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Intra-Community transactions between related companies and transfer pricing

VAT Alert

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Judgment no. C-726/23, Arcomet Romania case, Opinion of Advocate General delivered on 3 April 2025

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1. Introduction

The case analyzed by Advocate General within judgment no. **C-726/23** focuses mainly on the treatment of intra-group services supplied by a parent company to a subsidiary established in another Member State. In particular, also considering the OECD (Organisation for Economic Co-operation and Development) Guidelines, attention should be paid to the tax treatment of supplied intra-group services, since they would seem to be subject to value added tax – as they derive, in any case, from the transfer pricing system for multinational companies – and therefore considered as autonomous supplies of services.

The case brought before the Court of Justice of the European Union (CJEU) is related to a dispute arisen in Romania, where Arcomet Romania operates, which is a company part of the Arcomet group, an independent global group in the crane rental sector. In the specific case, the parent company Arcomet Belgium (Arcomet Service NV Belgium) seeks suppliers for its subsidiaries (including Arcomet Romania) and negotiates contractual terms with them. However, sale and rental contracts are concluded between Arcomet Romania and its suppliers and customers, as it occurs in relation to Arcomet Romania.

The considerations made by Advocate General (Jean Richard De La Tour) are particularly interesting, as they identify a special insight into the taxation – or non-taxation –, for VAT purposes, of transfer prices, without prejudice to the fact that the final decision of the Court should be known before identifying the relevant substantial principles.

2. The case analysed by the CJEU

In order to settle the case, the Arcomet group, also analysing the relevant OECD Guidelines, concluded "*that, at market level, the subsidiaries should, in accordance with the transfer pricing rules, record an operating profit margin*" between 0.71% and 2.74%. For this reason, Arcomet Belgium and Arcomet Romania concluded a contract to guarantee the Romanian company an operating profit margin in that range. On the other hand, to avoid that such limits are exceeded in the case of a surplus profit above 2.74% or of losses that bring the profit below -0.71%, an annual "equalisation invoice" is provided to be issued by the Belgian parent company.

Since Arcomet Romania recorded a profit higher than the envisaged range for three consecutive years (2011-2013), Arcomet Belgium issued three invoices "*exclusive of VAT*" and declared them as intra-Community supplies of services. For its part, Arcomet Romania declared the first two invoices as intra-Community purchases of services in respect of which it applied the reverse charge mechanism but considered that the third invoice had been issued for "*transactions falling outside the scope of VAT*".

In such a context, the Romanian Tax Authorities refused the right to deduct for such invoices, on the ground that the company had not provided suitable supporting documents concerning the "*invoiced supply of services or the fact that they were necessary for the purposes of taxable transactions*".

Following the dispute that arose, the Bucharest Court of Appeal decided to stay the proceedings and to refer the following **two questions** to the Court of Justice **for a preliminary ruling**.

The first question concerns the possibility that the amount invoiced by the parent company to an associated company can constitute a payment for a service, if the amount invoiced, necessary to align the operating company's profit with the activities carried out is calculated in accordance with the "*margin method of the OECD Guidelines*".

The second question is aimed at identifying whether the tax authorities are entitled to require, in addition to the invoice, documents (for example, activity reports, works progress reports, and so forth) justifying the use of the services purchased for the purposes of the taxable transactions, or the right to deduct VAT should be based "*solely on the direct link between purchase and supply or [between purchase and] the taxable person's economic activity as a whole*".

3. Opinion of the EU institutions

The case, which is not simple to settle, was previously analyzed by the VAT Committee (Working paper No 923 of the VAT Committee, submitted in meeting no. 108 dated 27 and 28 March 2017) and then revisited in the analysis made by the VEG - Vat Expert Group, included in paper no. 071 (meeting no. 110 dated 13 April 2018 and WP 945 of the VAT Committee and relevant annexes).

In this context, the EU institutions, though identifying the problem of the possible relevance of the TP adjustment for VAT purposes, have not reached a final solution, therefore the issue was not subject to specific guidelines, as the complexity of the matter did not allow reaching final and certain conclusions but rather required a case-by-case analysis.

Given the above, the conclusions of the EU Commission in WP no. 923 (point 3.4) are relevant, as they state that "*there is a tension between the transfer pricing rules set out for the purposes of direct taxation which, based on the arm's length principle seek to arrive at the arm's length valuation of a transaction (i.e. the open market value), and VAT rules, generally based on the existence of a supply for consideration, where consideration is seen as a subjective value (i.e. the price actually paid)". This particular situation implies that "as regards the interaction between transfer pricing and VAT, transfer pricing adjustments (upwards or downwards) might have VAT implications, for instance, where such an adjustment could be seen as more or less consideration given in exchange for a taxable supply of goods or services already made (…)*".

As specified under point 35 of the Opinion of Advocate General, there are different types of transfer pricing adjustments based on different calculation methods, which are explained in OECD Guidelines and consist in "*three traditional transaction methods and two transactional profit methods*".

These circumstances require a case-by-case analysis, as mentioned above, and therefore the discussions of the VAT Committee, with the contribution of the VEG, have led to the conclusion that, in principle, adjustment invoices can be subject to VAT substantially when there is a direct link between the original transfer/supply transaction and the following actions taken by the parent company to make profits (or losses) registered by subsidiary companies consistent with the Transfer Pricing adjustment.

4. Analysis and opinion of Advocate General

To answer the two questions referred to the CJEU, it should be noted that "*the method of calculating the transfer price is used directly to calculate, a posteriori, the remuneration for the intra-group supply of services, without further adjustment*" (point 36), thus implying that a case-by-case economic and commercial analyisis cannot be avoided.

This means that it should be possible to identify whether the TP system actually gives rise to a supply of services for consideration, which must be subject to VAT.

To this regard, reference must be made to the contractual terms agreed by the parties, under which "*each party undertakes to provide a number of supplies to the other*", assuming the relevant economic risks (point 40). Moreover, the fact that the contract provides for "*remuneration of the parties equal to the amount necessary to align Arcomet Romania with the activities it carries out and the risks it assumes*" cannot be disregarded.

This would suggest the existence of a "direct link" between the service supplied and the consideration received, which could also disregard the actual amount of the consideration. However, also in the case of a non-defined amount, it is important to consider that "*the arrangements governing that remuneration [...] are laid down in the contract of 24 January 2012 based on very precise criteria and are, as such, devoid of risk*", i.e., the remuneration for the services supplied by Arcomet Belgio to Arcomet Romania "*can be determined perfectly well from the time of the conclusion of that contract*".

On this point, the opinion of Advocate General is that ***"remuneration for intra-group services supplied by a parent company to a subsidiary and set out contractually, which is calculated according to the transactional net margin method recommended by the Organisation for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, must be regarded as the consideration for a supply of services for consideration within the meaning of that provision and must be subject to value added tax (VAT)"***.

The second question related to the burden of proof to benefit from the right to deduct by a VAT taxable person is simpler.

According to the CJEU case law (including judgment no. C-527/23 dated 12 December 2024, *Weatherford Atlas Gip case*), the analysis of art. 168 of Directive 2006/112/EC leads to the statement that "*in order for the right to deduct input VAT paid to be available, first, the person concerned must be a 'taxable person' within the meaning of that directive and, secondly, the goods or services relied on as the basis for claiming the right of deduction must be used by the taxable person for the purposes of its own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person*" (point 25 of the mentioned judgment).

In addition to this, a direct and immediate link between the input transactions and output transactions is required to benefit from the right. However, in its opinion, Advocate General observes that such link could fail in case of general expenses incurred by the subject applying for deduction, but which in any case become an integral part of the price of goods/services supplied by the concerned subject (point 55 of the Opinion under analysis).

Since this seems to be the case of Romanian Arcomet, the issue of the burden of proof arises, which is the responsibility of the subject applying for the right to deduction and which should prejudice such right as little as possible, in order not to be in contrast with the principle of proportionality, constantly recalled by the CJEU.

Based on the above considerations, Advocate General concluded that in the case at issue, it is not a question of demonstrating solely the existence of formal requirements, but rather the existence of substantive requirements to benefit from the right.

Therefore, the Tax Authorities can require the taxable person applying for deduction to produce ***"documents other than the invoice in order to justify the use of the services purchased for the purposes of its taxed transactions (...) in compliance with the principle of proportionality"***.

In any case, without prejudice to the acuity of the opinions formulated by Advocate General, the final decision of the European Court of Justice shall be awaited.

At domestic level, the relevance of the TP Adjustment was subject to analyses by the Revenue Office through proper rulings, including, besides the most recent ruling no. 266 dated 18 December 2024, previous rulings no. 60 dated 2 November 2018, no. 884 dated 30 December 2021, and no. 529 dated 6 August 2021.

In particular, the Tax Authorities underlines that "the purpose of transfer pricing is that of allowing a correct global allocation of the profits among the companies of a multinational group, located in different countries", but this circumstance, mainly related to direct taxation, cannot always be considered applicable also to VAT, "whose main purpose is that of taxing the consumption of goods and services in the place where it occurs" and, therefore, in principle, considerations paid or received as Transfer pricing cannot be considered as automatically relevant for the calculation of the VAT taxable base.

In the past, the Tax Authorities, also based on the statements of the VAT Committee and the VEG Group (as mentioned above), believed that TP adjustments could have created some perplexities, especially when such adjustments were related to 95% of the TP value and were not relevant for VAT purposes. In fact, this circumstance would reflect in a kind of abuse of rights, since "the consideration of the intercompany transaction relevant for VAT purposes would be limited to 5% of the TP value".

In the latest ruling (no. 266 dated 2024), substantially, the Revenue Office corroborates a conduct based on the initial invoicing of "an amount equal to the sales TP value of exported goods" followed by an additional invoice as price adjustment. In fact, the second invoice, calculated on 95% of the TP adjustment and issued as final invoice, would serve as both settlement and consideration for "any differentials/shrinkages with the arm's length price" that could definitively be determined only *a posteriori*.

The conclusion of the ruling, however, is cryptic and contradictory, stating that, based on the insufficient information provided by the applicant, it could be affirmed that "the amount of the second invoice is not relevant for VAT purposes if and to the extent that it is aimed at adjusting the counterparty's operating margin".

Based on these conclusions of the Revenue office, which are not fully satisfactory, it is even more necessary to await the decision of the CJEU to settle this complex issue.

Our experts are at your disposal for a more detailed overview of the topics briefly discussed above.

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