KPMG Meijburg & Co Tax & Legal

CJEU in A Oy case: co-location services do not constitute the leasing of immovable property, nor any other immovable property service

On July 2, 2020 the Court of Justice of the European Union ('CJEU') rendered judgment in the A Oy case (no. C-215/19). The case concerned whether co-location services must be regarded as the leasing of immovable property or as another immovable property service. The CJEU ruled that the co-location services in this case do not constitute the leasing of immovable property nor any other immovable property service. We believe that the CJEU thus ruled that the co-location services in this case are general services. The difference in VAT treatment between immovable property-related services and general services is a fundamental one in practice and can be of commercial importance for data centers and their customers. In many EU Member States the VAT treatment of co-location services is not uniform and this judgment thus provides practical guidance.

1. Background and points of law

A Oy performs co-location services. These services include the making available of server cabinets, power supply and other operating services such as cooling, fire detection and access control. Customers of A Oy can place their servers in server cabinets, but do not receive their own key. The server cabinets are bolted to the floor and can be easily moved without destroying or changing the building or the construction. Customers can access their servers upon the presentation of an identity document. The request for a preliminary ruling asks whether A Oy's co-location services must be regarded as the leasing of immovable property or as another immovable property service.

2. CJEU judgment

The CJEU's basic assumption is that the co-location services in these proceedings form a single supply, with the principal service being the making available of server cabinets. The CJEU noted that an area or space that can be used by lessees as if they were the owner is not made available in a passive manner. It also noted that the server cabinets are not an integrated part of the building in which they are set up, nor are they permanently installed in it. However, the national court must examine this. According to the CJEU, there is thus no leasing of immovable property. Nor are there other types of immovable property services, because the purchasers of the co-location services do not possess an exclusive user right for the part of the building in which the server cabinets are located.

3. Impact on the Dutch and European practice

In practice, the VAT treatment of co-location services is not uniform and usually differs between EU Member States. This may lead to tax disputes with the tax authorities and commercial discussions between data centers and their customers. Especially with regard to cross-border services, the question is whether local VAT must be charged or whether the VAT can be reverse-charged to B2B customers in another country. In some cases it is not desirable to charge local VAT, because B2B customers must pre-finance this VAT and may have to undergo a lengthy VAT refund process with the tax authorities in the country of the service provider.

This CJEU judgment is a welcome practical clarification of when co-location services are general B2B services that are subject to VAT in the country of the customer under the reverse-charge mechanism. This was already an approach accepted in Dutch case law and in Dutch practice. It now also appears to have been accepted at the European level.

Based on this case, we however believe that it cannot, by definition, be applied in full to all types of co-location services. In these proceedings, the CJEU formulated several pre-conditions that must be assessed further on a case-by-case basis. For example, whether:

- the service provider 'passively' makes an area or space available that it can use as if it was the owner, or 'actively' makes an operating environment available in which servers can be used;
- the server cabinets are an integrated part of the immovable property or are permanently installed;
- the customers possess an exclusive user right to the part of the building where the server cabinets are installed.

It seems to us that, in practice, these pre-conditions may vary for different types of co-location services, for example if customers have their own key and are entitled to monitor or limit entry to the part of the building where the server cabinets are set up.

4. What can you do now?

We recommend that you check the current VAT treatment of data center services or co-location services that you perform or purchase in and outside the Netherlands. You should assess whether the facts/circumstances and the VAT treatment is in accordance with this judgment. If that is not the case, we recommend that you assess what follow-up steps should be taken.

The tax advisors of Meijburg & Co's Indirect Tax group would be pleased to help you identify the implications of the judgment in the A Oy case. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
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