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By PwC Deutschland | 29. Dezember 2023

ECJ: VAT liability for member of the board of directors of a Luxembourg company

In a request from Luxembourg for a preliminary ruling, the European Court of Justice (ECJ) was asked whether the member of the board of directors (MBD) of a Luxembourg public limited company pursues an economic activity which is carried out independently and thus subject to Value Added Tax. In previous cases this question was addressed only for a member of a supervisory board and a managing director and answered by the Court in the negative. In the current case the ECJ has reservations as to the independence of the service provided by the MBD.

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Background

TP is a member of the board of directors of several public limited companies incorporated under Luxembourg law and carries out many assignments in that regard. These include receiving the reports of the senior managers or representatives of the companies concerned, discussing strategic proposals, the choice of operational managers, questions related to the accounts of those companies and their subsidiaries as well as the risks they face. He also takes part in various decision-making processes to be submitted to shareholder meetings. In his capacity as board member, TP received bonus payments in a percentage share of the company's profits.

ECJ decision

In its decision the ECJ applied **Articles 9 and 10 of the VAT Directive** when answering the **two questions** referred to it:

1. *A member of the board of directors of a public limited company under Luxembourg law* ***carries out an economic activity****, where he or she supplies services to that company for consideration, provided that that activity is rendered on a continuing basis and in return for remuneration, the terms and conditions of which are foreseeable.*

In view of ECJ case-law it should be considered that the appointment of a natural person, such as TP, as a member of the board of directors of a public limited company under Luxembourg law for a renewable term of office of a maximum of six years means that TP's activity must be regarded as having a continuing basis. The fact that such a term of office may be summarily terminated at any time and without reason, and that its holder may also withdraw from the agreement at any time, cannot deprive that activity of its continuing character where a maximum duration of six years is attached to that term of office. Also, with respect to the six-year duration of the term of office, the ECJ concludes that the remuneration in the form of percentage fees is received on a continuing basis (more to that effect to be found in the ECJ judgment **C?420/18** of 13 June 2019, *IO* regarding the activities of a member of a supervisory board).

2. *The activity of a member of the board of directors of a public limited company under Luxembourg law is* ***not carried out independently****, where – despite the fact that that member is free to arrange how he or she performs their work, receives the emoluments making up his or her income, acts in his or her own name and is not subject to an employer-employee relationship – he or she does not act on their own behalf or under their own responsibility and does not bear the economic risk linked to their activity.*

The ECJ notes that where a person (such as TP) contributes his expertise and know-how to the board of directors of a company and votes in that board, he does not appear to bear the economic risk linked to his own activity since 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.

More details of the judgment in the case C-288/22,*Administration de l'Enregistrement, des Domaines and*

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de la TVA) to be found **here**.

Comment on the German legal situation

In its judgment of 27 November 2019 (V R 23/19 / R 62/17), the **Supreme Tax Court** commented on the entrepreneurial status of members of a Supervisory Board and held that where a member of a supervisory board receives a non-variable fixed salary for his services and as a result does not bear any risks vis-à-vis his remuneration, he is not acting as an entrepreneur. With this decision the Supreme Tax Court abandoned its earlier case law and agreed with the ECJ case law, in cases where the supervisory board member received a fixed remuneration for his work which was not dependent on his attendance at meetings, or the hours worked.

In its ruling dated 19 November 2019 (case: 5 K 2828/18), the **Lower Saxony Tax Court** held that the chairman of the board of directors of a professional pension fund is not subject to VAT for this activity. The appeal is currently pending before the BFH under case no. V R 6/20.

In a subsequent ruling of 8 October 2020 (case 5 K 162/19), the **Lower Saxony Tax Court** essentially confirmed its earlier judgment and decided in a comparable case that even an ordinary member of the board of directors of a professional pension fund is not a taxable person within the meaning of Art. 9 of the VAT Directive if they do not carry out this activity at their own economic risk. According to generally available information, this decision is legally binding as no appeal was brought before the Supreme Tax Court.

Schlagwörter

boards, supervisory board remuneration