

CJEU judgment with possible implications for the VAT position of supervisory board members and similar officials

On June 13, 2019, the Court of Justice of the European Union ('CJEU') rendered judgment in the IO case (no. C-420/18). This case concerns the VAT position of supervisory board members. The CJEU ruled that a member of a supervisory board of a Dutch *stichting* (foundation) does not perform economic activities independently and therefore does not qualify as a VAT taxable person. To date, the Dutch tax authorities ('DTCA') have designated supervisory board members with one or more supervisory positions as VAT taxable persons. This judgment therefore deviates from current Dutch practice.

The case

The supervisory board member in the present case is employed as a municipal official and is also a member of the Supervisory Board of a Dutch foundation. The supervisory board member does not hold any other supervisory positions. It is disputed whether the supervisory board member is a VAT taxable person for his activities as a supervisory board member of the foundation. The supervisory board member brought the dispute with the DTCA before the Court of Appeals Den Bosch. The Court then decided to refer the matter to the CJEU for a preliminary ruling.

The CJEU ruled that the supervisory position of the foundation's supervisory board member does not constitute an independent economic activity from a VAT perspective. The CJEU considers that the supervisory board member is in no way hierarchically subordinate to the foundation or the supervisory board itself in respect of his activities. However, the CJEU also noted that the supervisory board member does not act in his own name, for his own account or under his own responsibility, but only for the account and under the responsibility of the Supervisory Board. Finally, the CJEU noted that the supervisory board member receives a fixed fee for his activities and therefore does not bear any business risk. In view of the above, the CJEU ruled that the supervisory board member does not perform his activities as a VAT taxable person.

Analysis

This judgment may have consequences for supervisory board members who receive compensation for their supervisory board membership. Up until now, the DTCA have regarded a single supervisory positions as an economic activity. We believe that the CJEU judgment means that the DTCA will have to change course. It should be noted that the DTCA's current policy is based on instructions from the European Commission. The question therefore arises as to whether the DTCA will immediately change its current policy on the basis of this judgment.

On the basis of the CJEU judgment, supervisory board members who do not independently perform economic activities should not be regarded as VAT taxable persons. Supervisory board members consequently do not have to charge VAT on their fees. Moreover, supervisory board members who have already filed a notice of objection in respect of VAT that has already been remitted can invoke this judgment. If

their situation is indeed covered by the judgment, previously charged VAT can be credited and the DTCA will, in principle, have to repay the VAT already remitted. This possibly refundable VAT can then be remitted to the organization. However, account will have to be taken of the fact that, as a result of the cessation of the VAT entrepreneurship, the supervisory board member is not entitled to recover the VAT on costs and investments.

We recommend that you examine the VAT position of your supervisory board members. For organizations that are not entitled to recover input VAT (banks, insurers, pension funds and charities, for example), VAT is a cost item and as such, the CJEU's judgment is positive. Furthermore, we do not believe it inconceivable that the CJEU's judgment will also have an impact on members of the Supervisory Council, members of conciliation committees and members of investment committees.

The tax advisors of Meijburg & Co's Indirect Tax Group would be pleased to help you identify the potential tax implications of this judgment. Please feel free to contact one of them or your regular contact at Meijburg & Co.

Meijburg & Co
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