KPMG Meijburg & Co Tax & Legal

CJEU: fees based on transfer pricing policy subject to VAT

On September 4, 2025, the Court of Justice of the European Union ('CJEU') rendered its judgment in the case of SC Arcomet Towercranes SRL (C-726/23, 'Arcomet RO'). The CJEU ruled that the payments charged to it by Arcomet RO's parent company on the basis of the 'Transactional Net Margin Method' ('TNMM') – arising from OECD Transfer Pricing Guidelines – fell within the scope of VAT in this case. We will discuss this judgment below. In an earlier tax alert, we already discussed the opinion of the Advocate General in the same case. The Advocate General came to a similar conclusion.

1. Facts and background

Arcomet Towercranes is an international group specialising in the rental of cranes and has its headquarters in Belgium ('Arcomet BE'). In addition, it has several group companies within the European Union, including in Romania ('Arcomet RO'). Based on the group's transfer pricing policy, an agreement was concluded between Arcomet BE and Arcomet RO for the provision of certain reciprocal services. In particular, a number of Arcomet BE's head office activities for Arcomet RO were identified. These services related to financing and management of the crane fleet and negotiation of framework agreements with suppliers on behalf of the Romanian group entity. Under the agreement, Arcomet BE was responsible for most of the commercial activities and bore the main economic risks associated with Arcomet RO's activities.

In addition, the agreement stipulates that the parties agreed on a fee for these activities. This fee is calculated according to the TNMM, a method as included in the OECD Guidelines for Transfer Pricing. In this case, the method specified that if Arcomet RO's annual profit margin exceeded 2.74%, Arcomet BE had to issue an invoice to Arcomet RO for the amount of that excess profit. In the event of a profit margin of less than -/- 0.71% (i.e. a loss), Arcomet RO had to issue an invoice to the head office.

Arcomet RO had paid reverse charge VAT in Romania in respect of two invoices received from Arcomet BE and had also deducted that VAT as input tax. However, in the context of a VAT audit, the Romanian tax authorities refused the right to deduct VAT. It claimed that the Romanian group entity had not demonstrated that it had received services or that it was used for the purposes of its taxable transactions.

2. Judgment of the CJEU

In its judgment, the CJEU first addresses the question of whether the amounts charged by Arcomet BE fall within the scope of VAT on the basis of the transfer pricing documentation (whether they are considerations for the supplies of services).

The CJEU rules that it is irrelevant in this regard that the payments are made on the basis of transfer pricing agreements. The fact that the purpose of the payments is to determine the profit margin for income tax purposes does not alter the fact that for VAT purposes they may be considered a VAT-taxed consideration for supplies of services.

In order to determine this, it is necessary to fall back on the well-known rules in this regard on the basis of all the facts and circumstances of the specific case, namely

whether there is a legal relationship between the service provider and the customer pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the actual consideration for an identifiable service supplied to the recipient. The latter is the case if there is a direct link between the service supplied and the consideration received. So, the CJEU does not provide fora general rule for the VAT treatment of all transfer pricing adjustments. Each specific transfer pricing agreement must be assessed individually for VAT purposes.

In this case, the CJEU rules that the arrangements in the agreement between Arcomet BE and Arcomet RO point to a VAT-taxed supply of services. Arcomet BE's services to Arcomet RO have been agreed (Arcomet BE assumes commercial responsibilities for the benefit of Arcomet RO) and the agreement provides for a consideration for these services. That consideration also constitutes the actual value to Arcomet RO.

The CJEU still addresses some counterarguments. First, there is the argument that an uncertain payment cannot constitute a consideration for VAT purposes. The CJEU expressly ruled that it is irrelevant that there is a chance that no payment will be made in some years, namely if Arcomet RO's profit margin would remain below 2.74%. Even then, it remains clear how the consideration had to be quantified. Only the amount of the consideration is uncertain. The latter is insufficient to keep the fee out of scope for VAT. This requires that the consideration, as such, is uncertain.

Even the fact that the payment requirement could 'reverse' (a payment from Arcomet BE to Arcomet RO), namely when the profit margin would be less than -/- 0.71%, does not mean that the nature of the consideration itself is uncertain, according to the CJEU. It seems to consider it particularly important that this situation did not arise in this particular case and therefore does not address the VAT consequences of such a 'reverse payment'.

Finally, the CJEU rejects the argument that Arcomet BE's activities are typical activities of a shareholder and therefore cannot be regarded as separate supplies of services. The CJEU rightly points out that it has been known for many years that shareholder activities can be accompanied by supplying (management) services for consideration to group entities. That is the case in this case. An interesting, unanswered question is whether Arcomet BE can therefore also be regarded as an 'active holding company' (entitled to VAT recovery) in the years that the transfer pricing agreements do not lead to an actual payment. It seems that this is the case.

Having answered this first question, the CJEU then addresses the second question of whether the Romanian tax authorities may require additional evidence from Arcomet RO to demonstrate that it can deduct the VAT due on the service. The CJEU rules along already well-known lines that the tax authorities may do this, and that Arcomet RO bears the burden of proof to prove the right to deduct VAT. To that end, Arcomet RO must show that the service has actually been provided and used for its VAT taxable activities. However, the Romanian tax authorities may not impose a disproportionate burden on Arcomet RO in requiring additional evidence and, moreover, may not require it to demonstrate that the services incurred were necessary for the economic

profitability of Arcomet RO's activities. After all, the latter is not a requirement for the right of deduction.

3. Practical relevance

The practical relevance of the current judgment lies mainly in the answer to the first question. In our experience, companies apply many different VAT treatments to transfer pricing adjustments. This judgment makes it clear that such adjustments are subject to VAT if they arise from an agreement in which the payment is directly linked to agreed services. Companies with similar agreements as in this case would do well to check whether the transfer pricing payments have been given the correct VAT consequences.

The judgment certainly does not answer all the VAT questions that may arise in relation to transfer pricing adjustments. On the contrary, it becomes clear that it must be assessed on a case-by-case basis whether there are services for consideration for VAT purposes based on an analysis of all the circumstances of the case, and in particular of what is laid down in contracts and transfer pricing documentation. In our view, even after this judgment, certain (pre-agreed) transfer pricing adjustments can remain outside the scope of VAT, for example because no underlying supplies can be identified.

In addition, while it is understandable, it is unfortunate that the appropriate VAT treatment in case of a 'reversal' of the transfer pricing adjustment remains unclear. In our experience, it is not uncommon for TNMM agreements, especially in the start-up phase, to result in payment from the head office to the group company. After this judgment, it seems clear that even then it must be examined whether this constitutes a (as such not uncertain) consideration for supplies that benefit the head office. However, it remains unclear when this will be the case. This will depend, among other things, on how clearly 'genuine' services from the group company to the head office have been agreed.

4. Finally

In any case, one thing is clear after this judgment. The treatment of transfer pricing adjustments within VAT is not unambiguous and must be assessed on a case-by-case basis. There is now a concrete assessment framework for TNMM agreements. For other profit-based transfer pricing agreements, further clarification may come in the Stellantis Portugal case (C-603/24), which is currently pending before the CJEU.

However, after this Arcomet judgment, companies can no longer wait to determine the VAT consequences of intercompany agreements and payments resulting from transfer pricing agreements. Where necessary, they should clarify agreements aand transfer pricing documentations, make adjustments to the VAT treatment, and/or consult with tax authorities on the VAT treatment in the past and future.

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

KPMG Meijburg & Co
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