ECJ REPORTS

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EMAG Handel Eder v Finanzlandesdirektion fur Kaernten (Case C-254/04), ECJ 6 April 2006

EMAG Handel was an Austrian company that obtained non-ferrous metals from K GmbH ('K'), which was also established in Austria.

K itself acquired the goods concerned from suppliers in Italy or the Netherlands ('the suppliers'). It is not disputed that EMAG did not know who K's suppliers were. After each transaction was concluded, K instructed its suppliers to hand over those goods to a forwarding agent it had engaged to deliver those goods by lorry directly either to EMAG's premises in Austria or to those of EMAG's customers, also in Austria, in accordance with the instructions given to K by EMAG. K invoiced EMAG the agreed purchase price of the goods and added Austrian VAT at the rate of 20%. EMAG subsequently claimed deduction of that tax as input VAT.

Consequently, the competent Finanzamt (tax office) and, subsequently, the Carinthia Regional Tax Authority refused to allow that deduction on the ground that K had been wrong to include VAT in the invoice to EMAG. The latter brought an appeal before the Verwaltungsgerichtshof (Higher Administrative Court).

While examining the case the Higher Administrative Court referred the following questions to the Court of Justice for a preliminary ruling:

– Is the first sentence of Article 8(1)(a) of the Sixth Council Directive ... to be interpreted as meaning that the place where dispatch or transport begins is relevant even when several undertakings enter into arrangements for the

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supply of the same goods and those arrangements are implemented by way of a single movement of goods?

– Are successive supplies to be treated as exempted intra-Community supplies when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods?

– If the answer to the first question is in the affirmative, is the place at which the second supply begins the actual place of departure of the goods or the place where the first supply finishes?

– Is the identity of the party having the right of disposal of the goods during their movement a relevant factor in answering the first, second and third questions?

Having heard the case the Court stated that:

1. Where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, give rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995.

That interpretation holds good regardless of which taxable person – the first vendor, the intermediary acquiring the goods or the second person acquiring the goods – has the right to dispose of the goods during that dispatch or transport.

2. Only the place of the supply which gives rise to dispatch or intra-Community transport of goods is determined in accordance with Article 8(1)(a) of the Sixth Directive 77/388/EEC, as amended by Directive 95/7; that place is deemed to be in the Member State of the departure of that dispatch or transport.

The place of the other supply is determined in accordance with Article 8(1)(b) of that directive; that place is deemed to be either in the Member State of departure or in the Member State of arrival of that dispatch or

transport, according to whether that supply is the first or the second of the two successive supplies.

European Commission v UK (Case C-305/03), European Court of Justice, 9 February 2006

The initial situation that caused the Court to pass the judgment was as follows. In the United Kingdom, works of art are imported with a view to possible sale by auction under the procedure for temporary importation with total exemption from import duty. If, after sale by auction, the work is definitively imported into the European Community, VAT is calculated on the basis of the price obtained on the sale by auction, including the auctioneer's profit margin. That amount is then reduced in accordance with Article 11B(6) of the Sixth Directive in such a way that the effective tax rate is equal to 5% of the applicable taxable amount.

The Commission, having established that, contrary to its obligations under Article 28(1a) and Article 28c(E)(1) of the Sixth Directive, the United Kingdom does not tax at the standard rate the auctioneers' profit margin on the sale by auction of imported works of art, sent the UK a letter of formal notice on 17 March 1997 and initiated the procedure for infringement provided for in Article 226 EC.

Furthermore, the Commission always maintained during the pre-litigation and litigation procedures that the United Kingdom applies a reduced rate of VAT to the auctioneer's profit margin, contrary to its obligations under the Sixth Directive. Whether or not that margin is an element of the customs value certainly does not change the fact that the United Kingdom applies an effective reduced rate. The Commission's view that such a margin must be taxed at the standard rate has not changed during the procedure.

The main question was whether the auctioneer's profit margin on the sale of works of art imported under the arrangements for temporary importation must be taxed as a transaction within the territory of the country in accordance with the conditions referred to in Article 16(1) of the Sixth Directive.

According to the Commission two chargeable events are involved in this case: an importation of goods and a transaction within the territory of the country. In all cases where importation is followed by a sale by a taxable person, both the importation and the sale must be taxed. Moreover, the Commission complained that the United Kingdom did not separate the second taxable event, that is, the sale by auction, and did not tax it as a transaction within the territory of the country. That Member State has therefore failed to fulfil its obligations under Articles 2(1), 5(4)(c) and 12(3) of the Sixth Directive.

According to the Court, by applying a reduced rate of value added tax to the commission received by auctioneers on sales by auction of works of art, antiques and collectors' items imported under the arrangements for temporary importation, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(1), 5(4)(c), 12(3) and 16(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 1999/49/EC of 25 May 1999.