



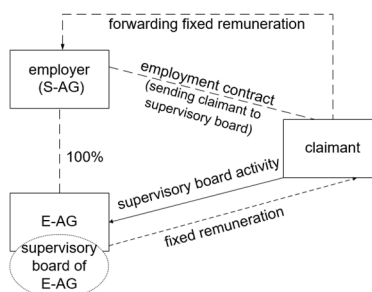
VAT NEWSLETTER

Supervisory board members are not taxable persons / self-billing document to non-taxable persons does not constitute VAT liability

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1 Facts

The German Federal Fiscal Court had to decide if a member of a supervisory board, must be regarded as a taxable person for VAT purposes (case V R 23/19). The claimant was an employee of S-AG, the sole shareholder of E-AG. Within the scope of his employment, the claimant was sent by S-AG to E-AG's supervisory board in the capacity of an internal member of the group. He received a fixed annual remuneration from E-AG for his supervisory board activities. Based on his employment contract with S-AG, the claimant was obliged to report and forward his annual supervisory board remuneration to S-AG.



The forwarding of the fixed remuneration was effected by means of a set-off (reduction), when annual bonuses were paid out. E-AG issued self-billing invoices, which partially showed VAT.



Dr. Thomas Streit, LL.M. Eur.
Lawyer

+49 (0) 89 217 50 12-75
thomas.streit@kmlz.de

2 Decision

With reference to the ruling of the ECJ of 13.06.2019 (C-420/18, see KMLZ Newsletter 29/2019), the Federal Fiscal Court, for the first time, recognised the activity of a supervisory board member as being non-taxable. It agreed with the opinion of the ECJ in cases in which the member of the supervisory board does not bear any economic risk. It ruled that the claimant did not independently carry out his economic activities within the scope of his supervisory board mandate. Therefore, it followed, that the claimant did not provide any services as a taxable person pursuant to sec 2 para 1 German VAT Act.

As a member of the supervisory board, the claimant was only involved in the decisions of the supervisory board as a body. Since the claimant received a fixed annual remuneration, he did not bear any economic risk. In particular, any negligent conduct on the part of the board had no influence on his remuneration. The obligation of the claimant to forward his remuneration to his employer, was of no relevance to the Federal Fiscal Court, which also ruled, that the self-billing invoice, which showed VAT, did not constitute a tax liability in accordance with sec 14c para. 2 of the German VAT Act. According to the wording of sec 14c para. 2 of the German VAT Act, a self-billing invoice can only be equated with an invoice if a supply of services or other services "of a taxable person" are invoiced. If - as in the case of the claimant - the recipient of the self-billing invoice is not a taxable person, the self-billing invoice showing VAT does not constitute a tax liability in accordance with sec 14c para. 2 of the German VAT Act.

3 Consequences for the practice

The Federal Fiscal Court discarded the view that a supervisory board member, who receives a fixed remuneration, is a taxable person for VAT purposes. Even though the judgement was issued in terms of a supervisory board member of a German Aktiengesellschaft, it should be transferable to limited liability companies, foundations, advisory boards and comparable supervisory bodies, and possibly also to management boards.

The Federal Fiscal Court deliberately left open other case constellations, other than fixed remuneration. The decision raises follow-up questions. Is there an economic risk, even in the case of mixed remuneration consisting of fixed and variable components? Or with purely variable remuneration? Or in the case of profit sharing? In an earlier decision on a different matter, the ECJ not only considered whether there is an income risk, it also took into account the expenses associated with the activity. It therefore determined the existing risk by taking an overall view. On this basis, the question, as to when a member of a supervisory board bears an economic risk, seems to be an important one. Moreover, the question remains as to whether the economic risk alone can make a difference. In its decision, the ECJ examined the issue of whether a supervisory board member can be regarded as acting in his own name, for his own account and on his own responsibility. The economic risk was therefore only one aspect considered by the ECJ.

So what should be done? As long as the tax authorities do not change sec 2.2 para 2 sentence 7 of the German VAT Circular, supervisory board members and companies can continue to invoke it. Sec 176 of the German Federal Fiscal Code provides protection of legitimate expectation for the past. If the supervised company is not or not fully entitled to deduct input VAT, non-taxation of the supervisory board activity (at least in cases of fixed remuneration) can be advantageous. To this end, supervisory board members should refer directly to EU law or to the interpretation of national law, in conformity with EU law. They can do so for the future, but also for the past. Since self-billing invoices in constellations such as the present one, do not constitute a tax liability in accordance with sec 14c of the German VAT Act, supervisory board members can expect an interest advantage in accordance with sec 233a of the Federal Fiscal Code, in addition to the tax refund. This is followed by questions of civil law regarding the reversal with the supervised company.