

CJEU JUDGES THAT DIRECTORS' FEES MIGHT BE OUTSIDE THE SCOPE OF VAT



BACKGROUND

The Court of Justice of the European Union (CJEU) delivered its judgment in case C-288/22 TP ("TP Case") on the VAT status of independent directors on 21 December 2023.

The TP Case deals with the question of whether a natural person, in his/her capacity as an independent director, should be considered to be carrying out an economic activity for VAT purposes, giving rise to the status of a taxable person for VAT purposes.

As a reminder, Circular 781 of 30 September 2016 specifically recognized the activity of independent directors as being subject to VAT.

QUESTIONS RAISED TO THE CJEU

1. The first question was whether the remuneration of a board of directors for its activity as part of a body of a legal person constitutes remuneration for an independent economic activity within the meaning of Article 9 of the VAT Directive.
2. The second question was whether a natural person, who is a member of the board of directors of a public limited company, carries out his or her activity "independently" within the meaning of Articles 9 and 10 of the VAT Directive.

OPINION OF ADVOCATE GENERAL KOKOTT

AG Kokott questioned whether TP could be regarded as carrying out an independent economic activity, given the lack of personal liability (no economic risk), the fact that TP's working conditions prevent him from carrying out his activities on the free market in relation to other third parties (no economic initiative) and the fact that TP's remuneration is determined unilaterally by the company.

Finally, AG Kokott argued that the principle of legal form neutrality supports the view that directors' fees should not be subject to VAT in order to avoid distortions of competition between companies, since some companies are required by law to operate through a board of directors, while others are not, which means that VAT could result in a burden for companies with a limited right to deduct.

JUDGMENT AND NEXT STEPS

The CJEU's decision was published on 21 December 2023.

1. Answer to the first question: The member of a board of directors of a public limited company governed by Luxembourg Law is considered

as carrying out an economic activity for VAT purposes within the meaning of Article 9 of the VAT Directive 2006/112/EC, to the extent he or she provides services for **consideration** to a company, for which he receives a **remuneration** that can be calculated based on predictable methods and provided that the activity is performed on a **permanent basis**.

2. Answer to the second question: The activity of a member of a board of directors of a public limited company governed by Luxembourg Law is **not exercised independently**, despite the fact that this member freely organizes the modalities of execution of his work, perceives the earnings that constitute his income, acts in his own name and is not subject to a link of hierarchical subordination. **He or she does not act on his/her own behalf or under his own responsibility and does not bear the economic risk linked to his or her activity.**

This decision has made clear that the main factor in order to assess whether a director should be considered as independent or not, is the bearing of the economic risk and the acting on self-responsibility. It is thus clearly stated, that in the case of the activities of directors, such as in the case at hand, the independence condition is not met and thus directors forming part of a board of directors of a public limited company are not to be considered as taxable persons.

While this should be assessed on a case-by-case basis, the CJEU's judgment will, in principle, have the following consequences:

- ▶ There could no longer be any VAT implications in relation to the services provided by independent directors.
- ▶ Independent directors registered for VAT in Luxembourg may be required to deregister.
- ▶ Companies may be able to apply for the regularization of past VAT returns (taking into account the statutes of limitations) in order to reclaim non-deductible VAT incurred on director services.

HOW CAN EY HELP?

- ▶ At EY, we can review the VAT status of independent directors.
- ▶ Where applicable we can assist with deregistration process and the associated post filing VAT requirements, as well as ensuring that the deregistration file and the remaining VAT returns are submitted on time to ensure a smooth process and to answer any questions the VAT Administration may have.
- ▶ We can also assist with the regularization of past VAT returns and liaise with the Luxembourg VAT Authorities, with a view to recovering any VAT previously incurred on director services.

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