

## Input VAT newsletter

### Advocate General opines on VAT impacts for directors

18 July 2023

On 13 July 2023, the Advocate General with the Court of Justice of the European Union (CJEU), Mrs. Kokott, delivered her conclusions in the “TP” case (C-288/22). She opined that a natural person acting as director of company is not a VAT taxable person. If the Court follows this opinion – as yet unconfirmed – this might have substantial consequences in Luxembourg. Considering the usual delays, we could expect that the CJEU should deliver their ruling at the end of 2023 or the very beginning of 2024.

#### Background

On 30 June 2016, the Administration de l'Enregistrement, des Domaines et de la TVA (AEDT, Luxembourg's VAT authorities) issued their Circular 781 to clarify that a director of company is a VAT taxable person. This clarification was necessary at the time because different approaches were applied in Luxembourg:

- Some as in Belgium and France, considered that the director is the “organ” of the company and thus not a VAT taxable person.
- Others considered that the activity of a director is a service taxable to VAT as it is generally the case of services.

A Luxembourgish lawyer, referred to as “TP,” who is also non-executive director of different Luxembourg companies has decided not to apply the VAT on fees he receives as a director. The VAT authorities assessed him, he did not accept their assessment, and the affair came to the Luxembourg Civil Tribunal, which decided to refer the case to the CJEU.

#### Questions referred

- *Is a natural person who is a member of the board of directors of a public limited company incorporated under Luxembourg law carrying out an “economic” activity within the meaning of Article 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and more specifically, are percentage fees received by that person to be regarded as remuneration paid in return for services provided to that company?*
- *Is a natural person who is a member of the board of directors of a public limited company incorporated under Luxembourg law carrying out his or her activity “independently,” within the meaning of Articles 9 and 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?*

## Arguments of the parties and hearings

Please refer to our newsletter in [September 2022](#), issued when the request of preliminary ruling was made available, where we detailed the arguments of the parties. These arguments are around the responsibility and economic risk supported by directors. During the hearings on 17 May 2022, the parties were able to develop their arguments and answer the judges' questions. The judges asked to consider only the second question (does a director act independently?). The European Commission also intervened. The debates focused mainly on the question of a director's responsibility toward the company and third parties. Mr. TP's lawyers argued that, except in very specific situations, a director has no personal responsibility because the responsibility lies with the board of directors, while the AEDT's lawyers argued that a director has a personal responsibility in different situations, such as the responsibility to pay taxes, including VAT, due by the company. The European Commission argued that a case-by-case approach is necessary and should consider elements such as the type of remuneration.

## Conclusions of the Advocate General

After an in-depth analysis of the role and function of directors, the Advocate General considers that the decisive factor to determine if a director acts as a taxable person is whether he personally supports an economic risk and acts on his own initiative, which must be determined by the referring court.

The Advocate General adds that a natural person acting as a director, which is required by law and who receives a remuneration for that activity, cannot be regarded as carrying out an independent economic activity. Therefore, a director could not be considered as a VAT taxable person.

## What if the CJEU follows and decides that a natural person acting as a director is not a taxable person?

We should first emphasize that, even though the CJEU often follows the opinion of its Advocate General, there are exceptions, and we could still see a divergent decision. If the CJEU decision follows the opinion of the Advocate General, this would have substantial consequences because it contradicts the position of the AEDT, Luxembourg's VAT authorities. A CJEU decision aligned to the Advocate General may imply that directors could deregister for VAT, stop charging VAT on their fees and cease to fill in VAT returns.

It would, in principle, be possible to claim back the VAT paid during the statute of limitation period (five years from 31 December of the year when the VAT is due). Different elements should be considered, such as:

- Whether remuneration paid to the director is foreseen as VAT inclusive,
- Whether the company paying the remuneration is able to fully deduct the VAT,
- Whether the director is established in Luxembourg and has charged the Luxembourg VAT to the company or is established abroad, which means that the company should assess the Luxembourg VAT pursuant the reverse charge mechanism.

In addition, do not forget that, should a director be considered as a non-taxable person, the VAT incurred on costs would become not deductible.

Lastly, no matter the CEU's final decision, the impact for the numerous directors of investment funds should be limited. Indeed, their fees are already not subject to VAT because they are exempt as fund management services pursuant article 44.1.d) of the Luxembourg VAT law.

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This case is certainly a very interesting one for VAT specialists and, more importantly, a very significant one. All concerned persons should envisage the potential impact of the decision between now and when the CJEU releases their final decision.

Deloitte Luxembourg's Indirect Tax Team remains at your disposal to discuss the potential impacts on your organization.

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