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OPINION OF ADVOCATE GENERAL

KOKOTT

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Case C-155/12

Minister Finansów

v

RR Donnelley Global Turnkey Solutions Poland Sp. z o.o.

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Tax legislation – Value added tax – Article 47 of Directive 2006/112/EC – Place where a service is supplied – Service connected with immovable property – Storage of goods)

I – **Introduction**

1. The request for a preliminary ruling relates to the levying of value added tax (VAT) on the storage of goods and the question of which Member State has the power to levy tax in this respect. That power to levy tax depends on the place where a taxed service is supplied, as determined by VAT law.

2. Under that law, the power to levy tax on services ‘connected with immovable property’ is held by the Member State in which the immovable property is located. The Court has previously ruled in this context that such a connection between the service and the immovable property must be ‘sufficiently direct’. (2) The referring court now wishes to clarify whether that also applies to the storage of goods.

3. The reference for a preliminary ruling provides a good opportunity to set out more precisely the Court’s case-law on the place where a service in connection with immovable property is supplied. Going beyond the individual case, clarity should be provided, for the purposes of application of the law, as to what the Court understands by a ‘sufficiently direct’ connection.

II – **Legal framework**

A – *European Union law*

4. Article 43 et seq. of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, (3) as amended by Directive 2008/8, (4) (‘the VAT Directive’) contain rules on the place where a service is supplied.

5. Article 44 of the VAT Directive contains the following general rule:

‘The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. …’

6. If the recipient of the service is not a taxable person, under Article 45 of the VAT Directive the following general rule applies:

‘The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. …’

7. Article 46 et seq. of the VAT Directive contain particular provisions on the place of supply of a service. Article 47 of the VAT Directive governs the ‘supply of services connected with immovable property’:

‘The place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located.’

8. 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 (5) (‘the Sixth Directive’), which was applicable until 31 December 2006, laid down provisions on the place of supply of a service in Article 9. The specific provision on services connected with immovable property was in Article 9(2)(a):

‘(2) However:

(a) the place of the supply of services connected with immovable property, including the services of estate agents and experts, and of services for preparing and coordinating construction works, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is situated’.

B – *National law*

9. The Polish VAT Law of 11 March 2004 contains, in the version to be applied in the main proceedings, provisions which, in essence, correspond to Articles 44 and 47 of the VAT Directive.

III – **Main proceedings and proceedings before the Court**

10. RR Donnelley Global Turnkey Solutions Poland Sp. z o.o., a company governed by Polish law (‘the taxable person’), provides services for the storage of goods to undertakings established in other Member States of the European Union and in non-member States. Those services include admitting the goods to the warehouse, placing the goods on storage shelves, storing the goods, packaging the goods for the customer, issuing the goods, unloading and loading. The service may also include repackaging materials supplied in collective packaging into individual sets.

11. With regard to that activity, the taxable person applied to the Polish tax authorities for an interpretation of Polish VAT law. It wished to know whether the services described are liable to VAT in the Republic of Poland. The Minister Finansów (Minister for Finance), who was competent in this regard, answered that they are, provided that the warehouse is situated in Poland, since

they are services connected with immovable property and for that reason they should be taxed where the immovable property is located.

12. The taxable person brought an action against that decision before the Polish courts. In its submission, for VAT purposes the place where the services it provides are supplied is, in accordance with Article 44 of the VAT Directive, the place of establishment of the respective recipient and not, in accordance with Article 47 of the VAT Directive, the place where the immovable property is located. In so far as the recipients of the service are established outside Poland, the storage services therefore cannot, in its view, be taxed by the Republic of Poland.

13. In that context and in the light of the differing taxation practice of other Member States established by it, the Naczelny S?d Administracyjny (Supreme Administrative Court), which is now hearing the dispute, referred the following questions to the Court pursuant to Article 267 TFEU:

Are the provisions of Articles 44 and 47 of the VAT Directive to be interpreted as meaning that complex services relating to the storage of goods, which comprise admission of the goods to the warehouse, placing the goods on the appropriate storage shelves, storing the goods for the customer, issuing the goods, unloading and loading and, in the case of certain customers, repackaging materials supplied in collective packaging into individual sets, constitute services connected with immovable property which are to be taxed, in accordance with Article 47 of the VAT Directive, at the place where the immovable property is located?

Alternatively, should it be accepted that the services in question are to be taxed, pursuant to Article 44 of the VAT Directive, at the place where the customer for whom the services are supplied has established his business on a permanent basis or has a fixed establishment or, in the absence of such a place, at the place where he has his permanent address or usually resides?

14. In the proceedings before the Court, the taxable person, the Greek and Polish Governments and the Commission have all submitted written observations.

IV – **Legal assessment**

15. By its questions, the referring court wishes, in essence, to ascertain whether Article 47 of the VAT Directive is to be applied to the described services for the storage of goods.

16. Reasoning in two stages is required in order to answer the question. First, it must be determined whether the complex service provided by the taxable person is a single supply or whether it consists of various individual supplies the place of each of which must be assessed separately (see A). Then it must be determined whether Article 47 of the VAT Directive applies to the services identified (see B).

A – *Single supply or independent individual supplies*

17. It must be clarified first whether the place where the individual services (admission of the goods to the warehouse, placing the goods on the appropriate storage shelves, storing the goods, issuing the goods, unloading and loading) involved in the complex service are supplied should be determined separately in each case or singly.

18. The Polish Government has rightly pointed out that, in the present case, the case-law of the Court on a single supply should be taken into account. Under that case-law, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine whether that transaction consists of two or more distinct supplies or one single supply. (6)

19. A single supply exists in particular if one individual supply constitutes the principal supply and the other individual supplies are merely ancillary supplies. An individual supply must be regarded as merely ancillary to a principal supply if it does not constitute for customers an end in itself, but a means of better enjoying the principal service supplied. (7)

20. Where there is a single supply in the form of a principal supply and ancillary supplies, the ancillary supplies are to share the tax treatment of the principal supply. (8) The Polish Government rightly points out, therefore, that the place of the principal supply determines the place of the single supply as a whole. (9)

21. It is in principle a matter for the referring court to establish, in the main proceedings, whether the individual supplies described constitute a single supply and, if appropriate, which of the individual supplies is the principal supply. (10) However, on the basis of the facts set out, it appears compelling, in principle, to regard the warehousing of the goods, that is to say the actual storage, as the principal supply, and, by contrast, their admission, placement, issuing, unloading and loading as ancillary supplies, since the latter individual supplies are not generally an end in themselves for the customer but only serve to facilitate the desired storage of the goods.

22. Nevertheless, it is also possible to regard the repackaging of materials, as carried out for certain customers, as an independent service, if the repackaging does not take place for reasons of better storage. In that case, two services would have to be found for VAT purposes, and the place of each would have to be determined separately: one for repackaging and the other for storage of the goods.

23. A different outcome might be reached overall if the loading and unloading of the goods to be stored involved a substantial transport service on the part of the taxable person. If collecting the goods from one place and, after a brief period of storage, taking them to another place forms part of the service, then the transport may be the principal supply while the interim storage does not serve any end in itself for the customer and is therefore merely an ancillary supply. The place where such a service is supplied would then be determined according to the place of supply applicable to a transport service.

24. On the basis of the individual services described by the referring court, in particular in the questions referred, I shall, however, assume, in my further examination that the complex service described concerning goods storage is a single service, whose place of supply is determined according to the principal service of storing the goods.

B – *Place of the single supply of storage*

25. The place where the storage service is supplied could be determined according to the general rules of Articles 44 and 45 of the VAT Directive or according to the special provision of Article 47.

26. As the special provisions on the place where a service is supplied take precedence over the general rule, (11) the application of Article 47 of the VAT Directive should be examined first.

27. The storage of goods is not one of the services explicitly listed in the provision. Since, however, the list is not exhaustive, (12) the question arises whether the storage of goods is a service ‘connected with immovable property’ within the meaning of the provision.

1. Sufficiently direct connection

28. According to the case-law of the Court on Article 9(2)(a) of the Sixth Directive, not every connection between a service and immovable property is sufficient for this purpose. Rather, the connection must be ‘sufficiently direct’. (13) In *Heger* the Court found such a connection because the immovable property concerned was a ‘constituent’, ‘central and essential element’ of the supply of services and the immovable property was the place of final consumption of the service. (14)

29. There is no reason not to apply that case-law to the provision – Article 47 of the VAT Directive – to be interpreted in the present case, despite the now expanded wording as regards the services explicitly listed. However, that case-law must be expressed in more concrete terms, since, as Advocate General Jacobs has previously rightly pointed out, (15) in determining the place where a service is supplied for the purposes of VAT, the main objective is to ensure legal certainty.

30. The provisions on the place where a service is supplied constitute conflict rules that determine the place where services are taxed and thus delimit the competences of the respective Member States. The object is to avoid, first, conflicts of jurisdiction which may result in double taxation and, secondly, non-taxation. (16) The concepts used in the provisions must therefore be interpreted uniformly throughout the European Union, (17) and in such a way that lays down a definite, simple and practical criterion and thus avoids conflicts of jurisdiction between Member States. (18)

31. With regard to Article 47 of the VAT Directive, this objective has not yet been achieved by the existing case-law of the Court. The requirement of a ‘sufficiently direct’ connection is, as the present case also shows, so indeterminate that its application in an individual case is not foreseeable. The same is true of the supplementary criteria listed by the Court in a ruling, namely that the immovable property should be a ‘central and essential element’ of a service or the place of final consumption.

32. The Court has previously held with regard to the ‘direct and immediate link’ between input transactions and taxable output transactions for the deduction of input tax pursuant to Article 168 of the VAT Directive, as required in its case-law, that, in view of the diversity of economic transactions, it is impossible to give a more appropriate reply as to the necessary relationship in every case and the application of this test is therefore a matter for the national courts. (19) However, the same cannot be said as regards the ‘sufficiently direct connection’ that determines the application of Article 47 of the VAT Directive, which is to be interpreted in the present case, for, while the right to deduct input tax in an individual case is to be determined by only one national court, the question of the place where a specific service is supplied can be dealt with in parallel before the courts of different Member States. In order to avoid divergent rulings in this regard that would lead to double taxation or non-taxation of a service, the Court must provide the national courts with as objective a criterion as possible for the application of Article 47 of the VAT Directive. (20)

2. Objective criterion for a sufficiently direct connection

33. The referring court has proposed in this respect that a sufficiently direct connection

between a service and immovable property should be found if *specific* immovable property is the *subject-matter* of the service.

34. The Court should follow this proposal.

35. It means, first, that it is not sufficient that any immovable property be required for the performance of the service. Rather, it must be *specific* immovable property identified by the parties. This requirement also follows from the fact that, in applying Article 47 of the VAT Directive, it must be clear to the parties where the tax obligations have to be fulfilled.

36. However, the requirement of *specific* immovable property with which the service is connected is also itself insufficient for application of Article 47 of the VAT Directive. Numerous services are to be provided in a specific property as the service provider has his business premises there, without this being able to establish a sufficiently direct connection between the service and immovable property. As the Court has previously held, a large number of services are connected in one way or another with immovable property. (21)

37. For that reason, secondly, the specifically determined immovable property must also be the *subject-matter* of the service, that is to say, the immovable property is the *object* of the supply. This requirement may also be inferred from the services explicitly listed in Article 47 of the VAT Directive, which, in essence, are the only guide to interpretation. (22) According to that list, the immovable property is the subject-matter of a service when it is used by the customer (granting of rights including accommodation), when work is carried out on it (construction services) or when it is assessed (services of experts).

38. It is of no consequence in this respect that two services are listed in Article 47 of the VAT Directive which do not actually fall within one of these three categories. That is the case for the services of estate agents and the preparation of construction work. These have as their subject-matter not the immovable property itself, but the contract for the purchase of immovable property or the planning documents for the work to be carried out on it.

39. The general rule for a sufficiently direct connection with immovable property need not, however, cover all the services explicitly listed in Article 47 of the VAT Directive. Rather, their inclusion in the wording may serve merely to extend application of the article for the purposes of simplification. (23) If, on the other hand, the general rule were made so broad that it also included all the services explicitly listed in Article 47 of the VAT Directive, that would significantly extend the scope of that provision, since, in order also to include the services of estate agents and the preparation of construction work in a general rule, that rule would have to include services the subject-matter of which is not immovable property but which are related to a property. As already shown, (24) however, this is the case for a large number of services.

40. Against this background, a sufficiently direct connection between the service and immovable property for the application of Article 47 of the VAT Directive is to be found if the service has the use of, work on, or assessment of specific immovable property as its subject-matter or is explicitly listed in the provision.

41. The individual cases decided to date by the Court are in accordance with these requirements: the fishing rights to be assessed in *Heger* constitute the use of immovable property (25) and the organisation of the exchange of timeshare usage rights which was at issue in *RCI Europe* (26) amounts to the service of an estate agent. In *Inter-Mark Group* the Court held that there was not a sufficiently direct connection between the construction of fair stands and immovable property, although work on immovable property was involved. However, that case-law merely clarifies that such work, even in the form of construction services, must have a certain

scope and a certain permanence. (27)

3. Subject-matter of a supply of storage services

42. The supply of storage services to be assessed in the present case can therefore display a sufficiently close connection with immovable property only if it is linked with a right to use a specific property or a specific part of a property. Only then is the subject-matter of the service the immovable property itself. In this connection, the fact that the storage areas are not freely accessible to the customer – upon which the Wojewódzki S?d Administracyjny w ?odzi (Regional Administrative Court, ?ód?) relied at first instance in the main proceedings – may be of significance.

43. If, however, the supply of storage services is not linked to a right of use of specific immovable property, the subject-matter of the supply is merely the goods to be stored. The fact that immovable property is necessarily required for storage is, as has been seen, irrelevant. (28) As the Greek Government has rightly stated, in that case the immovable property is only a means of performing the supply.

44. Nor does the supply of storage services fall, as the Polish Government suggests, under accommodation in the hotel sector or in sectors with a similar function as listed in Article 47 of the VAT Directive. The accommodation of persons takes place under quite different conditions from the storage of goods, so that the storage sector does not fulfil a function similar to the hotel sector.

45. Thus, as the taxable person has correctly observed, for the application of Article 47 of the VAT Directive to a storage service a distinction should be drawn according to whether the customer obtains a right of use of a specific storage area or whether he is merely to receive the goods back in the same condition.

4. Guidelines of the VAT Committee

46. This distinction between storage services also corresponds to the position adopted by the Advisory Committee on Value Added Tax (‘the VAT Committee’). The VAT Committee, which under Article 398(2) of the VAT Directive comprises representatives of the Commission and of the Member States, expressed ‘almost unanimously’ in a guideline from the 93rd meeting on 1 July 2011 the view that the storage of goods in immovable property does not result in application of Article 47 of the VAT Directive where ‘no specific part of the immovable property is assigned for the exclusive use of the customer’. (29)

47. The guidelines of the VAT Committee are admittedly not legally binding, (30) but Article 398(4) of the VAT Directive expressly assigns to the Committee the task of examining questions which concern the application of European Union provisions on VAT.

48. In the field of customs law, the Court at an early date described the opinions of the former Committee on Common Customs Tariff Nomenclature, which had a similar task, (31) as a valid aid to the uniform application of the Common Customs Tariff, although they did not have legally binding force. (32) This is the basis for the settled case-law of the Court according to which the explanatory notes on the Combined Nomenclature which are drawn up by the Commission – now in conjunction with the Customs Code Committee (33) – are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force. (34)

49. There is no longer any reason not to accord the guidelines of the VAT Committee a comparable role. In my Opinion in *Levob Verzekeringen and OV Bank*, I rejected this on the grounds that the guidelines were not published. (35) Now, however, they are. (36)

50. The importance of the VAT Committee should not, however, be overestimated. Its guidelines are, in essence, an expression of the opinion of the Commission and the competent authorities of the Member States. (37) For this reason, unanimity – as prescribed in Article 113 TFEU for the Council's legal acts on VAT – is not a prerequisite for their use as an aid to interpretation.

51. As an aid to the interpretation to be undertaken in the present case, the almost unanimously adopted guideline cited confirms, however, that a distinction is to be drawn between supplies of storage services as regards the application of Article 47 of the VAT Directive.

V – **Conclusion**

52. Therefore I propose the following answer to the questions referred for a preliminary ruling by the Naczelny S?d Administracyjny:

1. Application of Article 47 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2008/8/EC, requires that the subject-matter of the service be the use of, work on or assessment of specific immovable property or that the service be explicitly listed in that provision.

2. Complex services relating to the storage of goods fulfil these requirements only if the storage of the goods is the principal supply of a single service and it is connected with a right to use specific immovable property or a specific part of such property.

1 – Original language: German.

2 – See Case C-166/05 *Heger* [2006] ECR I-7749, paragraph 24, and Case C-530/09 *Inter-Mark Group* [2011] ECR I-10675, paragraph 30.

3 – OJ 2006 L 347, p. 1.

4 – Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11).

5 – OJ 1977 L 145, p. 1.

6 – Case C-44/11 *Deutsche Bank* [2012] ECR, paragraph 18 and the case-law cited.

7 – See Case C-392/11 *Field Fisher Waterhouse* [2012] ECR, paragraph 17 and the case-law cited.

8 – See *Deutsche Bank*, cited in footnote 6, paragraph 19 and the case-law cited, and *Field Fisher Waterhouse*, cited in footnote 7, paragraph 17.

9 – See also, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433; a lack of clarity remains so far as concerns Case C-429/97 *Commission* v *France* [2001] ECR I-637, paragraphs 46 to 48, according to which the existence of a composite supply appears to militate against the application of a special provision on the place where a service is supplied.

10 – See *Field Fisher Waterhouse*, cited in footnote 7, paragraph 20 and the case-law cited.

11 – See, to that effect, on Article 9 of the Sixth Directive, Case C-377/08 *EGN* [2009] ECR I-5685, paragraph 28 and the case-law cited.

12 – See the Opinion of Advocate General Sharpston in *Heger*, cited in footnote 2, point 36.

13 – *Heger*, cited in footnote 2, paragraph 24, and, on the essentially identically worded Article 45 of the old version of the VAT Directive, *Inter-Mark Group*, cited in footnote 2, paragraph 30; see also Case C-37/08 *RCI Europe* [2009] ECR I-7533, paragraph 36: 'sufficiently direct connection'.

14 – *Heger*, cited in footnote 2, paragraph 25.

15 – See the Opinion of Advocate General Jacobs in Case C-438/01 *Design Concept* [2003] ECR I-5617, point 30.

16 – See, on Article 9 of the Sixth Directive, Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraph 10; *Commission* v *France*, cited in footnote 9, paragraph 41; Case C-108/00 *SPI* [2001] ECR I-2361, paragraph 15; Case C-452/03 *RAL (Channel Islands) and Others* [2005] ECR I-3947, paragraph 23; *Levob Verzekeringen and OV Bank*, cited in footnote 9, paragraph 32; Case C-114/05 *Gillan Beach* [2006] ECR I-2427, paragraph 14; Case C-401/06 *Commission* v *Germany* [2007] ECR I-10609, paragraph 29; Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2008] ECR I-8255, paragraph 24; Case C-1/08 *Athesia Druck* [2009] ECR I-1255, paragraph 20; *EGN*, cited in footnote 11, paragraph 27; and Case C-218/10 *ADV Allround* [2012] ECR, paragraph 27.

17 – See, to that effect, on Article 9 of the Sixth Directive, Case C-68/92 *Commission* v *France* [1993] ECR I-5881, paragraph 14; Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907, paragraph 15; Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 12; *Gillan Beach*, cited in footnote 16, paragraph 20; and Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 32.

18 – See, on Article 9 of the Sixth Directive, *Commission* v *France*, cited in footnote 9, paragraph 49; see also, to that effect, Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 23 and the case-law cited; *Kollektivavtalsstiftelsen TRR Trygghetsrådet*, cited in footnote 16, paragraph 31; and *ADV Allround*, cited in footnote 16, paragraph 30.

19 – Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 25.

20 – See already, to that effect, the Opinion in *Heger*, cited in footnote 2, point 33.

21 – *Heger*, cited in footnote 2, paragraph 23.

22 – See, as regards the spirit and purpose of the exception for services connected with immovable property, the Commission Proposal of 23 December 2003 for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services, COM(2003) 822 final, pp. 6 and 7: 'policy reasons'.

23 – See, regarding the extension of the list of services by Directive 2008/8/EC, Commission Proposal COM(2003) 822 final, cited in footnote 22, p. 11, on Article 9a.

24 – See point 36 above.

25 – See *Heger*, cited in footnote 2, paragraph 25.

26 – See *RCI Europe*, cited in footnote 13.

27 – See *Inter-Mark Group*, cited in footnote 2, paragraph 31.

28 – See above, point 35 et seq.

29 – Document A – taxud.c.1(2012)400557 – 707, p. 4, point 8(a).

30 – See the Opinion of Advocate General Geelhoed in Case C-144/00 *Hoffmann* [2003] ECR I-2921, point 72, and the Opinion of Advocate General Bot in *Commission* v *Germany*, cited in footnote 16, point 50.

31 – See Article 2 of Council Regulation (EEC) No 97/69 of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969(I), p. 12).

32 – Joined Cases 69/76 and 70/76 *Dittmeyer* [1977] ECR 231.

33 – See the second indent of Article 9(1)(a) and Article 10 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16).

34 – See, inter alia, Case C-201/96 *LTM* [1997] ECR I-6147, paragraph 17; Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17; and Case C-423/10 *Delphi Deutschland* [2011] ECR I-4003, paragraph 24.

35 – See my Opinion in *Levob Verzekeringen and OV Bank*, cited in footnote 9, point 25.

36 – See the Commission's website at http://ec.europa.eu/taxation_customs/taxation/vat/key_documents/vat_committee/index_en.htm, accessed on 11 January 2013.

37 – See, to this effect, the Opinion of Advocate General Warner in *Dittmeyer*, cited in footnote 32, p. 244.