineral oil company directly and at its sole discretion.

However, in certain cases a supply of fuel from a mineral oil company to a fuel cardholder with the intervention of a fuel card issuer may have to be treated differently from a VAT standpoint. This is notably the case when the supply falls within the remit of the provision of Article 14(2)(c) of the VAT Directive.

In fact, based on Article 14(2)(c) of the VAT Directive, a transfer of goods pursuant to a contract under which commission is payable on purchase or sale shall be regarded as a supply of goods while diverging from the definition of the concept of a supply of goods in Article 14(1) of the VAT Directive. The provision of Article 14(2)(c) of the VAT Directive designates a commission contract and creates the legal fiction of two identical supplies of goods made consecutively and falling within the scope of VAT[7].

What constitues a **transfer of goods** under Article 14(2)(c) of the VAT Directive?

Before analysing the concept of transfer of goods, it must be mentioned that the VAT Directive expressly refers in its Article 14(2)(c) to a transfer of goods and not to a supply of goods. Therefore the concept of transfer of goods must be differentiated from the general definition of a supply of goods in Article 14(1) (see supra the definition of "supply of goods").

Turning to the analysis of the concept of transfer of goods, the answer of the CJEU to a question in the *Gmina Wrocław* case[8] is of interest to determine which situations are falling under Article 14(2)(c).

In that case the CJEU was questioned as to whether there can be a 'supply of goods' in circumstances where only a legal transfer of ownership of the goods has occurred, in return for the payment of compensation, while the party having economic control over the relevant goods remained the same.

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6 The principal (the oil company) makes a taxable supply of fuel to the commissionaire (fuel card issuer) and the commissionaire in turn makes a taxable supply of fuel to the buyer (fuel card user).

7 CJEU, judgment of 4 May 2017 in case C-274/15, *Commission v Luxembourg*, EU:C:2017:333, paragraph 88.

8 CJEU, judgment of 13 June 2018 in case C-665/16, *Gmina Wrocław*, EU:C:2018:431.

The CJEU answered that paragraph 2 of Article 14 constitutes a *lex specialis* whereas paragraph 1 defines generally the concept of a 'supply of goods'[9] and noted that:

"*the definition of the transaction that is the subject of Article 14(2)(a) of that directive does not make any reference to the 'right to dispose of tangible property as owner', as referred to in Article 14(1) of the same directive."* [10],

and that

"for the purposes of Article 14(2)(a) of the VAT Directive, it is the transfer of the ownership of property in the sense of the formal legal title that suffices for such a transaction to be regarded as a taxable 'supply of goods', on condition that the other requirements of that provision are fulfilled."[11] (emphasis added).

The interest of that case for the matter at hand is that, seemingly to Article 14(2)(a), Article 14(2)(c) does not make any reference to the 'right to dispose of tangible property as owner' for a transaction to be regarded as a supply of goods.

Moreover, the CJEU in the *ITH* case indicated that the right to dispose of the tangible property as owner is not necessary for a supply of goods to happen under Article 14(2)(c) and stated that it is the right of ownership that should be transferred in the context of a transfer of goods through an agency relationship falling under Article 14(2)(c)[12].

Hence a transfer of goods under Article 14(2)(c) is a different type of transaction as compared to a supply of goods under the general definition. It does not require that a transfer of the right to dispose of tangible property as owner occurs in order to be regarded as a taxable 'supply of goods'. It can therefore be considered that the transfer of the ownership of property in the sense of the formal legal title suffices for a transaction falling under Article 14(2)(c) to be regarded as a taxable 'supply of goods', on condition that the other requirements of that provision are fulfilled.

What constitutes a commission contract under Article 14(2)(c) of the VAT Directive?

The other requirements of Article 14(2)(c) are that the transfer happens within the framework of a contract under which a commission is payable on purchase or sale.

The CJEU has indicated that such a situation occurs when two conditions are satisfied, being respectively that an agency relationship through which the commission agent acts on behalf of the principal in the supply exists and, that the supply to and that from the commissionaire agent are identical[13].

The CJEU in that context stressed that for the first condition to be met it is necessary for there to be an agreement between the commission agent and the principal[14].

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9 *Gmina Wrocław*, paragraph 36.
10 *Gmina Wrocław*, paragraph 35.
11 *Gmina Wrocław*, paragraph 41.
12 CJEU, judgment of 12 November 2020 in case C-734/19, *ITH Commercial Timişoara*, EU:C:2020:919, paragraphs 49 and 54.
13 *ITH Commercial Timişoara*, paragraphs 51 and 54.
14 *ITH Commercial Timişoara*, paragraph 52 .

A point of attention concerns the requirement that the supplies to and that from the commissionaire agent are similar. The point of contention is whether one supply that concerns only the formal legal title (supply to the commissionaire agent) is similar to a supply where the right to dispose of the tangible property as owner is transferred (supply from the commissionaire agent). If the question has merits, it seems, based on a teological interpretation, that the "content" of the transfer should not impact the assessment of the transactions being similar. Indeed, Article 14(2)(c) aims at a commissionaire structure: that is a situation where there is no transfer of the right to dispose of the goods in the hands of the intermediary. Therefore requiring that the supply to and that from the commissionaire transfer the same right to dispose of the tangible property as owner would deprive Article 14(2)(c) of its substance.

In summary, the conditions for a fuel card transaction to be able to fall under Article 14(2)(c) are that a transfer of the ownership of the fuel in the sense of the formal legal title is made to the fuel card issuer (acting as intermediary); that the supply to and that from the fuel card issuer (commissionaire agent) are similar and that an agreement exists between the commission agent and the principal.

It should also be stressed that these conditions should be seen independently of the definition of a "commissionaire" under certain domestic civil laws and should bear no consequences on this domestic qualification under civil law. Since the VAT Directive does not make any reference to the law of the Member States in regard to the concept of "commissionaire", that concept constitutes an autonomous concept of EU law that must be interpreted uniformly throughout the European Union, irrespective of characterisation in the Member States[15].

<u>How to identify transactions meeting the conditions required to fall under Article 14(2)(c) of the VAT Directive?</u>

Without prejudice for any prior characterisation by Member States of fuel supplied to a cardholder under a fuel cards scheme as being a supply of goods under Article 14(1) of the VAT Directive, a number of criteria may be relied upon to determine if the conditions are met for a transaction in the context of fuel cards to be deemed to be a supply of goods under Article 14(2)(c).

Those criteria must be amenable to judicial review.

At least when the following criteria are met, a transaction happening at the earliest on the day of the publication of the guidelines in the context of a fuel card scheme should be deemed to be a supply of goods under Article 14(2)(c).

1. Condition: transfer of the ownership of the fuel in the sense of formal legal title.
    a) The parties bear the risk of non-payment at their respective delivery stage being the mineral oil company at the level of the fuel card issuer and the fuel card issuer at the level of the fuel card holder respectively.
    b) The contractual risk of damage to the fuel cardholder is borne by the fuel card issuer, such that in the event material defects in the fuel cause damage to the cardholder (e.g., in the form of engine damage caused by the fuel

[15] CJEU, judgment of 18 January 1984 in case C-327/82, *Ekro*, EU:C:1984:11, paragraph 11.

supplied), the customer shall assert all contractual claims including product related ones to the fuel card issuer, and not the mineral oil company.

c) The parties independently set the price at each leg of the chain at the level of the mineral oil company and at the level of the fuel card issuer respectively.

d) By confirming each individual supply within the framework of its contractual agreements with the mineral oil company and the fuel card user, the fuel card issuer decides on the conditions of the purchase including the quality, quantity, place and time and confirms that the fuel card user is allowed to access the fuel directly.

2. Condition: the supply to and that from the fuel card issuer are similar.
   a) The fuel card issuer does not alter the fuel delivered by the mineral oil company.

3. Condition: an agreement exists between the intermediary and the principal.
   a) The fuel card issuer is supplying on behalf of the mineral oil company or purchasing on behalf of the fuel card holder and the chosen structure is reflected in their agreement. The agreement explicitly refers to a supply of fuel and ancillary services, not to the granting of credit or the administration of fuel supplies.
   b) The agreement is reflected in the economic and commercial reality. At the fuel station, the fuel card holder demonstratesthe existence of the agreement by using a means of an identification card (e.g., a fuel card) issued by the fuel card issuer.
   c) The fuel car issuer charges a fee, or receives a commission, for its services to his principal (the mineral oil company or the fuel card user).

4. CONCLUSIONS

From the above considerations, the following can be concluded as regards the VAT treatment of the supplies of fuel in the context of fuel card schemes:

- As indicated in the 121st meeting[16], the character of a supply made in the context of a fuel cards scheme is dependant upon the person to whom the right to dispose of the fuel as owner is transferred.

- If it can be established that the right to dispose of the fuel as owner is transferred to the fuel card issuer, the latter may be considered as buying and then supplying the fuel.

- In a number of situations, despite the absence of such a transfer of the right to dispose of the fuel as owner to the fuel card issuer, the later may nonetheless be considered as supplying the fuel.

16 Working paper No 1057 *Minutes of the 121st meeting.*

- This happens when a supply is made under the remit of Article 14(2)(c) as then, the transfer of the ownership of the fuel in the sense of the formal legal title suffices to be regarded as a taxable 'supply of goods', on condition that the supplies to and from the fuel card issuer are similar and that an agreement exists between the fuel card issuer and the principal.

5. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the issues raised.

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