

## Input VAT newsletter

### Is a natural person acting as a director a taxable person for VAT?

### The CJEU deliberates.

12 September 2022

On 29 August 2022, the official journal of the European Union published the request lodged with the Court of Justice of the European Union (CJEU) by the Luxembourg Civil Tribunal. This request questioned whether a natural person (or individual person) acting as director of company is a VAT-taxable person C-288/22, 12 August 2022). A negative answer from CJEU would contradict the current Luxembourg practice and would imply that director fees currently subject to VAT would become VAT free. The CJEU procedure will last at least one year, which gives concerned persons, directors and companies time to contemplate potential impacts.

#### Background

On 30 June 2016, the Luxembourg VAT authorities issued their circular 781 to clarify that a director of company is a VAT-taxable person. At that time, this clarification was necessary to unify different approaches adopted in Luxembourg because some operators adopted the interpretations then applicable in Belgium or France that a director is the “organ” of the company and thus not a VAT-taxable person, while some adopted the one then applicable in Germany and the Netherlands that the activity of a director was a service taxable for VAT.

A Luxembourgish lawyer, referred to by CJEU as “TP,” who is also non-executive director of different Luxembourg companies, decided not to apply the VAT on fees he received as a director. In July 2020, the VAT authorities disagreed with this approach and issued a reassessment of the VAT treatment applied. TP decided to claim against this decision and brought the case in front of 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

Although we will not detail all [26 pages of the preliminary request](#), we will highlight the main arguments brought forward by the parties to determine whether a natural person acting as a director of a company performs or not an economic activity in an independent manner.

TP argues that a director only acts as the member of an “organ,” while the board of directors is the legal representative of the company and thus not independent. According to TP, this is further demonstrated by the fact that when a director is in charge of the day-to-day management, which is a task outside the scope of the director activity, he is usually remunerated for this and this remuneration qualifies as a salary for income tax purposes. He adds that a director does not support the economic risk of his activity, which is borne by the company, and that he has no personal obligations or liability toward the company and third parties except when he clearly exceeds the limits of acceptable conduct which is a wrongful act separable from the function of director. For these reasons, TP considers that a director does not act independently and is therefore not a taxable person for VAT. This means, of course, that his remuneration should not be subject to VAT.

TP also refers to the “IO” case (C-420/18, 13 June 2018) where the CJEU ruled that a natural person who acts as a member of the supervisory board of a Dutch foundation is not a VAT-taxable person because he does not act independently and supports no economic risk. However, we may wonder whether the role and responsibilities of a supervisory board member of a Dutch non-profit foundation is similar enough to those of a Luxembourg commercial company director to be considered decisive in this case.

To the contrary, the Luxembourg VAT authorities consider that a director acts independently and is a VAT-taxable person (and that his remuneration is subject to VAT) because, unlike an employee, he organizes his activity independently, is revocable “ad nutum” (without any delay), which is different from employee protection, and that he could be made responsible towards third parties. In this respect, the VAT authorities indicate that directors are more and more frequently made responsible for the payment of VAT unpaid by a company for which they act as director of when the non-payment results from their faulty behavior. Per article 67.3 of the Luxembourg VAT law, this responsibility hangs on all “de jure” or “de facto” managers of any entity which qualifies as a VAT-taxable person, including not-for-profit entities.

The VAT authorities also argue that the remuneration of a director is, at least partly, dependent on the results of the company to incentivize them. In this respect, it should be noted that a 2020 ILA survey indicated that 88% of Luxembourg directors receive only a fixed fee, only 1% of directors receive only a variable remuneration, while the remaining 11% receive only attendance fees or a mix of attendance fees and fixed or variable remuneration.

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

Directors of investment funds and similar entities covered in article 44.1.d of the Luxembourg VAT law (fund management exemption) should not be affected by the decision because their remuneration is already not subject to VAT due to this exemption.

Entities and natural persons not under this exemption should consider:

- Whether the remuneration paid to the director is foreseen as VAT inclusive or exclusive, if the company paying the remuneration is able to deduct fully or without VAT;
- Whether the director is established in Luxembourg and has charged Luxembourg VAT to the company;
- Or whether the director is established abroad which means that the company should self-assess the Luxembourg VAT pursuant the reverse charge mechanism.

Lastly, it should not be forgotten that if a director is considered as a non-taxable person, the VAT incurred on related costs would become not deductible.

**This case is very interesting for VAT specialists and, more importantly, for directors and for the companies of which they are directors. They should think how it could affect them before its release.**

**Deloitte Luxembourg’s Indirect Tax Team is at your disposal to discuss the potential impacts on your organization.**

# Your contacts

**Raphaël Glohr**

Partner | Indirect Tax – VAT  
T +352 45145 2665  
[rglohr@deloitte.lu](mailto:rglohr@deloitte.lu)

**Joachim Bailly**

Partner | Indirect Tax – VAT  
T +352 45145 2824  
[jbailly@deloitte.lu](mailto:jbailly@deloitte.lu)

**Christian Deglas**

Partner | Indirect Tax – VAT  
T +352 45145 2611  
[cdeglas@deloitte.lu](mailto:cdeglas@deloitte.lu)

**Cédric Tussiot**

Partner | Indirect Tax – VAT  
T +352 45145 2604  
[ctussiot@deloitte.lu](mailto:ctussiot@deloitte.lu)

Deloitte Luxembourg  
20 Boulevard de Kockelscheuer  
L-1821 Luxembourg  
Grand Duchy of Luxembourg

Tel: +352 451 451  
Fax: +352 451 452 401  
[www.deloitte.lu](http://www.deloitte.lu)

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