

ATOZ ALERT

Director Fees: No VAT according to the CJEU

4 January 2024

On 21 December 2023, the Court of Justice of the European Union (“**CJEU**” or “**the Court**”) issued its decision on the VAT status of independent directors in the “TP” case (C-288/22).

This long-awaited decision constitutes a true Copernican revolution in the Luxembourg VAT world as the Court concluded that directors’ fees do not fall within the scope of VAT as long as directors are not acting independently. Consequently, and in such situations, director fees are therefore no longer subject to VAT.

This decision is in stark contrast with the position of the Luxembourg VAT authorities as reflected in Circular letter no. 781 dated 2016 (the “**2016 Circular**”).

Background

Mr. TP is a member of the board of directors of several public limited companies and earns percentage fees (*tantièmes*). He was of the opinion that these activities performed as a member of the board of directors did not constitute an “economic activity” carried out independently for VAT purposes and therefore did not fall within the scope of VAT. As such, he did not charge any VAT on his percentage fees.

In line with the 2016 Circular, the Luxembourg VAT authorities considered that the activity of Mr. TP was an economic activity subject to VAT on the basis that director services were provided for consideration and on a permanent basis.

Seized of the case, the District Court of Luxembourg requested a preliminary ruling to the CJEU to determine whether a director effectively performs an economic activity and, if so, whether such activity is carried out independently. In order to confirm the position of the VAT authorities that considers director fees as falling within the scope of VAT and, with some specific exceptions, subject to VAT, the CJEU has to cumulatively answer these two questions positively.

Decision of the Court

DIRECTORS PERFORM AN ECONOMIC ACTIVITY...

In its [decision of 21 December 2023](#), the CJEU concludes that the member of a board of directors carries out an economic activity where he supplies services “*for consideration, provided that that activity is effected on a continuing basis and for a remuneration for which the procedures for fixing that amount are foreseeable*”.

Based on our experience and in most cases, directorship functions are conducted in a continuous manner and the related remuneration is foreseeable. The activity of a director is therefore “economic” from a VAT perspective.

...BUT NOT INDEPENDENTLY...

Following the position of the Advocate General Kokott, the Court reminds that an economic activity should be performed independently to fall within the scope of VAT. The decisive factor for the independence assessment should be whether the director personally and directly bears an economic risk in the context of their activity.

Noticing that “*it is the company itself that will have to confront the negative consequences of the decisions adopted by the board of directors and that will accordingly bear the economic risk resulting from the activity of the members of that board*”, the Court concludes that a director of a public limited company does not bear the economic risk linked to their activity.

In light of the facts at stake and considering the Luxembourg law based on which board members do not assume any personal obligations concerning the debts of the company, the Court ruled that Mr. TP should not be considered as performing his activity independently. As a consequence, he should not qualify as a “taxable person” for VAT purposes.

...PRECLUDING THE APPLICATION OF VAT ON THEIR FEES...

Insofar as Mr. TP is not acting as a taxable person for VAT purposes, the directors’ fees earned fall outside the VAT scope and are therefore not subject to VAT.

Luxembourg impacts

SCOPE OF THE JUDGMENT – POINT OF ATTENTION

The decision of the Court is based on the one hand on the facts of the case, i.e. TP did not have a casting vote within the boards of the public limited companies, he was not responsible for the representation or the day-to-day management of the company, nor was he a member of the management committee, and on the other hand, on the Luxembourg law provisions.

As a result, depending on the mandates (i.e. daily operations, etc.) and legal form of the company (public limited company, etc.), a case-by-case analysis should be performed in order to assess the level of independence and to confirm whether directors’ fees fall outside the VAT scope.

CONSEQUENCES FOR BUSINESSES

Where directors are not seen as independent from a VAT perspective, the consequences of the judgment are the following:

- Luxembourg VAT is no longer applicable on directors’ fees paid to Luxembourg-based directors; and

- Luxembourg VAT is no longer due under the reverse charge mechanism when directors are established outside of Luxembourg.

This decision is particularly welcomed by companies with no or limited VAT deduction rights as VAT on directors' fees will no longer be constitutive of a VAT leakage for them.

CONSEQUENCES FOR DIRECTORS

For directors that are not seen as independent from a VAT perspective, the consequences of the judgment are the following:

- Directors are relieved from the obligation to charge VAT;
- Directors no longer have to determine whether the VAT exemption for fund management services applies to part or all of the services they provide; and
- Directors registered for VAT purposes will have to de-register for VAT to the extent they do not perform other activities requiring such VAT registration.

This decision will decrease the VAT compliance burden lying on directors (VAT registration, filing of VAT returns, issuance of VAT compliant invoices, etc.). On the negative side and due to the absence of turnover granting a VAT deduction right, directors will no longer be entitled to recover input VAT incurred on their own costs.

Next steps

CIRCULAR LETTER 781-1 AND THE FUTURE JUDGMENT OF THE DISTRICT COURT

The TP case has been referred back to the Luxembourg District Court to be judged in light of the preliminary ruling of the CJEU.

In parallel and following the publication of the CJEU decision, the Luxembourg VAT authorities released [Circular letter no. 781-1](#) suspending, with immediate effect, the effects of the 2016 Circular until the decision of the Luxembourg District Court.

RETROACTIVE EFFECT AND SCOPE OF THE NEW CIRCULAR LETTER TO COME?

On their website, the VAT authorities also mentioned that a new circular letter will be published following the judgment of the District Court. This circular letter will:

- Ensure a “*non-bureaucratic regularisation of the VAT (...) until the statutes of limitation*”.

It can therefore be expected that the circular letter will provide details on the regularisation to be performed for the past (the period of limitation for the year 2019 will be closed at the end of 2024). This point should be closely monitored by companies with no or limited VAT deduction rights having incurred irrecoverable VAT costs on director fees during the past few years.

- Cover the specific situation of companies providing directorship services as “*they will have to amend their VAT deduction right*”.

For these companies and to the extent that they are not “independent”, the turnover granting a VAT deduction right prior to the TP case should be recharacterised as not granting such VAT deduction right leading to a potential decrease of their VAT deduction right.

Do you have further questions?

Our VAT team will comment the new circular letter when published and is available for any questions you may have or should you need assistance with handling the above-mentioned VAT aspects.

We will be hosting an [ATOZ VAT](#) briefing on **23 January 2024 at 3pm CET**, where members of our team will share updates on the TP case and the related impacts for directors and companies receiving director services. An invitation will be circulated in due course.



THIBAUT BOULANGE
Partner, Head of Indirect Tax
thibaut.boulange@atoz.lu
T + 352 26 940 270



SILVIN LEIBENGUT
Principal, Indirect Tax
marie.bentley@atoz.lu
T +352 26 940 903



JUSTINE GUILLUY
Director, Indirect Tax
justine.guilluy@atoz.lu
T + 352 26 940 294



LIONEL VAN DER NOOT
Director, Indirect Tax
lionel.vandernoot@atoz.lu
T + 352 26 940 609