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Court of Justice of the European Union: e-mobility service provider performs a VAT supply of goods with EV charging transaction

On October 17, 2024 the Court of Justice of the European Union (CJEU) rendered judgment in the Digital Charging Solutions case (C-60/23) concerning the VAT consequences of the charging of an electric vehicle (EV) at a charging station of a charging point operator (CPO) using a charging card from an e-mobility service provider (e-MSP). The CJEU specifically addressed the question about how the supply chain works for VAT purposes.

The CJEU ruled that there is a supply of a good (electricity) and that as a result of the scope of the 'commissionaire fiction' this supply is not directly provided by the CPO to the EV user, but instead runs via the intermediary company of the e-MSP. This ruling is in line with current Dutch practice and provides more legal certainty.

The facts of the case

Digital Charging Solutions GmbH (DCS) is an e-MSP established in Germany. It offers EV users, also when in Sweden, access to a network of charging stations. In doing so, DCS provides the EV users with a charging card and an authentication app which they can use to charge their vehicles at the charging stations. This allows the EV users to choose the amount, the time and the place of charging, as well as the way in which the electricity is used.

The charging stations that make up the network do not belong to DCS, but to the CPOs with whom DCS has concluded contracts. When the EV user uses the card or app, the charging session is registered with the CPO. The CPO then invoices DCS for the session. DCS bills the EV user monthly based on the CPO invoices. Additionally, DCS charges a fixed subscription fee for access to the network and associated services.

The Swedish tax authorities asked whether the supply consisting of the charging of EVs constitutes a supply of a good or a service for VAT purposes and whether DCS must be regarded as the provider of this supply or whether it runs directly from the CPO to the EV user. Those questions were put to the CJEU.

CJEU judgment

The CJEU firstly ruled that, for VAT purposes, the supply must be regarded as the supply of a good (the electricity) and not as a charging service. This is no longer a surprising outcome, after the similar ruling in CJEU case C-282/22 (Dyrektor Krajowej Informacji Skarbowej), April 20, 2023.

More interesting is the CJEU's answer to the second question about the supply chain. Previously, the CJEU had twice ruled that with regard to filling up a car with regular fuel using a fuel card the supply chain does not run via the issuer of the fuel card, but directly from the petrol station to the end user. The issuer of the fuel card would then be providing a financing service (CJEU February 6, 2003, C-185/01 (Auto Lease Holland) and CJEU May 15, 2019, C-235/18 (Vega International)). The CJEU ruled that the issuer of the card had never been able to dispose of the fuel as owner, because it was the car

owner who decided the amount, time and place to refuel, as well as the way in which the fuel was used.

However, the CJEU did not find the situation in those cases comparable to the facts in the DCS case, including because in this case there was no lease company that worked with fuel pre-payments (such as Auto Lease Holland) or a parent company that issues fuel cards to its subsidiaries and pre-finances the fuel (such as Vega International). DCS does not pre-finance. The CJEU also deduced this from the fact that DCS does not charge a percentage markup on the charging costs.

As a matter of principle, the CJEU did not rule out that in the situation of DCS there is a normal purchase-and-onward supply. Nevertheless, the CJEU ruled that, based on economic reality, the agreements made between the parties seem to be best understood along the lines of the so-called 'commissionaire fiction'. In the present case, this fiction means that DCS purchases the electricity in its own name, but on behalf of the EV user, from the CPO and passes this on to the EV user as an identical supply. If the agreements are understood in that way, it is then logical (according to the CJEU) that, on the one hand, the EV user decides the amount, quality, etc. of the charging, while, on the other hand, DCS concludes the contracts with the CPOs.

The consequence of the VAT commissionaire fiction is that technically, for VAT purposes, the CPO supplies the electricity to DCS and DCS subsequently supplies it to the EV user. As such, DCS was thus right to issue an invoice to the EV user for the supply of electricity. As a corollary of this conclusion, the CJEU also ruled that the separately charged subscription fees constitute the payment for a separate service by DCS to the EV user, because that service is not dependent on the question whether, where and how the EV user charges their vehicle.

Lastly, and a not unimportant point in practice due to the uncertainty about this that had arisen from the different conclusion reached by Advocate General Ćapeta in the same case, the CJEU ruled that, even if ancillary services by DCS were to be incorporated into the supply of electricity, this does not preclude the application of the commissionaire fiction. Even then, the supply of electricity by DCS remains identical to that of the CPO, because the supply of electricity is the characteristic and predominant component of the service performed by DCS.

KPMG Meijburg & Co observations and practical implications

For the parties involved in the EV charging supply chain, we believe this is a desirable outcome that mostly aligns with current practice, but offers more legal certainty, certainly also in international situations. If the outcome had been different, there was a risk that CPOs would in future have to invoice the separate EV users, but this is not the case. Of course, the parties involved must review whether their own contractual arrangements offer sufficient reference points for the same outcome as in this case. A special point to consider in doing so, is that EV charging chains are, in practice, often longer than the three parties in the DCS case, for example when a lease company is involved.

It is striking that the CJEU – without mentioning anything about this – opted for the same solution (the commissionaire fiction) that the VAT committee had previously adopted almost unanimously in non-binding guidelines for the supply chain involving regular fuel cards in order to 'repair' what were undesirable outcomes in practice of the previous CJEU judgments on this matter. By rendering this judgment, the CJEU may also be nuancing its previous rulings on regular fuel cards and allowing the commissionaire fiction to apply there as well. This seems to be supported by the fact that the CJEU has 'narrowed' these previous judgments by pointing out the very specific circumstances regarding pre-financing. Although an approval already given by the Dutch tax authorities in a policy decree means that this is not an issue in Dutch practice in the case of regular fuel, we believe the judgment does offer EU-wide opportunities.

This is reinforced by the CJEU's flexible approach with regard to the commissionaire fiction. The CJEU has interpreted the 'agency in performance' ('on behalf of') and 'identical supplies' requirements broadly. This makes it possible that even if two 'ordinary' supply contracts are agreed (such as seems to be the case here), the commissionaire fiction can still be applied. The ruling that the ancillary services of the intermediary person can also be incorporated in their (commission agent) main supply and that this does not preclude the application of the fiction is also a practical conclusion. In that case, there are still identical supplies. We believe that this flexibility also offers issuers of regular fuel cards ample opportunities (perhaps more than the VAT committee had already thought of) to apply the commissionaire fiction. This flexibility is also important in other cases where businesses would like to apply the commissionaire fiction.

Lastly, we would like to point out that the CJEU did not address whether the e-MSP that, under the commissionaire fiction is deemed to purchase electricity and then supply it onwards, is to be regarded as a reseller in the context of the place of supply rules for the supply of electricity. That would have provided even more clarity about the VAT consequences of the supply chain, in particular in the case of international transactions. However, the CJEU was not asked about this.

If you would like to discuss the consequences of this judgment for your supply chains, not necessarily with regard to electric charging, feel free to contact your usual Meijburg advisor or the advisors listed in this tax alert.

KPMG Meijburg & Co
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