

Indirect Tax | VAT

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Digital Charging Solutions: ECJ concludes eMSPs buy and sell electricity for EU VAT purposes.

On 17 October 2024, The European Court of Justice (ECJ) delivered its verdict in the Digital Charging Solutions (C-60/23) case. This case focuses on the VAT implications for e-Mobility Service Providers (“eMSPs”). The ECJ concludes that eMSPs buy and sell electricity, and leans towards qualifying the contract as a commissionaire contract. This case is relevant for the EV charging industry and provides new insights for the fuel card business.

Background

In the European Union, there is a growing number of registered electric vehicles (EVs), aligning with the European Green Deal's goal of making the continent climate-neutral by 2050. This rise in EVs necessitates infrastructure like charging points. This case involves interpreting the VAT Directive concerning EV charging.

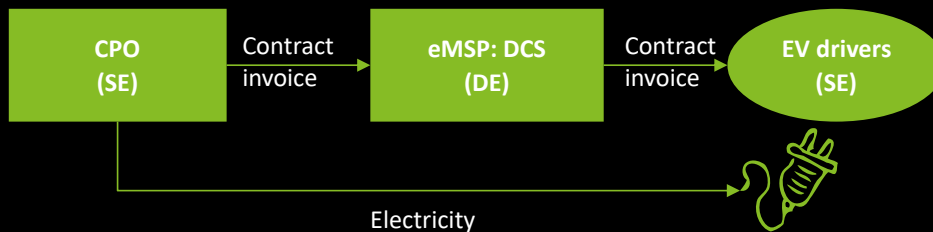
The dispute arose between Digital Charging Solutions GmbH (“DCS”), a company established in Germany, and the Swedish Tax Agency. DCS provides Swedish EV users access to a network of charging points operated by charge-point operators (“CPOs”). DCS has concluded contracts with the CPOs. Users have a contract with DCS and receive a card or app for authentication. CPOs invoice DCS monthly for charging sessions, and DCS bills users for electricity supplied and network access, with a fixed fee for services.

DCS sought a tax ruling from the Swedish Revenue Law Commission. The Commission was divided: a majority viewed the CPOs as supplying electricity to DCS, which in turn supplied users with the same. A minority within the commission takes the view that DCS provides users with a service consisting of the provision of a network of charging points and subsequent invoicing. The commission brought the question for the Swedish court, which referred the question to the ECJ.

Key question and answer

The Swedish court has posed two questions to the ECJ. First, it inquired whether charging an electric vehicle at a charging point constitutes a supply of goods. The Court had already ruled on 20 April 2023 in another case, confirming that it does ([C-282/22](#)) and reconfirmed that in the current case.

The second question is whether this supply of goods applies to every stage in the transaction chain. Current market practice is that operators in EV charging consider the EV charging transactions as a series of consecutive purchases and sales, as illustrated below. In this case the ECJ confirms that the eMSP is buying and selling electricity.



Background – VAT qualification of supplies

Despite its intangible nature, electricity is considered a good for VAT purposes. The qualification of a transaction as the supply of goods depends on the assumption that each party in the supply chain can transfer "the right to dispose of electricity as owner".

The VAT treatment of EV charging has been debated for some time now. In 2021, the European VAT Committee issued (non-binding) [guidelines](#) stating that the EU Member States unanimously agreed that in a typical EV charging value chain the CPO should be seen to supply electricity to the eMSP, while the eMSP should be seen to carry out the same supply of electricity to the driver. In our experience these guidelines, while not binding, are applied by most EU Member States.

These guidelines were necessary, because in past rulings regarding fuel card issuing companies (e.g. Auto Lease Holland [C-185/01](#)), the ECJ determined that the card issuer should not be viewed as obtaining and transferring control over the fuel. In other words, from a VAT standpoint, the fuel card issuer in these cases could not be considered as buying and selling fuel.

ECJ Judgement

Regarding the second question, the ECJ confirms that the supply of goods applies to every stage in the transaction chain. The ECJ observes that DCS appears to act as an intermediary and thus examines whether DCS functions as a commissionaire (undisclosed agent). European VAT legislation creates a legal fiction for commissionaires, whereby a commissionaire who, acting in their own name but on behalf of another, participates in the supply of goods is deemed to have both received and supplied those goods. The ECJ concludes that the conditions for qualifying DCS as a commissionaire seem to be met, meaning DCS should be considered as having received the electricity from the CPO and supplied the electricity to the user.

The ECJ addressed the differences compared to the fuel card case law. The differences appear quite limited (e.g. annual settlement vs monthly invoicing, fee model to cover administrative costs), though apparently sufficient to come to another conclusion. Prior to testing whether DCS operates as a commissionaire, the ECJ acknowledges that there can be successively supplies of (the same) electricity (buy-sell). The ECJ does however seem to favor the qualification as commissionaire.

The ECJ also addresses the issue of service fees charged separately by DCS. It does so, as the commissionaire fiction only applies if the same goods are supplied. The question is whether these service fees and the supply of electricity

should be considered a single complex transaction or multiple separate supplies. Independent supplies can be taxed individually, while a single complex transaction can have only one VAT treatment. The ECJ defers this decision to the referring court but notes that if deemed a single supply, the electricity would be viewed as the main element and the services as ancillary. This would result in the services adopting the VAT treatment of the electricity supply. As such, the qualification as commissionaire is not impacted by the qualification of the services (which is to be determined by the Swedish court). Conversely, if the services are considered separate, their VAT treatment should be determined independently. The court does not provide explicit guidance on this matter, as it was not directly raised in the questions.

Practical implications

In our experience, the ECJ's judgment aligns with the prevailing market practices employed by most operators in the EV charging supply chain. Nevertheless, it is crucial for these operators to carefully reassess their current legal frameworks and pricing models to determine if they are engaged in the buying and selling of electricity from a VAT perspective. There are subtle nuances in this case, which we have not elaborated in detail in this alert, that could significantly influence the VAT treatment.

Moreover, it is key to determine whether any service charges invoiced separately from the supply of electricity, are to be taxed separately or follow the VAT treatment of the supply of electricity. This depends, amongst others, on the contractual set-up and the pricing structure.

We note that special rules determine the VAT taxation location for electricity supplies. When electricity is supplied to a reseller, it is taxable in the country where the reseller is established. Conversely, if electricity is supplied to end-users, it is taxable in the country where the supply physically occurs. While it is generally assumed that these rules also apply to the EV charging sector, this has not been explicitly confirmed by the ECJ in this case. The AG did address this in her opinion and considered that the reseller rules may not apply to a commissionaire. That interpretation would clearly go against market practice.

The EU aims to introduce a so-called One Stop Shop (OSS) mechanism for VAT reporting of EV charging transactions in the EU per 2026. OSS allows businesses to report and pay VAT for all their EU sales through a single online portal in their home country, rather than registering for VAT in each member state they sell to. By centralizing VAT reporting, OSS aims to reduce administrative burdens and compliance costs. This legislation has however not yet come into force.

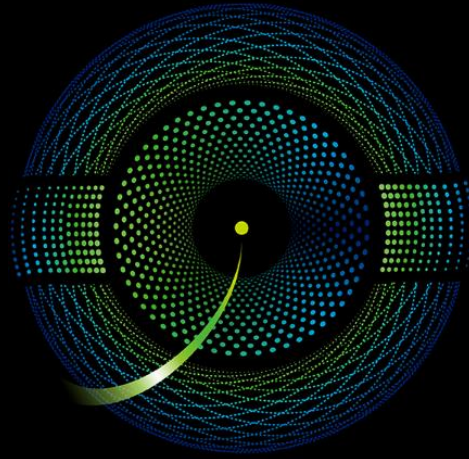
Lastly, while this ECJ case is about EV charging, we would also encourage fuel card issuers currently grappling with the complexities of VAT treatment for their services to consider whether the judgment in this case offers any avenues to alleviate these challenges.

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