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CJEU decision with a potential impact on companies from various industries: VAT is due on the reimbursement of the costs related to the secondment of staff by the parent company to its subsidiary

The amounts received by the parent company from its subsidiaries for lendings or secondments are subject to VAT, according to the Court of Justice of the European Union's judgment in the case C-94/19 San Domenico Vetraria.

To the extent that you practice such arrangements with other intra-group companies, the above decision may have an impact.

In brief, the case analyzed by the Court concerns the secondment of an employee by the parent company to its subsidiary, the parent company recovering the costs incurred from the subsidiary (without applying a profit margin).

Law regarding the paid leave granted for the parents for supervising their children, during the period in which the learning institutions are closed

The Law regarding the paid leave granted for the parents for supervising their children during the period in which the learning institutions are closed, as a consequence of the current circumstances generated by COVID-19, was published in the Official Gazette no. 209 on March 14, 2020.

CJEU decision with a potential impact on companies from various industries: VAT is due on the reimbursement of the costs related to the secondment of staff by the parent company to its subsidiary

On March 11, 2020, the judgment of the Court of Justice of the European Union (“CJUE”) in case C-94/19 San Domenico Vetraria was published, regarding the applicability of VAT on the reimbursement of costs related to the secondment of staff within an intra-group transaction.

The case analyzed by the CJEU

In this case, the CJEU analyzed the VAT treatment for the reimbursement of costs related to the secondment of staff by a parent company to its subsidiary. The purpose was to ascertain whether these amounts, when limited only to the costs incurred by the secondment, without applying a profit margin by the parent company, are subject to VAT or not.

In 2004, Avir, a company established in Italy, seconded one of its managers to hold the position of director of one of its subsidiary, San Domenico Vetraria.

The costs incurred for the seconded manager were invoiced by Avir to San Domenico Vetraria, who deducted the VAT related to these costs.

The tax authorities took the view that these reimbursements fell outside the VAT scope since they did not concern a supply of service between the parent company and the subsidiary and refused VAT deduction right at the level of the subsidiary.

The CJEU's arguments and decision

To analyze from the VAT perspective the payments made for the reimbursement of the costs related to the secondment, the CJEU first examined whether there is a direct link between the supplied service and the amounts received. A direct link exists when a supply is made only on condition that the other is also made, and vice versa.

The Court concluded that such a link exists, considering the fact that the payment by the subsidiary of the amounts invoiced by its parent company was a *condition* for the latter to second the director. Thus, the subsidiary paid these amounts in return for the secondment.

In addition, the Court notes that the amount of the consideration is irrelevant, namely if it is equal to, greater or less than the costs incurred by the secondment.

Considering the above, the Court states that lending or secondment by a parent company to its subsidiary, carried out in return for only the reimbursement of the related costs, is subject to VAT provided that the amounts paid by the subsidiary and the lending / secondment are interdependent.

The impact of the CJEU's decision

The decision offers a new interpretation from a VAT perspective of the secondment of staff services.

In this context, the tax implications of the Court's decision should be analyzed by each company as there could be a financial impact from a VAT perspective in such cases (including for past periods).

At the level of beneficiary companies, in particular, the decision has an impact on companies that carry out activities not giving the right to deduct VAT (such as banking institutions, insurance, real estate, etc.) and which have benefited from secondments outside of Romania. In the context where the transactions are subject to VAT, the companies have the obligation to pay the VAT to the state budget (the input VAT registered by the reverse charge mechanism cannot be deducted – fully or partially).

Moreover, following this decision, it is expected that the tax authorities will pay more attention to this type of intra-group transactions in future tax audits.

Note: The analysis of the specific case on the contractual arrangements, the amounts paid for the secondment, as well as the particularities of the labor law in Romania may influence the applicability of the conclusions of San Domenico case in Romania. We recommend a thorough analysis of the CJEU' decision to determine whether it can be extended in all cases in Romania. For example, a number of aspects (obligations of the employer, definition of secondment) in Romanian labor law appear to be different from the ones in Italy (as presented by the CJEU), aspects which could influence the conclusions regarding the applicability of this decision in Romania.

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Law regarding the paid leave granted for the parents for supervising their children during the period in which the learning institutions are closed

Main provisions regulated under the Law no. 19/2020:

- Only one parent can benefit from paid leave during the extreme situation established by the competent authorities;
- The law is applicable if the following conditions are **cumulatively** fulfilled:
 - The workplace does not allow neither working from home nor tele-working activities;
 - Their children are up to 12 years old or up to 18 years old, in case of children with disabilities;
 - The children are enrolled at a learning institution.
- The paid leave are granted by the employer of the parent which supervises the child, at the written request of the parent, which must be accompanied by an affidavit from the other parent declaring that he/she did not request such paid leave from his/her employer;
- The indemnity for each free day amounts to 75% of the salary corresponding to a working day, but not more than the correspondent per day of 75% from the average gross salary used for establishing the social insurance state budget.
- The present law applies to all employees from both public and private working sectors.

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