



VAT liability for supervisory board remuneration

9. November 2021

The VAT handling of the settlement of remunerations for Supervisory Board members has been changed. Consequences resulting from these changes must be implemented by 1 January 2022 at the latest. Companies must check the legal situation and adjust their processes if necessary.

Change in case law

For decades, the activity performed by a member of the supervisory board was regarded as being on a self-employed basis and the remuneration was classified as being subject to VAT. In 2019, however, the European Court of Justice¹ (ECJ) decided the following:

- Members of a supervisory board do not qualify per se as entrepreneurs (*Unternehmer*) under German VAT law.
- Rather, entrepreneurial activity can only be assumed if the supervisory board member carries out the activity on a self-employed basis.
- This is only the case if the person in question bears the economic risk (as this is typical for an activity performed on a self-employed basis).
- There is no economic risk if supervisory board members receive a fixed remuneration for their activity that neither depends on the attendance of meetings nor the hours worked.

The German Federal Fiscal Court has adapted the ECJ ruling and has decided – contrary to its previous rulings – that members of a supervisory board do not work on a self-employed basis and therefore do not qualify as entrepreneurs in the sense of German VAT law if they do not bear any

¹ ECJ ruling passed on 13 June 2019 – C-420/18, IO

remuneration risk due to the fact that they receive a non-variable fixed remuneration.²

Change in the administrative approach

Against the background of the court rulings by the ECJ and the Federal Fiscal Court, section 2.2 of the German VAT Application Rules (*UStAE*) was amended (and communicated in a circular dated 8 July 2021) by adding a new paragraph 3a:

“If members of a supervisory board bear no remuneration risk due to the fact that they receive a non-variable fixed remuneration, they are not deemed self-employed. The remuneration can comprise both cash payments and benefits in kind. Fixed remuneration within the meaning of sentence 1 is deemed to exist in particular where a lump-sum expense allowance is paid for the duration of the membership on the supervisory board. Attendance fees which members of the supervisory board only receive if they actually attend a meeting, as well as expense allowances based on actual expenditure do not qualify as fixed remuneration within the meaning of sentence 1. Where a supervisory board member’s remuneration package comprises both fixed and variable components, that member will generally be deemed to be self-employed if the variable components amount to at least 10% of the total remuneration in the calendar year, including expense allowances received. Travel expense reimbursements are not deemed part of the remuneration and are therefore not taken into account when determining the 10% limit. Sentences 1 to 6 are to be checked separately for each mandate on a supervisory board. [...]”

The circular also states that the amended regulations are to be applied in all open cases. However, the fiscal authorities will not raise objection if the previously applicable legal situation is applied to activities carried out up to and including 31 December 2021³.

Consequences in practice

For companies that usually apply the credit note procedure and invoice their supervisory board members with VAT, the new court rulings and the consequent administrative approach result in a change to previous practices. For many members of a supervisory board, the criteria for a self-employed activity are unlikely to be fulfilled due to a lack of variable remuneration components. This means that they no longer classify as entrepreneurs in the sense of German VAT law. All settlements carried out on the basis of the credit note procedure must be billed without VAT in future

This applies even where supervisory board members exercise their mandate in addition to other entrepreneurial (and thus VAT-liable) activities, e.g. as a lawyer. In this respect, the activity that is subject to VAT does not “cross-pollinate” the activities of a supervisory board member. Rather, activities that are not subject to VAT are not deemed to be part of the entrepreneurial sphere.

In addition, the amended rulings of the Federal Fiscal Court are also transferable to comparable supervisory bodies and, if applicable, board members and managing directors. Various lower court rulings have been issued in which the Federal Fiscal Court ruling was applied to other constellations and in some cases even expanded⁴. Moreover, the *UStAE* points out that the stated regulations also apply to “[...] members of committees appointed by the supervisory board in accordance with section 107 (3) AktG and members of other bodies which serve not to execute but rather to control business management activities at a legal entity or an association of persons”.

Need for action from a tax perspective

– For companies applying the credit note procedure:

Companies must now determine to what extent members of their supervisory board (or members of

² Federal Fiscal Court ruling passed on 27 Nov 2019 – V R 23/19

³ Circular issued by German Federal Ministry of Finance on 8 July 2021, BStBl. 2021 I p. 919

⁴ cf. ruling by Fiscal Court of Lower Saxony, 19 Nov 2019 – 5 K 282/18, rkr.; ruling by Fiscal Court of Lower Saxony, 8 Oct 2020 – 5 K 162/19, rkr.; ruling by Fiscal Court of Hamburg, 8 Sept 2020 – 6 K 131/18, rkr.; ruling by Fiscal Court of Cologne, 26 Nov 2020 – 8 K 2333/18, rkr

comparable bodies) still qualify as entrepreneurs under German VAT law according to the criteria outlined above. If the criteria are not met, credit notes must be issued without declaring VAT, at least for services received from 1 January 2022 onwards. If necessary, internal processes, and likely also VAT parameters in the IT systems, will have to be adjusted.

– **For supervisory board members:**

Supervisory board members (and members of comparable bodies) no longer qualifying as entrepreneurs in the sense of German VAT law will receive credit notes without VAT being declared (at least in connection with services provided from 1 January 2022 onwards). Consequently such supervisory board members cannot claim any input VAT paid on services received in connection with the mandate, for instance.

– **With regard to past activities:**

As far as the past is concerned, credit notes that have already been issued do not need to be corrected, from a tax law point of view, due to the transition period. This applies for the company as well as for supervisory board members (or members of comparable bodies).

Need for action from a corporate law perspective

Another question, however, is whether and to what extent the management board or managing director should reclaim any VAT that has been paid in addition to the remuneration. This applies in particular to companies that are not fully entitled to deduct input tax.

In this respect, the question arises as to whether a board member or managing director acts in breach

of duty if they fail to pursue a claim for repayment to which the company is entitled. In order not to expose themselves to the risk of being held liable under section 93 of the German Stock Corporation Act (*AktG*) or section 43 of the Limited Liability Companies Act (*GmbHG*), the legal situation should be examined in detail and the arguments for and against a reclaim considered with due care. If necessary, an external legal adviser should be consulted and the results of the examination must be documented.

Relevant criteria that should regularly be taken into account in the decision-making process are, for example:

- the value of a potential reimbursement claim
- the company's financial situation
- the impact on future collaboration with the supervisory board
- reputational implications.

How A&O can support you...

We would be pleased to carry out a comprehensive VAT assessment, examining in particular the extent to which the new court rulings and administrative principles also have an impact on invoicing for other bodies. We can also support you by aligning your company's internal processes to the new legal situation or by drafting respective procedural instructions or adapting IT-relevant settings. Together with colleagues from our Corporate practice, we can advise you on the extent to which a reclaim should be pursued or can be waived by assessing the individual case in detail.

Contacts



Dr Gottfried E. Breuninger

Partner, Head of Tax
Tel +49 89 71043 3302
Gottfried.Breuninger@
allenoverly.com



Ellen Birkemeyer

Partner
Tel + 49 211 2806 7109
Ellen.Birkemeyer@allenoverly.com



Dr Michael Ehret

Partner
Tel +49 69 2648 5586
Michael.Ehret@allenoverly.com



Dr Magnus Müller

Partner
Tel +49 89 71043 3312
Magnus.Mueller@allenoverly.com



Dr Heike Weber

Partner
Tel +49 69 2648 5879
Heike.Weber@allenoverly.com



Christina Habermayr

Counsel
Tel +49 89 71043 3312
Christina.Habermayr@
allenoverly.com



Dr Dirk Schade

Counsel
Tel +49 89 71043 3302
Dirk.Schade@allenoverly.com



Tim Spranger

Counsel
Tel +49 69 2648 5437
Tim.Spranger@allenoverly.com

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