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VAT'S UP

VAT NEWSLETTER

The German VAT group is tottering … – but will it fall?

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1 Background

The German VAT group has been an ongoing issue at the ECJ in recent years. The ECJ has twice ruled that a partnership can also be a controlled company of a VAT group. Currently, two more cases concerning the German VAT group are pending. However, they essentially concern only one question: Who is the taxable person in the case of a VAT group? Is it the controlling company (according to German law and the V. Federal Fiscal Court Senate in its referral, see KMLZ Newsletter 26 | 2020)? Or is the taxable person the VAT Group itself (according to the XI. Federal Fiscal Court Senate in its referral, see KMLZ Newsletter 15 | 2020)? These two *"diametrically different interpretations*" by the two Federal Fiscal Court Senates show that there is a "*real need for the Court to provide guidance*". This is the view held by Advocate General Medina, concerning the grounds for admissibility as found in her recently published Opinions on these two cases.

2 First Opinion of Advocate General Medina

In her Opinion on the referral of the XI. Senate, published on 13 January 2022, Advocate General Medina first compares the wording of the provision under EU law with the wording of the German law. In doing so, she found considerable differences existing between the two. The Advocate General concludes that it was obvious that the German provision was too restrictive. In this respect, she also refers to the ECJ decision, according to which the Federal Fiscal Court too broadly excluded partnerships as controlled companies (see KMLZ Newsletter 14 | 2021).

The Advocate General sees a further, very fundamental difference in the fact that, according to the provision under EU law, each member of the VAT group remains an independent taxable person. This means that taxable supplies seem to be

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possible between the members of a VAT group. The VAT group creates a further taxable person which (as a fictitious entity) is liable for VAT, whereby one member of the group has to assume the group´s VAT obligations vis-à-vis the tax authorities. As is well known, this is different under German law. Taxable supplies between members of a VAT group are not possible due to a lack of independence. It is mandatory that the controlling company is the taxable person. (It should be noted, however, that to date, the ECJ has also consistently held, in its jurisprudence, that taxable supplies between members of a VAT group are not possible.)

Finally, the Advocate General explains that, in contrast to German law, there is no provision in Union law that reserves the "controlling company" the right to be the taxable person. Germany has not provided any specific reasoning as to why this provision was necessary to prevent abuse. Therefore, the ECJ should conclude, that it is contrary to Union law that German law designates solely the "controlling company", but not the other members of the group, as being the group's representative and taxable person.

3 Second Opinion of Advocate General Medina

In the Opinion on the referral of the V. Senate, the Advocate General first summarizes the remarks presented in her previous Opinion. She then comments on the particularities resulting from the fact that the "controlling company" in the specific case was a legal person under public law, which had both an economic and a non-economic area of activity. The Advocate General's proposal to the ECJ as to how it should respond to the Federal Fiscal Court is in line with her first Opinion.

4 Consequences for the practice

First of all, it should be noted that these are "only" Opinions, rather than ECJ judgments. The ECJ itself may ultimately decide completely differently. While the ECJ often follows the Advocate General's Opinion, in this case the Advocate General seems to deviate, at a decisive point of argumentation, from the view previously held by the ECJ.

If it were to transpire that the ECJ, in its upcoming rulings, decided to follow the Advocate General's Opinion, the Federal Fiscal Court would again have to determine what consequences this would have for Germany. It is hardly conceivable that the Federal Fiscal Court – despite the corresponding concerns of the V. Senate in its referral – would actually decide to annul all challenged VAT assessments against controlling companies for the past years. Either a "creative solution" would have to be found by means of the German Fiscal Code or the legislator would likely intervene again (similar to the case of the reverse charge mechanism for supplies of property developers). Nevertheless, taxable persons must currently decide as to whether they keep VAT assessments against a controlling company open for the past by filing an appeal or an application for amendment. This is, at least, supported by the fact that both an appeal, as well as an application for amendment, can be filed quickly, and neither entails a fee or the threat of any future accusation that the responsible persons have negligently failed to realise VAT benefits.

Completely independent of the individual's approach: The Advocate General will not accept the argument of a possible VAT loss. She explicitly points to the many critical voices in jurisprudence and literature that have existed for years. Germany has had sufficient time to take steps to remedy the problems. Germany may not remain inactive at first only then to argue that it would lose significant tax revenue if the Court ruled "incorrectly". According to the Advocate General, the proposals of the tax authorities' working group on the "reform of the VAT group regime" are heading in the right direction. One can only agree with this. Germany should finally implement the envisaged reform of the VAT group (in particular, an application procedure).