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By PwC Deutschland | 15 November 2024

ECJ: Liability of managing director for failure to duly notify the tax office of the company’s inability to pay

Following a request for a preliminary ruling from the Supreme Court of the Netherlands, the European Court of Justice commented on the Dutch legislation providing for joint and several liability of the establishment's administrator and specifically the circumstances under which the shareholder and managing director of a Dutch holding company may be held liable for the company’s inability to pay the taxes due.

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Background

Under local Dutch law, each director of a legal entity is in principle jointly and severally liable for certain taxes owed by that legal entity. If the legal entity is unable to pay the taxes that it owes, it must notify the tax authorities of this inability to pay.

KL was the director and sole shareholder of a Dutch management holding company. Until 29 March 2019 the holding company was the director and sole shareholder of an operating company. On that date the holding company transferred the shares which it held in the operating company to a third party.

The revenue issued additional assessments for salary tax and for VAT to the operating company. Those tax assessments were based on the declarations made by the operating company. The operating company did not pay the taxes.

The Court of Appeal found that KL had been wrongly held liable for the wage tax and VAT since he had resigned from his position as director of the holding company as of 29 March 2019. The period provided for notifying the inability to pay the tax due for February 2019 had in fact not yet expired on that date. KL should therefore have been classified as a former director for that month, as provided for by Dutch law.

However, KL had to be held liable for the salary and turnover tax debts related to the months from November 2018 to January 2019, during which, first, KL was acting as director of the holding company and, second, the operating company had not duly notified its inability to pay those taxes.

Decision

By its **first question**, the referring Supreme Court of the Netherlands asked, in essence, whether Article 273 of Directive 2006/112, read in the light of the principle of proportionality, must be interpreted as precluding national legislation under which a director of an entity which has not complied with the obligation to notify its inability to pay a tax debt must, in order to be relieved of his or her joint and several liability for the payment of that debt, demonstrate that the failure to comply with that notification obligation is not attributable to him or her.

The ECJ held that **EU law does not preclude** a national legislation under which a director of an entity which has not complied with the obligation to notify its inability to pay a value added tax debt must, in order to be relieved of his or her joint and several liability for the payment of that debt, demonstrate that the failure to comply with that notification obligation is not attributable to him or her. Imposing responsibility for paying VAT on a person other than the person liable to pay that tax, without allowing him or her to escape liability by providing proof that he or she had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality.

It is apparent from the request for a preliminary ruling that if the management director succeeds in establishing that the failure to comply with that obligation is not attributable to him or her, it is also open to that person to demonstrate that the entity's inability to pay is not the result of manifest mismanagement on

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his or her part during the three years preceding the due payment date. Since, in that situation, the director is only required to raise circumstances which exclude manifest mismanagement on his or her part, the fact that that person bears the burden of proof does not appear to constitute an excessive procedural obligation.

As to **the second question** referred, the ECJ notes that **EU law does not preclude** the Dutch legislation which has the effect that the director of an entity which has failed to notify the latter's inability to pay remains jointly and severally liable for the payment of a value added tax debt relating to a particular period, whereas he or she has been released from a debt on the same basis related to an immediately following period after being able to demonstrate that he or she acted in good faith and exhibited, during the previous three years, all the due diligence required of a circumspect trader in order to prevent the entity from being unable to honor its obligations and his or her participation in abuse or fraud is excluded.

Source:

ECJ, judgment of 14 November 2024 in the case C-613/23 - *Herdijk*.

The ***complete judgment*** of the ECJ to be found **here**.

Keywords

liability for VAT, owner/manager