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in Luxembourg



## **FREQUENTLY ASKED QUESTIONS ON DIRECTORS AND VAT - UNDERSTANDING WHAT HAS CHANGED (since CJUE ruling and AED Circular 781-1)**

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## Background

On Thursday, 21 December 2023, the European Court of Justice (CJEU), for Case C-288/22, ruled that a natural person acting as a director of a commercial company registered as a Société Anonyme (S.A.) is **not** a taxable person for VAT.

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### **The Registration, Domains and VAT Administration (AED) reacted one day after the CJEU ruling by “suspending the effects of circular 781 with immediate effect until a judicial decision is taken by the Luxembourg District Court”. What does this mean in concrete terms for a director?**

We need to wait for the final decision on VAT on directors' fees from the Luxembourg court. While expecting that the decision will align with the CJUE ruling, authorities cannot preempt the court's decision.

The implication for directors as of January 1st, 2024 is that they are no longer obliged to charge VAT to the companies that they serve if their situation is identical to the TP case. If registered as a director for VAT, they are permitted to stop submitting VAT returns without penalties. However, directors cannot claim input VAT on their expenses in 2024.

The general recommendation is to stay VAT-registered while awaiting the final court decision. Remaining registered will simplify potential future regularization compared to restarting the process entirely.

It is likely that a second circular will be issued to explain how to regularize the past period (since 2018) once the Luxembourg court ruling is published.

### **Are all directors affected?**

The CJUE ruling is based on the case of a natural person on the board of public limited companies (Sociétés Anonymes, S.A.).

Directors acting through a company or as employee-directors of service providers are not covered by the current ruling. These scenarios require further analysis and potential discussions with the Luxembourg authorities for clarity.

Directors are advised to assess their specific individual situations to determine if they might be affected. They need to take into account company type (Sociétés Anonymes (SAs), Sociétés à Responsabilité Limitée (SRLs), and Société en Commandite (partnerships) with general partners (associés commandités)) and their individual roles and responsibilities. Directors in roles with wider responsibilities, like general partners in partnerships, might face different implications compared to typical directors.

The final decision from the Luxembourg court is also awaited to understand any potential nuances or limitations.

Overall, while the CJUE ruling provides initial direction, uncertainties remain regarding directors in specific situations. ILA will work with authorities to achieve a clearer understanding for all directors.



## Are there any direct impacts of the suspension of circular 781 from a director's personal tax point of view especially regarding the upcoming 2023 tax declaration?

We described briefly hereafter the main elements to be considered by natural persons resident in Luxembourg and acting as directors.

We should first remind the role of directors, as any other taxable person, as a collector of the VAT. Taxable persons, have to collect VAT from their clients, i.e., the companies in the case of directors, and have to remit this VAT to the authorities. This process does not affect the net income of the taxable person, i.e., the VAT collected and remitted is not booked in the profit and loss but in the transitory accounts of the balance sheet. If the taxable person's accounting is on a cash basis<sup>1</sup>, the amount of VAT collected and remitted also matches and has thus no impact. The income of a taxable person is affected by the VAT that would not be due on its expenditures either because its activity is not fully taxable<sup>2</sup>, or because some of its costs are considered by the VAT authorities as purely private or sumptuous (rare)<sup>3</sup>.

One of the impacts of the CJUE decision would be that the VAT collected by directors from companies and remitted to the VAT authorities since 2018 would be refundable to the companies. In principle, either under the normal procedure (issuance of credit notes) or under the MyGuichet procedure, the VAT will be reimbursed first by AEDT to the directors, and by the directors to the companies. This VAT never "belongs" to the directors who act only as collectors or paying agents. This is true whether the accounting of the director is on an accrual basis or on a cash basis<sup>4</sup>. This mechanism does not affect the taxable income of the director. VAT on expenditures will become non-deductible and this non-deductible VAT will be a cost for income tax (except in case of private or sumptuous expenses).

Thus, in principle, except if VAT has been already regularized in 2023, the CJEU decision should have no impact on the 2023 income tax return. When filing the 2023 (if VAT has been already regularized in 2023) or future personal tax declarations, it is strongly recommended that directors review past personal tax filings and assessments related to director fees. They may need to consult with a tax advisor to understand the potential personal tax and social security consequences arising from the VAT changes. In particular, directors using the cash basis method (or "assimilated to" by ACD) should be aware that a variation of their income may have social security consequences. This is crucial as the information from personal tax filings is automatically shared with social security, as part of a holistic approach to ensure accuracy and compliance.

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<sup>1</sup> In principle, the cash basis regime is available only to persons with a turnover of less than € 100,000 (ex VAT) per year. However, it appears that the income tax authorities (ACD) also apply this regime to persons with a higher turnover and with a proper accounting. Comments regarding directors using the cash basis regime should apply, mutatis mutandis, to those "assimilated" directors.

<sup>2</sup> It would be, for example, the case of a person who is, on the one hand, director of investment funds, and on the other hand, director of "normal" companies and/or provides consulting services. Because fees received from the investment funds could benefit from the fund management VAT exemption of article 44.1.d) of the Luxembourg VAT law, this person could only partly deduct the VAT on his expenditures. This VAT is a cost that is deductible for income tax purposes.

<sup>3</sup> Such an expense would, in principle, not be deductible for income tax purposes, including the non-deductible VAT.

<sup>4</sup> For a director using the cash accounting method (and those "assimilated to" by the ACD), the fact that the two payments (from AEDT to the director and from the director to AEDT) are not made the same calendar year can affect the taxable income of the two concerned calendar years. For example, if he/she receives the VAT from AEDT on calendar year N but pays it back to the companies on calendar year N+1, his/her income of year N will be increased by this amount and the income of year N+1 will be decreased of the same amount (and vice versa). However, when considering the two calendar years on a consolidated basis, this does not affect the taxable basis but could affect the tax due (in case of change of the personal tax rates, change of tax class, variation of the worldwide taxable income basis, application of the income tax brackets, etc.).



## **Might a judgment of the Luxembourg Civil Court reverse/alter the situation?**

Although there is inherent unpredictability surrounding the potential impact of the Luxembourg Civil Court's ruling on the director fee VAT situation, it is not anticipated that the Luxembourg Civil Court judgment will reverse the CJUE ruling.

## **Implications and Impact**

### **Insofar as directors become non-taxable persons, they should be able to deregister from VAT. Should they deregister immediately or is it preferable to wait for the judgment of the Civil Court and a specific circular to be issued by the authorities?**

If directors become non-taxable persons due to the ruling, they have the option to deregister from VAT. However, the overall advice for directors is to wait and remain VAT-registered for now.

The benefits of staying registered are that it will simplify the adjustment process, ensure continued communication with authorities, and minimize any administrative hassle. Authorities have also announced a non-bureaucratic process for adjusting past VAT charges, that requires director involvement; deregistering could complicate this process.

If directors have the appropriate Statistical Classification of Economic Activities in the European Community (NACE) code 70220 they can stop submitting VAT returns while remaining registered. This will also minimize the extra burden of deregistering and re-registering later.

### **Are details known of how this My Guichet Procedure will work? Is it for instance a single point of contact centralising requests from directors and companies?**

The My Guichet procedure for directors to adjust past VAT on fees is not yet available. It's awaiting the final decision from the Luxembourg court.

The purpose of the online platform is to centralize director requests for VAT adjustments on fees collected since 2018.

Directors are responsible for initiating the process through My Guichet and are advised to start gathering information about their director fees collected since 2018, including company names, Luxembourg tax number or VAT ID (if available).

To simplify cash flow management for directors, My Guichet allows directors to receive the adjusted VAT directly and then reimburse the company.

Directors do not need to reimburse the input VAT recovered on general expenses and reasonable-value tangible assets (e.g., computers, desks, chairs). This applies unless expenses are deemed unjustified for their director activity.



## **Where do you see the main impacts for the future individual tax declarations of Directors (2024 and beyond)?**

While the long-term tax implications are uncertain, directors can expect further communication and potential simplification measures from the authorities once the final court decision is issued.

The authorities may well offer simpler procedures for negotiating tax figures if necessary. However, there is potential complexity due to existing tax laws and how they were applied in individual cases by tax authorities during past tax assessments.

As for the 2023 tax filing, the deadline is still far, in the meantime clear guidance should be available to assist directors with accurate personal tax declarations.

## **As an independent director, would you have wished for a different result/approach from the authorities?**

While appreciating the pragmatic solutions (the simplicity of the My Guichet app for adjustments and the elimination of VAT advances and administrative burdens like credit notes) there remains a burden for directors to act as intermediaries between the authorities and companies.

In offering advice for directors, with potential checks from authorities, caution needs to be exercised against using this situation for personal gain by making sure that collected VAT is reimbursed to respective clients, Directors cannot keep VAT from companies that have ceased activity as it belongs to the authorities.

Finally, directors are either subject to VAT or exempt, there is no middle ground.

The logo for ILA is written in a white, elegant cursive script. The letters 'I', 'L', and 'A' are connected, with a long, sweeping tail on the final 'A'. The logo is positioned on a large, dark blue triangular background that points towards the bottom right of the page. To the left of the blue triangle, there are two smaller triangles: a yellow one pointing right and a grey one pointing left.