



VAT NEWSLETTER

Activities of board members outside the scope of VAT even in cases of variable remuneration

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1 Facts

The Plaintiff was a freelancer, and at the same time, a member of a professional chamber and a professional pension fund. As chairman, he headed the relevant pension fund's board of directors, which was responsible for the management of the pension fund. The assembly of delegates of the pension fund elected the board of directors for a five-year term. The board of directors was required to convene at least twice a year. It could also be convened at the request of two of its members or at the request of the management appointed by it. There were no special liability regulations. The articles of association of the board of directors provided for its decisions to be taken by means of a vote. Each member had one vote. The articles of association also provided for the members to work on a voluntary basis. Compensation for expenses and reimbursement of costs were laid down in a separate compensation regulation. On this basis, the Plaintiff, as chairman, received a monthly flat-rate expense allowance. In addition, he received a compensation fee for the duration of board meetings and travelling time. The amount of this attendance fee was based on the number of hours spent. The Plaintiff was also reimbursed for travel expenses. The Plaintiff did not pay any VAT on these payments. The tax office, however, calculated the VAT from the payments received and assessed it accordingly. The Plaintiff objected to this and invoked Union law, according to which he was not "economically active". At the very least, he argued, his activity was VAT exempt in accordance with sec. 4 no. 26 of the German VAT Act, as a volunteer activity.

2 Opinion

In its decision of 19 November 2019 (Ref.: 5 K 282/18), the Tax Court of Lower Saxony decided that the Plaintiff's activity as a member of the board of directors was not subject to VAT. The tax court referred to the ECJ judgment of 13 June



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2019 - C-420/18 in the IO case (KMLZ Newsletter 29/2019) when arriving at its decision. In this case, the ECJ had denied the taxability of a Dutch supervisory board member. However, in the case of the Plaintiff, he was found, by virtue of his having exercised his office as chairman of the board of directors for many years in return for a regular fee, to have acted in a sustainable manner for a fee - and thus "economically" within the meaning of Article 9 para. 1 of the EU VAT Directive. However, the independence of his activity, as chairman of the board of directors, was rejected by the tax court. The Plaintiff was found not to have acted in his own name and on his own account. By representing the pension fund externally as chairman of the board of directors, he was entitled and obliged to act on behalf of the pension fund, rather than himself. In addition, decisions regarding the management of the pension fund were only taken collectively with the other members of the board of directors. Thus, the Plaintiff's position was found to correspond to that of the supervisory board member in the IO case. Additionally, the Plaintiff did not bear any individual responsibility; neither did he assume any personal liability for damages to third parties caused by him when carrying out the resolutions of the board of directors in accordance with its instructions. It was also irrelevant that the board of directors acted as a management body, whereas in the IO case, the plaintiff was only a member of the supervisory board, who merely monitored the activities of the management board. In both cases, the Plaintiffs belonged to a collective body for which they acted and therefore they did not act independently. The Plaintiff also bore no economic risk. He received a monthly fixed remuneration, which was not linked to any specific expenditure. The reimbursement of travel expenses was essentially a transitory item. Nor did the attendance fee, the amount of which depended on the duration of the meetings, justify an economic risk. The attendance fee the Plaintiff received was low and he could also not freely decide on the scheduling of board meetings. As the tax court already denied the taxability of the activity, it was not required to consider the question of tax exemption in accordance with sec. 4 no. 26 of the German VAT Act.

3 Consequences for the practice

The Tax Court of Lower Saxony's decision continues, albeit in a different guise, the most recent case law of the ECJ in the IO case and that of the Federal Fiscal Court of 27 November 2019 (V R 23/19, KMLZ Newsletter 06/2020) as regards the taxability of supervisory board members. The Federal Fiscal Court decided (V R 23/19) that a supervisory board member's activity is not subject to VAT if the member receives a fixed remuneration. In doing so, it expressly left open the question of how to assess cases with variable remuneration components. In the current case, the tax court first recognised the non-taxability of the activity, despite variable attendance fees, and only secondly considered the relevance of the Plaintiff being a member of a management body. The fact that the amount of the variable attendance fee was low should not be decisive. It seems more important that the Plaintiff was not in a position to convene the meetings at his own discretion, i.e. the Plaintiff was not able to develop a "business initiative". The decision is final.

The standards applied here apply equally to the members of supervisory boards and boards of directors, as well as to members of other collegial bodies. Not every variable remuneration therefore constitutes an economic risk. It remains open to question when exactly the impact of a variable remuneration may be felt. In any case, the ECJ does not only focus on the income side but also on the expenses (ECJ, judgment of 25 July 1991 - Ayuntamiento de Sevilla). On the basis of the German VAT Circular, supervisory board members can continue to assume that they are engaged in economic activities. However, management and supervisory board members also have the option to invoke Union law against their tax office and claim non-taxability. This seems to make sense in cases where the recipient does not have a full right to deduct input VAT. In the relationship between members of boards of directors and supervisory boards on the one hand, and the company/organisation on the other, civil law settlement issues should be given special consideration.