



ECJ: members of a board of directors are not taxable persons, even with variable remuneration

50 | 2023

1 Background

In the *IO* case (KMLZ VAT Newsletter 29 | 2019), the ECJ categorised the activity of a supervisory board member of a foundation with fixed remuneration as not being carried out independently and therefore not subject to VAT. The Federal Fiscal Court (BFH) subsequently amended its jurisprudence regarding supervisory board members with fixed remuneration accordingly (KMLZ VAT Newsletter 6 | 2020). The tax authorities also changed their opinion. In accordance with sec. 2.2 para. 3a of the German Administrative VAT Guidelines, only members of a supervisory board with a variable component of at least 10% of the total remuneration are deemed to carry out an independent economic activity and can therefore be regarded as taxable persons (KMLZ VAT Newsletter 26 | 2021 and 14 | 2022). However, the ECJ did not decide, at the time, whether a different decision should be made in the case of variable remuneration. In its judgment of 21 December 2023 - C-288/22 - *TP*, the ECJ has now commented on boards of directors. Its comments apply accordingly to supervisory boards.

2 Facts of the case

TP, a lawyer, is a member of the board of directors of four Luxembourg public limited companies with a term of office of up to six years. There is no employment contract. The board of directors is an obligatory executive body and plays a crucial part in the decision-making process regarding the accounts, risk policy and the strategy to be pursued by the respective group. The board of directors also draws up proposals for the shareholders' meetings. The day-to-day management of two companies is carried out by a management committee. The other two companies have no activities that require a management committee. The companies' decisions are usually implemented by their employees and not by individual



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members of the board of directors. According to the law, members of the board of directors do not enter into any personal obligations with regard to the company's liabilities. TP's remuneration is decided by the general meetings of shareholders on the proposal of the board of directors. The remuneration consists of a fixed remuneration or a percentage fee depending on the companies' success. TP classifies his board of directors' activities as non-taxable, while the tax office is of the view that the activities are carried out independently and are therefore taxable.

3 Reasons for the decision

The ECJ points out that, with regard to carrying out one's activity "independently", the national court must determine whether the person carries out his activities in his own name, for his own account and under his own responsibility and whether he bears the economic risk associated with those activities. In particular, the national legislation regulating the responsibilities of the parties involved and their liability must be taken into account. TP advises the company and participates in voting but is not personally liable for the company's obligations. Therefore, it is the company itself rather than TP, that has to confront any negative consequences of the decisions adopted by the board of directors and thus the economic risk of TP's activities. Even as regards the percentage fee, which depends on the profits generated, TP does not assume any risk of profit or loss of her own. This is because TP, like a shareholder, only participates in the success of the company and its economic risk, as the percentage fee can, in the worst case, only amount to EUR 0 and does not include any loss incurred by the company.

4 Consequences for the practice

The tax authorities have previously determined the question of activities carried out "independently" by members of a supervisory board in a very simplified manner. As soon as the variable remuneration accounts for at least 10% of the total remuneration, the supervisory board member is deemed to carry out his activities "independently" and thus acts as a "taxable person" within the meaning of VAT law. This could be achieved very easily by including variable remuneration components. This is because remuneration, based on the number of meetings attended, was already considered "variable" (see sec. 2.2 para. 3a sent. 4 of the German Administrative VAT Guidelines). For some supervisory board members, being considered as a taxable person was a good thing, because they were able to benefit from input VAT deduction. However, the new ECJ judgment shows us that variable remuneration alone does not lead to an economic risk for the member of the board of directors or supervisory board. Rather, the member must also bear the risk of loss of the company due to his decisions, whereby purely tortious liability is not sufficient. The national regulations must be analysed for this. The ECJ's decision relates to Luxembourg (corporate) law. However, the principles established by the ECJ can be applied to German law. For better or worse, the tax authorities will now, once again, have to revise the German Administrative VAT Guidelines. Further questions will arise, which the authorities will also have to take into consideration. This is because the VAT classification does not say anything about the assessment under wage tax and social security laws. Business rightly expects guidelines at this point that provide practitioners with a clear understanding, in terms of the unity of the legal system.

In its decision, the ECJ did not comment on the question of whether the activity as a member of the board of directors is infected by the member's independent and taxable main activity, here in the case of TP, as a lawyer. However, Advocate General Kokott, in her published Opinion, rightly rejected this to be the case for two separate activities. According to the ECJ, the main activity can only infect the ancillary activity, where there is a close link between the activities, with regard to the aspect of sustainability in the case of occasional activity. The ECJ's failure to mention this in the present case should be understood to mean that it shares this position.