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## VAT treatment applicable to remuneration of a member of the board of directors

The determination of VAT treatment for supplied goods or services depends not only on the nature of goods or services supplied but also on the status of the person who carried out that supply. In other words, it is crucial to ascertain whether that supplier, in the part where they perform these supplies, is or is not a "taxable person" within the context of VAT.

Article 9 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: the VAT Directive) defines the term "taxable person". Paragraph 1 of this Article states the following: "*Taxable person* shall mean any person who, **independently**, carries out in any place any **economic activity**, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

The term "taxable person" represents a concept of the European VAT legislation, and this term is not left to the Member States to interpret it according to their discretion. However, in practice, uncertainties and issues often arise in interpreting this provision, leading to incorrect conclusions by national tax authorities and courts, resulting in cases being brought before the Court of Justice of the European Union.

VAT regulations have not precisely defined the treatment of members of a management board, a supervisory board, a board of directors and similar positions.

Previously, the Court of Justice of the European Union rendered a judgment in the case C-420/18 regarding the **VAT status of members of the supervisory board**.

The Court of Justice of the European Union rendered a judgment on 21 December 2023 in the case C-288/22 concerning the **VAT status of members of the board of directors**.

In its judgment in the case C-288/22, the Court considered whether an individual acting as a member of the board of directors of a public limited company, incorporated under Luxembourg law, is carrying out an "economic activity" within the meaning of Article 9 of the VAT Directive, and whether they are carrying out their activity "independently."

29. prosinac 2023.

## PDV tretman naknada članova upravnog odbora

Određivanje PDV tretmana naknada za isporučena dobra ili usluga, osim o vrsti dobra ili usluge, ovisi i o statusu osobe koja je tu isporuku obavila. Drugim riječima, bitno je je li ta osoba, u dijelu u kojem obavlja navedene isporuke, „porezni obveznik“ u kontekstu PDV-a ili nije.

Pojam „poreznog obveznika“ definiran je u članku 9. Direktive vijeća 2006/112/EZ od 28. studenoga 2006. o zajedničkom sustavu poreza na dodanu vrijednost (u nastavku: PDV Direktiva). Stavak 1. ovog članka navodi sljedeće: „...**Porezni obveznik**“ znači svaka osoba koja **samostalno provodi gospodarsku aktivnost** na bilo kojem mjestu, bez obzira na svrhu ili rezultate te aktivnosti. Sve aktivnosti proizvođača, trgovaca ili osoba koje pružaju usluge, uključujući rudarstvo i poljoprivredne aktivnosti i aktivnosti samostalnih profesija, smatraju se „gospodarskom aktivnošću“. Korištenje materijalne ili nematerijalne imovine radi ostvarivanja prihoda, na kontinuiranoj osnovi, posebno se smatra gospodarskom aktivnošću.“

Pojam „poreznog obveznika“ predstavlja koncept unutar europskog PDV zakonodavstva, koji ne dopušta državama članicama da ga tumače prema svojoj diskrecijskoj ocjeni. Ipak, u praksi se često javljaju nedoumice i problemi u tumačenju ove odredbe i pogrešnim zaključcima od strane nacionalnih poreznih uprava i sudova, te se pokreću postupci pred Sudom Europske unije.

PDV propisi nisu precizno uredili tretman članova uprave, nadzornih odbora, upravnih odbora i sl.

Ranije je Sud Europske unije donio presudu u predmetu C-420/18 u vezi s **PDV statusom članova nadzornih odbora**.

Sud Europske unije je 21. prosinca 2023. godine donio presudu u predmetu C-288/22 i u vezi s **PDV statusom članova upravnih odbora**.

U presudi u predmetu C-288/22 Sud je razmatrao pitanje obavlja li fizička osoba kao član upravnog odbora dioničkog društva, osnovanog u skladu s luksemburškim pravom, „gospodarsku djelatnost“ u smislu čl. 9. PDV Direktive, te obavlja li svoju djelatnost „samostalno“.

U tom specifičnom slučaju, Sud je zaključio da postoji **obavljanje gospodarsku djelatnost**, ali da se ona **ne obavlja samostalno** u smislu odredbe iz čl. 9. PDV

In that specific case, the Court ruled out that **there was indeed an economic activity being performed, but it was not being performed independently** within the meaning of the provision in Article 9 of the VAT Directive. Therefore, **this individual, when acting as a member of the board of directors, is not considered a taxable person for VAT purposes** and is not required to charge VAT on services provided to the public limited company.

Concerning the issue of “independence” in the referenced case, the Court highlights that to determine whether an economic activity is performed independently, it is necessary to assess whether the individual serving as a member of the board of directors, operates within a hierarchical subordination while performing their activities. This requires an examination, for example, of whether that person conducts their activity in their own name, on their own account and under their own responsibility, and whether they bear the economic risk arising from those activities.

The Court’s conclusions are intriguing, pointing out that even when an individual acts in their own name, it is crucial not to overlook whether they are actually acting on behalf of the board they belong to. Furthermore, it emphasizes the need to assess whether the individual assumes the economic risk based on the activities they perform, i.e., whether the company alone will bear the negative consequences of the board’s decisions and consequently bear the economic risk arising from the activities of its members.

While the judgment pertains to members of the board of directors, certain conclusions can be analogously applied to members of the management board. However, this should be done considering the distinctions between members of the management board and members of the board of directors.

Undoubtedly, the determination of “independence” in conducting economic activities by individuals who are members of various corporate bodies is also influenced by provisions within national non-tax regulations governing their functioning and the allocation of responsibilities between members of these bodies and the companies. Therefore, when considering the application of the conclusions from this judgment in Croatia, the provisions of the Croatian Companies Act must also be taken into account.

**It is important to note that the interpretation of “independence” in the context of VAT regulations differs from its meaning in Croatian personal income tax regulations. Thus, while an individual engaged as a member of the management board, a member of the board of directors, or a member of the supervisory board, may be regarded as “independent” according to Croatian personal income tax regulations, this might not hold true under VAT regulations.**

Direktive, i **da se stoga ova osoba, kada djeluje kao član upravnog odbora, u kontekstu PDV-a ne smatra poreznim obveznikom** i ne treba obračunavati PDV na usluge pružene dioničkom društvu.

U vezi s pitanjem „samostalnosti“ u navedenom slučaju, Sud ističe da je za utvrđivanje obavlja li se gospodarska djelatnost samostalno, potrebno provjeriti nalazi li se fizička osoba član upravnog odbora prilikom obavljanja svojih aktivnosti u podređenom odnosu. To zahtjeva ispitivanje, primjerice, obavlja li ta osoba svoju djelatnost u svoje ime, za svoj račun i na vlastitu odgovornost te snosi li gospodarski rizik povezan s obavljanjem tih djelatnosti.

Zanimljivi su zaključci suda iz presude koji ukazuju na to da, i kada osoba djeluje u vlastito ime, ne treba zanemariti djeluje li zapravo za račun odbora čije je član. Nadalje, ističe se da treba razmotriti i to preuzima li osoba gospodarski rizik po osnovi aktivnosti koje obavlja, odnosno hoće li se samo društvo morati suočiti s negativnim posljedicama odluka upravnog odbora i stoga snositi gospodarski rizik koji proizlazi iz djelatnosti članova tog odbora.

Iako se presuda odnosi na članove upravnih odbora, određene zaključke je moguće analogijom primijeniti i na članove uprave, ali vodeći računa o razlikama između članova uprave i članova upravnog odbora.

Sasvim sigurno da utjecaj na utvrđivanje „samostalnosti“ pri obavljanju gospodarske djelatnosti fizičkih osoba, koje su članovi raznih organa trgovačkih društava, imaju i odredbe nacionalnih neporeznih propisa koje uređuju njihovo funkcioniranje te raspodjelu odgovornosti između članova raznih organa i trgovačkih društava. Stoga, prilikom razmatranje primjene zaključaka iz ove presude u Hrvatskoj, u obzir treba uzeti i odredbe hrvatskog Zakona o trgovačkim društvima.

**Treba istaknuti da tumačenje „samostalnosti“ u kontekstu PDV propisa nema isto značenje kakvo ima u kontekstu hrvatskih propisa o porezu na dohodak, te je moguće da kod angažmana neke osobe kao člana uprave, upravnog odbora ili nadzornog odbora u kontekstu hrvatskih propisa o porezu na dohodak bude smatramo da postoji „samostalnost“, ali da u kontekstu PDV propisa ipak treba smatrati da „samostalnost“ ne postoji.**

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