



# KMLZ VAT NEWSLETTER

## VAT-group: Ministry of Finance implements court case law

### 1. Facts

You may remember *Larentia + Minerva*, a case in which the ECJ found that partnerships can be members of a VAT-group. However, this situation is regulated differently in national law. In sec. 2 para. 2 no. 2 German VAT Act, only legal persons are mentioned. Member States can only exclude partnerships from VAT-groups if this serves to avoid tax fraud – see Art. 11 para. 2 VAT Directive. Whether the exclusion of a partnership serves this purpose was to be examined by the national court.

The Federal Fiscal Court changed its case law. Firstly, the V. Senate of the Federal Fiscal Court, and subsequently the XI. Senate of the Court both agreed that partnerships could also be members of a VAT-group. The V. Senate (V R 25/13), however, will only allow this if members of the partnership are persons who, in addition to the VAT-group, are financially integrated into the controlling company. The XI. Senate of the Federal Fiscal Court (XI R 38/12) considers it harmless if a minority shareholder is also involved in a GmbH & Co. KG, in addition to the VAT-group.

### Partnerships may be member of a VAT-group

The German Ministry of Finance has now implemented the Federal Court of Justice's new case law and therefore now allows partnerships to be potential VAT-group members. However, this only applies if 100% shares in the partnership are held by the VAT-group or its subsidiaries. From a practical point of view, it is also pleasing that the German Ministry of Finance is sticking to its generous interpretation of the features of the organizational integration.

### 2. Ministry of Finance: Partnerships as VAT-groups

The German Ministry of Finance adopted the view of the V. Senate in its circular of 26 May 2017. The decisive passage in the new para. 5a of sec. 2.8 VAT Circular is as follows:

*(5a) The financial integration of a partnership requires that the shareholders of the partnership are, in addition to the controlling company of the VAT-group, only persons who are financially integrated into the controlling company pursuant to sec. 2 para. 2 German VAT Act, so that the necessary scope to intervene is ensured even in the always possible case of the application of the unanimity rule. For the participation of the controlling company required by sentence 1, indirect participations are sufficient.*

According to this passage, partnerships are financially integrated into the controlling company of the VAT-group, if the VAT-group holds, directly or indirectly, all company shares in the partnership. It is irrelevant whether it is a GmbH & Co. KG, an OHG or a GbR. All types of partnerships may be members of a VAT-group.



Contact: Prof. Dr. Thomas Küffner  
Lawyer, Certified Tax Consultant,  
Certified Public Accountant  
Phone: +49 89 217501230  
thomas.kueffner@kmlz.de



### 3. Clarification regarding the feature of organizational integration

It is pleasing that the German Ministry of Finance is sticking to its previous 3-step theory. Organizational integration is also possible if the managing directors in the controlling company and in the controlled company are different persons. In the case of a different managing director in the controlled company, institutionally secured safeguards are necessary. The German Ministry of Finance considers it to be sufficient, with reference to the judgment of the XI. Senate of 12 October 2016 (see Newsletter 04/2017), if the VAT-group is able to prove its decision-making authority, vis à vis third parties, by means of agreements stipulated in writing (e.g. the regulations governing the management of the company, the group directive, the employment contract) and to hold the managing director of the VAT-group responsible in the case of violation of his/her instructions.

### 4. German Ministry of Finance: Transitional arrangements

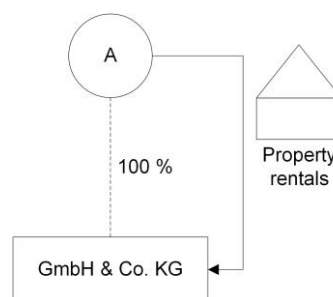
The German Ministry of Finance has granted an extension until 31 December 2018 to implement the new regulations. This extension is very welcome as many companies still have a lot of work to do.

It is interesting to note that the German Ministry of Finance does not object to an earlier application if the parties involved in the VAT-group mutually agree to the corresponding provisions of this circular when assessing the scope of the VAT-group. However, an application with respect to individual supplies only is not possible. In addition, the application is only available to the extent that the affected tax assessments of the controlling company and the new VAT-group members are still subject to change. Whether the

restrictions set out by the German Ministry of Finance (in particular the stipulation that both parties be required to refer to the VAT-group) are legitimate, remains uncertain. There may be room for interpretation.

### 5. Recommendations for the practice

Since the national VAT-group regulation (unfortunately!) does not provide for an application or decision-making procedure, taxpayers now have to carry out a VAT-group screening. They will have to check whether their respective partnership belongs to the VAT-group as of 1 January 2019. Many taxpayers have deliberately chosen the legal form of the partnership in the past in order to avoid becoming a VAT-group member. One thing must be clear: The VAT risk is passed on to the controlling company of the VAT-group. It is the tax debtor. This is particularly problematic if the controlling party is a natural person, for example in a situation where the shareholder leases the premises to a GmbH & Co. KG where he is the only shareholder. In future, this would result in a VAT group.



If a VAT-group is to be prevented, a third party must take over company shares in the GmbH & Co. KG. Another way out would be if the features of the organizational integration are “destroyed” by appointing another managing director.