

Tax & Legal Weekly Alert

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Tax Updates

Advocate General opinion on the VAT treatment of supplies of fuel to vessels via undisclosed intermediaries

On March 5th, Advocate General (“AG”) Sharpston from the Court of Justice of the European Union (“ECJ”) delivered her opinion in case C-526/13 Fast Bunkering Klaipeda UAB (“FBK”).

The question of the case is whether the VAT exemption for supplies of fuel to vessels used for navigation on the high seas should be applied only to the final supply to the vessel operators or can be extended to prior supplies (in the commercial chain) to undisclosed intermediaries.

This question to the ECJ comes in the context of the previous ECJ decisions in cases:

- C-185/89 Velker International Oil Company (“Velker”) and C-181/04 to C-183/04 Elmeka (“Elmeka”) whereby the ECJ decided that the VAT exemption applies only to supplies performed in the last stage of the commercial chain.
- C-33/11 A Oy where the ECJ took the view that the VAT exemption for supplies of aircrafts can also apply to previous stages of the commercial chain.

As a consequence of the decisions in Velker and Elmeka cases, the practice of many EU countries (including Romania) was that supplies performed in previous stages of the commercial chain do not benefit from the VAT exemption.

Generally, the case discusses A-B-C supplies of fuel, A being the initial supplier, B the undisclosed intermediary and C being the vessel operator (owner, charterer, etc.) The question is whether the supply A-B is VAT exempt, provided that the goods physically move directly from A to C.

Background

FBK (A) purchased fuel from outside the European Union and stored it in Lithuania under a customs warehousing procedure, so that import VAT was not yet due. FBK received orders to deliver fuel to specific vessels used for navigation on the high seas, which it sold on a FOB basis and which it delivered itself into the vessels’ fuel tanks under a customs re-export procedure.

However, the orders were not placed directly by the owners or operators of the vessels (C), but by intermediaries (B) established in various EU Member States. Likewise, FBK (A) invoiced the sales to the intermediaries (B) rather than to the owners or operators of the vessels (C).

The intermediaries (B) acted in their own name vis-à-vis both FBK (A) and the owners or operators (C) – buying from A and selling to C – but never themselves took physical delivery of any of the fuel.

FBK (A) applied the VAT exemption on the invoices issued to the intermediaries (B).

Relying largely on the ECJ’s judgments in Velker and Elmeka, the tax authority took the view that the A-B supplies, being made to intermediaries, were “effected at a previous stage in the commercial chain” and could not benefit from the VAT exemption.



Points made by the Advocate General

The AG took the view that the facts of FBK case are different from those in Velker and Elmeka cases. In Velker, the legal ownership of the fuel was transferred before the delivery to the operator of the vessels (C). In FBK's case, the legal ownership could change hands only once the fuel had been delivered, since it was only then that the quantity delivered could be determined and invoiced.

In this context, the AG analysed the concept of supply of goods for VAT purposes, i.e. the transfer of the right to dispose of the tangible property as owner. The AG took into account the stage (moment) when the right to dispose of the fuel as owner is transferred since that stage (moment) – which is decisive in terms of VAT treatment – does not necessarily coincide with the transfer of legal ownership.

The AG was of the opinion that the VAT exemption can apply only if the transfer of the right to dispose of the fuel from FBK (A) took place when the fuel was loaded in the vessels' tanks (C). Otherwise, i.e. if the intermediary (B) takes economic ownership of the fuel before effectively being loaded in the vessels' tanks, then the VAT exemption is not applicable (a case similar to Velker).

Conclusion

The AG's conclusion was that the VAT exemption provided at Article 148(a) of the VAT Directive should apply to both the supply to the vessel operator (B-C), as well as to any other intermediate transactions (A-B) which do not include the disposing of the goods as owners.

Our view / Practical aspects

In Romania, based on the Velker and Elmeka cases, the existing practice is that the VAT exemption applies only to supplies in the last stage of the commercial chain (B-C).

If the ECJ follows the opinion of the AG, this practice will have to change.

Facts and circumstances of each case will be central in the analysis since the key differentiator (compared to Velker) is the moment (stage of commercial chain) when transfer of the right to dispose of the fuel as owner takes place.

The change will not affect only supplies of navigation fuel, but also supplies of aviation fuel (i.e. supplies of fuel to aircrafts used by airliners operating for rewards chiefly on international routes). Although the VAT exemption for supplies to vessels is based on a different paragraph of the law than the VAT exemption for supplies to aircrafts, these exemptions follow the same principles (and they are regarded as such by the ECJ).

Please do not hesitate to contact us if any clarification is needed:

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