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Opportunity for VAT recovery on benefits in kind (e.g. company cars)

The European Court of Justice (ECJ) recently ruled in the case of Hotel Scandic Gasaback AB versus the Swedish VAT authorities (C-412/03, 20th January 2005). In essence, the ECJ has decided that when an employee pays a contribution to an employer for a supply of goods or services, VAT is only due on the actual consideration received from the employee and that any additional “benefit in kind” cannot be treated as a deemed supply for VAT purposes and no VAT has to be accounted for in this respect. This is also the case when the price received is lower than the cost price of the supply of goods or services. This could lead to a reduction of the global cost of benefits in kind.

1. Background

A reference for a preliminary ruling has been made to the ECJ in proceedings between Hotel Scandic Gasaback AB and the Swedish National Tax Board concerning the determination of the taxable amount for the provision of meals by that company to its members of staff for a price which is lower than the cost price.

The Court ruled that when the members of staff pay an actual consideration for the meals supplied, the transaction is effected for consideration and there is no reason to apply the provisions that treat certain transactions for which no consideration is actually received as supplies of goods and provisions of services effected for consideration (e.g. private use or use by the staff)¹ where the input VAT on the goods in question or the component parts thereof was wholly or partly deductible and to consider as the taxable amount for the supply of goods or services a value estimated according to objective criteria (e.g. cost price)². The taxable basis for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received. Furthermore, the Court has repeated that the consideration must be capable of being expressed in money and the fact that the price paid is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a “transaction effected for consideration”.

Moreover, the ECJ also repeated that the cost incurred by the taxpayer itself in providing meals to its staff cannot form part of the taxable amount for the transaction in question. Indeed, this amount cannot be viewed as a subsidy directly linked to the price of the supplies since the consideration is always paid by the “purchaser, the customer or a third party” and never by the supplier or provider itself.

¹ Article 5(6) and 6(2)(b) of the Sixth VAT Directive

² Article 11A(1) of the Sixth VAT Directive

2. Opportunity

Until now, the Luxembourg VAT authorities claimed VAT from the employer on the value of the benefit in kind, ignoring the contribution paid by the employee. For company cars, the VAT should in principle be paid on the actual private use of the car by the employees (based on mileage).

In practice, however, the Luxembourg VAT authorities allow VAT to be computed on the value of the benefit in kind in the hands of the employees according to the same valuation principle used for income tax purposes, i.e. 1.5% of the price of the car including accessories per month of use.

Based on the ECJ judgment, **the taxable value should be the employee's contribution, which means a lower taxable basis. Consequently, output VAT may have been overpaid in a number of instances.** In cases where an employer has overpaid VAT based on the principles laid down by the ECJ, it is entitled to a refund provided that the limitation period has not expired. In Luxembourg, this applies to the VAT paid in the period from 2000 to date.

Therefore, in cases where companies have paid VAT on the benefit in kind on top of the VAT calculated out of contributions paid by employees, (for example on the private use of a company car) VAT will have been overpaid. A refund of this overpaid VAT can now be requested.

3. Actions

Some actions could be undertaken to benefit from the recent decision of the ECJ regarding the VAT payable on benefits in kind. In this respect, we would be pleased to assist you in examining any current and future opportunities for your business and the best ways to manage these opportunities.

Contacts

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