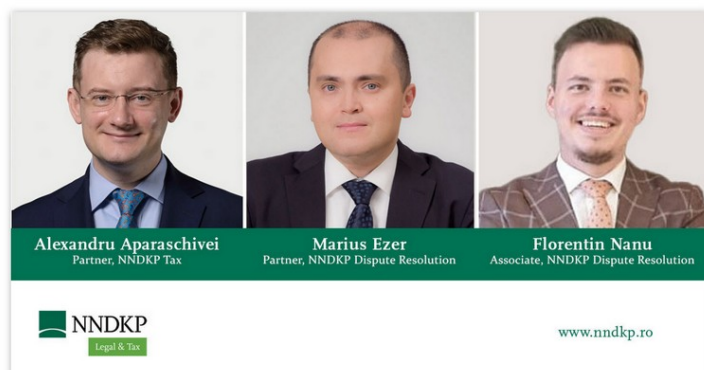


NNDKP CELF confirms its position as leader in tax litigation: has obtained the referral to and will represent its client before the Court of Justice of the European Union in a tax dispute concerning VAT fixed establishments



NNDKP CELF has successfully represented its client, a non-resident company, before the national court in which it has made a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) concerning the interpretation of the EU VAT Directive and Regulation as regards the existence of a VAT fixed establishment. The dispute with the Romanian National Agency for Tax Administration (in Romanian: Agenția Națională de Administrare Fiscală or, in short, ANAF) occurred in connection with the provision of toll manufacturing services (or “*lohn*” contracts as they are commonly known in Romania).

In this case, the non-resident company acquired a complex manufacturing service from a related party, established in Romania. The non-resident company was the owner of the raw material and of the finished products while the resident company contributed with the labor and owned the related production equipment. In addition to the processing of raw material and transformation into finished products, the complex service included related activities such as reception, inventory, placing orders with suppliers of raw material, providing storage space, inventory management in the IT system, processing orders from customers of the finished products, mentioning the address on the transport documents and invoices, support in quality audits, etc. The finished products resulting from the processing were sold by the non-resident company mainly outside Romania under VAT exemption and, to a small extent, in Romania subject to VAT.

ANAF considered that the technical and human resources of the resident company are de facto at the disposal of the non-resident company. Thus, the non-resident company has a fixed establishment in Romania and therefore, the services provided by the resident company have the place of taxation in Romania, being subject to Romanian VAT.

During the past years, the subject of VAT fixed establishments has become a favorite target of ANAF, initially starting with electricity/gas trading, later going to the distribution of pharmaceuticals, recently reaching toll manufacturing.

ANAF's interest is justified by the widespread of these business models in Romania and the large amounts at stake, following the global trend of tax administrations to investigate not declared permanent / fixed establishments. We note that the Romanian tax authority has refined its analysis from one case to another, the arguments increasing in complexity and showing a detailed understanding of the business models.

The preliminary questions proposed by **NNDKP CELF** aim to clarify the fixed establishment from an EU law perspective, to correctly allocate the taxation rights between Romania and the EU Member State of residence of the beneficiary of the manufacturing services.

These questions refer to:

- the possibility for a non-resident company to create a fixed establishment in Romania if it performs only supplies of goods (and not also services),
- the scope of administrative-support services,
- the place of consumption of manufacturing services given that the finished products were sold outside Romania and those sold in Romania were subject to VAT and
- if there is a supply from a VAT perspective where the human and technical resources of the beneficiary involved in the services are the same with the resources of the provider.

NNDKP CELF has proposed a set of questions to allow the CJEU to settle this legal debate of interest to all companies involved in cross-border toll manufacturing services. The success of **NNDKP CELF** is even greater in the context in which the provisions of art. 267 paragraph 3 of the Treaty on the Functioning of the EU provide for the obligation to refer questions to the CJEU only before the court whose judgments can no longer be appealed under national law. In this dispute, the national court sending the request for the preliminary ruling to the CJEU is the first instance. However, the national court correctly accepted **NNDKP CELF**'s arguments that the correct interpretation and application of EU law cannot be ensured in lack of a referral to the CJEU.

The **NNDKP CELF** core team providing assistance and representation in relation to this case includes **Alexandru Aparaschivei**, *Tax Partner – VAT, NNDKP Tax Advisory*, **Marius Ezer**, *Partner, Dispute Resolution* and **Florentin Nanu**, *Associate, Dispute Resolution*.

NNDKP established in 2019 the NNDKP Center of Excellence in Fiscal Disputes (NNDKP CELF), a specialized resource in the field of tax disputes. Through this center, the firm offers highly specialized advice to local and international companies and Romanian entrepreneurs, drawing on the extensive experience gained by the firm in over 325 fiscal disputes handled by an integrated team, comprised of 15 lawyers and tax advisors, experience that underpins the firm's best practices in the field.