OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 5 March 2015 (1)

Case C?526/13

Fast Bunkering Klaip?da UAB

v

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

(Request for a preliminary ruling from the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Lithuania))

(VAT — Exemption for the supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas — Applicability to supplies made to intermediaries acting in their own name — Ultimate use of goods known and duly established by confirmatory evidence submitted to the tax authority before supply)

1. Article 148 of the VAT Directive (2) requires Member States to exempt, inter alia, the supply of goods for the fuelling and provisioning of certain vessels used for navigation on the high seas. A dispute before the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Tax Disputes Commission under the Government of the Republic of Lithuania; 'the Tax Disputes Commission') (3) involves supplies of fuel invoiced not directly to operators of such vessels but to intermediaries, although the ultimate use of the fuel is established in advance and it is delivered directly to the vessels in question. The Tax Disputes Commission wishes to know whether the exemption applies in such a case.

The VAT Directive

2. Under Article 2(1)(a) of the VAT Directive, a supply of goods for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

3. Article 14(1) defines such a supply as 'the transfer of the right to dispose of tangible property as owner'. Under Article 14(2)(c), 'the transfer of goods pursuant to a contract under which commission is payable on purchase or sale' is also to be regarded as a supply of goods. (4)

4. In the chapter headed 'Exemptions related to international transport', Article 148 of the VAT Directive provides, in particular:

'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 …;

…

(c) the supply, modification, repair, maintenance, chartering and hiring of the vessels referred to in point (a), and the supply, hiring, repair and maintenance of equipment, including fishing equipment, incorporated or used therein;

(d) the supply of services other than those referred to in point (c), to meet the direct needs of the vessels referred to in point (a) or of their cargoes;

…'

5. In accordance with Article 131, those exemptions are to apply in accordance with conditions to be laid down by the Member States for the purposes of ensuring their 'correct and straightforward application' and of 'preventing any possible evasion, avoidance or abuse'.

6. Article 148(a) of the VAT Directive is the direct successor to Article 15(4) of the Sixth Directive, (5) which the Court interpreted in *Velker* (6) as applying only to the supply of goods to a vessel operator who will use them for fuelling and provisioning and not to their supply at a previous stage in the commercial chain. That was because, in particular, the extension of the exemption to stages prior to the final supply of the goods to the vessel operator 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.

7. Article 148(e), (f) and (g) of the VAT Directive contain provisions comparable to those in, respectively, (a), (c) and (d), exempting the supply of goods for the fuelling and provisioning of aircraft used by airlines operating for reward chiefly on international routes. Those provisions, or their predecessors in the Sixth Directive, have been interpreted by the Court in case-law which may also be relevant to Article 148(a). (7)

Lithuanian legislation

8. Article 44 of the Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas Nr. IX 751 (Law No IX-751 of the Republic of Lithuania on value added tax; 'the Law on VAT') states, inter alia:

'1. The supply of goods shall be taxed at the zero rate of VAT where the goods are supplied as provisions to vessels referred to in Article 43(1) of this Law [namely, 'vessels sailing on the high seas that are intended to transport passengers and/or cargo on international routes and/or to supply other services for reward'] …

...

3. In this Law … fuel (motor fuel) and lubricants shall be regarded as provisions. ...'

9. Various rules governing the provisioning and fuelling of vessels and aircraft impose a number of strict administrative requirements which entail, inter alia, full traceability of all deliveries of fuel to vessels, in particular from customs warehouses, under the control and supervision of the customs authorities.

Facts, procedure and question referred

10. Fast Bunkering Klaip?da UAB ('FBK') is registered for VAT in Lithuania. It is in dispute with

the competent tax authority over supplies of fuel which it made between 2008 and 2011 to vessels used for navigation on the high seas.

11. The fuel originated outside the European Union and was stored in Lithuania under a customs warehousing procedure, so that VAT due on its importation had not yet been levied. FBK received orders to deliver fuel to specific vessels used for navigation on the high seas, which it sold FOB Klaip?da and which it delivered itself into the vessels' fuel tanks under a customs re-export procedure.

12. However, the orders were not placed directly by the owners or operators of the vessels but by intermediaries established in various Member States. Likewise, FBK invoiced the sales to the intermediaries rather than the owners or operators. The intermediaries acted in their own name vis-à-vis both FBK and the owners or operators — buying from the former and selling to the latter — but never themselves took physical delivery of any of the fuel. On the basis of Article 44(1) of the Law on VAT, FBK applied the zero rate on the invoices made out to the intermediaries.

13. Relying largely on the Court's judgments in *Velker* and *Elmeka*, the tax authority took the view that the supplies in question, being made to intermediaries, were 'effected at a previous stage in the commercial chain' and could not therefore be exempted from VAT.

14. The dispute is now before the Tax Disputes Commission, which harbours some doubts as to the applicability of the reasoning in *Velker* and *Elmeka* to a situation in which the fuel was in fact delivered directly by FBK to the vessels in question and sufficient controls were in fact in place to identify its ultimate use with certainty. The Tax Disputes Commission also points out that in *A* (8) the Court explicitly adopted a less strict approach with regard to the supply of aircraft, where it considered that a requirement that the intended use of the aircraft must be known and established as of the time of its acquisition, and its actual use subsequently verified, did not seem liable to give rise to constraints which would be irreconcilable with the correct and straightforward application of the exemption.

15. The Tax Disputes Commission therefore asks:

'Must Article 148(a) of [the VAT Directive] 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 provisioning the vessel, but also to supplies other than to the operator of the vessel, that is to say, to undisclosed intermediaries, 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?'

16. Written observations have been submitted by FBK, by the Italian and Lithuanian Governments, and by the European Commission. At the hearing on 4 December 2014, FBK, the Lithuanian Government and the Commission presented oral argument.

Assessment

Introductory considerations

Facts

17. It seems to me important that the Court's ruling on the interpretation of Article 148(a) of the VAT Directive should meet the specific factual situation at issue in the main proceedings. The account of the facts set out in the order for reference has been supplemented by FBK in its written

observations and at the hearing. The Lithuanian Government and the Commission also commented on the facts. Even so, it has not been possible to ascertain precise details of the transactions and relationships between the intermediaries and the owners or operators of the vessels concerned, although I do not consider that the lack of information is such as to prevent the Court from answering the question referred.

18. None the less, all the parties present at the hearing agreed that the way in which the various transactions were carried out in the present case reflects a common international practice. The Court's ruling is therefore likely to be relevant not only in the main proceedings but also wherever such practice is followed in the Union. However, it is possible that the practice is not universal, or that it varies in detail between ports in the Member States, so that the correct solution in this case may not always prove the correct solution in other cases.

19. Against that background, the following seem to me to be the salient aspects of the present case. None of them appears to be disputed.

20. FBK purchases fuel from outside the European Union and stores it under a customs warehousing procedure, pursuant to which the levying of the VAT due on importation is suspended until such time as the fuel may be released for free circulation in the Union.

21. When a vessel needs to refuel, the operator contacts an intermediary, identifying the vessel, the (approximate) quantity of fuel needed and the port (or perhaps ports) at which the vessel will be berthed and available for refuelling. The intermediary then selects a supplier (in this case, FBK) and places an order for the fuel to be delivered on board the vessel.

22. The reason for proceeding in that manner is both to simplify matters and to provide safeguards for both parties. Operators may not have contacts with suppliers in every port. Suppliers might be wary of delivering fuel if they were unsure of the creditworthiness of the operator. Specialised intermediaries, who deal with both parties on a regular basis and who are thus in a position to undertake to pay the supplier because they have confidence in the operator's ability to pay, provide a useful service by centralising transactions and assuming responsibility for the financial aspects.

23. The order placed by the intermediary specifies both the quality and quantity of fuel to be delivered to a particular vessel, but the quantity actually delivered may differ (by up to 10%, according to FBK), depending on the level in the vessel's tanks at the time of delivery, on meteorological conditions and possibly on other variables.

24. FBK delivers the fuel ordered into the tanks of the vessel in question, removing it from customs warehousing by completing the necessary re-export procedures. Only once the fuel has been delivered is FBK in a position to invoice the intermediary, who is its sole contractual partner for the sale, for the quantity actually delivered. On the assumption that the sale was exempt pursuant to the Lithuanian provisions implementing Article 148(a) of the VAT Directive, FBK did not charge VAT on its invoices for the deliveries at issue in the main proceedings.

25. The intermediary invoices the fuel to the operator of the vessel. (9) It is on this aspect — which, of course, does not concern FBK — that the Court has the least information. There may be different arrangements between different intermediaries and different operators. However, it is clear that, having purchased the fuel from FBK, the intermediary must then sell it to the operator and will wish to make a profit on the arrangement as a whole. He might do so, for example, simply by selling the fuel at a higher price, or else by selling it at the same price while adding a separate charge for his administrative, commercial and financial services. It cannot, therefore, be assumed without further information that the intermediaries always act on any particular basis. However, it

does appear to be accepted that, in the transactions at issue in the main proceedings, they acted in their own name, buying the fuel from FBK and selling it to the operator, and not simply as agents for the latter or as brokers bringing the two parties together.

26. It is on those factual elements that I shall base my analysis.

Case-law

27. The first and apparently most closely comparable of the Court's judgments in this field is *Velker*, which concerned Article 15(4) of the Sixth Directive, the predecessor to Article 148(a) of the present VAT Directive. The facts in that case were essentially as follows.

28. Forsythe purchased two consignments of bunker oil, intended for its vessels used for navigation on the high seas, from Velker; Velker had previously purchased both consignments from Verhoeven; Verhoeven had in turn purchased one of those consignments from Olie Verwerking Amsterdam ('OVA'). At the time of the sale by Velker to Forsythe, the consignments were still held by, respectively, Verhoeven and OVA. Following the sale by Velker to Forsythe, the consignments were delivered by Verhoeven and OVA to Forsythe.

29. In that chain of transactions, OVA charged no VAT on its sale to Verhoeven, Verhoeven charged none on its sales to Velker, and Velker charged none on its sales to Forsythe. An issue in the main proceedings was whether, if the sales by Velker to Forsythe were correctly exempted from VAT pursuant to what was then Article 15(4) of the Sixth Directive, the earlier sales by OVA to Verhoeven and by Verhoeven to Velker also qualified for the same exemption. (10)

30. The Court noted that the exemption in that provision must be interpreted strictly and that it applied to the fuelling and provisioning of vessels used for navigation on the high seas because such operations were equated with exports. Consequently, just as the mandatory exemption for exports 'applies exclusively to the final supply of goods exported by the seller or on his behalf, likewise the exemption laid down in Article 15(4) 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'. The Court explained further, in response to a submission that extending the exemption to all commercial stages in the supply would allow administrative simplification, that, on the contrary, it would require Member States to set up burdensome systems of supervision and control impossible to reconcile with the 'correct and straightforward application' of the exemption. (11)

31. Those considerations were confirmed in *Elmeka*, with regard to marine fuel freight services provided not directly to the operators of vessels used for navigation on the high seas but to a bunkering company which supplied such operators. In those circumstances, too, the exemption in what was then Article 15(8) of the Sixth Directive could not apply. (12)

32. The same approach was not, however, followed in *A*. That case involved the supply of an aircraft, not directly to an airline 'operating for reward chiefly on international routes' (13) but to a company hiring the aircraft to such an airline. The Court considered that not to apply the exemption in such circumstances would be liable to undermine the principle of fiscal neutrality. It distinguished the situation from those in *Velker* and *Elmeka* on the ground that '[m]aking the exemption in such circumstances subject to the intended use being known and duly established as of the time of acquisition of the aircraft and to subsequent verification of the actual use of the aircraft by such an undertaking does not seem, in the light of the type of object at issue here and, inter alia, the registration and authorisation mechanisms in place for its use, to be liable to give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the correct and straightforward application of the exemptions prescribed by the

Sixth Directive'. (14)

33. Another aspect of the Court's case-law which I consider to be relevant concerns the concept of a 'transfer of the right to dispose of tangible property as owner', which constitutes a 'supply of goods' for the purposes of the VAT Directive. According to settled case-law, that concept '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'; and, in principle, 'it is for the national court to determine in each individual case, on the basis of the facts of the case, whether there is a transfer of the right to dispose of the property as owner'. (15)

34. In *Auto Lease Holland*, the Court made its own determination on the basis of undisputed facts. That case concerned a vehicle leasing arrangement in which the lessee was able to purchase fuel, in the name and at the expense of the lessor (Auto Lease) by means of a fuel credit card in the name of and charged to the lessor, the lessee advancing each month one twelfth of the likely annual costs, with a settlement of account at the end of the year according to actual consumption, plus a charge for fuel management. The Court held that there was, for VAT purposes, no supply of fuel by the lessor to the lessee. It stated: '… it is necessary to determine to whom, whether the lessor or the lessee, the oil companies transferred … that right actually to dispose of the fuel as owner. … It is common ground that the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and Auto Lease does not at any time have the right to decide in what way the fuel must be used or to what end. … The argument to the effect that the fuel is supplied to Auto Lease, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property, cannot be accepted. … [T]he supplies were effected at Auto Lease's expense only ostensibly. … The actual consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel. … Accordingly, the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. Auto Lease does not purchase the fuel in order subsequently to resell it to the lessee; the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the time of purchase. Auto Lease acts, in fact, as a supplier of credit vis-à-vis the lessee.' (16)

35. That judgment, it seems to me, can provide a useful vantage point from which to view the circumstances of the present case as compared with those of *Velker*.

Interpretation of Article 148(a) of the VAT Directive in the light of the situation in the main proceedings and the Court's case-law

36. The case in the main proceedings presents parallels with those of *Velker*. In both situations, the fuel was physically delivered by its original owner to the operator of the vessel while legal ownership passed through one or more third parties.

37. However, I am not convinced that those parallels necessarily entail identical VAT treatment in the two situations. There are also aspects of difference between the cases.

38. In particular, it seems to me significant that, in *Velker*, legal ownership of the fuel changed hands before delivery to the operator of the vessels concerned, whereas, in the main proceedings in the present case, it appears likely that 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. (17)

39. That being so, it appears necessary to consider the stage at which the 'right to dispose of

[the fuel] as owner' is transferred since, as is clear from the case-law, that stage — which is decisive in terms of VAT treatment — does not necessarily coincide with the transfer of legal ownership.

40. It will therefore be necessary in my view for the Tax Disputes Commission to ascertain definitive facts beyond the scope of those already presented to the Court before a final determination can be made.

41. If, pursuant to the various contracts governing the transactions and the law applicable to those contracts (matters which may vary from one transaction to another and which may not be readily ascertainable), the parties (other than the operators of the vessels concerned) to and between whom legal ownership of the fuel passed became and/or remained, both in law and in fact, empowered actually to dispose of that fuel as owners when it had already been delivered to the vessels' tanks, then the situation is, from a VAT point of view, exactly comparable to the situation in *Velker*. (18) If that is so, the fact that, in *Velker*, the fuel was retained in the possession of a party other than the operator of the vessels, whereas in the present case it has already been transferred to the vessels' tanks, would seem to me to be immaterial.

42. However, careful consideration must be given to the identity of the party or parties empowered actually to dispose of the fuel in the same way as an owner. Once fuel has been delivered into the tanks of a vessel used for navigation on the high seas, it is extremely difficult to conceive of its being 'disposed of' other than by consumption by the vessel concerned (and thus by its operator) in order to meet its energy requirements. Any alternative actual disposal by a legal owner of the fuel, other than the operator of the vessel, would seem to require physical intervention of an impractical kind. (19) There is in practice no likelihood that the fuel will not be consumed for the vessel's needs, and it seems implausible that the intermediary, for the time that he may be legal owner, will wish to assume responsibilities of ownership (in the form of, for example, storage and insurance costs) in order to be able to dispose of it otherwise. By contrast, in *Velker*, it is clear that, up until the sale to Forsythe, Velker was in a position, both in fact and in law, to dispose of the consignments held by Verhoeven and OVA to any other party with whom it wished to contract.

43. In those circumstances, it seems to me that the best analysis, when considering the 'transfer of the right to dispose of tangible property as owner' specified in Article 14(1) of the VAT Directive, is the following.

44. Until such time as all aspects of the sale are completed, and subject to the actual terms of the contract, the supplier (in the present case, successively, FBK and the intermediary or intermediaries) enjoys legal ownership and, of course, a right to claim payment for the fuel (possibly involving, depending on the circumstances and the applicable law, a maritime lien over the vessel). (20) However, from the moment of delivery into the vessel's tanks, the operator is in fact in a position to dispose of the fuel as if he were its owner and it is at that moment that, for VAT purposes, the supply of goods takes place and falls to be taxed or exempted according to the circumstances.

45. The fact that the supply involves two or more transfers of legal ownership does not affect that liability to tax or that exemption. What matters is that there is a single ‘transfer of the right to dispose of tangible property as owner’ within the meaning of Article 14(1) of the VAT Directive, as interpreted in the case-law, and that that transfer constitutes a single supply of goods. Such a view is not inconsistent with the objectives of Article 148. In that context, the ‘right to dispose of’ the property must be construed as referring to a person’s entitlement to use, consume and/or otherwise enjoy that property, whether that entitlement is or is not subject to further contractual obligations, in particular the obligation to pay for the property in question.

46. That approach seems to me not only to be consistent with the terms of the VAT Directive as interpreted in the case-law (it follows the definition of ‘transfer of the right to dispose of tangible property as owner’ in the *Safe* line of decisions and does not conflict, because of the differing circumstances, with the *Velker* case-law) but also to favour the ‘correct and straightforward application’ of the exemption which (although it refers formally to conditions to be laid down by the Member States rather than to those laid down in the directive itself) is one of the aims set out in Article 131 of the VAT Directive. As FBK has pointed out, the process of levying VAT from, and subsequently reimbursing it to, taxable persons established in other Member States is a laborious one, and serves no purpose where the fuel has been delivered into the tanks of vessels used for navigation on the high seas and cannot in practice be used in a way other than that for which the exemption is intended. Such considerations are, moreover, consistent with those expressed by the Court in *A*; and the judgment in *Auto Lease Holland*, although the circumstances of that case were not identical, points in the same direction.

47. However, other considerations favouring a different view have been put forward by, in particular, the Lithuanian Government and the Commission, and it is necessary to examine those of them which appear significant.

Considerations put forward in favour of a different analysis

48. First, it is submitted that, in accordance with consistent case-law, the principle of fiscal neutrality means that economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT and, in that light, exemptions must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all supplies of goods or services effected for consideration by a taxable person; however, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive an exemption of its intended effect. (21) Consequently, in that view, Article 148(a) of the VAT Directive should be interpreted strictly as limited to the final transaction in the chain — which, as both the Commission and the Lithuanian Government point out, is the stage at which the fuel is ‘exported’.

49. I do not think that there is any real inconsistency between that view and the analysis I have proposed above.

50. Where, as in *Velker*, there are successive supplies, it being fully in the power of each successive legal owner to dispose of the fuel in that capacity, both legally and physically, *before* the point of the transaction equated with export (22) is reached, I agree entirely that, on a strict — and, indeed, on any rational — interpretation, it is only at that point that the exemption in Article 148(a) of the VAT Directive can be applied. By contrast, where the power actually to dispose of the fuel as, or in the same way as, an owner is transferred only once, at the point in the chain which is equated with an export, and where any intermediate or subsequent legal transaction in fact involves only the transfer of a claim for payment against the operator of the vessel, an interpretation under which the delivery of the fuel encompasses also such intermediate or

subsequent legal transactions is, in reality, no less strict. Nor does such an interpretation offend against the principle of fiscal neutrality, since the intermediaries between, in the present case, FBK and the operator of the vessel are not involved in the same transactions as those carried out by OVA or Verhoeven in *Velker*. The latter were selling on a market in which the final destination of the fuel was not yet determined and might have been different; the former are involved in a transaction concerning an interest in fuel whose final destination has already been determined.

51. Second, the Lithuanian Government refers to VAT Committee guidelines of 1 July 2011, in which the committee 'almost unanimously' agreed that the exemption provided for in Article 148(c) of the VAT Directive should apply exclusively to repair services rendered directly to the operator of the vessel and cannot be extended to any linked services supplied at an earlier stage in the commercial chain, in particular by sub-contractors. (23) At the hearing, the same government referred also to guidelines of 24-25 February 2014 in which, following up on the judgment in *A*, the VAT Committee again 'almost unanimously' agreed, inter alia, that the same exemption should not, under any circumstances, apply to supplies made at an earlier stage in the commercial chain than the supply made to a taxable person acquiring a vessel with a view to its immediate hire. (24)

52. It should be borne in mind that those guidelines are 'merely views of a consultative committee. They do not constitute an official interpretation of EU law and do not necessarily have the agreement of the European Commission. They do not bind the European Commission or the Member States who are free not to follow them.' Indeed, their reproduction 'is subject to mentioning this caveat'. (25)

53. However, even if the guidelines are to be taken into account, two points appear to me to be relevant. The first guidelines referred to explicitly concern, in particular, the provision of repair services by sub-contractors rather than supplies of goods (in this instance, fuel). The second guidelines go on to state that, where goods for fuelling and provisioning are supplied directly to the taxable person who uses a vessel for commercial activities on the high seas, the exemption in Article 148(a) of the VAT Directive is to apply, irrespective of any shared use of the vessel with other users who are not using it exclusively for their commercial activities. (26) Although that point relates specifically to shared use of the vessel rather than the place of a transaction in the commercial chain, the reference to goods 'supplied directly to the taxable person who uses the vessel for commercial activities on the high seas' seems to me suggestive of an assumption that it is the *direct supply to the operator* which triggers the exemption in Article 148(a).

54. I therefore find nothing in the VAT Committee Guidelines to call in question the view I have reached at point 44 above.

55. Third, from Article 14(2)(c) of the VAT Directive, (27) seen in the light of, in particular, Articles 28 (28) and 311(1)(5) (29) of the same directive and of the Court's case-law, (30) the Commission concludes that the intermediaries in the present case must be regarded as having first purchased the fuel in question and then delivered it to the operator of the vessel, in two separate transactions, only the latter qualifying for the exemption in Article 148(a).

56. Whilst I understand the reasoning underlying that position, I consider that it has already been largely dealt with in my interpretation of Article 148(a) of the VAT Directive. That interpretation is based on the need to determine how many transfers there have been of the 'right to dispose of tangible property as owner' for VAT purposes, which may or may not, depending on the circumstances, be the same as the number of transfers of legal ownership of that property. The circumstances of the case in the main proceedings, in which fuel is delivered directly into the tanks of a vessel used for navigation on the high seas and may thereafter (subject to verification by the national court) be disposed of only by the operator of that vessel, are not necessarily comparable to those of a supply of services involving an intermediary or those of a dealer in

second-hand goods, works of art, collectors' items or antiques.

57. I would however stress again that, when applying Article 148(a) of the VAT Directive in accordance with the interpretation I propose, the national court must make a thorough determination of the actual circumstances of the transactions involved, and that it will not always necessarily be the case that all the transactions in a supply of fuel involving one or more intermediaries should be exempted from VAT under that provision.

Conclusion

58. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the question raised by the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s to the following effect:

Where, in the conditions defined in Article 148(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, it is established that a seller delivers goods for the fuelling and provisioning of a vessel (a) directly to the operator of the vessel in such a way that (b) the latter immediately and unconditionally acquires, and the seller simultaneously loses, the right to dispose of those goods as owner and (c) no other person acquires or loses such a right over the same goods, then the transaction by which the seller transfers that right, the transaction by which the operator of the vessel acquires the same right and any intermediate transactions by which third parties may acquire and pass on rights which do not include that of disposing of the goods as owners are to be exempted from VAT.

In other circumstances, only the transaction whereby the operator of the vessel acquires the right to dispose of the goods as owner is to be exempted from VAT pursuant to that provision.

In all cases, it is for the competent national court to determine, in the light of the relevant facts, who acquires, and at what stage, the right actually to dispose of the goods as if he were their owner, such determination not being dependent solely on the transfer of legal ownership of the goods according to the applicable law.

1 – Original language: English.

2 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – The Tax Disputes Commission has been held by the Court to be a court or tribunal within the meaning of Article 267 TFEU; see judgment in *Nidera Handelscompagnie*, C?385/09, EU:C:2010:627, paragraphs 34 to 40.

4 – See further point 55 et seq. below.

5 – 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).

6 – Judgment in *Velker International Oil Company*, C?185/89, EU:C:1990:262 ('*Velker*'), paragraphs 22 and 24; see also judgment in *Elmeka*, C?181/04 to C?183/04, EU:C:2006:563 ('*Elmeka*'), paragraph 23.

7 – See, for example, judgments in *Cimber Air*, C?382/02, EU:C:2004:534, and *A*, C?33/11, EU:C:2012:482 ('*A*').

8 – Especially at paragraphs 51 to 56.

9 – It has been suggested that there may be a chain of several intermediaries between FBK and the operator. Even if that is so, the VAT treatment of the transactions must be the same, however many intermediaries may have been involved. What is at issue is whether the exemption applies only to the last transaction in the series or to the series as a whole.

10 – Another issue was whether the sales to Forsythe were indeed correctly exempted, given that Forsythe stored the fuel onshore before loading it on board the vessels for which it was intended. The Court found that the exemption was correctly applied in those circumstances, but that point is of no interest to the present case.

11 – *Velker*, paragraphs 20 to 24.

12 – Now Article 148(d) of the VAT Directive; *Elmeka*, paragraphs 17 to 25.

13 – Article 15(6) of the Sixth Directive, now Article 148(f) of the VAT Directive.

14 – *A*, especially at paragraphs 41 to 57.

15 – Judgment in *Shipping and Forwarding Enterprise Safe*, C?320/88, EU:C:1990:61 (‘*Safe*’), paragraphs 7 and 13; see, most recently, judgment in *Evita-K*, C?78/12, EU:C:2013:486, paragraphs 33 and 34 and case-law cited.

16 – Judgment in *Auto Lease Holland*, C?185/01, EU:C:2003:73 (‘*Auto Lease Holland*’), especially at paragraphs 33 to 36.

17 – See points 23 and 24 above. There is a parallel here with the situation in *Auto Lease Holland* in that, until the delivery is completed and invoiced, the party initially paying for it has only a general idea of how much fuel will be involved.

18 – See points 28 and 29 above.

19 – Thus, it seems implausible to suppose that (at a profit for those concerned) the fuel once charged into vessel A will then be discharged again in order to be supplied to vessel B before vessel A sails, all without detection by the port or customs authorities.

20 – See, for example, Clause 10 of the BIMCO (Baltic and International Maritime Council) Standard Bunker Contract, and BIMCO’s ‘Bunker Non-Lien Clause for Time Charter Parties’ (https://www.bimco.org). On maritime liens generally, see, for example, Baatz, *Maritime Law*, Routledge 2014 (3rd ed.), pp. 490-491.

21 – See, for example, judgment in *Navicon*, C?97/06, EU:C:2007:609, paragraphs 21 and 22 and case-law cited.

22 – And it must be borne in mind that the very reason for the exemption is that the transaction is equated with an export; see judgment in *Velker*, paragraph 21.

23 – Guidelines resulting from the 93rd meeting of 1 July 2011 Document E — taxud.c.1(2012)553296 — 722 REV.

24 – Guidelines resulting from the 100th meeting of 24-25 February 2014 Document D — taxud.c.1(2014)2716782 — 803, point 1.

25 – The caveat and the condition are reproduced on each page of the guidelines.

26 – Point 3 of the guidelines.

27 – See point 3 above.

28 – ‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.’

29 – ‘“[T]axable dealer” means any taxable person who, in the course of his economic activity and with a view to resale, purchases, or applies for the purposes of his business, or imports, second-hand goods, works of art, collectors’ items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale.’

30 – Judgment in *Henfling and Others*, C?464/10, EU:C:2011:489, paragraphs 34 to 36: under ‘the legal fiction of two identical supplies of services provided consecutively …, … the commission agent … is considered to have, firstly, received the services in question from the operator on behalf of whom it acts … before providing, secondly, those services to the client himself’. Since the provision in question ‘is couched in general terms, without containing restrictions as to its scope or its extent, [that] fiction … also concerns the application of VAT exemptions …’.