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Qualification of the recharging of electrical vehicles

VAT Alert

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Judgment of the European Court of Justice no. C-282/22 dated April 20, 2023, P. w W. case

By

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1. Introduction

With judgment C-282/22 dated April 20, 2023, P. w W. case, the European Court of Justice definitively solved – at least, for the moment – the question on whether the recharging of electrical vehicles should be legally qualified as a supply of goods or a supply of services. The dispute derived from the different ways in which electrical vehicles are "refuelled" compared to vehicles that use other types of fuel for their propulsion (such as, in general, gasoline, diesel, LPG, methane gas, etc.).

Doubts could be related to the fact that, in order to be realized, electric recharging requires a range of additional services – which were also identified by the Court of Justice, mainly consisting in: i) provision of recharging devices; ii) supply of electricity, whose price can vary depending on, among other things, "*the duration of the recharging session, expressed in hours for slow-charge connectors or in minutes for quick-charge connectors, as well as on the standard of connector*"; iii) provision of technical support; iv) provision of a special platform whereby users may reserve a particular connector and view their transaction and payment history, and of the option to use an "e-wallet" to pay the balance due for individual recharging sessions.

Moreover, P. w W. planned to create a specialized platform ("a website or an IT application") to enable users "to reserve a particular connector and to view his or her transaction and payment history".

In this context, since the different transactions carried out by the users concerned would have been remunerated with a single price, there was the doubt on whether the transaction should have been qualified as a complex and indivisible transaction to be taxed as a whole with the application of the ordinary VAT rate, since it is not possible to identify a principal supply and its ancillary supplies.

2. The terms of the question

The Court of Justice focussed mainly on two elements, also pointed out by the Polish Tax Authorities – since Poland is the country directly concerned by the judgment –, which raised the question on which one should prevail on the other one, i.e.: the provision of devices allowing the fast recharging of electrical vehicles and the effective recharging of the vehicle.

According to one current of thought (which also P. w W.'s opinion was based on) "*the primary intention of users of recharging stations is to use devices enabling them to recharge their vehicle quickly and efficiently*", thus asserting that the access to a recharging station is the principal supply. On the other hand, the Polish Tax Authorities would qualify the recharging of vehicles as the principal supply respect to the access to a recharging station (regardless of the procedure and time needed).

In this sense, the Court of Justice pointed out that "*access to recharging devices thus constitutes the means by which a user may better enjoy the supply of electricity, which is the principal supply*".

3. Qualification of the transaction according to the EU Court

Under point 27 of the judgment, the EU Court, based on its case law interpretation, states "*where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which that transaction takes place in order to determine, first, whether the transaction gives rise, for the purposes of VAT, to two or more distinct supplies or to one single supply and, second, whether, in the latter case, that single supply is to be regarded as a 'supply of goods' or a 'supply of services'*". Therefore, each transaction must be considered as a separate and independent transaction, therefore "*a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system*". This means "that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split" (see point 28).

Moreover, a supply should be considered as ancillary when it does not constitute an end in itself but a means of better enjoying the principal supply.

Given the clear considerations above, the Court stated that, in the case under analysis, "*a combination of transactions consisting of the supply of electricity for the purpose of recharging electric vehicles and the provision of various services*" to be considered as ancillary to the principal supply can only lead to the conclusion that the supply of electricity (recharging) for electric vehicles is the principal transaction, which constitutes a "supply of goods", since it consists in the transfer of the right to dispose of tangible property as owner (pursuant to art. 14, para. 1 of VAT directive no. 2006/112), also considering that electricity shall be treated as "tangible property", according to art. 15, para. 1 of the same directive.

Substantially, the interest of concerned users is that of recharging vehicles with the electricity needed to power it and "ancillary" supplies constitute a minimal aspect which necessarily accompanies the supply of electricity, and which does not change the nature of the principal supply in any way. Any price difference for fast direct current recharging does not imply a modification in the qualification of the above transaction.

One last interesting assertion of the Court concerns the provisions under directive no. 2014/94 on the deployment of alternative fuels infrastructure, which, under art. 1, establishes the minimum requirements for the building-up of alternative fuels infrastructure, including recharging points for electric vehicles, but has not the purpose "*to lay down any rules regarding the treatment, from the point of view of VAT, of the supply of alternative fuels*" (see point 36 of the judgment under analysis).

In conclusion, recharging of electric vehicles must be considered, for VAT purposes, as the principal supply and qualified as a supply of goods, while all other services related to recharging are merely ancillary supplies, therefore they will be taxed in the same way as the supply of electricity.

At the beginning of 2023, taxation of electricity for the recharging of electric vehicles has been the subject of the reply to a tax ruling issued by the Italian Revenue Office no. 27 dated 13 January 2023. The query concerned the qualification of the recharging of electric vehicles, accompanied by a range of services that are similar to those considered in judgment C-282/22 of the EU Court of Justice.

In this standard practice document, the Revenue Office issued its opinion based on the repeated considerations of the Court of Justice regarding indivisible complex transactions and, mainly, on the position of the EU VAT Committee expressed under DOCUMENT C – taxud.c.1(2021)6657618 – 1018, with reference to Working Paper n. 1012 dated 17 March 2021 of the 118th meeting of the VAT Committee held on 19 April 2021, relevant to a request from Italy concerning the VAT treatment of recharging services of electric vehicles and to a similar request from France (WP no. 969 dated 13 May 2019 of the 113th meeting held on 3 June 2019), already mentioned in previous DOCUMENT A – taxud.c.1(2019)6589787 – 972.

In the reply to the ruling, the Italian Tax Authorities reached the same conclusion as that stated in judgment C-282/22, asserting that the supplies substantially allow users to recharge their electric vehicles. Therefore, the Tax Authorities stated that the combination of transactions that constitute "recharging services" qualify as a complex and joint transaction for VAT purposes.

In identifying the nature of the transaction, it must be recognised that the main element of the complex transaction at issue is represented by the supply of electricity to recharge the electric vehicle, while all additional services (App, data monitoring, geo-localization, etc.) are ancillary to the principal transaction, i.e., the supply of electricity.

The above assertion is also confirmed by the fact that the periodic fee paid by the owners of electric vehicles, which varies depending on the type of battery and on the potential mileage of the vehicle, is adjusted based on the comparison between estimated consumption and actual consumption of electricity.

Lastly, referring to the abovementioned positions of the VAT Committee, the Italian Revenue Office pointed out that "recharging services" can be qualified for VAT purposes as supply of electricity being relevant from a territorial perspective pursuant to article 7bis, para. 3, letter b) of Presidential Decree no. 633/1972, thus implying that the supplier of electricity acts as a dealer for VAT purposes.

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