Company cars made available to (cross-border) employees…always subject to VAT?

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The Court of Justice of the European Union (the «CJEU») in the QM case[1] on 20 January 2021 interpreted that a company making available a car to one of its employees does not constitute a supply of services for consideration, and then should be disregarded for VAT purposes if there is neither cash consideration paid by that employee, nor contributions by either a wage cut or by waiving his/her right to enjoy other benefits granted by the company (to be understood in our opinion as entitlement to specific benefits included in a valid employment agreement). The judgment applies in situations where employers own the cars as business assets or make them available pursuant to a lease agreement.

Background

QM is a Luxembourg investment fund management company which made available two company cars to two cross border employees resident in Germany. As it happens in most cases, the cars were used by the employees for both professional and private purposes. This benefit in kind was very likely covered by a collective agreement as a key element of their remuneration package. The use of one of the cars was granted to an employee for free, whereas the other one was enjoyed by another employee against a salary reduction.

QM was registered for VAT purposes in Luxembourg under the simplified regime, i.e. without any input VAT deduction right. Besides, QM was registered as well in Germany as of November 2014 with the Saarbrücken Tax Office[2] in order to declare and pay German VAT for the private use of the company cars by the two employees in 2013 and 2014.

On 30 July 2015, QM lodged a claim against the 2013 and 2014 VAT assessments issued by the Saarbrücken Tax Office. The claim has been rejected on 2 May 2016 and an action against that decision before the Finance Court of Saarland[3] has been initiated on 2 June 2016.

It has been argued that the requirements for levying German VAT on the act of making cars available have not been met. QM considered that it was not carrying out a supply of services consisting on long-term hiring of means of transport[4].

On the basis of the foregoing, the Finance Court of Saarland referred to the CJEU whether the provision to an employee of a vehicle forming part of the assets of the business of a taxable person should also be considered as hiring of a means of transport to a non-taxable person when there is neither consideration in cash paid by the employee, nor contributions by either a wage cut or by waiving his/her right to enjoy other benefits granted by the company.

No consideration and no input VAT deducted, no supply of services for VAT purposes

The CJEU recalled that in order to be qualified as a long-term hiring of means of transport, a transaction should be subject to VAT. In addition, the CJEU stated that the act of making the company cars available by a taxable person to its employees qualifies as a supply of services, only taxable to the extent it is effected for consideration, i.e. when there is a reciprocal performance between the provider and the recipient of the service.

According to that, the act of making a company car available by QM to the employee neither for cash consideration nor for contributions by either a wage cut or by waiving his/her right to enjoy other benefits granted by the company does not constitute a supply of services for consideration since QM did not deduct the input VAT paid on this car. As a consequence, no German VAT was due by QM for making available this car to its employee.

Besides, the concept of «hiring of a means of transport' is not defined by the VAT Directive[5] and no reference is made to the national legislation of the Member States in that regard. According to the CJEU, the hiring of a means of transport can be defined as an owner of a means of transport which confers on the person hiring that means of transport the right to use it and to exclude other persons from doing so against a rent and for a specific period of time.

A wage cut constitutes consideration, so there is a taxable supply for VAT purposes

Even if not requested by the Finance Court of Saarland, the CJEU commented as well on the act of QM making a vehicle available to one of its employees against a wage cut. Since the car was made available to this employee for a period of more than 30 days, this transaction had to be regarded as a long-term hiring of a means of transport which place of supply was located in the place of residence of the employee (i.e. in Germany). In addition to the minimum period of time, it was essential that the employee had a permanent right to use that car for private purposes and to exclude other persons from using it, in exchange for rent based on an employment agreement with QM. In this case, German VAT was due by QM on the private use of the car.

Specific considerations and potential issues for Luxembourg companies

We are of the opinion that QM's decision to register in Germany for VAT purposes was very likely motivated by the fact that, the German tax authorities claimed with effect as of 30 June 2013, the right of taxation of the supply, for private use, of company cars by Luxembourg employers to employees residing in Germany. The position of the German tax authorities at that time was debatable and triggered a risk of double taxation[6].

In 2014, the VAT Committee[7] was at a large majority of its members of the opinion (further to a request of the Luxembourg indirect tax authorities[8]), that in case of means of transport forming part of the assets of a company, the use made by its employees for consideration shall qualify as hiring of means of transport, the place of supply being located in the place where the means of transport is actually put at the disposal of the customer (short-term hiring), or in the place where the customer is established, has his permanent address or usually resides (long-term hiring)[9].

Another relevant fact is that QM was registered under the simplified regime due to its VAT exempt activity, i.e. the management of investments funds listed by article 44, 1, d) of the Luxembourg VAT Law. Therefore, since QM did not deduct any input VAT on the two cars made available, the Luxembourg indirect tax authorities could not claim to QM the payment of output VAT arising from the private use of the company cars.

In Luxembourg, there are numerous companies having employees resident in neighbouring countries (i.e. Belgium, France and Germany) and benefiting from company cars. Thus, it is highly recommended that Luxembourg companies making available company cars against consideration carefully review and amend, where possible and relevant, car policies to avoid VAT compliance burden in other countries.

Moreover, it is important that Luxembourg companies benefiting from at least a partial input VAT deduction right and making available company cars to cross-border employees for consideration register for VAT purposes in the neighbouring countries to declare and pay the local VAT arising from the private use of the cars. Under this scenario, we believe that there will no Luxembourg VAT payable on these supplies since no deemed supply of services would arise.

With respect to the use of the car by an employee for free, it is worth mentioning that Luxembourg companies may be liable for the payment of VAT to the Luxembourg indirect tax authorities. More precisely, according to article 16 of the Luxembourg VAT Law[10], a supply of services carried out by a taxable person for free for its own private use or for the private use of its employees, or in general for any non-business purposes shall be assimilated to a supply of services for consideration. This scenario will arise if a Luxembourg company deducted, at least partially, input VAT on the company car made available to its employee(s).

Based on the above, the potential guidance and actions to be respectively issued and taken by the Belgian, French and German tax authorities should be closely monitored. Attention should be paid to potential retroactive effects in these jurisdictions. In fact, since the decisions of the CJEU have direct effect, the tax authorities of these countries might amend their VAT legislation and/or have an increased scrutiny in order to collect additional amounts of VAT…not unlikely in the current Covid-19 pandemic context.

1) Case QM v Finanzamt Saarbrücken, C-288/19, EU:C:2021:32
2) *Finanzamt Saarbrücken Am Stadtgraben*, the responsible tax office for companies based in Luxembourg
3) *Finanzgericht des Saarlandes*
4) Pursuant to Article 56(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the place of hiring, other than short-term hiring, of a means of transport to a non-taxable person shall be the place where the customer is established, has his permanent address or usually resides.
5) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended
6) The position of the German tax authorities was considered by certain organizations to be contrary to primary European Union Law in the sense it would infringe the principle of free movement of workers within the European Union.
7) Advisory committee set up to provide guidance and to promote the uniform application of the provisions of the VAT Directive.
8) *Administration de l'Enregistrement, des Domaines et de la TVA*
9) 101st meeting of 20 October 2014
10) Law dated 12 February 1979 regarding Value Added Tax, as amended.