



# KMLZ VAT NEWSLETTER

## Fireworks at the Federal Fiscal Court regarding VAT groups

### 1. Background of the new decisions by the V. Senate

As proposed by the XI. Senate, the European Court of Justice (ECJ) decided, in the case *Larentia + Minerva* (C-108/14, C-109/14), that Union law does not leave sufficient scope for Member States to exclude partnerships from VAT groups. Exclusion may only be justified as prevention from tax evasion – see Art. 11 para. 2 Directive 2006/112/EU. However, whether the exclusion of partnerships serves this purpose is to be decided by the national courts. Furthermore, the ECJ has ruled on the national requirements of integration in the form of a relationship of subordination. This may also only be justified as prevention from tax evasion. Many thought that the XI. Senate would address these questions, but far from it. It was the V. Senate which attempted to incorporate, into national law, the requirements of the ECJ by means of four decisions of 2 December 2015. In this newsletter we would like to present you with the three most important decisions.

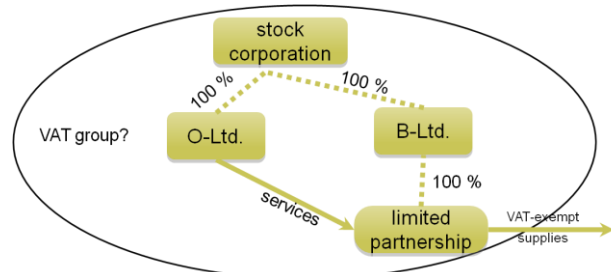
### 2. VAT groups with partnerships (V R 25/13)

The case in dispute addressed the issue of whether forming a VAT group is also possible with a partnership. According to national law, it is impossible as sec. 2 para. 2 no. 2 German VAT Act only recognizes legal entities as potential

### Partnerships as controlled companies

According to the Federal Fiscal Court, it should be possible, under certain conditions, to qualify partnerships as controlled companies in a VAT group. This has not previously been possible under national law. However, much will remain the same. The Federal Fiscal Court's ruling has fallen below expectations. It is unfortunate, that the scope of VAT groups has not been further expanded. It is positive, however, that the criterion of organizational integration has not been intensified. The undefined requirement of "institutionally ensured possibility of intervention" is retained.

VAT groups. However, something different applies according to Union law: According to Art. 11 VAT Directive, *persons* who are closely bound to one another by financial, economic and organizational links may form a VAT group.



The supplies of O-Ltd. to the limited partnership were not subject to VAT if O-Ltd. and the limited partnership, as controlled companies, formed a VAT group with the stock corporation as the controlling company. However, contrary to the previous case law, the Federal Fiscal Court now accepts VAT groups with partnerships. The Federal Fiscal Court concluded this by means of teleologically extending the phrase "legal entity". The prerequisite is that shareholders of the partnerships are the controlling companies and

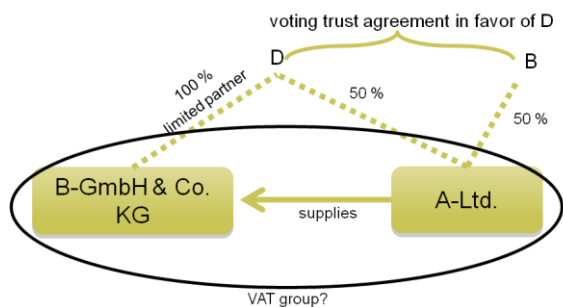


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other financially controlled companies dominated by the controlling company. By means of this ruling, the Federal Fiscal Court has expanded the scope of VAT groups. As long as the partnership is financially integrated and holding all the shares, the partnership may be involved in the VAT group.

### 3. No VAT group with sister company (V R 15/14)

The second case addressed the question of whether VAT groups are possible between sister companies. It was dubious whether A-Ltd. could form a VAT group with its sister company, B-GmbH & Co. KG.

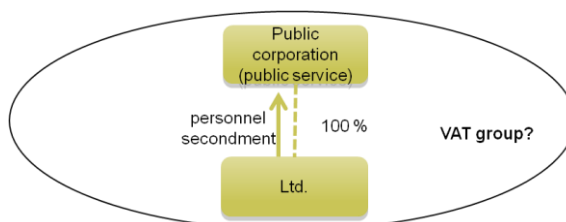


The Federal Fiscal Court has rejected a change to the case law, although Union law only requires a close connection. The Federal Fiscal Court still sticks to the fact that VAT groups require a majority stake of the controlling company in the sister company and that there usually needs to be personal ties between the two companies via the management of the B-GmbH & Co. KG. Integration exists only when there is a right to intervene. The following clarification by the Federal Fiscal Court is particularly pleasing: an “institutionally ensured possibility of intervention to the core area of the management” usually exists in the case of personal ties via the management of the legal entity as the controlled company. The right to issue directives, reporting obligations or

compulsory subjects for approval in the general meeting are not sufficient.

### 4. No VAT group with non-taxable persons (V R 67/14)

The third case in dispute addressed the question whether VAT groups may be formed with non-taxable persons. In this case, the non-taxable person was an exclusively statutory public law legal entity.



The Federal Fiscal Court rejects this with reference to tax evasion. The national legislator made a deliberate decision that the controlling company needs to be a taxable person. VAT groups serve as administrative simplification. They should not allow for tax incentives. If establishing a VAT group was possible without the “status of taxable person”, this would lead to an evasion of the prohibition on deduction.

### 5. Practical tips

Fiscal authorities will have to consider how to react to this new case law. They will, undoubtedly, first await the decision of the XI. Senate. A clarifying circular issued by the Federal Ministry of Finance is to be expected. Partnerships will then have to be qualified as parts of VAT groups based on the requirements of the Federal Fiscal Court. As of now, taxable persons may refer to the new case law, even with retroactive effect. There will be no additional legal security as a result of the new case law. However, this does not necessarily have to be negative.