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By PwC Deutschland | 15 September 2023

ECJ: VAT on carriage of goods intended for import and withholding tax on fees paid non-residents

In a Romanian case, the ECJ decided that a contract providing for the processing of the application for VAT refunds from the tax authorities of several Member States is to be a "supply of services" within the meaning of Article 57 TFEU. Furthermore, the ECJ stated that the tax exemption for transport services in connection with importation cannot be denied from the outset if other qualifying documents are presented to support the importation. The levy of withholding tax on handling fees paid to a foreign service provider was also dealt with by the ECJ.

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Background

The applicant, Cartrans Preda (*Cartrans*), is an operator of road freight transport services based in Romania. Following a tax audit *Cartrans* had **to pay additional VAT** corresponding to an invoice relating to services for the road carriage of goods which it provided to another company. The carriage concerned a journey between Rotterdam (Netherlands) and Romania. The tax authorities found that *Cartrans* had not submitted proper documents showing that the carriage services at issue were directly linked to the importation of the goods concerned and that the value of the services was included in the taxable amount of the imported goods.

In addition, the Romanian tax authorities issued an **assessment for withholding tax** on the income of non-resident persons in respect of sums paid by *Cartrans* to FDE Holding A/S, a Danish company, in consideration for the services which the latter had provided between 2012 and 2018. Based on the contract concluded on 3 November 2005 between *Cartrans* and FDE Holding A/S *Cartrans* assigned to FDU the right to claim on its behalf the refund of VAT relating to intra-Community acquisitions of goods, specifically fuel purchased by *Cartrans* in several EU Member States.

The Romanian tax authorities maintain that remuneration received by FDE Holding constitutes ‘commission’. Accordingly, *Cartrans* had failed to withhold tax on income earned by non-resident persons on that ‘commission’.

Cartrans appealed to the referring court against both assessment notices. As regards the taxation of income received by non-resident persons, *Cartrans* claims, that such income does not constitute ‘commission’. It argues that it is, instead, consideration for the provision of services, which, under Article 7(1) of the double taxation convention, is taxable only in Denmark. With respect to the additional VAT *Cartrans* holds that the carriage services which it supplied in the present case satisfies the conditions for the exemption provided for in Article 144 of the VAT Directive for the supply of services relating to the importation of goods.

In that context, the Regional Court, Prahova, Romania decided to stay the proceedings and to refer altogether six questions to the ECJ for a preliminary ruling.

ECJ decision

In essence the ECJ held that:

- *a Member State **may not automatically refuse** the exemption from VAT for carriage services connected with the importation of goods on the ground that the taxable person has not produced the **specific documents** required by national legislation, although other documents were produced which do not give rise to doubts as to their authenticity and reliability and which are capable of establishing that the conditions for entitlement to exemption from VAT laid down in those provisions are satisfied;*

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- *an **activity consisting of recovering VAT and excise duties** from the tax authorities of several Member States constitutes a supply of services, and, second, the **assessment of withholding tax** on income paid for a supply of services to a non-resident service provider, whereas an equivalent supply made by a resident service provider would not be subject to such withholding, constitutes a restriction on the freedom to provide services within the EU (article 56 TFEU). This restriction may be justified by the need to ensure the efficient collection of the tax and to the extent that it does not go beyond what is necessary to achieve this objective. However, the foreign service provider must be allowed to deduct business expenses directly connected with the underlying activities, unless the restriction on the freedom to provide services is justified by overriding reasons in the public interest.*

More details of the judgment including the four answers from the ECJ to the questions referred to be found **here**.

Source:

ECJ, judgment of 7 September 2023 (C?461/21), *Cartrans Preda*

Keywords

handling fee, import VAT, incomplete documentation