VAT exemption for cost-sharing groups does not apply to the financial and insurance sector

On September 21, 2017 the Court of Justice of the European Union (‘CJEU’) rendered judgments in the DNB Banka (no. C-326/15) and Aviva (no. C-605/15) cases and in the infringement proceedings initiated by the European Commission against Germany (no. C-616/15). The CJEU ruled that the VAT exemption for cost-sharing groups does not apply to the financial and insurance sector. In addition, the CJEU ruled that a general limitation of the VAT exemption for cost-sharing groups, such as occurs in German national VAT legislation, which restricts the exemption to health professions, is contrary to the VAT Directive.

1. Disputed issues in respect of the VAT exemption for cost-sharing groups

The VAT exemption for cost-sharing groups applies to:

- services performed by independent groups of persons;
- who perform an activity which is VAT-exempt or for which they are not subject to tax;
- in order to provide their members with the services that are directly necessary for the exercise of this activity;
- where those groups merely claim the reimbursement of their share of the joint expenses from their members;
- provided that this exemption does not lead to a distortion of competition.

For a summary of the facts and the proceedings, please refer to our previous news items about the Opinions rendered by the Advocate General (‘AG’) of the CJEU in the DNB Banka, Aviva cases and in the infringement proceedings initiated by the European Commission against Germany.

In the abovementioned cases, the national courts requested a preliminary ruling from the CJEU on the following disputed issues:

- the application of the VAT exemption for cost-sharing groups in cross-border situations;
- the interpretation of the expression ‘independent groups of persons’ (‘cost-sharing group’);
- the impact of transfer pricing adjustments on the application of the VAT exemption for cost-sharing groups;
- limiting the VAT exemption for cost-sharing groups to certain sectors;
- the explanation of the criterion that the VAT exemption for cost-sharing groups cannot lead to a distortion of competition.

2. CJEU judgments

The most important conclusions of the CJEU in the abovementioned cases are explained below.
No application of the VAT exemption for cost-sharing groups in the financial and insurance sector

The CJEU ruled that the VAT exemption for cost-sharing groups does not apply to the financial and insurance sector. This does not follow directly from the text of the provision on the VAT exemption. However, from the context and the purpose of this provision, the CJEU considers that the VAT exemption for cost-sharing groups only applies to cost-sharing groups with members that perform ‘public interest’ activities as referred to in Article 132 of the VAT Directive. The general rule that VAT exemptions must be strictly interpreted underlines this limitation according to the CJEU.

The CJEU inferred from the case documents that certain EU Member States - on the basis of an earlier CJEU judgment rendered on November 20, 2003 in the Taksatorringen case (no. C-8/01) - also allow the VAT exemption for cost-sharing groups in the financial and insurance sector. This case involved a cost-sharing group with insurers as members, and concerned the interpretation of the competition criterion. In this context, the CJEU concluded that tax authorities:

- cannot reopen definitely closed periods on the basis of the above restrictive interpretation by the CJEU
- may not refuse the VAT exemption for cost-sharing groups for outstanding periods on the basis of a direct appeal to (the abovementioned interpretation by the CJEU of) the VAT Directive, since a Directive cannot in itself impose any obligations on taxpayers.

Furthermore, national courts must respect the general principles of EU law, such as the principle of legal certainty and prohibition on retroactive effect, when interpreting the VAT exemption for cost-sharing groups in their national legislation in accordance with the Directive.

Limitation to certain sectors and the competition criterion

The CJEU ruled that the VAT exemption for cost-sharing groups may not in general terms be restricted to certain ‘public interest’ professions. The restriction of the VAT exemption to health professions in German national VAT legislation is therefore not in accordance with the VAT Directive.

According to the CJEU, nor can the abovementioned restriction of the VAT exemption for cost-sharing groups in German national VAT legislation be justified on the basis of the requirement that the VAT exemption for cost-sharing groups may not lead to a distortion of competition. The CJEU appears to provide scope for implementation rules for this criterion, but a restriction in general terms is not allowed. Moreover, Germany did not sufficiently demonstrate the importance of a general distinction between sectors for this criterion.
Other issues

Having regard to the CJEU’s judgment on the first issue, it did not rule on the other issues.

3. Practical consequences

The VAT exemption for cost-sharing groups is frequently applied in the financial and insurance sector, both in the Netherlands and in other EU Member States. The CJEU’s ruling that this VAT exemption does not apply to the financial and insurance sector is therefore very important.

In accordance with the CJEU’s abovementioned judgment, we believe that the application of the Dutch VAT exemption for cost-sharing groups to the financial and insurance sector (provided all conditions are met) cannot be corrected for the past. It cannot be deduced from the context of the statutory provisions (‘Exemptions’ section) of the Dutch VAT Act 1968 that this is restricted to cost-sharing groups of members with ‘public interest’ activities. Furthermore, the implementation rules indicate that the VAT exemption for cost-sharing groups in the Netherlands does apply to the financial and insurance sector, for example, due to the explicit exclusion of damage assessment activities and pension administration activities. The question is whether and to what extent such specific elements of Dutch VAT legislation and implementation rules, until the time of their amendment, also offer protection for future periods. In addition, in individual cases in which the application of the VAT exemption for cost-sharing groups is agreed with the Dutch tax authorities, account must be taken of general principles of good governance.

On May 4, 2017, the CJEU also rendered judgment on the VAT exemption for cost-sharing groups in the infringement proceedings of the European Commission against Luxembourg (no. C-274/15). In response to this CJEU judgment, the Ministry of Finance recently announced ending the extended application of the VAT exemption for cost-sharing groups to cooperating municipalities (with some activities subject to VAT).

We recommend that market parties affected by the abovementioned CJEU judgments identify the possible implications and any alternatives (such as the costs for joint account regime). The advisors of Meijburg & Co’s Indirect Tax Financial Services Group would naturally be pleased to be of assistance with this. Feel free to contact one of them or your regular contact for more information.

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