JUDGMENT OF THE COURT (Fourth Chamber)

3 September 2015 (*)

(Reference for a preliminary ruling — Taxation — Value Added Tax (VAT) — Directive 2006/112/EC — Article 148(a) — Supply of goods — Definition — Exemption — Supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas — Supplies to intermediaries acting in their own name)

In Case C?526/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Lithuania), made by decision of 30 September 2013, received at the Court on 7 October 2013, in the proceedings,

‘Fast Bunkering Klaip?da’ UAB

v

Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 4 December 2014,

after considering the observations submitted on behalf of:

– ‘Fast Bunkering Klaip?da’ UAB, by I. Misi?nas, atstovas,

– the Lithuanian Government, by D. Kriau?i?nas, R. Krasuckait? and D. Stepanien?, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli and A. Collabolletta, avvocati dello Stato,

– the European Commission, by C. Soulay and A. Steiblyt?, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 148(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006

L 347, p. 1).

2 The request has been made in proceedings between ‘Fast Bunkering Klaip?da’ UAB (‘FBK’) and Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate under the Finance Ministry of the Republic of Lithuania) concerning the status of supplies of fuel to intermediaries acting in their own name with regard to value added tax (‘VAT’).

Legal context

International law

3 The Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944 (‘the Chicago Convention’), has been ratified by all the Member States of the European Union, but the European Union is not itself a party. That convention lays down rules, inter alia, on the registration of aircraft and permits to fly.

EU law

4 From 1 January 2007 Directive 2006/112 repealed and replaced the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

5 Article 14 of Directive 2006/112 provides:

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

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

…

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

…’

6 Article 131 of that directive states:

‘The exemptions provided for in Chapters 2 to 9 shall apply … 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.’

7 Article 146(1) of Directive 2006/112 provides:

‘Member States shall exempt the following transactions:

(a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

…’

8 Article 148(a) of Directive 2006/112, sets out in identical terms the provisions of Article 15(4) of the Sixth Directive. Article 148 provides:

‘Member States shall exempt the following transactions:

(a) the supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities …

…

(e) the supply of goods for the fuelling and provisioning of aircraft used by airlines operating for reward chiefly on international routes;

(f) the supply, modification, repair, maintenance, chartering and hiring of the aircraft referred to in point (e), and the supply, hiring, repair and maintenance of equipment incorporated or used therein;

…’

Lithuanian law

9 Article 44 of the Law of the Republic of Lithuania No IX-751 of 5 March 2002 on value added tax (Žin., 2002, No 35-1271), as amended by Law No X-261 of 21 June 2005 (Žin., 2005, No 81-2944, ‘the Law on VAT’) provides:

‘1. A supply of goods shall be taxed at the zero rate of VAT where the goods are supplied for the fuelling and provisioning of vessels referred to in Article 43(1) of this Law [namely seagoing vessels intended for the international carriage of passengers and for goods and/or other services for reward].

…

…

3. In this Law … fuel (motor fuel) and lubricants shall be regarded as goods for fuelling and provisioning. ...’

Facts in the main proceedings and question referred for a preliminary ruling

10 FBK is registered for VAT in Lithuania.

11 Between 1 October 2008 and 31 December 2011, FBK supplied fuel, within Lithuanian territorial waters to vessels used for navigation on the high seas. The fuel concerned came from non-member States and was stored in Lithuania under customs warehousing arrangements. Under those arrangements, the collection of VAT for the import of that fuel was suspended so long as it was not released into free circulation in the European Union.

12 When FBK received an order, the corresponding fuel was taken from the customs depot and FBK carried out the necessary formalities. The fuel was then sold ‘free on board’, that is to say without transport or other related taxes and costs and without insurance, and FBK itself loaded the fuel into the vessels’ fuel tanks.

13 However, the orders were sent to FBK not by the ships’ operators but by intermediaries

established in various Member States, to which FBK invoiced the sales. Those intermediaries acted in their own name, both with regard to FBK and to the operators of the vessels, buying from the former and selling to the latter. At the hearing, FBK's representative explained that those intermediaries never took physical delivery of any fuel, their role being essentially to centralise orders and to ensure payment of the fuel delivered. It was only once it was loaded into the fuel tanks of the vessels that FBK was in a position to determine the actual amount transferred and thus to draw up the corresponding invoice.

14 Starting from the principle that the sale of the fuel at issue was exempt from VAT, in accordance with the Lithuanian law transposing Article 148(a) of Directive 2006/112, FBK applied a zero rate of VAT to those deliveries of fuel.

15 On 15 February 2013, following a tax inspection for the period mentioned in paragraph 11 of this judgment, the Klaip?dos apskrities valstybin? mokes?i? inspekcija ('the Klaip?da tax inspectorate') drew up a report, in which it stated that it was of the view that since the fuel at issue was not sold directly by FBK to the operators of the vessels, but to intermediaries acting in their own name, the latter must be regarded as having sold the fuel to those operators. Consequently, FBK could not apply the exemption laid down in Article 44(1) of the Law on VAT, because that exemption applies only where there is a supply of goods to the operators of seagoing vessels intended for international carriage of passengers and/or goods.

16 By decision of 26 March 2013, based on the report of 15 February 2013, the Klaip?dos apskrities valstybin? mokes?i? inspekcija made an upward adjustment of FBK's declaration with respect to the application of a zero rate of VAT on the supplies of fuel at issue of LTL 37 847 771, that is to say, approximately EUR 11 000 000.

17 On 15 April 2013, FBK lodged a complaint against the decision of the Klaip?dos apskrities valstybin? mokes?i? inspekcija before the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos.

18 By decision of 27 June 2013, the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos dismissed that complaint on the ground that, according to the case-law of the Court of Justice in *Velker International Oil Company* (C?185/89, EU:C:1990:262) and *Elmeka* (C?181/04 to C?183/04, EU:C:2006:563), the exemption provided for in Article 148(a) of Directive 2006/112, transposed by Article 44(1) of the Law on VAT, for supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas may apply only at the last stage in the commercial chain of the goods concerned, when they are supplied to the operator of the vessels which will use them.

19 On 30 July 2013, FBK brought an action against that decision before the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Tax Disputes Commission under the Government of the Republic of Lithuania).

20 That court is unsure as to whether it is possible to apply the reasoning followed by the Court in the judgment in *Velker International Oil Company* (C?185/89, EU:C:1990:262) to a situation in which the goods at issue are transferred to the tanks of the vessels which will use them by a taxable person and in which adequate checks were in place to ensure that the goods were actually used for the fuelling and provisioning of vessels used on the high seas. In the judgment in *A* (C?33/11, EU:C:2012:482), the Court acknowledged that the exemption provided for in what is now Article 148(f) of Directive 2006/112, for the supply of aircraft, might apply to supplies prior to the final stage of the commercial chain on the ground that taking account, in particular, of the type of goods concerned and, inter alia, of the registration and authorisation mechanisms to which their operation is subject, that extension of the exemption does not seem to be liable to give rise to

constraints for the Member States and the economic agents concerned which could not be reconciled with the correct and straightforward application of the exemptions laid down by what is now Article 131 of Directive 2006/112.

21 In those circumstances, the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 148(a) of Directive 2006/112 be interpreted as meaning that the provisions of that paragraph concerning exemption from VAT are applicable not only to supplies to the operator of a vessel used for navigation on the high seas, who uses those goods for the fuelling and provisioning of the vessel, but also to supplies other than to the operator of the vessel, that is to say, to intermediaries acting in their own name, where at the time of the supply the ultimate use of the goods is known in advance and duly established, and evidence confirming this is submitted to the tax authority in accordance with the legislative requirements?’

Consideration of the question referred for a preliminary ruling

22 By its question, the referring court asks essentially whether Article 148(a) of Directive 2006/112 must be interpreted as meaning that the exemption laid down by that provision is applicable to supplies of goods for fuelling and provisioning to intermediaries acting in their own name, where, at the date of the supply, the ultimate use of the goods is known and duly established, and evidence confirming this is submitted to the tax authorities in accordance with national legislation.

23 It must be recalled that Article 148(a) of Directive 2006/112 provides that supplies of goods for the fuelling and provisioning of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities are exempt from VAT.

24 It should be noted, at the outset, that that article is drafted in the same terms as Article 15(4) of the Sixth Directive which was repealed and replaced by Directive 2006/112.

25 Therefore, in principle, the case-law of the Court relating to Article 15(4) of the Sixth Directive is relevant for the interpretation of Article 148(a) of Directive 2006/112.

26 According to that case-law, transactions for fuelling and provisioning vessels used for navigation on the high seas are exempted because they are equated with exports (judgment in *Velker International Oil Company*, C?185/89, EU:C:1990:262, paragraph 21).

27 Therefore, just as the exemption provided for export transactions applies exclusively to the final supply of goods exported by the seller or on his behalf, the exemption laid down in Article 148(a) of Directive 2006/112 applies only to the supply of goods to a vessel operator who will use those goods for fuelling and provisioning and cannot, therefore, be extended to the supply of those goods effected at a previous stage in the commercial chain (see, to that effect, judgment in *Velker International Oil Company*, C?185/89, EU:C:1990:262, paragraph 22).

28 Furthermore, such a conclusion is supported by the fact that the extension of the exemption to stages prior to the final supply of the goods to the operator of the vessels, who will use them for their fuelling and provisioning, would require Member States to set up systems of supervision and control in order to satisfy themselves as to the ultimate use of the goods supplied free of tax. Far from bringing about administrative simplification, such systems would amount to constraints on the Member States and the taxable persons concerned which it would be impossible to reconcile with

the correct and straightforward application of the exemptions laid down in Article 131 of Directive 2006/112 (see, to that effect, judgment in *Velker International Oil Company*, C?185/89, EU:C:1990:262, paragraph 24).

29 It follows that, in order to benefit from the exemption laid down in Article 148(a) of Directive 2006/112, a supply of goods for fuelling and provisioning must be made to the operator of vessels used for navigation on the high seas which will use those goods and must therefore be made at the final stage in the commercial chain with respect to those goods.

30 Accordingly, it must be determined whether a supply of goods for fuelling and provisioning to intermediaries acting in their own name, such as those in the main proceedings, satisfies the conditions laid down in the preceding paragraphs.

31 In that connection, it must be noted that Directive 2006/112 does not use the concept of intermediary acting in his own name.

32 None the less, it is clear from Article 14(2)(c) of that directive that the transfer of goods made pursuant to a contract under which commission is payable on purchase or sale must be regarded as a supply of goods.

33 A contract under which commission is payable constitutes, in principle, an agreement by which an intermediary undertakes to carry out in his own name one or more legal transactions on behalf of a third party.

34 Therefore, a supply of goods for fuelling and provisioning made to intermediaries acting in their own name, even if the latter act on behalf of the operators of vessels which will use them, must be distinguished, for the purposes of Article 148(a) of Directive 2006/112, from a supply to those operators.

35 Thus, a supply of goods to an intermediary acting in his own name is not made at the last stage of the commercial chain for those goods, since it is intended that the intermediary will acquire the goods not to use them, but to sell them to a third party.

36 It follows that a supply of goods for fuelling and provisioning made to intermediaries acting in their own names, such as those at issue in the main proceedings, cannot, in principle, be regarded as a supply of the kind referred to in Article 148(a) of Directive 2006/112 and therefore cannot benefit from the exemption laid down in that provision.

37 However, the Court has acknowledged, in the context of Article 15(6) of the Sixth Directive, the provisions of which are set out in almost identical terms to those of Article 148(f) of Directive 2006/112, that the exemption laid down in that provision may apply to the supply of an aircraft to an operator which is not itself an airline operating for reward chiefly on international routes, but which acquires it for the purposes of exclusive use by such an undertaking, without transferring to the latter the power to dispose of the aircraft as owner, if that use is known and duly established. In that connection, the Court emphasised, inter alia, in the light of the type of object at issue and, inter alia, the registration and authorisation mechanisms in place for its use, the verification of its actual use is not liable to give rise to constraints for the Member States and the economic operators concerned which would be irreconcilable with the correct and straightforward application of the exemptions (see, to that effect, judgment in *A*, C?33/11, EU:C:2012:482, paragraphs 56 and 57).

38 The referring court asks whether that case-law is relevant for the purposes of interpreting Article 148(a) of Directive 2006/112, and whether it may lead to the application of that provision to

supplies of goods for fuelling and provisioning made to intermediaries acting in their own name where the ultimate use of those goods is known at the date of supply and duly established, and evidence confirming this is submitted to the tax authority in accordance with national legislation.

39 In that connection, it must be recalled, as a preliminary point, that in paragraph 53 of the judgment in *A* (C?33/11, EU:C:2012:482), the Court expressly held that, as regards the interpretation of Article 15(6) of the Sixth Directive, a provision the wording of which is identical to Article 148(f) of Directive 2006/112, there was nothing which required the approaches adopted in the judgment in *Velker International Oil Company* (C?185/89, EU:C:1990:262) concerning the interpretation of Article 15(4) of the Sixth Directive, the wording of which is identical to Article 148(a) of Directive 2006/112, to be carried across.

40 Next, it must be observed that, although the application of the exemptions laid down in Article 148(a) and (f) of Directive 2006/112 both depend on the use to be made of the goods concerned, the fact remains that the goods referred to, namely fuel in the first case and an aircraft in the second, are of radically different kinds, so that no analogy can be drawn between the two exemption schemes when applied to them.

41 Furthermore, the VAT exemptions referred to in Article 148 of Directive 2006/112 constitute independent concepts of EU law which must, therefore, be interpreted and applied uniformly throughout the European Union (see, to that effect, judgment in *Unterpertinger*, C?212/01, EU:C:2003:625, paragraph 34).

42 In the judgment in *A* (C?33/11, EU:C:2012:482), the Court based its findings, in particular, on the fact that the exemption at issue could be applied to the supply of an aircraft made in the circumstances set out in paragraph 37 of the present judgment on the existence of rules relating to registration and permits to fly existing in all Member States on account, in particular, of the fact that all the States are parties to the International Civil Aviation Convention mentioned in paragraph 3 of the present judgment.

43 It has not been established that, in all the Member States, there are rules or common authorisation mechanisms which enable the actual use to be guaranteed of goods for the fuelling and provisioning of vessels used for navigation on the high seas.

44 It follows that the uniform application of Article 148(a) of Directive 2006/112 could not be guaranteed, without compromising the objective of administrative simplification mentioned in paragraph 28 of the present judgment, if that provision were to be interpreted as applying to supplies of goods made to economic operators which are not the operators of vessels used for navigation on the high seas, but which acquire them for the purposes of the exclusive use by such operators, even if that use is known and duly established and evidence confirming this is submitted to the tax authority in accordance with the legislative provisions.

45 Accordingly, even though certain States, as appears to be the case with the Republic of Lithuania, have individually put in place mechanisms aiming to guarantee the actual use of goods for fuelling and provisioning of vessels used for navigation on the high seas, the case-law set out in paragraph 37 of the present judgment cannot be regarded as relevant for the interpretation of Article 148(a) of Directive 2006/112.

46 It follows from the foregoing that the exemption provided for in Article 148(a) of Directive 2006/112 is, in principle, not applicable to supplies to intermediaries acting in their own name, even if, at the date on which the supply is made, the ultimate use of the goods is known and duly established and evidence confirming this is submitted to the tax authority in accordance with national legislation.

47 However, it is apparent from the documents before the Court and the explanations provided at the hearing by FBK's representative that, in the case in the main proceedings, FBK itself loaded the fuel directly into the fuel tanks of the vessels for which that fuel was intended. Then it sent the corresponding invoice to the intermediaries acting in their own name, since it was only after loading that the exact amount of fuel supplied could be determined.

48 In those circumstances, it is conceivable that the transfer of ownership of the fuel to those intermediaries takes place only at the end of loading. If that is the case, which is a matter for the national court to ascertain, it must be held that such a transfer of ownership has taken place at the earliest at the same time as the operators of the vessels are actually entitled to dispose of the fuel, in fact, as if they were the owners.

49 As the advocate General noted in points 42 to 44 of her Opinion, from the moment the fuel is loaded into fuel tanks of a vessel, its operator is generally entitled actually to dispose of it as if it was the owner.

50 Consequently, it must be held that, in such circumstances, although, according to the procedures laid down by the applicable national law, the ownership of the fuel was formally transferred to the intermediaries and those intermediaries are deemed to have acted in their own name, those intermediaries have at no time been in a position to dispose of the quantities supplied, since the power to dispose of the fuel belonged to the operators of the vessels as soon as FBK had loaded it.

51 In order for a transaction to be classified as a supply of goods to a person for the purposes of Article 14(1) of Directive 2006/112, it is necessary that that transaction has the effect of authorising that person actually to dispose of them, as if he was the owner of the goods. According to settled case-law, the concept of 'supply of goods' referred to in Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (judgment in *Evita-K*, C?78/12, EU:C:2013:486, paragraph 33 and the case-law cited).

52 It follows that, in the situation mentioned in paragraph 48 of the present judgment, the transactions carried out by an economic operator, such as FBK, cannot be classified as supplies made to intermediaries acting in their own name, but should be regarded as being supplies made directly to the operators of vessels, which may, on that basis, benefit from the exemption laid down in Article 148(a) of Directive 2006/112.

53 Taking account of all of the foregoing considerations, the answer to the question referred is that Article 148(a) of Directive 2006/112 must be interpreted as meaning that the exemption provided for in that provision is not, in principle, applicable to supplies of goods for the fuelling and provisioning to intermediaries acting in their own name, even if, at the date on which the supply is made the ultimate use of the goods is known and duly established and evidence confirming that is submitted to the tax authority in accordance with the national legislation. However, in circumstances such as those at issue in the main proceedings, that exemption may apply if the transfer to those intermediaries of the ownership in the goods concerned under the procedures

laid down by the applicable national law took place at the earliest at the same time when the operators of vessels used for navigation on the high seas were actually entitled to dispose of those goods as if they were the owners, a matter which is for the national court to ascertain.

Costs

54 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 (Fourth Chamber) hereby rules:

Article 148(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the exemption provided for in that provision is not, in principle, applicable to supplies of goods for the fuelling and provisioning to intermediaries acting in their own name, even if, at the date on which the supply is made the ultimate use of the goods is known and duly established and evidence confirming this is submitted to the tax authority in accordance with the national legislation. However, in circumstances such as those at issue in the main proceedings, that exemption may apply if the transfer to those intermediaries of the ownership in the goods concerned under the procedures laid down by the applicable national law took place at the earliest at the same time when the operators of vessels used for navigation on the high seas were actually entitled to dispose of those goods as if they were the owners, a matter which is for the national court to ascertain.

[Signatures]

* Language of the case: Lithuanian.