24 July 2020

European Court of Justice: VAT treatment applicable to staff secondment

European Court of Justice, Case C-94/19 (San Domenico Vetraria S.p.A.) of March, 11 2020: the secondment of an employee of a parent company to a subsidiary, for which the latter reimburses only the relevant costs, will be subject to VAT in cases where the contractual relationship between parent and subsidiary qualifies as a provision of services against consideration.

The Case at hand, submitted by the Italian Supreme Court to the European Court of Justice ("**ECJ**"), concerns the VAT regime applicable to the amount paid by the hosting company in relation to the secondment of personnel.

According to the art. 8 (35), Law March 11, 1988, n. 67, secondments agreements where the hosting company reimburses costs incurred by the company which makes the secondee available are not subject to VAT.

The case:

- the executive of aparent company ("**Seconding Company**") has been seconded to a subsidiary company (the "**Hosting Company**") of the parent company;
- under the mentioned secondment relationship, the Hosting Company refunded to the Seconding Company an amount equal to the cost charged by the Seconding Company in connection to the seconded executive;
- hence, the Hosting Company received from the Seconding Company, invoices including an amount equal to the reimbursement of the cost related to the seconded executive;
- invoices showed VAT on top of the reimbursement;
- the Hosting Company paid the invoices including the VAT component and, subsequently, recovered the input VAT;
- during a tax inspection of the Hosting Company, the Italian Tax Authorities claimed that the VAT charged was not in line with the domestic legislation so no deduction of input VAT was allowed (under art. 8 (35), Law March 11, 1988, n. 67);
- the tax claim originated a tax litigation which went up to the Italian Supreme Court.

The Supreme Court requested the ECJ for a preliminary ruling: does the secondment of personnel in respect of which the hosting company merely reimburses the costs of the seconded personnel qualifies as a supply of services "for consideration" and therefore is relevant for VAT purposes?

Based on the ECJ settled cases-law, within the framework of the VAT system, taxable transactions postulate the existence of a legal relationship between the parties in which a price or consideration is agreed; therefore, it is necessary to determine whether a consideration has been fixed for the secondment.

ECJ clarified that a for-consideration transaction exists if there is a legal relationship between the provider of the service and the recipient whereby there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient; that is the case if there is a direct link between the service supplied and the consideration received.

In the view of the ECJ, if it were to be established that the payment made by the Hosting Company of the amounts invoiced to it by the Seconding Company was a condition for the latter to second the employee and that the Hosting Company paid those amounts only in return for the secondment, it would have to be held that there is a direct link between the two legs of the agreement and, therefore, such payments would have to be subject to VAT. If this is the case, the circumstance that the consideration is equal to, higher or less than, the costs incurred for the employee is not relevant executive.

On the basis of the above, the ECJ ruled that European legislation must be interpreted as precluding national legislation to qualify not relevant for VAT purposes secondments or supplies of personnel by a parent company to its subsidiary, in respect of which the subsidiary merely reimburses the related costs, provided that the amounts paid by the subsidiary (hosting company) to the parent company (seconding company), on one hand, and the services represented by the secondment, on the other, are interdependent.

Assonime (Italian association of stock companies) - through a note issued on May 19, 2020 (note no. 8) - comments the ECJ decision highlighting that the mere reimbursement to the seconding company of the cost that the latter incurred during the secondment, would not be an actual consideration since the reimbursement would simply neutralize the cost that seconding company should continue to incur during the secondment); the actual aim of the parties is not making available personnel against a consideration but a different one such as facilitating organizational set-up.

This in line with the applicable labour laws according to which it is a requirement necessary for seconding employees that the employer (given its organizational needs) has an actual and objective interest in seconding the relevant employee.

Assonime also comments on the impact of the ECJ decision viv-à-vis current secondments highlighting that the legislator should intervene amending the legislation; however, in absence of any amendment, tax authorities should not issue any tax assessment relating to the matter as they would be in apparent contrast with principle of legitimate expectation of the taxpayers who had had acted in full compliance with the national legislation.

Clarifications and practical guidance by the competent authorities as to how the current secondment schemes should be reviewed would be welcome.

This document is delivered for informative purposes only.
It does not constitute a reference for agreements and/or commitments of any nature.
For any further clarification or research please contact:

Fabio Chiarenza
Partner
Co-head Tax department

Rome
☎ +39 06 478751
@ fchiarenza@gop.it

Stefano Grilli
Partner
Co-head Tax department

Milan
☎ +39 02 763741
@ sgrilli@gop.it

Luciano Acciari
Partner
Taxation

Rome
☎ +39 06 478751
@ lacciari@gop.it

Luciano Bonito Oliva
Partner
Taxation

Rome
☎ +39 06 478751
@ lbonitooliva@gop.it

Cristina Capitanio
Partner
Labour Law

Rome
☎ +39 06 478751
@ ccapitanio@gop.it

Alessandro Zalonis
Partner
Taxation

Milan
☎ +39 02 763741
@ azalonis@gop.it

Vittorio Zucchelli
Partner
Taxation

Milan
☎ +39 02 763741
@ vzucchelli@gop.it

Marco Frulio
Counsel
Taxation

Milan
☎ +39 02 763741
@ mfrulio@gop.it

Veruska Maria Crucitti
Associate
Labour Law

Rome
☎ +39 06 478751
@ vcrucitti@gop.it

Francesca Maria Sciubba
Associate
Taxation

Rome
☎ +39 06 478751
@ fsciubba@gop.it

gop.it