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VAT'S UP

VAT NEWSLETTER

VAT group: ECJ referral on intra-group supplies / financial integration without majority of voting rights

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1 Current status of the VAT group

According to the German VAT Act, the controlling company of a VAT group is the only taxable person in the VAT group. On 01.12.2022, the ECJ ruled in two judgments that this German legal situation is in conformity with Union law (see KMLZ VAT Newsletter 48 | 2022). These two judgments were based on questions referred by the V. and XI. Senates of the German Federal Fiscal Court (BFH). In both proceedings, further questions arose concerning the VAT group. The XI. Senate has now decided one of these questions in a judgment. The V. Senate has referred another question to the ECJ.

2 Financial integration without majority of voting rights

In the case decided by the XI. Senate on 18.01.2023 (XI R 29/22), the parent company held a majority of 51% of the shares in the subsidiary but had only 50% of the voting rights in its shareholders' meeting. The subsidiary's economic and organisational integration into the parent company was undisputed. In particular, the management bodies were identical. The financial integration was disputed.

According to the BFH, financial integration is given in such a case. In this respect, it explicitly changes its jurisprudence. The V. Senate expressly agreed to this, in advance. The BFH states that, until now, a majority of voting rights in the shareholders' meeting had been required for financial integration to be found to exist. However, according to the ECJ, neither the requirement of a majority of votes nor that of a majority shareholding was to be regarded as crucial. The only significant factor was that the controlling company was in a position to impose its will upon the other shareholder.

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The BFH now assumes that, in the case of only 50% of the voting rights, despite a majority shareholding, the financial integration is merely weaker. However, this was compensated for by the fact that the management bodies were identical. As a result, the controlling company was in a position to enforce its will in the ongoing management and to prevent the formation of a will deviating from its own will through the 50% voting rights in the shareholders' meeting. However, sister companies still cannot form a VAT group on their own.

Due to the relatively narrow conditions (majority shareholding, 50% of the voting rights and identical management bodies) which the BFH specifies in order for financial integration to exist according to this new jurisprudence, the broad impact of the XI. Senate's judgment is likely to be kept within limits. In practice, it is usually the case that the percentage distribution of shares and voting rights does not diverge. The present judgment actually does not decide the latter case, which is of crucial practical relevance. The jurisprudence leaves it open to question as to how the BFH would implement the ECJ judgment of 01.12.2022 if the organisational integration is established by means of a management body, which is only partially identical.

3 ECJ referral on intra-group supplies

In the V. Senate's proceedings (V R 20/22), the BFH decided on 26.01.2023 to refer it to the ECJ. The plaintiff is a legal person under public law with both an economic and a non-economic area of activity. The subsidiary, which is undisputedly the plaintiff's controlled company, provides supplies for consideration in both the economic (undisputedly non-taxable) and non-economic area of activity of the controlling company. To date, it has been disputed whether the supplies of the controlled company to the non-economic sector of the controlling company are taxable.

Now that the ECJ has ruled that, to this extent, no taxation is due on a supply carried out free of charge (the BFH now also assumes this to be the case), the BFH now asked the question whether all supplies carried out between the controlled company and the controlling company (intra-group supplies) are taxable. Furthermore, the BFH wants to know whether at least intra-group supplies are taxable if there is otherwise a risk of tax losses (in this case due to the supplies of the controlled company to the non-economic sector of the controlling company). The BFH derives its doubts as regards Union law primarily from the two ECJ judgments of 01.12.2022 and examines them using various methods of interpretation. In doing so, the BFH comes to the conclusion that there is some evidence that intra-group supplies are taxable. The BFH believes that national law could also be interpreted accordingly.

The V. Senate's referral to the ECJ has great significance. If intra-group supplies were to be taxable, this would turn the entire VAT group upside down. For the past, those taxable persons affected should be granted protection of legitimate expectations. However, in many sectors where VAT exempt output transactions are carried out (banks, insurance companies, social sector), VAT groups are established precisely in order to be able to provide intra-group supplies without VAT. What is annoying, is the renewed considerable legal uncertainty associated with the referral. The ECJ did not have the question of the taxability of intra-group supplies in mind in its decisions of 01.12.2022, which the BFH cites as the trigger for its new doubts regarding intra-group supplies. The ECJ did not want to make a statement on this. As regards content, the BFH does not address the fact that the Commission's proposal on the option for a VAT group of 02.07.2009 explicitly states that the "intra-group transactions are non-existent with regard to VAT". This Commission proposal was cited by the ECJ in its judgments of 01.12.2022, precisely as an interpretation aid. Thus, there would also have been good arguments for leaving everything as it was with regard to intra-group supplies.