Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

26 July 2017 (*)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Article 138(1) — Classification of a transaction as an intra-Community supply — Exemption of intra-Community supplies of goods — Intention of the person acquiring the goods to resell them to a taxable person in another Member State before they are taken out of the first Member State — Possible effect of some of the goods being processed before they are dispatched)

In Case C?386/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 4 July 2016, received at the Court on 12 July 2016, in the proceedings

‘Toridas’ UAB

v

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

intervening party:

Kauno apskrities valstybin? mokes?i? inspekcija,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, C. Vajda and K. Jürimäe (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ‘Toridas’ UAB, by R. Mištautas, advokatas,

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

– the European Commission, by L. Lozano Palacios and A. Steiblyt?, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 138(1), 140(a) and 141 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'), read in conjunction with Articles 33 and 40 of that directive.

2 The request has been made in proceedings between 'Toridas' UAB and the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania) concerning the classification of transactions carried out by Toridas between 2008 and 2010 as intra-Community supplies and payment of the value added tax (VAT) relating to those transactions together with default interest and a tax penalty.

Legal context

EU law

3 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.'

4 Article 20 of the VAT Directive states:

'"Intra-Community acquisition of goods" shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.'

5 Article 32 of the VAT Directive provides:

'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.

However, if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods.'

6 Article 33 of the VAT Directive states:

'1. By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends 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 ends, where the following conditions are met:

(a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;

(b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.

2. Where the goods supplied are dispatched or transported from a third territory or a third country and imported by the supplier into a Member State other than that in which dispatch or transport of the goods to the customer ends, they shall be regarded as having been dispatched or transported from the Member State of importation.'

7 Article 40 of the VAT Directive provides:

'The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends.'

8 Article 138(1) of the VAT Directive is worded as follows:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the [European Union], by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

9 Article 140 of the VAT Directive states:

'Member States shall exempt the following transactions:

(a) the intra-Community acquisition of goods the supply of which by taxable persons would in all circumstances be exempt within their respective territory;

...'

10 Article 141 of the VAT Directive provides:

'Each Member State shall take specific measures to ensure that VAT is not charged on the intra-Community acquisition of goods within its territory, made in accordance with Article 40, where the following conditions are met:

(a) the acquisition of goods is made by a taxable person who is not established in the Member State concerned but is identified for VAT purposes in another Member State;

(b) the acquisition of goods is made for the purposes of the subsequent supply of those goods, in the Member State concerned, by the taxable person referred to in point (a);

(c) the goods thus acquired by the taxable person referred to in point (a) are directly dispatched or transported, from a Member State other than that in which he is identified for VAT purposes, to the person for whom he is to carry out the subsequent supply;

(d) the person to whom the subsequent supply is to be made is another taxable person, or a non-taxable legal person, who is identified for VAT purposes in the Member State concerned;

(e) the person referred to in point (d) has been designated in accordance with Article 197 as liable for payment of the VAT due on the supply carried out by the taxable person who is not established in the Member State in which the tax is due.'

Lithuanian law

11 Article 49(1) of the Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas (Law of the Republic of Lithuania on VAT), in the version applicable at the material time ('the Law on VAT'), is worded as follows:

'A zero-rate of VAT shall be charged on goods supplied to a VAT payer identified for VAT purposes in another Member State and transported from the territory of Lithuania to another Member State (irrespective of who — whether the supplier of the goods, the purchaser of the goods or a third party acting on orders from either of them — transports the goods).'

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

12 Toridas is a company established and identified for VAT purposes in Lithuania. Between 1 July and 31 December 2010, it imported frozen fish into Lithuania from Kazakhstan ('the goods at issue'). The goods at issue were then sold to Megalain OÜ, a company established and identified for VAT purposes in Estonia ('the first supplies'). Those sales between Toridas and Megalain were governed by a cooperation agreement entered into on 10 October 2006. As set out in that agreement, Megalain undertook to have the goods at issue taken out of Lithuania within 30 days and to submit documents to Toridas proving that they had in fact been exported. Toridas undertook to be responsible for the goods at issue, including their storage, and to cover the costs incurred until they were actually taken out of Lithuania.

13 It is apparent from the order for reference that, in practice, on the very day that the goods at issue were purchased from Toridas, or the following day, Megalain resold them to purchasers established and identified for VAT purposes in other Member States of the European Union, namely Denmark, Germany, the Netherlands and Poland ('the second supplies').

14 Some of the goods at issue were dispatched immediately after their resale from Lithuania to those other Member States, without passing via Estonia. Others were transported to the premises, located in Lithuania, of the company Plung?s šaltis, in order to be graded, glazed and packaged, before being transported directly to the purchasers in the Member States of destination, referred to in the previous paragraph. In all cases Megalain was responsible for the grading, glazing, packaging and export of the goods at issue.

15 As regards the first supplies, it was stated on the invoices from Toridas to Megalain that the transactions were subject to a zero rate of VAT, as intra-Community supplies of goods, in accordance with Article 49(1) of the Law on VAT. The invoices also stated that the address of the place of loading and delivery of the goods at issue was that of the warehouses, located in Lithuania, of the companies Kauno žuvis or Plung?s šaltis.

16 As regards the second supplies, the invoices were drawn up by Megalain exclusive of VAT, pursuant to the provisions of the VAT Directive relating to exemption of the intra-Community acquisition of goods. They also stated the place of loading of the goods at issue, namely the premises of Kauno žuvis or Plung?s šaltis located in Lithuania, and a place of delivery, namely an address in the Member State of each purchaser.

17 Following a tax inspection relating to the payment of VAT, the Lithuanian tax inspectorate took the view that the first supplies were internal supplies, taxable at the standard rate, and not intra-Community supplies exempt from VAT. That assessment, initially confirmed by the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania, was overturned by the Mokestini? gin?? komisija prie Lietuvos Respublikos vyriausyb?s (Commission on Tax Disputes

under the Government of the Republic of Lithuania).

18 In an action brought by the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) annulled the decision of the Commission on Tax Disputes under the Government of the Republic of Lithuania and held that the assessment of the local and State tax inspectorates was well founded.

19 Toridas appealed against that judgment to the referring court.

20 The referring court raises the question of the classification of the first supplies for the purposes of VAT. Pointing out that those transactions were followed by the second supplies and that intra-Community dispatch or transport of the goods at issue took place just once, that court is uncertain which out of the first and the second supplies must be classified as intra-Community supplies, exempt under Article 138(1) of the VAT Directive.

21 According to the referring court, it is established that the goods at issue were in fact transported to the final purchasers and that the final purchasers declared the corresponding intra-Community acquisitions in their respective Member States. Furthermore, the referring court states that it may reasonably be inferred from the evidence in the case-file that Toridas was aware of all the significant circumstances relating to the second supplies. In the light of the guidance provided by the judgment of 6 April 2006, *EMAG Handel Eder* (C?245/04, EU:C:2006:232), in particular paragraph 36 of that judgment, the referring court doubts that the first supplies qualify for the exemption provided for in Article 138(1) of the VAT Directive.

22 The referring court notes, on the other hand, that, for the same consignment of goods, the chain of two successive supplies would involve traders identified in different Member States and that Megalain acted as a middleman. This suggests that the economic transactions, as a whole, could be regarded as ‘triangular’ transactions, involving three traders, established and identified for VAT purposes in three different Member States, who carry out two successive supplies for which intra-Community transport takes place just once. It states that the transactions are capable of falling on that basis within Article 141 of the VAT Directive. Finally, the referring court raises the question whether the processing of some of the goods at issue affects the application of any exemption of the first supplies.

23 In addition, the referring court fears, given that Megalain is identified for VAT purposes in Estonia, that any refusal to exempt the first supplies may lead to double taxation of a single economic transaction, both on supply and on acquisition.

24 In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must Articles 138(1), 140(a) and/or 141 of [the VAT Directive], read, inter alia, in conjunction with Articles 33 and 40 thereof, be interpreted as meaning that, in circumstances such as those at issue here …, the supply of goods by a taxable person who is established in the first Member State must be exempt under those provisions in the case where, before that supply transaction is entered into, the purchaser (that is to say, a person identified as being a taxable person in the second Member State) expresses an intention to resell the goods immediately, before transporting them from the first Member State, to a taxable person established in a third Member State, for whom those goods are transported (dispatched) to that third Member State?

2. Is the answer to Question 1 affected by the fact that a portion of the goods was processed on

the instructions of the taxable person established (identified for tax purposes) in the second Member State, prior to their being transported to the third Member State?'

Consideration of the questions referred

Preliminary observations

25 By its two questions, the referring court asks the Court for an interpretation of Articles 33, 40, 138(1), 140(a) and 141 of the VAT Directive. It seeks, in particular, to ascertain whether supplies of goods such as the first supplies may be exempt pursuant to the provisions of the VAT Directive applicable to intra-Community transactions.

26 However, solely Article 138(1) of the VAT Directive concerns the exemption of supplies of goods, whilst Articles 140(a), 141 and 40 thereof apply only to intra-Community acquisition of goods. Similarly, Article 33 of the VAT Directive concerns the place of supply of goods, whereas the request for a preliminary ruling concerns the regime governing the exemption of supplies of goods.

27 Accordingly, the present request for a preliminary ruling should be examined solely in so far as it relates to the interpretation of Articles 40 and 138(1) of the VAT Directive.

Question 1

28 By its first question, the referring court asks, in essence, whether Article 138(1) of the VAT Directive must be interpreted as meaning that, in circumstances such as those of the main proceedings, a supply of goods by a taxable person established in a first Member State is exempt from VAT under that provision where, prior to entering into that supply transaction, the person acquiring the goods, who is identified for VAT purposes in a second Member State, informs the supplier that the goods will be resold immediately to a taxable person established in a third Member State, before he takes them out of the first Member State and transports them to that third taxable person.

29 As set out in Article 138(1) of the VAT Directive, Member States are to exempt the supply of goods dispatched or transported to a destination outside their respective territories but within the European Union, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

30 It follows from the Court's settled case-law that the exemption of a supply of goods for the purposes of that article becomes applicable only if the right to dispose of the goods as owner has been transferred to the person acquiring the goods, if the supplier establishes that those goods have been dispatched or transported to another Member State and if, as a result of that dispatch or transport, they have physically left the territory of the Member State of supply (see, to that effect, judgment of 16 December 2010, *Euro Tyre Holding*, C?430/09, EU:C:2010:786, paragraph 29 and the case-law cited).

31 It should also be noted that the corollary of an intra-Community supply falling within Article 138(1) of the VAT Directive is an intra-Community acquisition, as defined in Article 20 of the directive, and that those two provisions must therefore be interpreted in such a way as to confer on them identical meaning and scope (see, to that effect, judgment of 27 September 2007, *Teleos and Others*, C?409/04, EU:C:2007:548, paragraph 34).

32 It is clear from Article 20 of the VAT Directive that an acquisition can be classified as an

intra-Community acquisition only if the goods have been transported or dispatched to the person acquiring them.

33 Therefore, the conditions for applying Article 138(1) of the VAT Directive cannot be fulfilled if the goods being supplied are not transported or dispatched to the person whose acquisition is the corollary of the supply at issue.

34 In the case of transactions which, such as those at issue in the main proceedings, form a chain of two successive supplies that have given rise to only a single intra-Community transport, it is clear from the Court's case-law, first, that the intra-Community transport can be ascribed to only one of the two supplies, which, therefore, will alone be exempted under Article 138(1) of the VAT Directive (see, to that effect, judgment of 6 April 2006, *EMAG Handel Eder*, C?245/04, EU:C:2006:232, paragraph 45).

35 Secondly, in order to determine which of the two supplies the intra-Community transport must be ascribed to, it is necessary to undertake an overall assessment of all the specific circumstances of the case (see, to that effect, judgments of 16 December 2010, *Euro Tyre Holding* , C?430/09, EU:C:2010:786, paragraph 27, and of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 32).

36 In that assessment, it must be determined in particular when the second transfer of the right to dispose of the goods as owner, to the person finally acquiring the goods, has occurred. In a situation where the second transfer of that right, that is to say, the second supply, has taken place before the intra-Community transport occurs, the intra-Community transport cannot be ascribed to the first supply to the first person acquiring the goods (see, to that effect, judgment of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 32 and the case-law cited).

37 In the case of two successive supplies that have given rise to only a single intra-Community transport, in order to determine which of the two supplies that transport must be ascribed to, it must be established whether that transport took place after the second supply. If that were to be the case, only the second supply should be classified as an intra-Community supply and be entitled, where appropriate, to the exemption provided for in Article 138(1) of the VAT Directive.

38 In the present instance, it is apparent from the information contained in the order for reference that the supply by Megalain to the persons finally acquiring the goods took place before the intra-Community transport.

39 The order for reference also explains that the middleman, Megalain, which was identified for VAT purposes in Estonia, was not the person to which the intra-Community transport of the goods at issue was directed, as those goods were transported directly to the Member States where the persons finally acquiring them were established, namely Denmark, Germany, the Netherlands and Poland.

40 Accordingly, subject to verification by the referring court, the first supplies at issue in the main proceedings constitute internal supplies which are not eligible for an exemption from VAT under Article 138(1) of the VAT Directive.

41 That conclusion is not affected by the fact that the middleman was established and identified for VAT purposes in Estonia. It is true that the referring court takes the view, in essence, that, if the first supplies were regarded as having to be classified as taxable transactions, a risk of double taxation could arise given that Megalain declared its acquisitions in Estonia.

42 However, it is apparent from the wording of Articles 20 and 138(1) of the VAT Directive that

the place where a trader is identified for VAT purposes is not a criterion for classification of an intra-Community supply or intra-Community acquisition.

43 The referring court takes the view, in essence, that, if the first supplies were regarded as having to be classified as taxable transactions, a risk of double taxation could arise. However, as the Commission has submitted in its written observations, that risk cannot be regarded as capable of justifying exemption of those transactions, given that double taxation can be avoided and fiscal neutrality can be ensured if the VAT Directive is applied correctly.

44 Accordingly, the answer to the first question is that Article 138(1) of the VAT Directive must be interpreted as meaning that, in circumstances such as those of the main proceedings, a supply of goods by a taxable person established in a first Member State is not exempt from VAT under that provision where, prior to entering into that supply transaction, the person acquiring the goods, who is identified for VAT purposes in a second Member State, informs the supplier that the goods will be resold immediately to a taxable person established in a third Member State, before he takes them out of the first Member State and transports them to that third taxable person, provided that that second supply has in fact been carried out and the goods have then been transported from the first Member State to the Member State of the third taxable person. The fact that the first person acquiring the goods is identified for VAT purposes in a Member State other than that of the place of the first supply or that of the place of the final acquisition is not a criterion for classification of an intra-Community transaction or, in itself, evidence sufficient to show that a transaction is an intra-Community one.

Question 2

45 By its second question, the referring court seeks, in essence, to ascertain whether, for the purposes of interpreting Article 138(1) of the VAT Directive, processing of the goods, in the course of a chain of two successive supplies, such as that at issue in the main proceedings, carried out on the instructions of the middleman acquiring the goods and before the goods are transported to the Member State of the person finally acquiring them, has an effect on the conditions for exemption of the first supply.

46 It is apparent from the request for a preliminary ruling that some of the goods at issue in the main proceedings were processed, that is to say, graded, glazed and packaged, on the instructions of Megalain after the second supplies and before the goods were transported to the Member States where the persons finally acquiring them were established. The referring court takes the view that analysis of the provisions of the VAT Directive suggests that, in the event of exemption, it is the same, unprocessed, goods that must be supplied.

47 In that regard, it should be pointed out that Article 138(1) of the VAT Directive obliges the Member States to exempt supplies of goods meeting the substantive conditions which are listed there exhaustively (judgment of 9 February 2017, *Euro Tyre*, C?21/16, EU:C:2017:106, paragraph 29). The processing of the goods that have been supplied does not form part of the substantive conditions laid down by that article.

48 As regards a chain of two supplies such as those at issue in the main proceedings, it is sufficient to state that it is apparent from the answer to the first question that the first supplies cannot be classified as intra-Community supplies since no intra-Community transport can be ascribed to them. Any processing of the goods after the first supplies cannot alter that finding.

49 Accordingly, the answer to the second question is that, for the purposes of interpreting Article 138(1) of the VAT Directive, processing of the goods, in the course of a chain of two successive supplies, such as that at issue in the main proceedings, carried out on the instructions

of the middleman acquiring the goods and before the goods are transported to the Member State of the person finally acquiring them, has no effect on the conditions for any exemption of the first supply where that processing takes place after the first supply.

Costs

50 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 (Ninth Chamber) hereby rules:

1. **Article 138(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those of the main proceedings, a supply of goods by a taxable person established in a first Member State is not exempt from value added tax under that provision where, prior to entering into that supply transaction, the person acquiring the goods, who is identified for value added tax purposes in a second Member State, informs the supplier that the goods will be resold immediately to a taxable person established in a third Member State, before he takes them out of the first Member State and transports them to that third taxable person, provided that that second supply has in fact been carried out and the goods have then been transported from the first Member State to the Member State of the third taxable person. The fact that the first person acquiring the goods is identified for value added tax purposes in a Member State other than that of the place of the first supply or that of the place of the final acquisition is not a criterion for classification of an intra-Community transaction or, in itself, evidence sufficient to show that a transaction is an intra-Community one.**

2. **For the purposes of interpreting Article 138(1) of Directive 2006/112, processing of the goods, in the course of a chain of two successive supplies, such as that at issue in the main proceedings, carried out on the instructions of the middleman acquiring the goods and before the goods are transported to the Member State of the person finally acquiring them, has no effect on the conditions for any exemption of the first supply where that processing takes place after the first supply.**

[Signatures]

* Language of the case: Lithuanian.