



Case alert

Court of Justice – Advocate General’s Opinion - KrakVet

12 February 2020

Summary

Advocate General Sharpston has issued a long and detailed opinion in relation to this case – a referral from the Hungarian courts – concerning the interpretation of Article 33 of the VAT Directive.

Article 33 relates to the determination of the place of supply of goods for ‘distance sales’ to certain taxable persons and to non-taxable persons (i.e. consumers). ‘Distance sales’ are regarded as supplies of goods where the goods are dispatched or transported to the customer by or on behalf of the seller. In essence, Article 33 makes the place of supply the place where transport of the goods to the customer ends. As an example, a supply of goods dispatched by or on behalf of the seller from the UK to a non-taxable consumer in France would be regarded as taking place in France.

This rule ensures that generally, VAT is due and is collectable in the country where consumption of the goods takes place.

In this case, KrakVet – a Polish company with no establishment, office or warehouse in Hungary sold pet food to private consumers in Hungary. It offered customers the opportunity for them to arrange their own transportation of the goods from Poland to Hungary or for them to use a connected company “KBGT”. The question to resolve was whether, in light of these arrangements, the goods were dispatched or transported by or on behalf of the seller (KrakVet). A positive answer would result in the supply taking place in Hungary – a negative answer would result in the supply taking place in Poland.

Advocate General Sharpston - Opinion

The question to be resolved in this case is whether goods (pet food) sold by KrakVet to non-taxable persons in a different Member State (consumers) were dispatched or transported by or on behalf of KrakVet such that the place of supply of those goods is shifted from Poland to Hungary. The Hungarian tax authority considered that the goods had been so dispatched or transported and sought to collect the tax due from KrakVet along with penalties and interest charges.

Under normal rules, the place of supply of goods that are dispatched or transported to another Member State is the place where transport of the goods begins. However, there is an exception to that rule where, as in this case, the customer is a non-taxable person. Under the provisions of Article 33 of the VAT Directive, in such cases, the place of supply is shifted from the place where transport begins to the place where transport ends. This rule ensures that VAT is due and is collectable in the Member State within which the goods are consumed by the customer. The measure ensures that there is no benefit to consumers from buying goods from a Member State with a lower rate of VAT.

The question of whether or not goods are dispatched by or on behalf of the supplier is key to determining the place of supply. In KrakVet, the company supplied pet food but offered a choice to consumers of arranging their own transport or using the transport services of a connected business. Crucially, the company had sought and received a binding ruling from the Polish tax authority which agreed that, in the circumstances, the goods were not dispatched or transported by or on behalf of KrakVet – the Polish tax authority accepted that the goods were dispatched or transported by or on behalf of the customer. Unfortunately, the Hungarian tax authority disagreed concluding that the supplies took place in Hungary. It imposed a tax assessment on KrakVet and also imposed penalties and interest.

In her opinion, Advocate General Sharpston considers that a sensible interpretation of the law is needed. She states that for the dispatch or transport to be undertaken ‘by’ the supplier then it would need to take most or all of the essential steps necessary to prepare the goods for transportation and to make the arrangements for the goods to be collected and start their journey. Similarly, for the dispatch or transportation to be done ‘on behalf of’ the supplier then the supplier (and not the customer) would take the decisions governing how the goods are to be dispatched or transported. Notably, the Advocate General ignored the VAT Committee’s Guidelines on distance selling (published in 2015). Those guidelines suggest that, where the supplier intervenes (either directly or indirectly) with the dispatch or transport of the goods to the customer, the supply is to be regarded as ‘dispatched or transported by or on behalf of the supplier – and will thus qualify as ‘distance sales’ taxable in the Member State of consumption. Advocate General Sharpston confirmed that the VAT Committee’s guidelines are simply that, guidelines - and they are not legally binding.

Comment - In KrakVet’s case, the fact that it obtained a binding ruling from the tax authority may not be sufficient for it to win its case. The Advocate General considers that it is for the national Polish court to determine the specific facts relating to who (KrakVet or the customer) took the essential steps necessary to prepare the goods for transportation and make the arrangements for the goods to be collected and start their journey. If, on the evidence, the Polish national court considers that this was KrakVet, then in Advocate General Sharpston’s opinion, the place of supply will be Hungary.

These place of supply rules are due to be amended from 1 January 2021 to make ‘direct or indirect intervention’ by the supplier in relation to dispatch or transport of the goods a factor in the determination of the place of supply.

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