



Court of Justice of the European Union challenges Luxembourg VAT administration's approach on director fees

Following the decision of the ECJ in the Case C-288/22, the Luxembourg VAT Authorities have suspended their Circular 781-1 dated September 30th, 2016, in relation to the activities of company directors.

As a reminder, a preliminary ruling had been requested by the Luxembourg tribunal (Tribunal d'arrondissement) to the Court of Justice of the European Union (ECJ) to determine whether VAT must be applied on directors' fees.

The current practice in Luxembourg was to apply Luxembourg VAT on director fees charged by a natural person as a board member of a Luxembourg company. This VAT treatment was based on the fact that directors would carry out in such a case an economic activity in the meaning of the EU VAT Directive. It was clarified by the circular 781 issued by the Luxembourg VAT Authorities on 30 September 2016, detailing the basis and exact scope of application.

Through its request, the Luxembourg tribunal intended to clarify whether such an approach is in fact legitimate under the provisions of the EU VAT Directive.

On 21 December 2023, the ECJ answered as follows:

- A member of the board of directors of a public limited company incorporated under Luxembourg law is considered as carrying out an “economic” activity within the meaning of Article 9 of the VAT Directive if he/she provides services for consideration to that company and if that activity has a permanent nature and is carried out in consideration of a remuneration, for which the amount is determined based on a foreseeable method;
- That the member of the board of directors of a public limited company incorporated under Luxembourg law is not carrying out his/her activity “independently”, within the meaning of Articles 9 and 10 of the VAT Directive, even though he/she:
 - freely organizes the way in which his/her work is performed;
 - receives himself/herself the emoluments constituting his/her income;
 - acts in his/her own name;
 - is not subject to a hierarchical relationship of subordination,

if he/she does not act on his/her own behalf or under his/her own responsibility and does not bear the economic risk associated with his/her activity.

As a result, the activities of directors that fall within the criteria set out by the ECJ should no longer be subject to VAT.

On 22 December 2023, the Luxembourg VAT Authorities announced that, as soon as the Luxembourg tribunal issues its judgement, they will ensure that the VAT due by directors is regularized in a non-bureaucratic manner until the limitation period expires, and that a detailed circular will be issued at that time. The Luxembourg VAT Administration also specifies that companies whose directors have invoiced them for VAT will have to adjust their input VAT accordingly. On the same day, the Luxembourg VAT Authorities published Circular 781-1, suspending Circular 781 with immediate effect pending the decision of the Luxembourg tribunal.

All eyes are now on the Luxembourg tribunal to know the final approach of the Luxembourg VAT authorities on this topic.

Our VAT team will closely manage any new developments in this area and remain at your entire disposal should you have any question or need of assistance regarding this matter.

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