



## Reports of Cases

### JUDGMENT OF THE COURT (Third Chamber)

28 March 2019<sup>\*i</sup>

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 131 and Article 146(1)(a) — Exemption for supplies of goods dispatched or transported to a destination outside the European Union — Condition of exemption laid down by national law — Placing of goods under a particular customs procedure — Proof of placing of goods under the export procedure)

In Case C-275/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 28 March 2018, received at the Court on 23 April 2018, in the proceedings

**Milan Vinš**

v

**Odvolací finanční ředitelství,**

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, J. Malenovský, C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Odvolací finanční ředitelství, by T. Rozehnal and D. Jeroušek, acting as Agents,
- the Czech Government, by M. Smolek, J. Vlášil and O. Serdula, acting as Agents,
- the Greek Government, by M. Tassopoulou and A. Dimitrakopoulou, acting as Agents,
- the European Commission, by L. Lozano Palacios, J. Jokubauskaitė and M. Salyková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

<sup>\*</sup> Language of the case: Czech.

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Articles 131 and 146 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').
- 2 The request has been made in proceedings between Mr Milan Vinš and the Odvolací finanční ředitelství (Appellate Tax Directorate, Czech Republic) concerning the refusal of the tax authorities to exempt from value added tax (VAT) various supplies of goods dispatched to a destination outside the European Union.

### **Legal context**

#### ***EU law***

##### *The VAT Directive*

- 3 In Chapter 1, 'Supply of goods', of Title IV, 'Taxable transactions', of the VAT Directive, Article 14(1) provides:

"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

- 4 In Chapter 1, 'General provisions', of Title IX, 'Exemptions', of the VAT Directive, Article 131 provides:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

- 5 In Chapter 6, 'Exemptions on exportation', of Title IX of the VAT Directive, Article 146(1) provides:

'Member States shall exempt the following transactions:

- (a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

...'

- 6 In Chapter 7, 'Miscellaneous provisions', of Title XI, 'Obligations of taxable persons and certain non-taxable persons', of the VAT Directive, Article 273 provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

...'

*The Customs Code*

- 7 In accordance with Article 4(15) to (17) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council (OJ 2005 L 117, p. 13) ('the Customs Code'):

'For the purposes of this Code, the following definitions shall apply:

...

(15) "Customs-approved treatment or use of goods" means:

(a) the placing of goods under a customs procedure;

...

(16) "Customs procedure" means:

...

(h) exportation.

(17) "Customs declaration" means the act whereby a person indicates in the prescribed form and manner a wish to place goods under a given customs procedure'.

- 8 In Section 1, 'Placing of goods under a customs procedure', of Chapter 2, 'Customs procedures', of Title IV, 'Customs-approved treatment or use', Article 59 of the Customs Code provides:

'1. All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure.

2. Community goods declared for an export, outward processing, transit or customs warehousing procedure shall be subject to customs supervision from the time of acceptance of the customs declaration until such time as they leave the customs territory of the Community or are destroyed or the customs declaration is invalidated.'

- 9 Article 61 of the Customs Code provides:

'The customs declaration shall be made:

(a) in writing; or

(b) using a data-processing technique where provided for by provisions laid down in accordance with the committee procedure or where authorised by the customs authorities; or

(c) by means of a normal declaration or any other act whereby the holder of the goods expresses his wish to place them under a customs procedure, where such a possibility is provided for by the rules adopted in accordance with the committee procedure.'

- 10 In Section 4, 'Export', of Chapter 2 of Title IV of the Customs Code, Article 161(1) and (2) provides:

'1. The export procedure shall allow Community goods to leave the customs territory of the Community.

Exportation shall entail the application of exit formalities including commercial policy measures and, where appropriate, export duties.

2. ... all Community goods intended for export shall be placed under the export procedure.'

*Regulation (EEC) No 2454/93*

- 11 In Chapter 2, 'Permanent exportation', of Title IV, 'Implementing provisions relating to export', of Part II, 'Customs-approved treatment or use', of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1875/2006 of 18 December 2006 (OJ 2006 L 360, p. 64), Article 795(1) of Regulation No 2454/93 provides:

'Where goods have left the customs territory of the Community without an export declaration, such declaration shall be lodged retrospectively by the exporter at the customs office competent for the place where he is established.

...

Acceptance of this declaration by the customs authorities shall be subject to provision by the exporter of one of the following:

...

- (b) sufficient evidence concerning the nature and quantity of the goods, and the circumstances under which they left the customs territory of the Community.

...'

*Czech law*

- 12 Paragraph 33a, headed 'Tax document on export', of Law No 235/2004 on value added tax, in the version in force at the material time for the main proceedings, provides:

'A tax document on export shall mean:

- (a) a decision by the customs office on the exportation of the goods to a third country by which the customs office confirms the exit of the goods from the territory of the European Union ...'

- 13 Paragraph 66 of that law reads as follows:

'(1) For the purposes of the present law, the exportation of goods shall be understood to mean the exit of the goods from the territory of the European Union to the territory of a third country, provided that the goods have been placed under the export customs procedure ...

(2) The supply by the taxpayer of goods which are dispatched or transported from the Czech Republic to a third country

- (a) by the seller or a person authorised by him ...

...

shall be exempt from tax on the exportation of goods to a third country.

...

(4) In the supply of goods to a third country, the date on which the transaction shall be deemed to take place is the date on which the goods exit the territory of the European Union, confirmed by the customs office. The taxpayer shall prove the supply of the goods to the territory of a third country by means of a tax document in accordance with Paragraph 33a(a).

...

(6) Where the exit of the goods from European Union territory is not confirmed by the customs office in the tax document, the taxpayer may prove the exit of the goods by other means of evidence.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 14 From 2012 to 2014 Mr Vinš sent by post each month 400 to 500 collectors' items of military memorabilia outside the European Union. He did not submit VAT declarations for those goods, since he considered that the supplies in question were exempt from VAT because they concerned goods intended for export.
- 15 By decision of 27 August 2015, the Appellate Tax Directorate essentially confirmed the tax notices issued by the tax authorities ordering Mr Vinš to pay VAT on the supplies of goods in question, on the ground that he had not shown that he had placed the goods under the export customs procedure, so that the goods could not benefit from the exemption on export in accordance with Paragraph 66(1) of Law No 235/2004.
- 16 Mr Vinš's action against that decision was dismissed by the Krajský soud v Hradci Králové (Regional Court, Hradec Králové, Czech Republic), as that court found that the requirement for goods intended for export to be placed under the export customs procedure, as a condition of the right to exemption on export, was proportionate, allowed effective review of the exportation by the court, and was fully consistent with EU law. It was not sufficient in that respect that the goods had actually been supplied to third countries.
- 17 Mr Vinš appealed on a point of law to the referring court. In support of his appeal, he submits that, to satisfy the conditions laid down in Paragraph 66(1) of Law No 235/2004, what matters is the fact that the goods have left the territory of the European Union and, consequently, have actually been supplied to a third country. That can be demonstrated by a confirmation of the customs office or by other evidence, including documents issued by the postal services. Mr Vinš refers in this respect to the judgment of 19 December 2013, *BDV Hungary Trading* (C-563/12, EU:C:2013:854), from which he concludes that the very condition of placing the goods under a customs procedure goes beyond what the Member States may require under Article 131 of the VAT Directive.
- 18 The Appellate Tax Directorate repeats its argument that the cumulative conditions for benefiting from the exemption for supplies for exportation were not all satisfied in the case in the main proceedings. It submits that the national legislature introduced the condition of placing the goods concerned under a customs procedure in order to avoid tax evasion, and that that condition is consistent with the VAT Directive. Mr Vinš, in its view, confined himself to making assertions not supported by any evidence.
- 19 The referring court considers that, while it is permissible for the Member States to lay down conditions in their national law, in accordance with Article 131 of the VAT Directive, in order to ensure the correct and straightforward application of the exemptions provided for by that directive, including those laid down in Article 146 of the directive, and to prevent any possible evasion,

avoidance or abuse, they must nonetheless observe the general principles of EU law when doing so. The court doubts whether the Czech legislation observes those principles in imposing on the taxable person a requirement to show that goods intended for exportation have been placed under the export customs procedure, in particular where the taxable person is able to show that the goods have actually left the territory of the European Union.

20 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Is it permissible to render the right to an exemption from value added tax on the exportation of goods (Article 146 of [the VAT Directive]) conditional on the fact that the goods must first be placed under a particular customs procedure (Paragraph 66 of Law No 235/2004 ...)?
- (2) Is such national legislation sufficiently justifiable under Article 131 of the [VAT] Directive as a condition for the purposes of preventing tax evasion, avoidance or abuse?’

### Consideration of the questions referred

- 21 By its two questions, which should be considered together, the referring court essentially asks whether Article 146(1)(a) in conjunction with Article 131 of the VAT Directive must be interpreted as precluding a national legislative provision from making the exemption from VAT for goods intended to be exported outside the European Union conditional on the goods being placed under the export customs procedure.
- 22 It must be recalled, in the first place, that in accordance with Article 146(1)(a) of the VAT Directive the Member States are to exempt the supply of goods dispatched or transported to a destination outside the European Union by or on behalf of the vendor. That provision should be read in conjunction with Article 14(1) of the directive, in accordance with which ‘supply of goods’ is to mean the transfer of the right to dispose of tangible property as owner (see, to that effect, judgment of 28 February 2018, *Pieńkowski*, C-307/16, EU:C:2018:124, paragraph 24).
- 23 That exemption is intended to ensure that the supplies of goods concerned are taxed at the place of destination of those goods, namely the place where the exported products will be consumed (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 34).
- 24 It follows from the provisions mentioned in paragraph 22 above, and particularly from the word ‘dispatched’ in Article 146(1)(a) of the VAT Directive, that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser, the supplier establishes that those goods have been dispatched or transported outside the European Union, and, as a result of that dispatch or that transport, the goods have physically left the territory of the European Union (see, to that effect, judgment of 28 February 2018, *Pieńkowski*, C-307/16, EU:C:2018:124, paragraph 25).
- 25 First, according to the referring court, it is common ground in the main proceedings that the goods concerned were dispatched by Mr Vinš, by post, to destinations outside the territory of the European Union, Mr Vinš stating in particular that he is able to show by means of documents issued by the postal services that the goods actually left that territory.



- 26 Second, Article 146(1)(a) of the VAT Directive does not lay down a condition, such as that provided for in Paragraph 66(1) of Law No 235/2004, that the goods intended for exportation must be placed under the export customs procedure for the exemption for export laid down in Article 146(1)(a) to be applicable.
- 27 Consequently, the classification of a transaction as a supply for export under Article 146(1)(a) of the VAT Directive cannot depend on the placing of the goods under the export customs procedure, failure to do so having the consequence of depriving the taxable person of the exemption for export (see, by analogy, judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 27).
- 28 In the second place, however, it is for the Member States to lay down, in accordance with Article 131 of the VAT Directive, the conditions under which they will exempt transactions on exportation with a view to ensuring the correct and straightforward application of the exemptions provided for in that directive and of preventing any possible evasion, avoidance or abuse. When they exercise their powers, Member States must nonetheless observe the general principles of law which form part of the EU legal order, which include in particular the principle of proportionality (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 37).
- 29 As regards that principle, it must be recalled that a national measure goes beyond what is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. Transactions should be taxed taking into account their objective characteristics (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 38).
- 30 A condition such as that in Paragraph 66(1) of Law No 235/2004 which prevents the grant of an exemption from VAT for a supply of goods which have not been placed under the export customs procedure, even though it is not disputed that the goods have actually been exported in accordance with the criteria referred to in paragraph 24 above and that the supply therefore corresponds, by its objective criteria, to the conditions of exemption laid down in Article 146(1)(a) of the VAT Directive, does not observe the principle of proportionality.
- 31 To impose such a condition would be equivalent to making the right to the exemption subject to compliance with formal obligations, in the sense of paragraph 29 above, without any consideration being given as to whether or not the substantive requirements of EU law have in fact been satisfied. The mere fact that an exporter has not placed the goods in question under the export customs procedure does not mean that no such exportation has actually taken place (see, by analogy, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 50).
- 32 According to the Court's case-law, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 40).
- 33 First, the principle of fiscal neutrality cannot be relied on for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT. According to the Court's case-law, it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion. If it were concluded that the taxable person concerned knew or ought to have known that the transaction he carried out was part of a fraud committed by the purchaser and

that he had not taken every step which could reasonably be asked of him to prevent that fraud from being committed, he would have to be refused the exemption (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 41).

- 34 In the present case, there is nothing before the Court to indicate that the refusal of the exemption at issue in the main proceedings was based on the existence of such evasion.
- 35 Second, a breach of a formal requirement may lead to the refusal of an exemption from VAT if the effect of the breach is to prevent the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 42).
- 36 In so far as, as the Czech Government essentially submits, the failure to place goods intended for exportation under that customs procedure could often have the effect of making it more difficult, or even impossible, for the tax authorities to ascertain that the goods have actually left EU territory, it is indeed true that, as regards the production of conclusive evidence referred to in paragraph 35 above, the fact of exportation must be established to the satisfaction of the competent tax authorities, that requirement relating to the substantive conditions necessary for the exemption to be granted (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 48).
- 37 However, as follows from paragraph 25 above, it was not asserted in the main proceedings that the non-placement of the goods under the export customs procedure prevented it being established that the substantive conditions, in this case that the goods actually leave the territory of the European Union, were satisfied.
- 38 It follows that, in circumstances such as those at issue in the main proceedings, the failure to comply with the formal requirement of placing the goods intended to be exported under the export customs procedure cannot lead to the exporter losing his right to the exemption on export, provided that it is established that the goods concerned have actually left the territory of the European Union.
- 39 That conclusion is not invalidated by the Czech Government's argument that the exporter should in any event, by virtue in particular of Articles 59(1) and 161(2) of the Customs Code, have placed the goods under that customs procedure by means of a customs declaration to that effect, which he could if necessary have made *ex post*, so that the initial failure to comply with that requirement would not entail the definitive loss of the right to the exemption on export. As follows from paragraphs 29 to 31 above, such placing, whether done before or after the export, constitutes a formal obligation which, moreover, belongs not to the common system of VAT but to the customs system. Consequently, non-compliance with that obligation does not in itself preclude compliance with the substantive conditions for the grant of the exemption.
- 40 In the light of all the foregoing, the answer to the questions referred is that Article 146(1)(a) in conjunction with Article 131 of the VAT Directive must be interpreted as precluding a national legislative provision from making the exemption from VAT for goods intended to be exported outside the European Union conditional on the goods being placed under the export customs procedure, in a situation in which it is established that the substantive conditions of exemption, in particular the condition that the goods concerned actually leave the territory of the European Union, are satisfied.

## Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.



On those grounds, the Court (Third Chamber) hereby rules:

**Article 146(1)(a) in conjunction with Article 131 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national legislative provision from making the exemption from value added tax for goods intended to be exported outside the European Union conditional on the goods being placed under the export customs procedure, in a situation in which it is established that the substantive conditions of exemption, in particular the condition that the goods concerned actually leave the territory of the European Union, are satisfied.**

[Signatures]

i — The wording of paragraph 23 of this document has been modified after it was first put online.