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VAT'S UP

VAT NEWSLETTER

No VAT group between sister companies

36 I 2022

1 Background

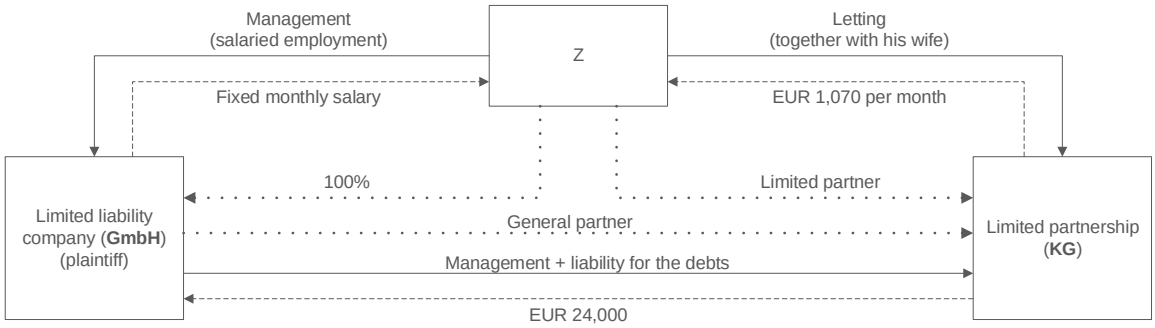
The exact requirements and legal consequences of a VAT group have been in doubt for many years. Since the ECJ judgment in the case *Larentia & Minerva* (C-108/14), one crucial aspect has been whether sister companies alone, (in the absence of their shareholder as controlling company), can form a VAT group. In its aforementioned judgment, the ECJ held that Union law only requires the controlling and the controlled companies to be closely bound. National law may only provide for further requirements in order to prevent abusive practices. Such a close link between sister companies is quite conceivable. Nevertheless, the V. Senate of the German Federal Fiscal Court (BFH) upheld that sister companies cannot form a VAT group (V R 15/14). In a recent judgment, the BFH confirmed this jurisprudence despite an ECJ referral by the XI. Senate of the BFH, which has not yet been decided and which also deals with the concept of a financial link (XI R 16/18).

2 Facts (German Federal Fiscal Court decision of 01.02.2022 – V R 23/21)

The Plaintiff is a limited liability company (GmbH). Z was the sole shareholder and managing director of the GmbH. In its judgment, the Federal Fiscal Court found that Z provided managing director services to the GmbH as part of his salaried activity. At the same time, Z was the sole limited partner in a limited partnership (KG). Together with his wife, Z let office space to the KG for EUR 1,070 per month. The sole general partner of the KG was the GmbH. In accordance with its business purpose, the GmbH was responsible for the management and liable for the KG's debts. In the year in dispute, the GmbH received EUR 24,000 from the KG for its management activities. The GmbH assumed that it was not required to pay VAT on this amount due to the existence of a VAT group with the KG.

Dr. Michael Rust
Lawyer

+49 (0) 89 217 50 12-74
michael.rust@kmlz.de



3 Decision of the German Federal Fiscal Court

The BFH initially denied that Z was the controlling company of the GmbH and the KG. There was no economic integration. Z provided management services to the GmbH as part of his salaried employment and thus these services constituted a non-economic activity. The rental of the office space to the GmbH was considered of little importance, since the premises were not specially equipped for the KG and were therefore exchangeable.

No VAT group was found to exist between the GmbH and the KG. The BFH upheld its jurisprudence to the effect that the controlling company itself is required to at least indirectly hold shares in the controlled company. This is not the case as regards sister companies. The BFH essentially substantiated its opinion based on the fact that it could not be determined which of the sister companies was the controlling company. Whether the situation would be different if one assumed that the VAT group was the taxable person and not the controlling company, was irrelevant. In any event, German law could not be interpreted accordingly. Finally, the BFH refers, in this context, to the lack of any direct effect laid down in Art. 11 of the VAT Directive, which regulates VAT groups under Union law.

4 Consequences for the practice

For the time being, it remains the case that no VAT group is possible between sister companies without involving their shareholder being the controlling company. Insofar as taxable persons follow this legal interpretation, there is legal certainty. However, it remains to be seen whether this is really the last word. The BFH's grounds for denying the existence of a VAT group – namely that the requirements (financial integration) are not met because the legal consequences (who is the controlling company) cannot be determined – is pragmatic but not convincing. The BFH gave further reasoning in its judgment of 02.12.2015 (V R 15/14), to which it now does not refer. The XI. Senate has taken up at least some of these reasonings in its referral to the ECJ and has put forward counter-arguments. The result could therefore change again following the ECJ's statements in response to this referral by the XI. Senate or, as a result of a further referral by a Fiscal Court. Insofar as taxable persons take a different legal view, e.g. when defending themselves against additional tax claims, it is therefore still conceivable that they will ultimately be proven right.

With regard to the issue of economic integration, it is interesting to note that the letting of office space does not constitute grounds for economic integration in circumstances where the premises are interchangeable as a result of not being specially equipped. In this respect, the BFH refers to one of its judgments from 2009, in which it assumed that economic integration was given by the letting of immovable property, that formed the spatial and functional basis of the company. By mentioning the aforementioned criteria, the BFH appears to clarify and somewhat tighten up this jurisprudence.

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399