UKRAINE

Comparables Analysis Insufficient; Ukrainian Court Remands Case

by Alexander F. Peter

The Ukrainian Supreme Administrative Court (SAC) has remanded the transfer pricing case of stevedoring company Olympex to the appeals court, saying the court did not adequately investigate the tax authorities' arguments for excluding specific comparables.

In its decision in *Olympex Coupe International TOV v. State Tax Service*, published August 14, the SAC said the appellate court should have analyzed all the circumstances that led it to conclude that not all the comparable companies presented by the taxpayer were appropriate under the transactional net margin method (TNMM) despite where the businesses were located. On remand, the appellate court will have to evaluate the tax authorities' objections to the plaintiff's georgraphic selection criterion, the SAC ruled.

"The appeals court analyzed the facts of the case in a lot of detail, which is not necessarily typical for the second instance administrative courts. There, we often see a one-to-one adoption of the first instance court's reasoning," Ivan Shynkarenko of KM Partners in Kyiv told *Tax Notes* August 17. "By remanding the case, the Supreme Administrative Court appears to assist the tax authorities in their burden of proof by giving them again an opportunity to better substantiate their case."

Olympex, a Ukrainian limited liability company, is part of the Ukrainian GNT group, which exports and stores agricultural products at its seaport terminals. The GNT group is embroiled in a bankruptcy battle over debt obligations with its U.S. creditors, Argentem Creek Partners and Innovatus Capital Partners.

In audit years 2014 and 2015, Olympex performed grain cargo transshipments with several group companies in the United Arab Emirates and the Dominican Republic. To justify its related-party pricing, Olympex submitted a transfer pricing report selecting the TNMM. The tax authorities accepted only three of the 16 companies chosen in a nine-step process by the taxpayer as comparables for 2014 and two of 14 companies for 2015.

Olympex's calculated profit level indicator in its larger sample was 7.42 percent in 2014 and 8.3 percent in 2015. The tax authorities' profitability range varied between 13.37 percent in 2014 and 44.39 percent in 2015. Based on those findings, the tax authorities assessed Olympex additional tax of UAH 12.75 million (about $340,000), saying the company's profitability numbers, as compared with the tax authorities' profit level indicators, did not comply with the arm's-length principle in article 39 of the Ukrainian Tax Code.

The taxpayer filed an appeal to the District Administrative Court of Odessa, asserting that the tax authorities did not sufficiently consider the size of its company when excluding specific comparables.

The tax authorities alleged that companies that do not operate in deep-sea ports like Odessa and Pivdennyi should be excluded from the list of comparables because only companies that operate in those ports can create cost advantages by loading large-tonnage vessels at the berth, resulting in lower freight rates with a simultaneous price increase for the transshipped product.

In June 2022 the Odessa court (Legal Proceeding No. P/420/19800/21, Case No. 420/19747/21) stressed that the tax authorities must prove that the price established by the parties to the transshipment transactions was not arm's length. Based on that rule, it said, the audit report did not clearly show on what grounds the tax office accepted some medium-size companies in the sample while rejecting others, given that Olympex is considered to be a large company, as acknowledged by the tax authorities.

The court disagreed with the tax authorities' argument that geographical location should play a decisive role in the selection of comparable companies, noting that all the ports in the sample had the same accessible transport infrastructure. It therefore granted the taxpayer's appeal.

Appealing to the Fifth Administrative Court of Appeals, the State Tax Service claimed that the Odessa court disregarded the capacity indicators of regular ports for cargo handling, asserting that their technical characteristics and the types and sizes of ships that can enter the ports are completely different.

In December 2022 the appeals court (Legal Proceeding No. 854/4738/22) rejected that argument, saying all relevant ports provide the same services, the same access transport infrstructure and weighted average port depths, and similar transshipment grain rates.

However, the first instance court focused only on the number of employees without taking into account the size of the enterprises' fixed and intangible assets, the appeals court said. Thus, the Odessa court's conclusion that the tax authorities unjustifiably excluded some enterprises chosen by the plaintiff was erroneous because the assets at a company's disposal matter for comparability. However, the Odessa court's holding could still stand because the tax office should not have put weight on the port's geographical location, the appeals court held.

Both parties appealed to the SAC.

"Had the tax authorities not appealed the second instance decision, the tax deficiency notice would have remained canceled, but the tax authorities would have had the opportunity to revisit the audit's conclusion based on the court's guidance and potentially issue a new assessment," Shynkarenko noted.

The SAC (Legal Proceeding No. K/900/21261/23) rejected the appeals court's approach of leaving the first instance court's holding unaltered but changing the reasoning. If the tax authorities provided sufficient arguments in accordance with Tax Code article 39.3.2.4,.3.2.5, and.3.2.6 for their profit level indicator and gave a meaningful explanation for their conclusion that geographical location makes a difference, the appeals court needs to weigh that aspect and investigate all other circumstances that could lead to a conclusive decision, the SAC said, remanding the case to the second instance court.

"From my perspective, there can be a general merit in considering the geographic location of comparable companies," Shynkarenko said. "However, I don't think that reexamining this point should make a difference because the appeals court provided detailed arguments why the geographic location of the companies selected in this case did not substantiate the tax authorities' transfer pricing adjustment." ■

UNITED KINGDOM

Northern England Faces Highest Council Tax Burden, Report Finds

by Sarah Paez

People living in low-cost northern England face higher council tax burdens than those living in areas with higher costs of housing, such as London, according to a report from the TaxPayers' Alliance.

The U.K. taxpayer advocacy group published a report on council tax burdens in Great Britain on August 16. The report compares average "band D" council tax for 2023-2024 against housing prices and median gross pay in the local municipal areas and found that individuals in northern England face the highest council tax burdens. The tax was introduced in Great Britain in 1993 to replace the community charge, which had replaced domestic rates in 1990 in England and Wales and in 1989 in Scotland. Northern Ireland does not levy council tax because domestic rates were never replaced there, the report notes.

Local authorities charge council tax on the occupants of residential property. The tax is linked to the value of a property and applies to residential properties in eight bands based on 1991 property valuations, except in Wales, which has nine bands based on 2003 property values. The rates are set by local authorities, but in Scotland and Wales, the devolved central tax administrations set the valuation bands.

Burnley, a town in the North West region of England that is 21 miles north of the city of Manchester, has the highest council tax relative to housing price, according to the report. Band D tax is £2,244 compared with an average house price of £116,172, which amounts to 1.93 percent annually. In Westminster, part of Greater London, residents pay £914 band D council tax on an average housing price of £927,774, making it the lowest council tax relative to housing price at just 0.1 percent.

All 62 councils that charge over 1 percent of the average housing price in council tax are located in northern England, according to the report. Meanwhile, of the 10 lowest council tax rates relative to housing price, nine are in London