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Ordinance no. 12/2022 for amending and supplementing certain normative acts in relation to the road transport

On February 3, 2022, the Government Ordinance no. 12/2022 for amending and supplementing some normative acts in relation to the road transport, which also amends the Government Ordinance no. 27/2011 on road transport and Law no. 16/2017 on the posting of employees within the transnational provision of services, published in the Official Gazette of Romania, Part I, no. 196 of March 21, 2017, with subsequent amendments.

CJEU decides again to include contractual “sanctions” in the VAT sphere

On January 20, 2022 the Court of Justice of the European Union (“CJEU”) delivered its judgment in Case C-90/20 Apcoa Parking Danmark A / S. By its judgment, the CJEU ruled that the control fees levied in the event of non-compliance by the beneficiaries with the general conditions of use of car parks must be regarded as consideration for a supply of services and hence, subject to Value Added Tax (VAT).

Starting with February 3, 2022, they were amended, by Government Ordinance no. 12/2022, a series of normative acts targeting the transport sector

Therefore, among others, the following have been modified:

I. Government Ordinance no. 27/2011 on road transport

The amendments refer, among others, to conditions for real and stable headquarters in Romania. Therefore, in order to comply with the requirement to have a real and stable headquarters in Romania, the enterprise must meet the following conditions:

- a) to have an establishment situated on the territory of Romania within which it keeps the originals of its main working documents, whether they are in electronic format or in any other format, in particular its transport contracts, the documents relating to the vehicles at the disposal of the enterprise, accounting documents, personnel management documents, employment contracts, social security documents, documents containing data on transport operations allocated to drivers and their posting, documents containing data on cabotage, driving time and rest periods and any other document to which the inspectors of the State Inspectorate for Road Transport Control - I.S.C.T.R., must have access, for the purpose of verifying that the undertaking complies with the conditions laid down in the ordinance;
- b) to organize the activity of its fleet in such a way as to ensure that the vehicles available to the enterprise and used in international transport return to one of the operational centers in Romania within eight weeks of departure from it;
- c) be registered with the National Trade Register Office;
- d) be subject to profit tax / income tax and, where appropriate, have a VAT registration code, if the company is subject to the provisions of Article 316 of Law no. 227/2015 regarding the Fiscal Code, with subsequent amendments;
- e) to have at its disposal one or more vehicles that are registered or put into circulation and authorized for use in Romania, regardless of whether all those vehicles are owned by it or are owned under a contract of hire sale, rental or leasing;
- f) to carry out effectively and permanently its administrative and commercial activities with the help of the appropriate equipment and installations at the headquarters located in Romania, according to letter a), and to manage its actual and permanent transport operations using the vehicles referred to in letter g) with the help of the appropriate technical equipment located in Romania;
- g) to have at their disposal permanently and habitually a number of vehicles that comply with the conditions set out in point e) and of drivers whose usual place of stationary is at an operational center in Romania; in both cases this number shall be in proportion to the volume of transport operations carried out by the undertaking.

II. Law nr. 16/2017 on the posting of employees within the transnational provision of services, published in the Official Gazette of Romania, Part I, no. 196 of March 21, 2017, with subsequent amendments.

The most important changes concern:

1. The qualification of cabotage as one of the situations in which the rules on posting apply in the context of the transnational provision of services;
2. Introduction of transnational rules applicable to drivers, to whom the posting provisions do not apply in the context of the transnational provision of services:

- a) carries out bilateral road freight transport operations;

- b) carry out, in addition to carrying out a bilateral road transport operation, an activity of loading and/or unloading in the Member States or third countries which he transits through, provided that he does not load goods and unloads them in the same Member State;
- c) carry out a maximum of two additional loading and/or unloading activities in the Member States or third countries through which they transit, provided that no goods are loaded or unloaded in the same Member State, where the bilateral road transport operation begun in the Member State of establishment during which no additional activity has been carried out, it is followed by a bilateral road transport operation to the Member State of establishment;
- d) performs operations of bilateral road transport of persons;
- e) in the context of the bilateral carriage of persons by road, they shall carry out a person embarkation and/or disembarkation of persons in the Member States or third countries which they cross, provided that they do not offer passenger transport services between two points in the Member State crossed. The same shall apply to the return journey;
- f) it shall pass through the territory of a Member State without loading or unloading goods or without the taking up or disembarking of persons;
- g) carry out the initial or final road leg of a combined transport operation as defined in Article 2 (2) (a). (1) of Government Ordinance no. 88/1999 on the establishment of rules for the combined transport of goods, approved with amendments by Law no. 401/2002, where the road segment, taken separately, represents a bilateral freight transport operation.

These exceptions to the application of the rules on transnational posting for the additional activities referred to in points (.b), (c) and (e) above shall apply only until the date from which the smart tachographs complying with the requirement to record the border crossings and the additional activities referred to in Regulation (EU) No. 165/2014¹, must be fitted to vehicles registered for the first time in a Member State. As of this date, the exemptions for the additional activities referred to in points (b), (c) and (e) shall apply only to drivers using vehicles equipped with intelligent tachographs, as provided for in Articles 8, 9 and 10 of EU Regulation No 8. 165/2014.

3. How the duration of posting is calculated

By way of exception to the general rule applicable to transnational postings, when determining the duration of the transnational posting, a posting is considered to end when the driver leaves the territory of Romania during the performance of the international road transport of goods or persons / the driver leaves the host Member State during the performance of the international carriage of goods or persons by road.

Also, in the case of drivers posted on the territory of Romania / from the territory of Romania, the posting period is not cumulated with the previous posting periods, in the context in which such previous international road transport operations are / in the context of such international operations performed by the same driver or by another driver whom he replaces.

Important: The exceptions to the application of the transnational posting referred to in point 2 above, as well as the method of calculating the duration of posting, shall apply only to drivers employed by:

- a) In the case of drivers employed by undertakings established on the territory of Romania which, in the framework of the provision of transnational services, post, outside the group of enterprises to which they belong on the territory of a Member State other than Romania, or on the territory of the Swiss Confederation, employees with whom they have established

¹ See Art. 8 para. (1) the first subparagraph of Regulation (EU) No. 165/2014. In order to facilitate the verification of compliance with the relevant legislation, the position of the vehicle shall be automatically recorded at the following points or at the closest point to such places, when the satellite signal is available:

- the place where the working day begins,
- every three hours of cumulative driving time;
- the place where the working day ends.

For this purpose, vehicles registered for the first time 36 months after the entry into force of the detailed provisions referred to in Article 11 shall be equipped with a tachograph connected to a positioning service based on a satellite navigation system.

employment relationships, who apply the transnational measure in Article 5 para. (1) point (a)², and

- b) In the case of drivers employed by undertakings established on the territory of Romania which, in the framework of the provision of transnational services, post, outside the group of undertakings to which they belong, on the territory of a Member State other than Romania, or on the territory of the Swiss Confederation, employees with whom they have established employment relationships), who apply the measure of a transnational nature referred to in Article 5 para. (2) point (a)³.

4. Introduction of an obligation to inform drivers of their rights including by displaying them on the premises of the undertaking

In addition to the information obligations regulated for any situation of transnational posting, employers have the obligation to inform the employees employed in the position of driver about their rights and obligations, provided by Law no. 16/2017 and directive 2020/1.057/EU, by displaying this information at the company's headquarters.

5. Introduction of the express obligation for the employers who post drivers on the territory of Romania to notify the Labour Inspection about a series of aspects regarding the transnational posting and to ensure that the respective drivers have at their disposal the necessary documents related to the posting and submit them to the Labour Inspection and / or I.S.C.T.R. in case of control

Similar to the obligation of notification by employers who post employees on the territory of Romania, regardless of the field of activity, it was imposed the express obligation of employers who post drivers on the territory of Romania to notify the Labor Inspection about a series of additional aspects, such as the registration numbers of motor vehicles, if the transport services performed qualify as international road transport of goods, the international carriage of passengers by road or cabotage operation.

At the same time, in the case of posting the drivers on the Territory of Romania, it was established the obligation of the employer to ensure that the respective drivers have at their disposal, on paper or in electronic format, a series of documents (e.g. the copy of the posting declaration sent through IMI, proofs of the transport operations). Drivers have the obligation to keep and make available to the I.S.C.T.R. inspectors the above-mentioned documents when requested in traffic.

6. The inclusion of the State Inspectorate for Control in Road Transport - I.S.C.T.R. as an authority with control and sanctioning attributions, as well as the regulation of new types of violations that will be considered minor offences, for which the control authority, respectively the sanction belongs, as the case may be, either to the Labor Inspection or to I.S.C.T.R..

I.S.C.T.R. will have, as a result of the legislative amendment, control and sanctioning attributions for a series of violations that will be incriminated as minor offences in connection with the transnational posting of drivers.

² Posting an employee on the territory of Romania, on behalf of the undertaking and under its coordination, within a contract concluded between the undertaking making the posting and the beneficiary of the provision of services that carries out its activity on the territory of Romania, if there is an employment relationship, during the period of posting, between the employee and the undertaking making the posting.

³ The posting of an employee from the territory of Romania, on behalf of the undertaking and under its coordination, within the framework of a contract concluded between the undertaking making the posting and the beneficiary of the provision of services which carries out its activity on the territory of a Member State other than Romania, or on the territory of the Swiss Confederation, if there is an employment relationship, during the period of posting, between the employee and the undertaking making the posting.

CJEU decides again to include contractual “sanctions” in the VAT sphere

On January 20, 2022 the Court of Justice of the European Union (“CJEU”) issued its judgment in Case C-90/20 Apcoa Parking Danmark A / S. The question in this case was whether certain sanctions (“control fees”) for infringing a regulation on private parking must be regarded as consideration for a supply of a service, thus subject to VAT.

The question arises in the context of previous decisions of the CJEU, where the CJEU decided, depending on the specifics of the cases, whether to classify the amounts paid as transactions outside the VAT scope – in the absence of an operation (C-277/05 Société thermale d’Eugénie-les-Bains), or as VAT operations, as remuneration for the service which the supplier has undertaken to provide (C-295/17 MEO și C-43/19 Vodafone Portugal).

Context:

Apcoa is a private company governed by Danish law, which operates and manages car parks on private land for which it charges certain control fees in case of non-compliance by the beneficiaries with the general conditions of use of the car parks. These control fees are set at a predetermined and significant tariff in relation to the corresponding parking fee, used in order to avoid illegal parking.

Taking into account the economic and commercial reality of the transaction in question, the Court ruled that the control fees applied constitutes consideration for the provision of a parking space provided to customers and therefore, this operation is subject to VAT.

Main points of the judgement and opinion of the Advocate General:

- The classification of “control fees” from a VAT perspective is made according to the economic reality of the operation, the qualification of the contractual provisions according to the national civil law not being likely to produce effects, insofar as they do not really reflect the economic reality of the operation;
- Parking on a certain space, gives rise to a legal relationship between the company that manages this parking, as a service provider and the beneficiary who used this space. The total amount that the beneficiary has undertaken to pay by deciding to park his vehicle in one of these car parks is the conditions under which he has benefited from a parking space, so that the control fees paid are directly related to the parking service and can be considered as an integral part of the total amount that this customer undertook to pay to Apcoa;
- The fact that these control fees constitute, from a legal point of view, penalties for breach of the general conditions of use was not relevant to this decision, the Court arguing that for the correct interpretation of the provisions of the VAT Directive, Union law must be taken into account and not the assessment made in national law.

CJEU conclusion:

By its judgment, the CJEU ruled that the control fees levied by a private law firm in charge of operating private car parks in the event of non-compliance by motorists with the general conditions of use of such car parks must be regarded as consideration for a supply of services and hence, subject to VAT.

Practical aspects:

In the light of those mentioned, analyzing the practice and the guidelines offered by the CJEU, we consider that the application of art. 286, paragraph 4b) of the Tax Code, which provides that the VAT

taxable base does not include penalties and any other amounts required for total or partial breach of contractual obligations, if they are levied over negotiated prices and / or tariffs.

We consider that this decision has an impact on the companies that practice the sanctioning of certain operations in case of violation of the agreed contractual clauses (similarly the decision may be directly applicable to public institutions and international public law bodies that are taxable persons for the transport of goods / persons).

For further questions regarding the aspects mentioned in this alert, please contact us.



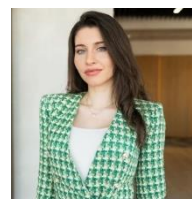
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