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Input VAT newsletter

CJEU's preliminary VAT ruling on the provision of vehicles by Luxembourg employers to staff members residing abroad: Advocate General's opinion (C-288/19)

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Should providing vehicles to staff members be considered as a "hiring of a means of transport to a nontaxable person"? And, where should these services be taxed for VAT purposes: in the employer's or the employee's Member State? These are the two main questions the European Court of Justice (CJEU) must answer in this preliminary ruling.

European Union (EU) companies that provide company cars to their employees residing abroad should consider the impact of this case, given its implied additional VAT obligations, potential VAT reimbursements, or liabilities in neighboring countries, all of which may result in an extra administrative burden.

In case C-288/19, the CJEU is tasked with deciding the location and, as a result, how the provision of cars to employees should be treated from a VAT perspective.

Background

QM, a Luxembourg-established company, provides two of its employees residing in Germany company cars that form part of its business assets. During the years referred to in the case, QM received from one of the employees a contribution to the car's costs, which was deducted from the employee's remuneration.

As QM's activity is in fund management, it is registered for VAT under the "simplified tax regime" in Luxembourg and, therefore, could not claim input VAT on the costs relating to these company cars. Following a circular issued in 2014 by the German VAT authorities regarding the provision of vehicles, QM registered for VAT in Germany that same year at the Finanzamt Saarbrücken tax office (the "German tax office"). It reported its provision of the vehicles in its German 2013 and 2014 VAT returns. This has been accepted by the German tax office.

However, QM objected to the 2013 and 2014 VAT assessments issued by the German tax office, which the latter considers as unfounded.

QM requests that the VAT for 2013 and 2014 to be fixed at EUR0, as it considers that the requirements for levying VAT on the provision of company cars in Germany were not met. QM's view is that the company cars were not provided for consideration within the provisions of EU law, as the employees did not make a payment nor gave up part of their cash remuneration to benefit from these cars. And, referring to the CJEU's current case law, QM also considers that making company assets available for private purposes without requiring a contribution from employees should be seen as a benefit in kind rather than a hiring service.

Therefore, it is QM's view that the vehicles should be considered as provided in the place where the supplier has established its business, i.e., Luxembourg in the present case, meaning that tax should not be levied in Germany.

The German tax office requests that QM's action be dismissed as unfounded. It considers that the provision of the vehicles to employees should be seen as a service provided for consideration in the form of long-term hiring out of a means of transport. Therefore, it should fall under the concept of "hiring of a means of transport to a nontaxable person" within the meaning of the VAT Directive, where the place of supply is the employee's permanent address (i.e., the Federal Republic of Germany).

The outcome of this dispute depends on the interpretation of Article 56 (2) of the VAT Directive (i.e., Article 17.2.7°.b) of the Luxembourg VAT law). The question of whether the VAT Directive's concept of "hiring of a means of transport to a nontaxable person" should also cover the provision of a company car that forms part of the business' assets to its staff, if the employee does not provide consideration for it, was referred to the CJEU by the referring court in April 2019.

The Advocate General's opinion

The Advocate General (AG) rendered his opinion on 17 September 2020 and made a distinction between the two employees.

In the first instance, the AG considered that the supply of the car to the first employee, who did not contribute to the costs incurred in relation to the vehicle, should not be considered as a supply of services for contribution. In the AG's view, it should only be considered as such when an employee does not support any costs, nor waive part of their remuneration or other benefits due to them by the employer, nor carry out additional work for the provision of said vehicle.

For the second employee, who did contribute (via a salary deduction), the AG considered that the national judge should assess whether QM provided a vehicle constituting an element of its business assets for the worker's private needs for more than 30 days and for consideration. The AG specified that, in this case, this service should be regarded as the hiring of a means of transport to a nontaxable person. Consequently, this service should be taxable where the employee resides.

We would like to emphasize that, even though the AG's opinion is important, the CJEU is not bound by it; therefore, the CJEU could still deviate from the opinion or contradict the AG.

In any case, the CJEU's answer to this preliminary ruling could have a significant impact on Luxembourg companies and its conclusions will need to be carefully analyzed.

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For example, what happens if the CJEU follows the AG's opinion and considers that the supply of vehicles to employees is a service for contribution and the place of supply is the employees' permanent address? This would result in a significant administrative burden for Luxembourg companies as we expect they would have to fulfill some administrative obligations to pay the VAT in Germany.

And, what happens if organizations have employees residing in France or Belgium with company cars? Employers would have to compute and declare VAT on the supply of these vehicles by applying the different rules of these countries, which may be more complex and costly than Luxembourg's rules.

Even if the CJEU deviates from the AG's point of view and believes that the supply of vehicles to employees is a service for consideration provided in Luxembourg, questions will still arise. Companies who registered for VAT in Germany to report and pay VAT on the supply of vehicles to their employees residing in Germany will have to investigate whether they can reclaim the VAT they paid in previous years.

We will continue to monitor this CJEU case closely and keep you posted on any updates.

Deloitte Luxembourg's indirect tax team remains at your disposal to discuss the potential impacts of these questions to your organization.

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