

No VAT obligation for members of Supervisory Boards, Boards of Supervisory Directors

On May 6, 2021 the Deputy Minister of Finance published a decree on the VAT position of members of supervisory boards and boards of supervisory directors, as well as members of complaints advisory committees and review, dispute and comparable committees (hereinafter: supervisory officer(s)). The reason for this was the judgment rendered by the Court of Justice of the European Union on June 13, 2019 in the IO case and the Supreme Court judgment of June 26, 2020.

In this decree, the Deputy Minister of Finance takes the position that the individual supervisory officers do **not** qualify as a VAT taxable person if and insofar as they are only jointly, thus along with the other supervisory officers of, for example, the Board of Supervisory Directors, authorized to take decisions/monitor activities. The individual supervisory officer therefore does not perform their tasks in their own name or under their own responsibility. This means that as of May 7, 2021 supervisory officers who are only *jointly* responsible for their tasks or can only take *joint* decisions are no longer a VAT taxable person for the performance of these tasks. Therefore, they can no longer charge VAT on the fee they receive for performing these tasks and thus also have no VAT recovery right for the costs associated with the performance of their tasks.

The decree has retroactive effect to June 13, 2019, the date of the judgment by the Court of Justice of the European Union in the IO case.

A notable approval

The decree also contains a notable approval. If the supervisory officer has charged VAT, they do not have to correct this for the period through to May 7, 2021, provided the organization for which the supervisory officer performs their tasks ('the principal') has deducted the VAT charged by the supervisory officer. In that case, the supervisory officer will therefore also retain, through to May 7, 2021, their VAT recovery right on their costs.

If the principal has no or only a limited VAT recovery right and thus has not or has only partly recovered the VAT charged to it, the VAT recovered by the supervisory officer in the past will have to be corrected. The VAT that was paid (i.e. the wrongly invoiced VAT less the recovered input VAT) may also be reclaimed from the Dutch tax authorities at that time. However, this is subject to the condition that the supervisory officer should reimburse the principal for the wrongly invoiced VAT and therefore will have to issue a credit invoice to the principal for this. The supervisory officers will have to request the refund of VAT by means of submitting a notice of objection. If the notice of objection is submitted after the (six-week) deadline for such submissions, the Dutch tax authorities will treat the notice of objection as a request for an ex officio reduction.

What if the supervisory officer did charge VAT?

1. The principal (BV, NV, foundation (*stichting*) etc.) has fully recovered the VAT charged by the supervisory officer
In this situation, the supervisory officer does not have to take any action for the period through to May 7, 2021. If VAT was still charged after that date, it must be rectified.
In this situation it is important that the supervisory officer, as confirmation of their position, obtains a statement from their principal confirming that the VAT charged by the supervisory officer was fully recovered.
2. The principal (BV, NV, foundation (*stichting*) etc.) has not or has only partly recovered the VAT charged by the supervisory officer
In this situation, the supervisory officer must correct the VAT they recovered in the past. The VAT that was paid (i.e. the wrongly invoiced VAT less the recovered input VAT) may also be reclaimed from the Dutch tax authorities at that time. To this end, the supervisory officer must credit the principal for the wrongly invoiced VAT (credit invoice) and reclaim it from the Dutch tax authorities by submitting a notice of objection. On balance, the supervisory officer repays the recovered input VAT on their costs. Assuming that the average supervisory officer incurs relatively few costs, this will probably only be a small amount.

This situation occurs for supervisory officers of non-profit organizations (such as organizations in healthcare and education), but also for those at housing associations, banks, pension funds and insurers.

In this situation, for the supervisory officer to determine their position they will have to request a statement from their principal confirming that the VAT charged by the supervisory officer was not recovered. If the VAT was partly recovered, the supervisory officer will have to request a statement from the principal confirming that the principal has corrected the (partly) recovered VAT in response to the credit invoice that was issued.

In conclusion

When correcting the past, the supervisory officer will have to take account of various circumstances, including the VAT position of the principal. If there are several supervisory officers at a principal, it could be more efficient to have the principal coordinate the VAT adjustment. Your advisor at KPMG Meijburg & Co can help you with this.

If you have any questions, feel free to contact your regular contact at Meijburg & Co.

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