BUNDESVERBAND DEUTSCHER LEASING-UNTERNEHMEN
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Comment Letter of the Federal Association of German Leasing Companies to the VAT Committee of the European Commission

"VAT assessment of the fuel card business – ECJ judgment C-235/18 *Vega International*"

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1. Introduction

The Federal Association of German Leasing Companies (BDL)[1] represents the interests of the German leasing industry. The companies in the leasing sector realise new investments of more than € 70 billion annually for their customers in Germany. More than three quarters of this is accounted for by the vehicle sector, comprising of cars, trucks and busses. A large proportion of the contracts concluded in this segment include additional components beyond the transfer of use, such as maintenance, insurance and the provision of fuel cards, which are in the focus here. The number of current fuel card contracts in the German fleet leasing sector is well over one million.

Recharging of electric vehicles is also becoming increasingly important for the leasing companies we represent. The leasing industry is making a decisive contribution to the market launch of electric mobility and thus to the preconditions for achieving the Paris climate protection goals. As in the fuel card business, supplementary offers from leasing companies are an important component in this segment as well, enabling customers to efficiently obtain charging electricity via corresponding framework agreements.

Against this background, we very much welcome the fact that the VAT Committee has already taken up the issue of recharging of electric vehicles and is now also discussing the VAT treatment of refuelling vehicles by means of fuel cards in view of the ECJ ruling in *Vega International*[2]. We are very interested in a uniform European application practice. With this position paper, we would like to present the views of the German leasing industry on the overall issue.

We fully share the results of the 118th meeting of the VAT Committee and the guidelines[3] just published on the assessment of transactions in the typical value chain of charging of electric vehicles between the charge point operator (CPO), the e-mobility provider/leasing company (eMP) and the end customer (driver). These confirm our view that this relationship represents a chain transaction, where the CPO performs a supply of electricity to the eMP and the eMP in turn carries out the same supply of electricity to the driver.

We are firmly convinced that, applying the same principles, the typical business models of refuelling vehicles by means of fuel cards are also to be assessed as a chain transaction and not, for example, as a financing transaction of a direct fuel purchase. That is because in

[1] EU Transparency Register No. 84917875724-73.
[2] CJEU, judgment of 15 May 2019 in case C-235/18 *Vega International Car Transport and Logistic,* EU:C:2019:412.
[3] Guidelines resulting from the 118th meeting of 19 April 2021, Document C - taxud.c.1(2021)6657618 - 1018.

principle the recharging of electric vehicles and the fuel card business are based on the same contractual relationships and the same technical processes, as the example of the refilling of a plug-in hybrid vehicle clearly shows: At one and the same filling station the end customer can first obtain conventional fuel via his fuel card and then charging electricity via the same or a similar e-mobility charging card. Both processes are based on the contractual relationships described in more detail below. It would be completely incomprehensible and contradictory if, in the relationship between the card issuer and the customer, conventional refuelling was treated as a financing transaction, while at the same time charging electricity is a (chain) delivery according to the above-mentioned guidelines.

2. Business models of refuelling and recharging vehicles by means of cards

2.1 Contractual relations

In practice, the business models for the procurement of fuel by means of fuel cards are essentially based on a three-party relationship between the oil company, the lessor and the lessee. This involves the conclusion of contracts for the supply of fuel between the oil company and the lessor on the one hand and between the lessor and the lessee on the other. It should be emphasised at this point that there are no contractual relationships between the lessee and the oil company.

The details of the agreements generally correspond to the criteria laid down by the German tax authorities[4] in the light of the ECJ ruling in *Auto Lease Holland*[5] for assessing the existence of (chain) supply transactions between the oil company, the lessor and the lessee:

- Lessor and lessee do not enter into a fuel management agreement nor do agree on any other contractual relations on the granting of credit for the procurement of mineral oil products.
- By using an appropriately labelled fuel card, the lessee refuels the vehicle in the name of and on behalf of the lessor, making it recognisable to the petrol station operator involved.
- The procurement of fuel via the fuel card requires that the lessor has not made use of his right to deny refuelling in his name and for his account, such as by blocking the card.
- The price for the fuel is negotiated separately between the oil company and the lessor as well as between the lessor and the lessee (price setting sovereignty). Each supplier bears the risk of non-payment at his delivery stage: the mineral oil company with regard to the lessor and the lessor with regard to the lessee.
- In the event of impairment of performance (e. g. in the form of engine damage caused by the fuel supplied), the lessee shall assert any claims for damages against the lessor and the lessor shall assert claims against the oil company.

Comparable business models are also used in the leasing industry for the recharging of electric vehicles. The leasing company acts as e-Mobility Provider (eMP) while the counterpart to the oil companies or petrol stations are the Charge Point Operators (CPOs). The end customer/driver is the lessee. The contractual relationships between CPO and eMP on the one

[4] BMF letter of 15 June 2004 (BStBl. 2004 I, p. 605), No. 1.
[5] CJEU, judgment of 6 February 2003 in case C-185/01, *Auto Lease Holland,* EU:C:2003:73.

hand and between eMP and driver on the other hand are aimed at the supply of charging electricity in the chain CPO – eMP – driver and also comply with the above criteria.

2.1 Economic significance of the treatment as chain transaction

For both, fuel procurement via fuel cards and recharging of electric vehicles, the VAT treatment as a chain transaction is of essential importance for efficient administrative processing. This ensures that the oil companies (or CPOs) can submit collective invoices to the leasing companies for the deliveries made during the billing period. The leasing companies in turn charge their lessees periodically and promptly for the subsequent deliveries by using collective invoices as well. Thus, invoices are issued according to the actual commercial circumstances and at each delivery stage to customers with whom an actual contractual relationship exists and who are known in detail to the respective supplier. The resulting transparency is to the advantage of all parties involved, simplifies the documentation of VAT and input tax deduction and facilitates verification by the tax authorities.

In contrast, it would seem completely impracticable and unrealistic if the oil companies (or CPOs) had to invoice lessees directly on the basis of all compulsory information. This is because there is no contractual relationship between them and also no detailed knowledge of relevant compulsory invoice information. Refusing the qualification as chain transaction would fundamentally jeopardise the business model of fuel procurement via fuel cards with unforeseeable consequences for logistics chains and the entire commercial road mobility sector.

3. ECJ case law does not preclude assessment as a chain transaction

As already mentioned, we very much welcome the fact that the VAT Committee is dealing with the VAT treatment of fuel procurement by means of fuel cards in the interest of a uniform European application practice. In our opinion, however, *Vega International* gives no reason to deviate from an assessment of the fuel card business models described above as a chain transaction. This ruling merely confirms the principles already established in 2003 in the above-mentioned ECJ ruling *Auto Lease Holland*. These are repeated virtually word for word, without any recognisable new aspects being introduced. Both rulings *Auto Lease Holland* and *Vega International,* however, concern very particular individual cases which clearly deviate from the business models described above. In our opinion, they do not conflict with maintaining the current practice, which, to the best of our knowledge, is not only applied in Germany but also in many other Member States[6].

The *Auto Lease Holland* judgment was based on a "fuel management agreement" remunerated by a respective "charge". As far as can be seen, the leasing company had no autonomous price setting sovereignty with regard to fuel. The design of the payment flows intended to achieve a financing effect and a "fuel credit card" was used. The *Vega International* case also involved a fuel management agreement in which a company in the group organised and managed the supply of fuel cards, issued by different fuel suppliers, to all its subsidiaries.

[6] Austria, for example, has already issued an appropriately differentiating guideline in response to *Vega International:* A potentially tax-exempt financing transaction is only to be assumed when fuel is charged to a recipient who merely organises and administrates fuel cards for the direct user within the framework of a fuel management agreement. In contrast, in the case of fuel card contracts that stipulate the purchase and sale of fuel, a chain transaction is to be assumed (cf. Guidelines of the Ministry of Finance regarding the interpretation of the national VAT Act, UStR 2000, para. 345, as amended by the maintenance decree of 28 November 2019).

Also in this case, periods granted for payment lasted sometimes several months and the remuneration for the service was calculated in the form of a management fee.

In both cases the ECJ came to the conclusion that the service provided by the entity standing between the oil company and the fuel card user did not consist of a supply of fuel, but is rather to be assessed as a “contract to finance the purchase of fuel” (*Auto Lease Holland*) or as a "service granting credit" (*Vega International*). Considering the circumstances of the very specific individual cases, this may seem comprehensible. However, these rulings[7] are not suitable as justification for a general re-classification of fuel procurements via fuel cards as financing transactions due to the very special circumstances in the underlying cases. This is because the common business models described above are characterised in particular by the fact that the granting of a loan is neither commercially intended nor stipulated and that the contractual and factual circumstances are not aimed at fuel management, but obviously at multistage fuel supply chains with separate liability relationships and autonomous price setting sovereignty at each stage.

4. Broadening the scope of the judgments to conventional fuel supply transactions violates basic principles of the VAT Directive

The VAT treatment of the described typical models for fuel procurement by means of fuel cards as a multistage supply of goods is in line with the general principles of the VAT Directive on chain transactions and on the assessment of supply relationships in multi-person constellations, including the treatment of commissionaire contracts. If one wanted to broaden the scope of the ECJ rulings *Auto Lease Holland* and *Vega International* and transfer its criteria developed for fuel management and financing contracts to the said fuel card chain transactions, this would lead to irresolvable contradictions within the VAT system.

4.1 Chain transactions

Chain transactions, codified for the first time by Art. 36a VAT Directive and previously already acknowledged by case law, are characterised by the fact that in a chain with several successive supplies the delivery item gets directly from the first supplier to the last customer. Thus, it is virtually impossible for an intermediate supplier in the chain to gain physical possession of the delivery item. Furthermore, it is absolutely characteristic for almost every form of chain transaction that the last customer initially decides on the quality and quantity of the delivery item as well as on the place and time of the desired delivery and thereby triggers a respective purchase order chain, which is followed in the opposite direction by a supply chain.

If one were to deny the qualification of the fuel card issuer as an intermediate supplier with reference to the incorrect assertion that only the card user could freely decide on purchasing details such as quality, quantity, etc. and that the card issuer thus had no power of disposal over the fuel, this would call into question the existence of virtually all chain transactions subject to VAT.

[7] The same applies, moreover, to CJEU, judgment of 3 September 2015 in case C-526/13, *Fast Bunkering Klaipėda,* EU:C:2015:536. We fully agree with the Guidelines resulting from the 107th meeting of 8 July 2016 (Document B - taxud.c.1(2016)7297391 - 911), according to which the decision shall be seen as predicated on the specific facts of the case in question and must be construed narrowly.

In the end, it is of course the free decision of the fuel card issuer that he purchases the fuel in the exact quality and quantity, at the exact place and time so that he can deliver it immediately – i. e. without transport and intermediate storage – to the fuel card user who initiated the corresponding delivery process. This is ultimately the basis of his business model, which he has established with regard to pre-selected products through appropriate contractual relationships with pre-selected oil companies on the one hand and with the fuel card users on the other. By concluding these contracts, the issuer's free decision has already been realised in the abstract. Through the authorisation process involving the fuel card at the filling station and comprising a check of whether or not the issuer has made use of his right to block the card, it is confirmed in concrete terms for each filling transaction.

4.2 Attribution principles and commissionaire contracts

In the typical fuel card business models described above, the fuel card issuer is involved in the supply chain as an intermediate supplier and acts in its own name and on its own behalf. This is ensured by appropriate coding and labelling on the fuel card and is communicated transparently to all parties involved in the business transaction. The contracts concluded by the fuel card issuer with the oil companies and with the card users do also indicate without any doubt that the procurement is not only carried out in the name but also for the account of the issuer.

According to elementary principles of European VAT law the personal attribution of a supply basically follows the primacy of the contractual agreement under civil law, which materialises in the external appearance of the parties[8]. Both the provider and the recipient of a supply are determined by the underlying contractual relationship[9]. This applies particularly when the contractual situation reflects the economic and commercial reality of the transaction[10]. In the present case of the fuel card business this is undoubtedly true, as is emphasised particularly by the mentioned price setting sovereignty and the separate liability relationship at each stage.

The above principle is particularly evident in the Directive's provisions on commissionaire contracts set out in Art. 14 (2) (c) and Art. 28 VAT Directive. The former stipulates that (even) a commissionaire acting in his own name but (only) on behalf of a third party is to be included in the supply chain comprising principal, commissionaire and third party. If one were to deny the issuer of fuel cards, acting in his own name *and* on his own behalf, inclusion in the supply chain due to the alleged lack of power of disposal of the fuel, this would lead to incomprehensible contradictions and inconsistencies within the VAT system. Moreover, a generalised application of the criteria developed by the ECJ for the very specific situation of fuel management and financing contracts would render any distinction between autonomous suppliers, commissionaires and mere agents virtually impossible.

[8] Cf. Rau/Dürrwächter, UStG, No. 592 on § 1.
[9] Cf. Bunjes, UStG, No. 34 on § 15, Sölch/ Ringleb, UStG, No. 7 on § 1, each with numerous further references from case law.
[10] CJEU, judgment of 20 June 2013 in case C-653/11, *Paul Newey*, EU:C:2013:409.

5. Summary and conclusion

The above considerations can be summarised as follows:

- The typical business models of fuel procurement by means of fuel cards are contractually and in their actual implementation aimed at a multistage fuel purchase in the supply chain oil company – fuel card issuer – fuel card user with price setting sovereignty and separate liability relationships at each stage. A financing effect is neither commercially intended nor stipulated.
- These models are fundamentally different from fuel management agreements, which the ECJ has classified as financing transactions or the granting of credit in the *Auto Lease Holland* and *Vega International* judgments.
- A generalised application of the criteria that were developed for very specific circumstances of fuel management agreements to the effect that the typical business models described would no longer be treated as multistage supply transactions but as financing transactions or the granting of credit would violate fundamental principles of the VAT Directive and would lead to unresolvable contradictions and inconsistencies. This concerns in particular the principles on chain transactions and on the assessment of supply relationships in multi-person constellations, including the treatment of commissionaire contracts.
- E-charging and fuel procurement via cards are based on similar contractual agreements and comparable technical processes. Therefore, both business models should be treated as chain transactions according to the principles recently adopted by the VAT Committee in its 118th meeting.
- There is a considerable commercial interest in treating fuel card transactions as chain transactions for VAT purposes in order to maintain an efficient, transparent and easily verifiable processing of the fuel card business that corresponds to the actual contractual and economic circumstances. If there were to be far-reaching changes here, this would fundamentally jeopardise the whole business model of fuel procurement via fuel cards. There is a risk of considerable negative effects on logistics chains and the entire commercial road mobility sector.

In view of this, we would urgently request the VAT Committee to interpret the ECJ *Vega International* ruling narrowly with particular consideration of the explained arguments so that a treatment of the typical business models for fuel procurement by means of fuel cards as a chain transaction for VAT purposes remains possible without significant changes.

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