

VAT AND DIRECTORS' FEES: FINAL GUIDELINES ISSUED BY THE LUXEMBOURG VAT AUTHORITIES

On 11 December 2024, the Luxembourg VAT authorities (*Administration de l'Enregistrement, des Domaines et de la TVA*) issued the circular n°781-2 (the "**Circular**"), completing circular n°781 of 30 September 2016 and providing additional criteria for determining VAT liability as a company's director.

The Circular provides also practical information on the recovery procedure of the VAT unduly paid by a director of a Luxembourg company on his/her/its remuneration, further to the decision of the Luxembourg District Court (*Tribunal d'arrondissement*) of 22 November 2024, implementing the ruling of the Court of Justice of the European Union ("**CJEU**") of 23 December 2023.

CASE LAW

On 21 December 2023, the CJEU ruled on whether directors' fees (*tantièmes*) of a Luxembourg company should be subject to VAT (case C-288/22).

The question referred to the CJEU was whether the function of member of a board of directors of a Luxembourg public limited company (i.e. *société anonyme*) (i) is an economic activity (ii) which is performed independently by the board member – in the meaning of the VAT Directive – leading to the taxation of such activity.

In Luxembourg, according to circular n°781 of 30 September 2016, the VAT authorities considered that director mandates exercised independently by private individuals or legal persons constitute an activity falling within the scope of VAT. Thus, since 1 January 2017, directors' fees were subject to VAT at the standard VAT rate and Luxembourg-based directors were liable to register for VAT, issue VAT-compliant invoices and file Luxembourg VAT returns.

In the case at hand, the CJEU ruled that directors may carry out an economic activity to the extent that they supply services to the company on a permanent basis – in the case at hand due to the director's renewable six-year term – in consideration of a remuneration for which the procedures for fixing the amount are foreseeable. In addition, the CJEU considered that there is a direct link

Key issues

- VAT
- Directors' fees
- Economic activity not carried out independently
- Recovery procedure of VAT unduly paid
- Statute of limitation

between the service and the remuneration since the director was remunerated in respect of its function of a member of the board of directors.

Additionally, the CJEU ruled that this economic activity is not carried out independently despite the director is free to arrange how to perform his work and not subject to an employer-employee relationship. Indeed, it was ruled that the company itself bears the economic risk linked to the decisions taken by the director, thereby excluding the independent character of the director's economic activity.

On 22 November 2024, the Luxembourg District Court rendered a judgment confirming the ruling of the CJEU, according to which a member of the board of directors of a Luxembourg public limited company, not acting under his own responsibility and not bearing the economic risk linked to his activity, does not exercise his role independently and, therefore, cannot be considered subject to VAT in Luxembourg.

GUIDELINES ISSUED BY THE LUXEMBOURG VAT AUTHORITIES

Following the ruling of the CJEU, the Luxembourg VAT authorities announced that they would issue a new circular as soon as the Luxembourg District Court had rendered its decision. It is now done with the Circular, which provides additional clarifications in terms of the scope and process of such VAT regularisation.

Scope

Luxembourg VAT authorities clearly indicated in the Circular that the scope of the decisions of the CJEU and the Luxembourg District Court is broader than the case at hand (i.e. director of a public limited liability – *société anonyme*) and will also apply to other members of the management board of a company with other legal forms (e.g. private limited liability company – *société à responsabilité limitée*; partnership limited by shares – *société en commandite par actions*).

In addition, this concerns all directors/managers identified for VAT purposes, whether individuals or legal persons.

The concerned directors/managers should make their own assessment to determine whether they meet the criteria identified by the above-mentioned decisions to qualify as VAT taxable persons or not and benefit from the VAT regularisation.

Process

The Luxembourg VAT authorities have set up a non-bureaucratic regularisation process for VAT unduly paid by the directors/managers on MyGuichet.lu. The tool allows to make the regularisation under a unique procedure available until July 2025.

This regularisation can be made for non-prescribed years and the Luxembourg VAT authorities have specifically waived the statute of limitation for the year 2018, meaning that regularisations can be done as from that year. They have also waived the statute of limitation for the year 2019, provided that the regularisation request is introduced before 1 July 2025.

The regularisation process slightly differs depending upon whether or not the director/manager is resident in Luxembourg. Indeed, Luxembourg resident

directors/managers have to do the regularisation by themselves on MyGuichet.lu and then transfer the VAT refunded to their clients, while it is up to the company to make corrections for the VAT wrongly applied on the remuneration of non-resident directors/managers for which reverse-charge was applied (in one go for all affected years in the annual VAT return).

It should be noted that the regularisation process is not mandatory for the directors/managers concerned and it should be checked on a case-by-case basis with their clients whether they want to launch this process and obtain a VAT refund.

For directors/managers subject to VAT in Luxembourg, circular n°781 of 30 September 2016, which has been suspended by circular n°781-1 of 22 December 2023, resumes its effects on the date of the Circular (i.e. 11 December 2024). In that respect, it might be useful to remember that directors/managers that still qualify as VAT taxable persons according to the criteria set out in the case law – the Circular and circular n°781 of 30 September 2016 – should continue to apply VAT on their fees. Moreover, management services rendered to certain investment funds can still benefit from a VAT exemption under certain conditions (cf. article 44.1.d) of the law of 12 February 1979 concerning VAT, as amended).

HOW CAN WE HELP?

The tax lawyers at Clifford Chance Luxembourg are at your disposal to further advise on the VAT regularisation process for directors/managers not subject to VAT in Luxembourg and also, when applicable, on the qualification of VAT taxable persons of directors/managers of Luxembourg companies.

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