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Input VAT newsletter

The CJEU's decision (C-288/19) and Circular 807 of the Luxembourg VAT authorities on the provision of vehicles by employers to staff members residing abroad

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Should the provision of vehicles to staff members be considered as "a hiring of a means of transport" to a non-taxable person? And, where should these services be taxed for VAT purposes: in the country of the employer or the employee?

The European Court of Justice (CJEU) recently ruled that the provision of a vehicle to an employee should be considered as a hiring of a means of transport and be taxable in the country of the employee when made against remuneration. Employers providing company cars to their employees residing abroad should examine the impact of this case, as it may imply potential liabilities and additional VAT obligations in other countries and, therefore, an additional administrative burden.

In case C-288/19[1], the European Court of Justice (CJEU) had to decide where and, therefore, how the provision of cars to employees should be treated from a VAT perspective.

Background

QM, a Luxembourg established company, provides to two of its employees residing in Germany a company car that forms part of its business assets. During the years at issue, QM received from one of the employees a contribution for the costs of the provided car, which was deducted from the employee's remuneration. The other employee did not contribute to the car's costs.

As QM's activity is in fund management—a VAT exempt activity that does not open the right to deduct VAT—it is VAT registered under the Luxembourg "simplified tax regime" and not allowed to claim input VAT. As a result, it did not claim any input VAT incurred on the costs relating to these company cars. Following a circular issued in 2014 by the German VAT authorities regarding the provision of vehicles, QM registered for VAT in Germany that same year at the Finanzamt Saarbrücken tax office (the "German tax office"). It reported its provision of the vehicles in its German 2013 and 2014 VAT returns. This has been accepted by the German tax office.

[1] C-288/19, QM v Finanzamt Saarbrücken, 20 January 2021.

However, QM objected to the 2013 and 2014 VAT assessments issued by the German tax office. The German tax office, considering this objection to be unfounded, rejected it.

QM requests the VAT for 2013 and 2014 to be fixed at EUR0 as it considers the requirements for levying VAT on the provision of company cars in Germany had not been met. QM's view is that the company cars were not provided for consideration within the meaning of the EU law's provisions, as the members of staff neither made a payment nor had to give up part of their cash remuneration to benefit from these cars. QM also considers that, according to the CJEU's current case law, making company assets available for private purposes without requiring staff members to pay a rental fee should be seen as a benefit in kind rather than a hiring service.

Therefore, for QM, the provision of the vehicles should be considered as provided at the place where the supplier has established its business. As this is Luxembourg in the present case, the tax should not be levied in Germany.

The German tax office requests that QM's action be dismissed as unfounded. It believes that the provision of vehicles to employees should be seen as a service provided for consideration as a long-term hiring out of a means of transport. Therefore, this falls under the VAT Directive's meaning of "hiring of a means of transport to a non-taxable person", where the service's place of supply is the employee's permanent address (i.e., the Federal Republic of Germany).

The outcome of this dispute hangs on the interpretation of Article 56 (2) of the VAT Directive (i.e., Article 17.2.7°. b) of the Luxembourg VAT law). The following question was referred to the CJEU by the referring court in April 2019: whether the VAT Directive's "hiring of a means of transport to a non-taxable person" concept should also cover the provision of a company car that forms part of a taxable person's business assets to their staff, if the employee does not provide consideration for it.

Advocate General's opinion

The Advocate General (AG) rendered his opinion on 17 September 2020 and made a distinction between the two employees.

In the first instance, the AG considered that the supply of the car to the first employee, who did not contribute to the costs incurred in relation to the vehicle, should not be considered as a supply of services for contribution. In the AG's view, it should be considered as such when employees do not support any costs, do not waive part of their remuneration or other benefits due to them by the employer, and do not carry out additional work for the provision of said vehicle.

Regarding the second employee, who did contribute via a salary deduction, the AG considered that the national judge should assess whether QM provided a vehicle forming part of its business assets for the worker's private needs for a period of more than 30 days and for consideration. He specified that if this is the case, this service should be considered as the hiring of a means of transport to a non-taxable person. Consequently, this service should be taxable in the place where the employee resides.

Decision of the CJEU

The CJEU rules that the provision of a car should not be considered as a service made against remuneration when the following conditions are met:

a) The employee does not provide payment for the use of the car;

b) The employee does not give up a part of their remuneration as consideration for the car; and

c) The entitlement to use that vehicle is not contingent on the employee forgoing other benefits.

When these conditions are met, the provision of the car should be considered as not being made against remuneration and the employer's Member State could tax it as a "self-supply", except when the VAT on the costs was not deductible at all by the employer.

The CJEU also rules that the provision of a car constitutes the supply of long-term hiring of a means of transport made against remuneration when:

a) The employee has the right:

    a. To use the car for private purposes and

    b. To exclude other persons from using the car

    c. For an agreed period of more than 30 days

b) Against a rent and

c) The car remains permanently at the employee's disposal, including for private purposes.

The CJEU indicates some elements that do not affect the VAT treatment: if the employer is not the owner of the car but leases it; the lack of an agreement distinct from the work agreement; and the fact that the length of the car's provision is not precisely defined but is dependant on the working relationship.

The CJEU insists on the importance that true acceptation exists between the parties on the length of the car's provision and the right to use it exclusively, and on the fact that the car remains permanently at the employee's disposal, including for private purposes.

The CJEU reminds that such a service of supplying long-term hiring of a means of transport is taxable at the place where the employee resides when this place is in a different country than that of the employer. Therefore, when Luxembourg employers provides such a service to one of their staff members residing in Germany, German VAT would be due.

Circular 807 of the Luxembourg VAT authorities

The Luxembourg VAT authorities have commented on this case in their Circular 807[2] ("the Circular"). The Circular reiterates the content of the CJEU's decision without adding further details or explanations, except that Luxembourg employers may have VAT obligations in countries where their employees reside to pay the VAT due abroad. Due to the Circular's very general wording, it could be understood that the VAT authorities consider this decision also applies to cars provided to Luxembourg residents, which may imply a change of the computation of the taxable basis for VAT purposes. Surprisingly, the Circular does not contain any date of entry into force.

[2] Circular of the Administration de l' Enregistrement, des Domaines et de la TVA n° 807 of 11 February 2021.

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Our comments

The CJEU's decision may result in a significant administrative burden for applicable Luxembourg employers, as they would need to carry out some administrative obligations to pay the VAT in Germany. They would also have to compute and declare VAT on the supply of vehicles allocated to employees residing in Germany by applying the German rules.

But what about their employees with company cars who reside in other countries, especially in France or Belgium? Indeed, by definition, a decision by the CJEU is an interpretation of the EU VAT law and is applicable in all EU Member States. In these neighboring countries, employers may have the same obligations as in Germany, even if these countries have not reacted to the case and said how they will apply it, if at all. As a result of the Circular, the position of Luxembourg employees should also be considered.

If you provide company cars to your employees, it is important to closely monitor if, when and how the Luxembourg and foreign VAT authorities would apply this CJEU decision. To help you have a clearer view and better assess the impact of this important decision on your business, we are inviting you to a special VAT update on 23 March 2021 from 11 a.m. to 11:45 a.m. CET with Deloitte VAT specialists from our offices in Luxembourg, Germany, France and Belgium.

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