

CJEU: VAT payable on assignment of a debt recognized in enforcement proceedings

On October 17, 2019, the Court of Justice of the European Union ('CJEU') rendered judgment in the Paulo Nascimento Consulting case (no. C-692/17) concerning the VAT treatment of the assignment of a debt that had been recognized in enforcement proceedings. The CJEU ruled that such an assignment was subject to VAT.

In Dutch practice, the assignment of debts is usually regarded as a non-economic activity. It appears that the CJEU has now nuanced this. However, before reaching such a conclusion it is important to consider the facts in this case.

Facts

In 2006, Paulo Nascimento Consulting ('PNC') performed property agency activities. Because the customer refused to pay for these services, PNC initiated debt collection proceedings before the District Court to collect the agency commission of EUR 125,000 increased with VAT and default interest. The Court awarded PNC a claim of EUR 170,859.62.

Because the debtor refused to pay, an attachment of immovable property was ordered to secure payment of the amount due. The District Court awarded the attached property to PNC for an amount of EUR 606,000, which corresponded to 70% of the market value. Because PNC's claim was lower, it was obliged to repay EUR 417,937.12, which corresponded to the difference between the EUR 606,000 and the interest that had since accrued on its claim.

The judgment was to become final and irrevocable on September 30, 2010, after which it could be executed in full without any impediment. However, on the day before this, PNC chose to transfer its position in the enforcement proceedings to Starplant for an amount of EUR 351,619.90. In this regard, PNC entered EUR 125,000 in its accounts as a fee for its VAT taxed services on which it paid VAT of EUR 26,250. It recorded the remaining amount (EUR 200,369.90) as 'other unspecified income' on which it paid no VAT. The Portuguese tax authorities disputed the VAT treatment of this amount.

As part of the legal proceedings arising from this dispute, the referring court asked the CJEU for a preliminary ruling on whether the assignment for a consideration of a position held in enforcement proceedings falls under the exemption for transactions concerning the granting, negotiation and management of credit pursuant to Article 135(1)(b) of the EU VAT Directive.

Judgment

The transaction examined by the CJEU was the transfer of all the rights and obligations deriving from a position in enforcement proceedings to recover a debt. This debt was recognized in a judgment and its collection was guaranteed.

The CJEU first addressed the question whether PNC acted in the capacity of a VAT taxable person in the sale of the position in the enforcement proceedings, or whether the incidental nature of the sale precluded this. The CJEU ruled that PNC acted in the capacity of a VAT taxable person, given that the sale was a direct extension of its economic activity.

It then dealt with the VAT treatment. The CJEU noted that the reference for a preliminary ruling did not make clear whether PNC could dispose of the immovable property as owner at the time of the transfer of the position in the enforcement proceedings (September 29, 2010). If that were the case, then the transfer must be regarded as the supply of tangible property. If that were not the case, the transaction must be regarded as the transfer of intangible property, i.e. a right to immovable property, and would qualify as service. The CJEU did not address this any further and it also does not appear relevant to the outcome of the case.

The CJEU noted that, irrespective of the qualification, the outcome of the judgment in the GFKL case (no. C-93/10) did not apply here. The GFKL case concerned a business that acquired default debts at its own risk at a price below their face value. The CJEU ruled in this judgment that the assignee of the claim did not perform a service for a consideration (to the assignor) and that the assignee did not perform an economic activity. According to the CJEU, the nature of the transfer by PNC of its position in the enforcement proceedings differs from the transaction at issue in the GKFL case.

Lastly, the CJEU ruled that the assignment of the position in the enforcement proceedings is not VAT-exempt by virtue of the VAT exemption for transactions concerning the granting, negotiation and management of credit pursuant to Article 135(1)(b) VAT Directive. We consider that the CJEU correctly ruled that the present case does not involve the granting of credit. Even more interesting is the fact that the CJEU ruled that the assignment of the position in the enforcement proceedings does not relate to a transaction concerning debt. The application of the VAT exemption for transactions concerning debts (Article 135(1)(d) VAT Directive) thus fails.

Practical implications

In Dutch practice, the assignment of debts is not subject to VAT. Simply put: such an assignment involves 'cash for cash'. The assignee pays an amount in order to enter a monetary claim from someone else in the accounts. This can thus involve a non-economic activity or a VAT-exempt assignment of a debt.

The judgment in the Paulo Nascimento case may nuance this. Apparently, there is a moment when the recovery of a debt is so far advanced that there is no longer a debt, but a more comprehensive claim / position in legal proceedings. Moreover, the facts in this case seem rather specific and probably determined the outcome. In particular, the fact that the position in the enforcement proceedings was transferred one day before the judgment became final and irrevocable, may have contributed to the CJEU's decision.

Nevertheless, the case does raise questions for current Dutch practice. Of particular interest is the question when the assignment of a debt that falls outside the scope of VAT or is VAT exempt turns into an assignment of a claim that is subject to VAT, as in the Paulo Nascimento case. An undisclosed assignment (where a debt is only transferred for economic purposes) is thus more likely to remain outside the scope of VAT than a full assignment (where the legal rights and obligations of the claim are also transferred).

A question that still has not been completely answered is what the tax base should be. The Portuguese tax authorities appear to assume that the tax base is the amount that was paid to PNC (i.e. EUR 351,619.90). However, this amount is made up of, on the one hand, the right to an immovable property and, on the other, an obligation to repay an amount. We wonder whether it is correct to net these amounts and if it makes a difference whether PNC has the right to dispose of the immovable property.

It is also unclear whether there is some risk of paying double VAT. Normally, a property agency such as Paulo Nascimento will issue an invoice with VAT for its services and remit the VAT. Paulo Nascimento is finally paid for this at the end of the proceedings, thus there is ultimately no bad debt, which means that, in principle, the VAT remains payable. It appears that at the time of the assignment of the claim a new transaction took place that is again subject to VAT. If this is indeed the case, then VAT is, in principle, charged twice on the EUR 125,000 that was received.

We are inclined to interpret the scope of the judgment in the PNC case narrowly, as the case involved quite specific facts and circumstances. The position was assigned at a price that was higher than the face value of the underlying debt, whereby the referring court had already established the supply was for consideration. Furthermore, the debt was recognized in a judgment and its collection was actually guaranteed. Moreover, the assignment took place one day before the position in the enforcement proceedings would become final and irrevocable. Taking economic reality into account, Advocate General Saugmandsgaard Øe had already argued in his Opinion that there was no assignment of a debt but the assignment of (the right to) an immovable property.

The tax advisors of Meijburg & Co's Indirect Tax Financial Services Group would be pleased to help you identify the potential impact of this judgment on your business. Feel free to contact one of them or your regular contact for more information.

Meijburg & Co
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