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In case no. 6100-19, the **Swedish Tax Agency** (Appellant) v. **ER-T Godis AB** (Respondent), the Supreme Administrative Court delivered the following judgment on 6 April 2021.

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## **RULING OF THE SUPREME ADMINISTRATIVE COURT**

The Supreme Administrative Court overturns the judgment of the administrative court of appeal as regards the part which pertains to value added tax and remands that part of the case to the administrative court of appeal for continued examination in accordance with what is stated in paragraph 17 of the findings.

The Supreme Administrative Court grants ER-T Godis AB compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 60,775.

The Supreme Administrative Court affirms the decision of the administrative court of appeal regarding secrecy.

## **BACKGROUND**

1. In conjunction with the sale of goods which will be subject to value added tax, it is, as a rule, the seller who is to pay the tax. In the event the goods are sold to a company in another EU country and are transported there, however, it is instead the buyer who, under certain circumstances, is to pay tax for the acquisition in the buyer's country (so-called reverse charge procedure). The sale will then be exempt for the seller. The purpose of this regime is to see to it that value added tax, in accordance with the so-called destination principle, is charged in the country in which the goods are ultimately consumed.
2. As a starting point, the seller's right to exemption is not dependent on the buyer in the other EU country actually fulfilling its obligation to pay tax there. Through case law, however, it has been made clear that a seller who knew or should have

known that the seller, by virtue of the sale, became involved in tax evasion by the buyer is to be refused exemption.

3. ER-T Godis AB is engaged in the sale of candy and has sold goods to Danish companies. The goods have been transported to the buyers and the company has reported these sales as intra-Community sales which are exempt. However, the Swedish Tax Agency decided to charge the company output value added tax in the amount of approximately SEK 200,000 for the March and May 2014 accounting periods in respect of sales to the Danish company Auto Multiservice SMBA. According to the Swedish Tax Agency, the conditions for exempting the sales were not present since ER-T Godis knew or should have known that the sales constitute part of tax evasion downstream in the supply chain.
4. ER-T Godis appealed to the Administrative Court in Växjö which granted the appeal and overturned the decision of the Swedish Tax Agency. The administrative court was of the opinion that the Swedish Tax Agency had not shown that it was likely that the company knew or should have known that it became involved in tax evasion in conjunction with the relevant business transactions.
5. The Administrative Court of Appeal in Jönköping rejected the Swedish Tax Agency's appeal there. The following reasons for the decision were given. ER-T Godis can be refused exemption only if a final, actual loss of value added tax occurred within the context of the supply chain. The Danish Tax Agency has charged Auto Multiservice value added tax, but the company is now dissolved and there is accordingly a risk that the Danish state will lose, at least, part of the charged value added tax. However, the investigation lacks information regarding, for example, the amounts which have actually been paid in value added tax in Denmark and which measures may be taken or which have been taken within the context of the Danish tax collection and enforcement system. Accordingly, the Swedish Tax Agency cannot be deemed to have shown that it was likely that ER-T Godis knew or should have known that, by virtue of the transactions, it became

involved in tax evasion. Accordingly, the conditions for refusing the company exemption are not present.

### **CLAIMS, ETC.**

6. *The Swedish Tax Agency* claims that the Supreme Administrative Court shall modify the judgment of the administrative court of appeal and affirm the decision of the Swedish Tax Agency to charge ER-T Godis output value added tax for March and May 2014 in respect of the sales to Auto Multiservice.
7. *ER-T Godis AB* is of the opinion that the appeal shall be rejected and claims compensation for costs in the Supreme Administrative Court in the amount of SEK 60,775.

### **REASONS FOR THE RULING**

#### **The question in the case**

8. The question in the case is whether, as a condition in order for a seller to be refused exemption in conjunction with the sale of goods to another EU country by reference to the fact that the seller knew or should have known that it became involved in tax evasion, a final, actual loss of value added tax must have occurred within the framework of the relevant supply chain.

#### **The Court's assessment**

##### *The tax question*

9. Chapter 3, section 30 a, first paragraph (1) of the Value Added Tax Act (1994:200) provides that sales of goods transported to another EU country are to be exempt under certain circumstances. The provision corresponds to Article 138 (1) of the VAT Directive (2006/112/EC). It is common ground in the case that

ER-T Godis' sales to Auto Multiservice satisfy the conditions for exemption set forth in these provisions.

10. From established case law from the European Court of Justice, however, it is apparent that EU law cannot be relied on by individuals for abusive or other fraudulent ends (see, for example, *Schoenimport "Italmoda" Mariano Previti, et al.*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 43 and case law stated therein). According to the European Court of Justice, national authorities and courts shall accordingly refuse a seller the benefit of the rights to exemption if it is established, in the light of objective factors, that the seller knew, or should have known, that, by the sale, it was participating in VAT evasion committed in the context of a chain of supplies. This applies whether or not the evasion was carried out in another Member State and does not entail any profit for the seller itself. The Swedish Tax Agency bears the burden of proof that tax evasion has occurred and that the seller knew or should have known of this (see, for example, *Maks Pen*, C-18/13, EU:C:2014:69, paragraphs 27–29, *Schoenimport "Italmoda" Mariano Previti et al.*, paragraphs 44, 45, 50, 62 and 69, and *Bakati Plus*, C-656/19, EU:C:2020:1045, paragraph 80).
11. The European Court of Justice has, furthermore, made it clear that the principle of abuse is a general principle of EU law which entails that the obligation for national authorities and courts in cases of tax evasion and other abuse to refuse to grant individual rights, e.g. the right of exemption, applies even if there are no specific provisions to that effect in the national law providing for such and which may be interpreted in accordance with the requirements of EU law (see *Schoenimport "Italmoda" Mariano Previti, et al.*, paragraphs 51–59 and 62 and *N Luxembourg 1, et al.*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 117–119; *cf.*, also, HFD 2013 reported case no. 12 in which the Supreme Administrative Court reached, in principle, the same conclusion but then – with reference to the case law from the European Court of Justice at that time – based on a reasoning regarding the possibility to interpret the Value Added Tax Act in accordance with EU law).

12. Accordingly, ER-T Godis is to be refused exemption if the company, by virtue of the relevant sales, became involved in tax evasion downstream in the supply chain and knew or should have known that such was the case.
13. The administrative court of appeal has been of the opinion that tax evasion exists only if a final, actual loss has occurred within the context of the supply chain. The view of the administrative court of appeal thus appears to be that, even if a buyer in another EU country fails, for the purposes of fraud, to report value added tax on its purchases, there is no tax evasion in the event the authorities in that country discover the same and charge and succeed in collecting the relevant tax. Thus, according to the administrative court of appeal, in order for there to be tax evasion, the Swedish Tax Agency must show that no tax has been paid in the other country and that it will also not be possible to collect the tax there. The administrative court of appeal explains its position in that double taxation may otherwise occur in contravention of the principle of neutrality of the value added tax system and the principle of proportionality.
14. According to the Supreme Administrative Court, the view of the administrative court of appeal is not supported by the case law of the European Court of Justice. On the contrary, it is apparent from the case law of the court that preventing tax evasion and abuse is an objective recognised and encouraged by the VAT Directive and that the principle of VAT neutrality cannot preclude that right from being refused to someone who has been involved in evasion of tax (see, for example, *Schoenimport "Italmoda" Mariano Previti, et al.*, paragraphs 42 and 48 and *Bakati Plus*, paragraph 80). Refusing an individual rights only in cases where it may be ensured that this does not lead to double taxation would, furthermore, render combatting unfair practices considerably more difficult. In many cases, this would namely lead to tax not being able to be charged in any country notwithstanding that it is clear that fraudulent acts have occurred within the context of the supply chain and that the individual knew or should have known of it. The principle of proportionality may thus not be deemed to result in the

principle of abuse being so limited in application as opined by the administrative court of appeal.

15. Against this background, the Supreme Administrative Court finds that, in order for a seller to be refused exemption in the sale of goods to another EU country by reference to the fact that the seller knew or should have known that it became involved in tax evasion, it is not required that a final, actual loss of value added tax occurred within the context of the relevant supply chain.
16. It is apparent from the examination in the case that Auto Multiservice did not report any value added tax regarding the relevant purchases and that a person who is deemed to be this company's true representative has been sentenced to prison for having deprived the Danish State of a substantial amount of taxes from the State. According to the Supreme Administrative Court, it is accordingly clear that tax evasion occurred within the context of the supply chain.
17. The administrative court of appeal has not considered whether ER-T Godis knew or should have known that, by virtue of the sales, it became involved in tax evasion. Accordingly, the case will be remanded to the administrative court of appeal for examination of the question.

*Compensation for costs*

18. The case involves a question which is of importance for the guidance of the application of law. Accordingly, the conditions are present for granting ER-T Godis compensation for costs reasonably required by the company to uphold its rights. The claimed amount is reasonable.

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Justices Jermsten, Ståhl, Saldén Enérus, Svahn Starrsjö and Anderson have participated in the ruling.

Judge Referee: Ann Linders.