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Opinion AG at CJEU: fees based on transfer pricing policy fall within scope of VAT

On April 3, 2025 Advocate General (hereinafter: 'AG') Richard De La Tour issued his Opinion in the SC Arcomet Towercranes SRL (C-726/23, 'Arcomet') case pending before the Court of Justice of the European Union (hereinafter; 'CJEU'). The AG concluded that the fees Arcomet charged to a group entity according to the Transactional Net Margin Method (hereinafter: 'TNMM') – ensuing from the OECD Transfer Pricing Guidelines – fall within the scope of VAT. The AG's Opinion is discussed below.

1. Facts and circumstances

Arcomet, specialized in the leasing of cranes, has its head office in Belgium. Additionally, Arcomet has various group entities within the European Union, including in Romania. Based on the transfer pricing policy, an agreement was concluded between the Belgian head office and the Romanian group entity for the provision of certain services by the Belgian head office. These services related to the management of the crane fleet and negotiating the framework agreement with suppliers on behalf of the Romanian group entity. It was laid down in the agreement that the fee will be charged according to the TNMM, a method included in the OECD Transfer Pricing Guidelines. In this case this meant that if the surplus profit at the Romanian group entity was higher than 2.74%, an annual invoice should be issued by the Belgian head office. In the event of a loss of more than -0.71%, the Romanian group entity should issue an invoice to the Belgian head office.

The Romanian group entity had paid reverse-charged VAT in Romania on two of the invoices received from the Belgian head office and had recovered this VAT as input VAT. However, a VAT audit at the Romanian group entity saw the Romanian tax authorities refuse the VAT recovery right. They argued that the Romanian group entity had neither convincingly demonstrated that it had received services nor that the services were used for their VAT-taxable activities.

2. The AG's opinion

The first question that the AG answered was whether the fee for the services the Belgian head office performed for its Romanian group entity fall within the scope of VAT if the fee is determined according to the TNMM. The AG stated that there is no unequivocal answer to this and that it must be assessed on a case-by-case basis.

According to the AG, what has to be examined in this specific case is whether there is a legal relationship between the service provider and the recipient of the services, whereby mutual services are exchanged and the fee received by the service provider constitutes the actual consideration for an individual service provided to the recipient. The latter is the case if there is a direct connection between the service provided and the consideration received for it.

In answering that question, the AG firstly noted that there is an agreement between the Belgian head office and the Romanian group entity under which the Belgian head office provides services to the Romanian group entity. Furthermore, the agreement provides for a fee for these services. According to the AG, there is also an individual service, because the Belgium head office not only negotiates on behalf of the Romanian group entity in respect of future contracts, but also fulfills various other

tasks. With regard to the direct connection between the service and the fee, the AG noted that this has been met, because although the fee amount was not set, the conditions for the fee were established with precise criteria.

The AG concluded that the services the Belgian head office provided to the Romanian group entity fall within the scope of VAT. According to the AG, the mere argument of the Romanian group entity that there is a transfer price that as such is not subject to VAT, cannot suffice to justify an exclusion from the scope of VAT.

The second question assessed by the AG was whether the Romanian tax authorities can request the Romanian group entity to provide other documents, besides invoices, so that they can review the VAT recovery right of the Romanian group entity. The AG concluded that the tax authorities may do so, and that the burden of proof to convincingly demonstrate the VAT recovery right lies with the Romanian group entity. In this case, this means that although the tax authorities may request more than only invoices, the requested information should be consistent with the objective pursued and the VAT recovery right should be impacted as little as possible.

3. Practical consequences

The treatment of transfer pricing adjustments within VAT is ambiguous and according to the AG should be assessed on a case-by-case basis. Currently, in addition to this case, there are two other cases pending before the CJEU on this issue: Högkullen (C-808/23) and Stellantis Portugal (C-603/24). It is therefore extremely important that agreements between associated group companies that were drawn up for transfer pricing purposes are also examined for VAT purposes in order to prevent as much as possible any risk of disputes with the tax authorities arising retrospectively. It is now up to the CJEU to render a final judgment. That judgment is important for multinational enterprises with intra-group services.

The advisors of KPMG Meijburg & Co's Indirect Tax Group would be pleased to help you further if you have any questions or comments about this. Feel free to contact one of them or your usual advisor.

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