



## The ECJ has ruled: Internal supplies within a VAT-Group are not subject to VAT

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A case before the German Federal Fiscal Court that has caused quite a stir now appears to be drawing to a close. The resulting ECJ preliminary procedures caused both the tax authorities and businesses to become extremely nervous. The tax authorities were the first to become anxious, as the question arose as to if it was still permitted to tax the controlling company of a VAT group (the Federal Fiscal Court spoke of potential tax losses of EUR 234.8 billion in 2018). Once it had been clarified that the basic structure of the German VAT group complied with the VAT Directive, it was the taxpayers' turn to tremble. The question was whether internal supplies within a VAT group are taxable (also in the case of input VAT deduction restrictions of group members). The ECJ has now clearly answered this question. But first things first.

### 1 Facts of the case

A foundation governed by public law provided, on the one hand, non-economic activities and, on the other, taxable output transactions. The foundation was the controlling company of a VAT group with a GmbH. The GmbH provided cleaning services for both the taxable and non-taxable sectors of the foundation. It was disputed whether the services to the foundation's non-taxable sector were subject to VAT.

The first ECJ case on this legal dispute concerned the question of whether a controlling company itself can be the sole taxable person (rather than the VAT group) - as provided for under German law. In this respect, the ECJ confirmed the German view, meaning that the controlling company can continue to be seen as the only taxable person. In addition, the ECJ found that the services provided by the GmbH to the non-taxable sector of the foundation do not constitute activities for purposes other than those for the business within the meaning of Art. 6(2)(b) of the Sixth Directive.



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After receiving these answers, the German Federal Fiscal Court asked the ECJ another question, in a second procedure. This time, it wanted to know whether the services provided by the GmbH, despite the fact that they were between the members of a VAT group, were perhaps still subject to VAT. For the Federal Fiscal Court, there was some evidence in favour of such internal supplies being subject to VAT.

## 2 ECJ judgment of 11.07.2024 (Case C-184/23, Finanzamt T II)

The relatively short ECJ judgement is quickly summarised: Regardless of whether one of the members of the VAT group is subject to input VAT deduction restrictions, internal supplies between the members of a VAT group are not subject to VAT. The ECJ only needed 20 paragraphs for its actual reasoning. It derived its legal opinion from the wording of the VAT Directive and its previous case law, according to which the members of a VAT group form a single taxable person. This is also supported by the guidance of the VAT Committee and a communication from the Commission, as already remarked upon by the Advocate General. The ECJ judgement, which the Federal Fiscal Court used, in particular, to justify its question, dealt with a different issue, which is why the statements made there do not prejudice the answer to the present question according to the ECJ.

## 3 Consequences for the practice

The results of the judgement are not so much legal as factual: A big sigh of relief for many taxable persons. This mainly affects taxable persons with VAT exempt output transactions, such as banks, insurance companies and social institutions (hospitals, retirement homes, etc.). VAT groups often exist in these sectors. In this respect, in the case of taxable supplies between members of a VAT group, there would have been an increase in costs due to VAT. In terms of substantive law, however, the judgement does not change anything, as the internal supplies were already considered to be fully non-taxable.

This hopefully means that the Federal Fiscal Court will now bring this specific procedure to an end. The supplies provided to the non-business sector are also not subject to VAT as internal supplies between members of a VAT group. However, for input supplies that the GmbH has purchased for the provision of cleaning services (e.g. cleaning materials) it is (proportionately) not entitled to claim input VAT deduction. The VAT group also uses these purchases for its non-taxable output supplies.

Now that all ECJ proceedings in the area of VAT groups have been decided, there is further clarity. In addition to the issue of internal supplies, the ECJ and the German Federal Fiscal Court have recently ruled as follows: Germany may define the controlling company of a VAT group as the sole taxable person (and not the group itself). The VAT group includes both the taxable and the non-taxable sectors of the members of the VAT group. Supplies free of charge within a VAT group from the taxable to the non-taxable sector are not subject to VAT. Partnerships can be member of a VAT group, even if the controlling company does not control 100% of them.

The Federal Ministry of Finance will still have to implement some of the decisions in the Administrative VAT Guidelines (e.g. on the scope of the VAT group and the participation of partnerships as controlled companies). Finally, there is still one important issue to be addressed, and the legislator is being called upon to do so. Again and again, businesses and the tax authorities are uncertain as to whether a VAT group exists or not. It often transpires, in retrospect, that a VAT group existed or ceased to exist without detection. This results in unwanted tax payments or tax losses. In this respect, the hope remains that the legislator will address this issue (again). A "VAT group on application" would resolve these legal uncertainties.