FACTS

In its judgment of 20-1-2021, C-288/19, QM, the ECJ has once again pronounced on this, like others, **traditional area of dispute**.

It is described in the judgment that QM, the management **company** of an investment fund **established in Luxembourg**, assigned vehicles to two of its **collaborators**, who carried out their activity in Luxembourg, but **resided in Germany**. These vehicles were used both for professional and private purposes. It is also described that the assignment was made, for one of those collaborators, free of charge, while QM made, as consideration, a reduction in his salary to the other.

The entity was registered in a **simplified procedure in Luxembourg** for this purpose, according to which the transfer of the two vehicles was not subject to VAT nor did it give the right to deduct input VAT in relation to the vehicles.

Subsequently, QM was registered in Germany for VAT purposes and declared, as VAT, for the transfer of these vehicles, services subject to VAT for an amount equivalent to the aforementioned salary reduction in the first year and for an amount higher in the second. QM then filed a claim against these statements, which led to the **controversy**.

REASONING (I)

The first issue analysed by the ECJ has referred to the free or **onerous nature** of the transfer, based on the well-known doctrine of the direct link -legal relationship and consideration (judgment of 11-3-2020, San Domenico Vetraria, C- 94/19, or, with respect to retributions in kind, of 10/16/1997, Fillibeck, C - 258/95, and 7/29/2010, Astra Zeneca UK, C-40/09).

Considering the employee did not make any payment or use a part of his remuneration in cash, and neither did he choose between various advantages offered by the taxpayer, it has been concluded that the assignment could be considered free.

The assimilation to an onerous operation and its taxation in the form of **self-consumption** (following the VAT Directive article 26) has been assessed below, for which it is required that the input VAT, in this case for the vehicles, would have been deductible. Let us recall that the applicable regime in Luxembourg excluded this deduction. The ECJ has subordinated the taxation of self-consumption to the fact that VAT, had it been paid in Germany, would have been deductible. If this is the case, it would have been VAT taxable.

REASONING (II)

As regards **territoriality**, the application of the provisions of article 56.2 of the VAT Directive, relating to the leasing of means of transport, has been ruled out. Indeed, the ECJ jurisprudence regarding the rental of real estate -generally VAT exempted- has excluded its extension to free operations, precisely because of the absence of a rent paid by the tenant (judgments of 4-10-2001, “Goed Wonen”, C-326/99, and of 18-7-2013, Medicom and Maison Patrice Alard, C-210/11 and C-211/11, among others). Being that the case, the concerned services would be located in the business place of the provider, Luxembourg.

CONCLUSION

The **location** at the **permanent address or residence of the lessee** of the hiring to non-taxable persons of means of transport other than short-term established in article 56.2 of the VAT Directive is not applicable to the hiring, by a taxable person to his employee, of a vehicle if that operation does not constitute a **provision of services for consideration** for the purposes of the Directive.

On the contrary, if it is a provision made for consideration and the employee permanently has the right to use that vehicle for private purposes and to exclude other people from it, in exchange for rent and for an agreed period of time of more than 30 days, the aforementioned location rule is applicable.

RELATED TOPICS

1st.The foregoing conclusions are **independent** of the treatment that may exist for the purposes of **income taxes** (judgment of 18-7-2013, Medicom and Maison Patrice Alard, C-210/11 and C-211/11).

2nd. The above has been completed by adding that the fact that QM did not own the vehicle, since it had it under a **financial lease contract**, is **irrelevant** for these purposes, nor is the fact that the transfer was made within the scope of an **labour contract**, without a specific one, or that its duration was indefinite, depending only on the duration of the employment relationship.

3rd. The need to verify the existence of a **"true agreement"** on the duration of enjoyment and on the right to use the property and exclude other people from it, as has been declared in the area of housing (in line with the judgments of 8-5-2003, Seeling, C-269/00, and 29-3-2012, BLM, C-436/10).

4th. The requirement relating to the lessee's right to use the vehicle and to exclude others from its use requires that the vehicle be permanently available to the collaborator, including for their private purposes. This reference, which seems to address the **availability** rather than the actual and effective use of the vehicle, has been justified by the ECJ in the need for the tax where its consumption occurs, in line with the outcome of 13-3-2019, Srf konsulterna, C-647/17).