VAT on means of transport in Luxembourg: pitfalls to avoid

There is a great temptation to have means of transport purchased by a taxable Luxembourg company, as there seems to be numerous advantages in Luxembourg in such context. However, the VAT rules that are applicable in Luxembourg do not derogate from European law, and a misunderstanding of these rules can have unexpected financial consequences. Some of the most common pitfalls are evoked below.

1. Purchase from a professional and deliver the means of transport - in Luxembourg!

Providing your Luxembourg VAT number to a foreign garage/reseller may allow the sale in the country where the vehicle is purchased to be exempt from VAT. In such a context, some players pretend that no VAT is due on the sale, neither in the country of departure, nor at the time of registration in Luxembourg... these too quick shortcuts ignore two essential elements in the VAT circuit :

- Firstly, the exemption of the sale in the country of purchase presupposes that the means of transport is actually supplied to another Member State. If it remains in the country in which the sale takes place, the VAT of that country is in principle due.
- Secondly, an exempt intra-Community sale in the country of departure involves a corollary taxable intra-Community acquisition in the country of arrival. If it is true that VAT is not payable in Luxembourg to the authorities in charge of registration formalities, it is because the taxable person who purchased the means of transport must pay it through his Luxembourg VAT return. The transaction is therefore transparent when the registration formalities are carried out, but not for the taxable purchaser who must spontaneously declare his purchase in his Luxembourg VAT return. At this stage arises the question of the right to deduct VAT.

Please note that if you have provided the seller with your Luxembourg VAT number but the means of transport of which you remain the owner is delivered to a Member State other than Luxembourg, the VAT due in Luxembourg is not deductible unless you report properly the intracommunity acquisition in the destination country! Indeed, an intra-Community acquisition is in principle taxable in the country in which the transport to the buyer ends. However, the intra-Community acquisition is also taxable in the country which provided the VAT number under which the purchase is made (safety net provision), if it was issued by another country. Both the EU and Luxembourg judges agree that VAT due in a Member State under the "safety net" provision is not deductible. This would concern, for example, the case of a boat purchased in France, but delivered in Italy, and for which a Luxembourg VAT number was provided at the time of purchase. The intracommunity acquisition should have been declared in Italy, the penalty for the misuse of the Luxembourg VAT number is the non-deduction of VAT in Luxembourg, even if the other conditions for claiming a right to deduct VAT are met (see 2. below). Unless it can be shown that the intracommunity acquisition was

duly declared in the country of destination, or that the acquisition took place in the context of a triangular transaction, which would imply that the means of transport would be resold to a buyer identified for VAT purposes in the country of destination.

However, these principles do not apply to second-hand vehicles (more than 6,000 km and more than 6 months for cars) sold by taxable resellers under the margin scheme: whatever the VAT status of the purchaser and the Member State to which the car is delivered, the seller remains liable for VAT on his margin in his country, and the taxable purchaser must not declare any intracommunity acquisition in Luxembourg. The seller's invoice must include a specific mention about the application of this special scheme, and must not mention VAT. Thus, a vehicle purchased under the margin scheme will not generate any VAT due or deductible for the buyer.

Apart from the case of sales under the margin scheme, another important factor in the VAT circuit to be taken into account is the right to deduct VAT.

2. Deducting VAT - not always!

Unlike neighboring countries, Luxembourg has not identified any expenditure relating to means of transport which, by their nature, would be expressly excluded from the right to deduct VAT.

However, in order to open a right to deduct VAT, an expense incurred by a Taxable person must meet two cumulative conditions :

- The first condition is that the goods purchased must be used for an economic activity of the company opening right to deduct VAT. Otherwise, the VAT on the purchase will not be deductible: this is the case when the taxable person does not receive any income within the scope of VAT (no activities, or activities outside the scope such as the simple holding of shares by a holding company) or when he receives income within the scope of VAT but exempted without the right to deduct (intra-European financing activities, or exempted real estate rentals for example).
- The second condition, laid down by Article 54.1. of the VAT Law, is that the expenditure must be of a strictly professional nature. This provision excludes in particular sumptuary expenses from the right to deduct VAT. Thus, the Luxembourg VAT authorities regularly use this qualification to deny the right to deduct VAT on the purchase of certain luxury cars by taxable persons who nevertheless carry out activities giving rise to the right to deduct VAT. While the position is understandable when the value of the vehicle is clearly disproportionate to the taxpayer's income, it is less so when the vehicle in question is actually used for the needs of the business and its customers and its value is reasonable in relation to the business's income. In the present circumstances, particular caution should therefore be exercised when such a vehicle is purchased by a Luxembourg taxable person.

3. Using the vehicle for private purposes - what about the benefit in kind?

Let's assume that all the conditions for VAT deduction are met and that the taxable person has deducted the VAT on the purchase of his vehicle. Since the vehicle is assigned to an employee of the company who also uses it for his private needs without any consideration (see 4. hereafter), the VAT due on the private use of the vehicle must still be declared.

Article 16.a. of the VAT Act treats the use of company property for the private needs of its staff as a supply of services for consideration, provided that the input tax paid has been fully or partially recovered by the taxable person.

By applying this rule, the taxable person should, each month, take into account the actual use of the car to determine the amount of VAT he should pay for its private use.

The first approach is to rely on the actual business mileage (by means of a logbook) to calculate the proportion of deducted VAT that should be remitted. This is the principle laid down in Article 28 of the VAT Act and the only officially recognized method.

Other calculation methods are however tolerated, including:

- The taxable person may use the same flat-rate base as the one used for the direct taxes for the calculation of the benefit in kind on wages. The amount of VAT thus calculated may not, however, be zero, and this method is limited if one takes into account the reduced or zero rates applicable since 2017 to encourage the use of low-polluting cars.
- The taxable person may also use a flat rate key applied to the amounts of VAT deducted, to retain the private use of the vehicle.

If a logbook is not kept, whatever method is used, it must be sufficiently well considered and documented to justify its validity and the fact that it accurately reflects the private use of the vehicle, otherwise the VAT authorities may challenge it.

However, the calculation of VAT due on the private use of a vehicle only arises if the employee does not pay any consideration of any kind to his employer. Otherwise, the vehicle may be deemed to be made available for consideration, and VAT would no longer be due on the private use but on the service of making it available against consideration.

4. Making the vehicle available for consideration – in which case should VAT be collected?

The tricky question of the VAT treatment of the provision of vehicles to employees was addressed by the Court of Justice of the European Union (hereinafter "CJEU") in the QM case (C-288/19), which was decided on 20 January 2021.

In this case, the German tax authorities claimed from a Luxembourg VAT taxpayer that German VAT was due on the provision of two vehicles to its employees residing in Germany. While one vehicle was made available to an employee purely free of charge, the second was made available in return for a flat-rate deduction from the employee's salary, i.e. almost EUR

5,700 per year. According to the German tax authorities, German VAT was due on both the lump sum deducted from the salary and the free provision.

Focusing on the most important aspects of this Case, the Court held :

- that the provision of a vehicle free of charge by a taxable person to his or her employee must fall outside the scope of VAT, since that employee does not provide payment for that vehicle being made available to him or her and does not give up a part of his or her remuneration as consideration for it and if the entitlement to use that vehicle is not contingent on the forgoing of other benefits by that employee.

- that in the case of an amount deducted from the salary in return for the provision of the vehicle, the company is making a supply of services (long-term hire of a means of transport) which is taxable in the employee's Member State of residence (Art. 17. 7, b) and c) of the VAT Law) if the provision of the vehicle meets the criteria of a hiring of a means of transport, which is the case if the taxable person transfers to the hirer, for a rent and for an agreed period of time, the right to use the means of transport and to exclude other persons from using it.

As a consequence of the qualification as a taxable hiring of a means of transport in Germany, the taxable person would therefore have to calculate the German VAT within the amount deducted from the salary of its employee, and remit this VAT to the German tax authorities. In order to do so, it should register for VAT purposes in Germany and fulfil its reporting obligations there. This activity would also impact his tax obligations in Luxembourg, in particular as he would have to move from the "simplified" regime to the standard regime involving periodic declarations, due to his partial right to deduct VAT deriving from the taxable rental of the car.

In practice, following this Court decision, companies should review the arrangements for making vehicles available, both for their local employees and for cross-border commuters, as the rules laid down by the European judge are applicable to all countries and not just to relations with Germany.

5. Resale of the vehicle - with or without VAT?

The sale of a vehicle previously used by a taxable person in the course of its economic activities is in principle subject to VAT.

Indeed, if the taxable person has been able to recover the VAT on the purchase of the vehicle, the sale of the car will be subject to the usual VAT rules.

- If it is a new car (less than 6000 km or less than 6 months old), the sale to a taxable person will follow the normal VAT rules, which take into account the VAT number provided by the buyer as well as the place of delivery for the possible application of a VAT exemption. The sale to a private individual will be taxable in the country to which the vehicle is delivered (Article 2.c. of the VAT Law), and the buyer will have to pay the VAT due in his country.

- In the case of a second-hand car (more than 6000 km and more than 6 months), the sale to a taxable person will also follow the normal VAT rules, while the sale to a private person, without transport, will be taxable in the country where he collects the car.

Only taxable resellers, i.e. professionals who buy vehicles in the course of their economic activities with a view to reselling them, benefit from specific rules for the sale of second-hand cars. Depending on the conditions under which they purchased the vehicle, their sales may be subject to VAT on the margin only, and as already explained in point 1 their invoice is issued without VAT with a special mention of the application of the margin scheme.

However, there is one last special rule, which is not well known, and which applies in the case where the Luxembourg administration has refused to a taxable person the right to deduct VAT on the purchase of the vehicle on the grounds that it is a sumptuary expense or that the vehicle is used for an exempt activity without deduction right: when the vehicle is resold, the taxable person may benefit from the VAT exemption provided for in Article 44. 1.x. of the VAT Law, which exempts the sale from VAT, regardless of who the buyer is and where the car is delivered.

There are therefore many possible VAT issues related to the purchase, use and sale of means of transport and they may require the assistance of a VAT expert, especially if the purchase is of a certain value and the purchaser intends to claim the VAT back. Other pitfalls include notably the permanent transfer of a means of transport to another Member State or the taking into account of the customs status of the means of transport at the time of sale.

Thanks to its experience in the operational sector, the specialized VAT Solutions team supports their clients by various means (training, coaching, helpline, etc.) to help them tackle these difficulties in the most possible secured way.

Our services include

- Confirmation of VAT treatment of transport transactions (cars, ships, aircrafts)
- Coaching/training
- Handling of VAT obligations: Assistance, preparation and filing of VAT identification applications and VAT returns in Luxembourg and abroad

VAT SOLUTIONS

Contact

Karine Bellony, Managing Partner
karine.bellony@vat-solutions.com

Michael Lambert, Managing Director
michael.lambert@vat-solutions.com

Sylvie Eiras, Director
sylvie.eiras@vat-solutions.com

Sophie Siniciali, Director
sophie.siniciali@vat-solutions.com