

# ATOZ ALERT

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## Recent VAT developments

28 September 2022

These past few weeks have brought plenty of news that will impact the Luxembourg VAT practice. You will find hereafter a summary of the key elements.

### Temporary reduction of the Luxembourg VAT rates

On 20 September 2022, the Luxembourg Prime Minister announced that the Government, the employer representatives and the trade unions reached a gentlemen agreement on an anti-inflation package of more than one billion euros aiming to help households and businesses. Among the measures to be introduced by this package, it has been agreed to temporarily lower the following Luxembourg VAT rates by 1%:

- The standard VAT rate of 17% will be lowered to 16%
- The intermediary VAT rate of 14% will be lowered to 13%
- The reduced VAT rate of 8% will be lowered to 7%.

The super-reduced VAT rate of 3% will remain unchanged.

Based on the tripartite agreement signed on 28 September 2022, the 1% reduction of the VAT rates will become effective as from 1 January 2023 and will remain applicable until 31 December 2023.

Luxembourg businesses will need to have their invoices and ERP/invoicing-systems updated as soon as the measure will enter into force.

## Directors' fees and VAT: potential future changes?

On 29 April 2022, the Luxembourg District Court made a referral to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling in the case TP v. *Administration de l'enregistrement, des domaines et de la TVA* (Case C-288/22) on the VAT treatment of activities carried out by a natural person as a member of the board of directors of a public limited company.

In the case at hand, Mr. TP was sitting on the board of various companies and considered that his director's percentage fees (“*tantièmes*”) were not subject to VAT. In accordance with the Circular Letter published in 2016, the VAT authorities were of the opinion that VAT should have been charged on these director's percentage fees.

Following the referral of the Luxembourg District Court, the CJEU will have to determine whether directors' fees are subject to VAT or fall outside of the VAT scope.

### Two opposing visions on a complex question

#### [Mr. TP and the “theory of the organ”](#)

Mr TP, acting as a natural person, sits on the board of various Luxembourg companies. TP considered that his director's percentage fees (“*tantièmes*”) were not subject to VAT and did not charge VAT on them. This position is notably based on the theory of the organ. Under that approach, the board member is an organ of the legal person he represents and, for this reason, is not independent of that legal person.

The EU VAT directive and the Luxembourg VAT law are clear on the fact that, to fall within the scope of the VAT, an economic activity must be conducted “independently”. The lack of independence of the director would induce that his/her mandate would not fall within the scope of the VAT, justifying the non-application of the VAT on the related percentage fees.

#### [The VAT authorities and the notion of “economic activity”](#)

In line with the Circular letter n°781 published in 2016, the Luxembourg VAT authorities consider that the activity of TP is an economic activity subject to VAT. According to them, Mr TP acts independently, considering notably his working conditions, remuneration and liability.

### The questions referred to the CJEU

The CJEU will have to assess whether Mr TP performs an “economic activity” carried out “independently” to answer the questions referred by the Luxembourg District Court. In other words, the CJEU will have to conclude on (1) the existence of a link between the director's percentage fees earned and the services provided and (2) the independence of a director in the frame of his/her mandate.

### Potential implications

In case the CJEU were to conclude that director's percentage fees do not fall within the scope of the VAT, the Luxembourg VAT environment would experience a true Copernican revolution. Luxembourg directors (at least those acting as natural persons) would no longer be considered as VAT taxable persons and VAT would no longer be chargeable on directors' percentage fees. In addition to decreasing the administrative burden at the level of the directors (VAT registration, VAT filings, etc.), such a change would benefit to companies with no or limited VAT recovery right for which VAT charged or self-assessed on directors' fees constitutes a final cost.

The VAT treatment of directors' fees varies across the EU due to divergent interpretations, notably on the theory of the organ. The position of the CJEU is therefore much awaited.

## No VAT deduction for a holding company on costs contributed to subsidiaries in exchange of a profit distribution

On 8 September 2022, the CJEU released its judgement in Case Finanzamt R v W GmbH (C-98/21). W is an active holding company providing VAT taxable accounting and management services to its subsidiaries X and Y. These services, supplied for consideration and subject to VAT, granted a VAT deduction right to W.

Besides, W purchased services related to the real estate projects developed by the two subsidiaries (e.g. architectural services, energy supply, fit-out services, etc.). These services were contributed in kind by W to X and Y in exchange of a future share in the profits to be earned by those subsidiaries.

The CJEU ruled that W was not entitled to deduct the input VAT incurred on the services received in relation to projects of X and Y, where:

1. the services purchased and subsequently contributed have direct and immediate links with the VAT exempt activities of the subsidiaries (not entitled to recover input VAT) and do not have such a link with the VAT taxable activity of W (i.e. no link with the accounting and management services);
2. those costs are:
  - a. not included in the price of the taxable services provided by W to the subsidiaries, and
  - b. not part of the overhead costs of the holding company's own economic activity.

Once again, holding companies are reminded to pay a particular attention to the determination of their VAT deduction right. The demonstration of a “direct and immediate” link between the costs borne and the turnover granting a VAT recovery right is the best way to secure their VAT recovery right. In order to do so, particular attention should be paid to factual elements as well as to the legal documentation reflecting the nature of the services received and rendered.

Our VAT experts, Thibaut Boulangé, Justine Guilly, Lionel van der Noot and Silvin Leibengut, are available to discuss the potential impacts of these VAT news on your activities and to handle any questions you may have.

### Do you have further questions?



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