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VAT'S UP

VAT NEWSLETTER

Powder keg VAT group: further exchange of blows between the Federal Fiscal Court Senates

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1 Background

The established case law principles on VAT Groups, found in accordance with sec. 2 para. 2 no. 2 of the German VAT Act have, over time, been increasingly shaken. In its 11 December 2019 (XI R 16/18) referral to the ECJ for a preliminary ruling, the XI. Federal Fiscal Court Senate asked, inter alia, whether the previous German understanding, according to which the controlling company (and not the VAT group) is the taxable person and thus the tax debtor, is compatible with Union law (see KMLZ Newsletter 15 | 2020). In doing so, the XI. Senate has obviously poured oil onto the fire of the smouldering feud between the two Federal Fiscal Court Senates responsible for VAT law. As a result of the XI. Senate's reference for a preliminary ruling, the V. Senate felt compelled to also address the ECJ by way of a reference for a preliminary ruling (V R 40/19). This is quite remarkable given that the V. Senate would normally be expected to have waited for the ECJ decision before taking further steps. In the reference for a preliminary ruling, the V. Senate presents the ECJ with arguments to the effect that, (in contrast to the opinion of the XI. Senate), it is perfectly justifiable to designate a member of a VAT group, (namely the controlling company), as the taxable person. It is now patently clear to the ECJ that that there is disagreement within the Federal Fiscal Court. This does not cast a good light on Germany.

2 The order for reference of the Vth Senate

In its initial comments, the V. Senate makes it clear that it has no doubt that a taxable person within a VAT group must be one of the persons who, although legally independent, is closely linked to other members of the group by mutual financial, economic and organisational links. However, doubts are now to be raised on account of the reference for a preliminary ruling by the XI. Senate. It is interesting that the V. Senate emphasises the considerable fiscal consequences of the

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question referred in this context. For if the controlling company - contrary to the previous practice in German VAT law - is not a taxable person in accordance with Art. 11 of the VAT Directive, it could invoke sec. 2. para. 2 no. 2 of the German VAT Act as being contrary to Union law. In this case, the controlling company would at least no longer have to pay VAT on the transactions of the controlled companies. However, the controlled company would also not be considered to be a tax debtor either, as it could invoke national law (see KMLZ Newsletter 15 | 2020). This tax-political "lecture" was perhaps not strictly necessary given that the Federal government will probably also make statements within the framework of the proceedings, as it is entitled to do.

Nevertheless: This reference procedure is also justified because the V. Senate takes up a very important topic and refers this question to the ECJ: Does the VAT group also cover the non-economic area? The V. Senate positions itself clearly here and agrees with the broad understanding of the court of first instance (see KMLZ-Newsletter 13 | 2020). According to the interpretation of the V. Senate, the VAT group thus also includes supplies that are made from the economic to the non-economic sector. For the V. Senate, it is only questionable whether the supplies of a controlled company rendered to the non-economic area of the controlling company fulfil the requirements of a supply carried out free of charge that is deemed to be subject to VAT. In this context, the Federal Fiscal Court goes into detail on the ECJ's *VNLTO* judgment (C-515/07). The V. Senate raises the question of whether this ruling only concerns the scope of the input VAT deduction or whether it also has to be taken into account as regards supplies carried out free of charge that are deemed to be subject to VAT. In the *VNLTO* case, the ECJ ruled that a supply carried out free of charge, that is deemed to be subject to VAT, is ruled out if the taxable person has received supplies of goods or services for the non-economic area. Use for non-economic purposes is not to be equated with use for non-business purposes within the meaning of Article 6 para. 2 of the Directive 77/388/EEC. The consequence would be that the internal transaction to the sovereign area of the foundation, which acts here as the controlling company, does not represent a supply carried out free of charge that is deemed to be subject to VAT and thus is not taxable.

3 Consequences for the practice

The tax-policy exchange between the two Federal Fiscal Court Senates is highly unusual and will therefore not be further commented upon here. The ECJ will hopefully fix this problem. Both, taxpayers and tax authorities should take steps to ensure that they, as practitioners, do not get caught in the crossfire or crushed on the front line. The tax payer currently finds himself at a loss. As long as the interpretation of Art. 11 of the VAT Directive remains unclarified, the tax payer will be unable to gauge the direction of the wind, let alone set his sails correctly. Against this background, it would be desirable if the ECJ's answers to the questions referred to it would go some way in helping to draw a clear line on the correct interpretation of Art. 11 of the VAT Directive. It would be even better, however, if the referrals were to call the German legislator into action, resulting in the latter finally introducing a legally secure group taxation with application requirement. Taxable persons are therefore recommended to keep all VAT assessments open.

With regard to the second question referred, some legal entities under public law, non-profit organizations and mixed holdings, will be eagerly awaiting the answer to whether the supply of services against consideration rendered for the non-economic area of a controlling company are subject to VAT. The tax authorities have always taken a restrictive view of this. For no reason: it is contrary to the principle of legal form neutrality to make such "internal transactions" subject to VAT. A VAT group is intended to enable companies, in particular, to organize themselves in the way that is best for them. VAT must remain neutral here.

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