BUNDESVERBAND DEUTSCHER LEASING-UNTERNEHMEN
50 JAHRE

Comment Letter of the Federal Association of German Leasing Companies to the VAT Committee of the European Commission

"CJEU Case C-235/18 *Vega International*: Fuel cards - follow-up"

(Working Paper No. 1046 - taxud.c.1(2022)6857780)

as of 13 December 2022

1. Introduction

We refer to our comment letter of 28 January 2022 where we described the typical business models of refuelling vehicles by means of fuel cards. We argued for maintaining the current VAT practice of assessing these as a chain transaction and not, for example, as a financing transaction of a direct fuel purchase. We closely observed the further course of the discussions in the *VAT Committee* and would now like to comment on this again.

We fully share the analysis of the *VAT Expert Group* from March 2022 according to which the typical fuel card business models differ significantly from the fact pattern of the CJEU judgment *Vega International* and the principles of this ruling should therefore not be applied to these models. We are also convinced that the substance and economic reality of fuel procurement by means of fuel cards is virtually identical to that of recharging electric vehicles. Therefore, both business models should be treated uniformly throughout Europe as a chain transaction for VAT purposes according to the principles adopted by the *VAT Committee* in its 118th meeting.

We notice with concern and regret that the *Commission Services* negate the findings of the *Expert Group and* arrive at a completely opposite assessment. The *Services* perceive no significant differences between the typical buy-and-sell model of fuel card business and the *Vega International* case and thus argue in favour of assessing it in principle as a supply of financial services consisting in financing of the purchase of fuel. However, this would contradict the substance and economic reality of the fuel card business and would lead to an unjustifiable disparity in the treatment of the established buy-and-sell model compared to the recharging of electric vehicles and the refuelling within the commissionaire model. In a broader view, the entire VAT treatment of chain transactions, as they are commonly used in many industries regardless of the fuel card business, would be fundamentally called into doubt.

Against this background, we will hereinafter once again highlight the economic reality of the various models in question and analyze them with regard to their appropriate VAT treatment:

2. Refuelling and recharging vehicles by means of cards (buy-and-sell model)

2.1 Business model

The fuel card issuer's business model is to generate a profit margin through the purchase and resale of fuel. To this end, the issuer purchases the fuel in the quantity and quality desired by the fuel card customer, at the exact time and place so that he can resell it to the customer immediately and without intermediate storage. The procurement process is thus initiated by the customer and specified according to the customer's needs – as is generally the case with most chain supply transactions. However, this does not change the fact that the acquisition is carried out in the name and for the account of the issuer.

As the issuer does not operate its own petrol station network, it enters into framework contracts with mineral oil companies on the purchasing side. On the selling side, there are respective contracts with the customers. The contracts on both sides specify the terms and conditions under which customers are entitled to purchase fuel in the name and for the account of the issuer.

The fact that the refuelling transaction constitutes a purchase and immediate resale of fuel is manifested by the following aspects:

- Pricing sovereignty prevails at each trading level. The purchase price is negotiated between mineral oil companies and issuer, the sales price between issuer and customers.
- Liability for any warranty claims or payment defaults only applies at the respective trading level, i.e. between the mineral oil companies and the issuer on the one hand and between the issuer and the customers on the other hand.
- By using an appropriately labelled fuel card, the lessee refuels the vehicle in the name and for the account of the issuer, documenting it clearly and easily recognisable to all parties involved.
- An electronic authorisation process is carried out for each refuelling transaction, whereby the customer's authorisation is checked on a real-time basis, for example with regard to usage restrictions or a current card blocking event. This is because the issuer’s contract specifies compulsory *which* petrol stations at *which* places in *which* countries are available to the customer and *which* types of fuel in *which* quality may be refuelled. Only within this framework set by the issuer can the customer use the card, which is in turn ensured by the authorisation process.
- Any financing effect plays no role in this business model and is neither commercially intended nor agreed. Rather, the parties involved settle promptly in short periods for the fuel purchased at their respective trading level.

The business model described is essentially identical to that of recharging electric vehicles by means of cards. The latter also aims at the purchase and resale of charging power to generate a profit margin. The contracts concluded by the card issuer both on the purchase and the sales side have comparable contents. Dual cards, which allow the purchase of both conventional fuels and charging electricity in the name and for the account of the card issuer, are becoming more and more popular.

2.2 VAT assessment

The VAT assessment of the described business models depends crucially on to *whom* the right to dispose of the fuel as owner is transferred. Even though, according to the jurisdiction of the CJEU, this question is objective in nature and does not depend on the transfer of ownership under civil law, the contractual agreements must be taken into account for its assessment, provided that they reflect the economic and commercial reality of the transactions (see CJEU, judgment of 20.6.2013, C-653/11 *Paul Newey*, para. 43). This is true for the present case, as explained above.

Under this premise, it becomes clear that the mineral oil company transfers the right to dispose as owner to the *fuel card issuer,* not to the customer. This is because only with the issuer it has a contractual relationship and only from the issuer it can expect payment in return. In this respect, it is irrelevant that the fuel card customer initiates and specifies the purchase order and physically receives the fuel as the fulfilment agent of the card issuer – as is

generally the case with most chain transactions. This is all the more so because the use of the respectively labelled fuel card and its transaction related authorisation clearly document to all parties involved that action is being taken in the name and for the account of the card issuer. The card issuer – and only the card issuer – obtains in the course of the transaction *"the right to take decisions which are capable of affecting the legal situation of the [fuel]"*, in particular to resell it to the customer (see CJEU, judgment of 23.4.2020, C-401/18 *Herst,* para. 40). Physical possession of the fuel is not a requirement for the card issuer to obtain the right to dispose as owner (see CJEU, judgment of 15.7.2015, C-123/14 *Itales,* para. 36), so that the circumstance of merely indirect possession (by means of the customer as fulfilment agent) does not preclude this.

Also when considered from the customer's perspective, it is obvious that the *card issuer* (and not the mineral oil company) is the entity that provides the customer with the right to dispose of the fuel as owner. This is because only with the issuer does the customer have a contractual relationship and only towards the issuer is he liable to pay the purchase price in return. Moreover, only using the card and acting recognizably in the name of and for the account of the issuer allows the customer to purchase fuel at all. A further prerequisite is electronic authorisation, by which the issuer approves and adopts the customer's order in the specific individual case, consents to the purchase in his name and for his account and thereby sets the chain supply transaction in motion. Without the involvement and contribution of the card issuer, the customer would be acting like a thief, so that an acquisition of the right to dispose of the fuel as owner by him would be precluded from the outset (see CJEU, judgment of 14.7.2005, C-435/03, *British American Tobacco*, para. 36).

With regard to e-mobility, the *VAT Committee* has already concluded that recharging electric vehicles shall be seen as a chain supply of electricity from the charge point operator to the mobility provider (card issuer) and onward to the driver (customer). We fully agree with this assessment. Since e-charging, as explained above, is almost identical in economic, commercial and contractual terms, we believe the same must apply to the purchase of conventional fuels using fuel cards.

Overall, we see no reason to doubt that the purchase of fuel by means of fuel cards in the buy-and-sell model, just like e-charging, fulfils the requirements for a chain supply and should be treated accordingly for VAT purposes.

3. Fuel procurement with the involvement of a buying agent (commissionaire model)

3.1 Business model

The model of fuel procurement through a commission agent is unusual in the German leasing industry and is only considered theoretically here.

As explained by the *VAT Expert Group* in its presentation of March 2022, in this model the fuel card issuer acts as a commission agent in his own name but for the account of the principal (usually the fuel card customer). This means that – unlike the buy-and-sell model – there is no price sovereignty at each trading level and no profit margin can be achieved in the sense of a price difference between the purchase and sales price. Rather, the issuer as agent acts like a service provider, is constrained by the customer's instructions and takes action directly for the customer's account in return for a commission. Furthermore, liability rules for any warranty claims or payment defaults also differ from these of the buy-and-sell-model.

3.2 VAT assessment

If the procurement of fuel within the commissionaire model fulfils the conditions of Art. 14(2)(c) VAT Directive, there are two taxable supplies of goods for VAT purposes, one from the mineral oil company to the card issuer (here: commission agent) and another from the latter to the card customer.

However, the question arises as to how the existence of a commissionaire structure is to be proven in practice. This is because the *"purely factual assessment"* cited by the *Commission Services* corresponds to that of the buy-and-sell model: the fuel card customer decides within the limits of the card contract on the place, time, quantity and type of fuel procurement and refuels by making use of the card. If one applies the same standards as the *Commission Services* in its assessment of the buy-and-sell model by completely disregarding the contractual situation and the clearly expressed intentions of the persons acting, it would be impossible also in this case to decide whether the conditions of Art. 14(2)(c) of the VAT Directive are actually met.

4. CJEU judgment of 15.5.2019 – C-235/18 *Vega International*

For a detailed analysis of the CJEU judgment *Vega International* and its specific peculiarities, we refer to the presentation of the *VAT Expert Group* from March 2022. Comparing the fact pattern of the CJEU case with the characteristics of the above mentioned business models, we fully agree with the *Expert Group's* finding: *"[T]here were fundamental differences between how Vega International operates and how fuel card issuers typically operate."*

5. Conclusions

Summarising our comments above, we draw the following conclusions:

- The economic reality of the typical fuel card transaction in the buy-and-sell model aims at the purchase and immediate resale of fuel to achieve a profit margin. This requires price sovereignty at each trading level, which would not exist in the commissionaire model.
- When assessing the different models (buy-and-sell, commissionaire model, e-charging) for VAT purposes, the same standards must be applied in each case. In particular, notwithstanding the objective nature of this issue, it is absolutely indispensable to take into account the contractual circumstances and the clearly expressed intentions of the persons acting (“on behalf of whom?”).
- Under this premise, both the buy-and-sell model and e-charging are to be assessed undoubtedly as chain supply transactions. In the commissionaire model, which in fact can only be identified as such by taking into account the contractual situation and the clearly expressed intentions of the persons acting, the same result emerges via the fiction of Art. 14(2)(c) of the VAT Directive.
- Disregarding the contractual circumstances and the clearly expressed intentions of the persons acting would be a violation of elementary principles of VAT law and would lead to inconsistent and incoherent results.
- A different treatment of e-charging and the procurement of conventional fuels for VAT purposes under otherwise identical factual and legal conditions cannot be justified. The

same would apply if both transactions were treated as supply of financial services despite the absence of any financing function.

- The economic reality of the commissionaire model, barely met in practice, differs from that of the buy-and-sell model in some crucial points with detrimental effects on commercial issues (especially price sovereignty and liability rules). It therefore is not suitable as a substitute for the latter.
- **We kindly ask the *VAT Committee* to look for a way in which all three business models described – buy-and-sell, e-charging and commissionaire model – can be treated uniformly as a chain supply transaction throughout Europe. The CJEU judgment *Vega International* does not preclude this because it concerns a very particular case that differs fundamentally from the typical fuel card business.**

Contact:

Bundesverband Deutscher Leasing-Unternehmen e.V.

Dr. Martin Vosseler
Geschäftsführer/Managing Director
Linkstraße 2
D-10785 Berlin
Phone: +49 30 20 63 37 0
Mail: vosseler@leasingverband.de

Federal Association of German Leasing Companies
Representation Brussels

Anja Patricia Gruhn
Ständige Vertreterin/Permanent Representative
Avenue des Arts 19 A-D
B-1000 Brussels
Phone: +32 2 20 39 29 0
Mail: anja.gruhn@leasingverband.de