

Are board members of public limited companies taxable persons? CJEU ruling and its impact in Latvia 3/4/24



Manager, Tax, PwC Latvia
Matiss Auzins

On 21 December 2023 the Court of Justice of the European Union (CJEU) passed ruling C-288/22 on whether a public limited company's board members are taxable persons for VAT purposes. This ruling is important because it explains what criteria must be met if a person is to be treated as carrying out an economic activity that forms the basis for paying VAT and what factors should be considered to determine whether someone is an independent taxable person.

The case involved a dispute between the Luxembourg tax authority and TP, an individual. TP sat on the boards of several Luxembourg-registered public limited companies and received remuneration for his activities, which was dependent on each company's profit. TP was not employed by any of the companies but he had entered into agreements with each of them, which could be terminated. TP was not registered for VAT, but the Luxembourg tax authority claimed he was liable to register for VAT and demanded payment of VAT on his income. TP challenged the tax authority's decision in court. The Luxembourg Regional Court asked the CJEU to issue a preliminary ruling on how to interpret article 9 of Directive 2006/112/EC, which defines the taxable person as any person who independently carries out any economic activity in any place regardless of its purpose or result. The activity of manufacturers, sellers and service providers (including mining, farming and the professions) is considered an economic activity. In particular, economic activity includes the use of any tangible or intangible property with the intention of deriving long-term income from it.

The CJEU states that if TP receives remuneration in the form of a bonus, the Luxembourg Regional Court will have to verify whether – if the company does not make a profit or makes a small profit – its general meeting of shareholders can still award him a bonus (based on other factors) that can be recognised as objectively appropriate for his service. This CJEU statement might suggest that failure to pay remuneration to the board member in financial years the company does not make a profit would make his remuneration unpredictable, thereby removing the direct link between his service and remuneration, which would disallow a finding of economic activity.

The CJEU case law implies that the existence of services alone is not enough to find an economic activity pursuant to article 9(1) of Directive 2006/112/EC – there are other criteria that must be met as well.

The CJEU points out that an activity is usually recognised as economic if it's permanent and carried out for a consideration received by the economic operator, so the remuneration must be permanent. The court found that appointing an individual like TP to the board of a Luxembourg company for a term of up to six years with the option of extension lends a permanent quality to the board member's activities. The fact that this office is revocable and its holder can give it up at any time cannot per se cause this activity to lose its permanent nature if the office is initially awarded for the maximum six-year term.

The CJEU recognises that the six-year term may lend permanence to any remuneration paid in the form of a bonus. However, to retain this permanence, it's important that – if bonuses were awarded depending on

the company's income – those could also be awarded to the board member in financial years the company does not make a profit.

This means the CJEU recognises that article 9(1) of the VAT directive should be interpreted so that a Luxembourg company's board member carries out an economic activity within the meaning of this clause if he supplies services to that company for a consideration and his activity is permanent and is carried out for remuneration determined using a predictable procedure.

The next question the CJEU examined was whether the board member was acting independently.

The CJEU began by listing the facts and circumstances of the case: TP did not have the casting vote on the companies' boards, he did not represent those companies, and he was not running their day-to-day business. This might indicate the CJEU's intention to limit the number of cases covered by this ruling.

The CJEU found that the board member's activity is not carried out independently within the meaning of this clause. On the one hand, he freely organises the way he does his work, he receives remuneration that represents his income, he acts in his own name and is not subject to the company's management hierarchy. On the other hand, he's not acting on his own account and he's not taking economic risk associated with his activities.

We can see that the CJEU attached greater significance to whether the board member takes economic risk. The CJEU found it's the Luxembourg company that takes economic risk, not the board member, and Luxembourg law implies that board members are not personally liable for their company's debts. So, while we can establish TP's economic activity, we cannot establish its independence. Accordingly, TP is not considered a taxable person who should be charging VAT.

Section 3(1) of the Latvian VAT Act defines the taxable person as a person who independently carries out any economic activity in any place regardless of its purpose or result. This means that before anyone can be considered a taxable person in Latvia, we must establish independence of their economic activity. Under circumstances similar to this case a Latvian company's board members receiving remuneration in the form of a bonus could therefore fall outside the scope of the VAT Act.