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VAT'S UP

VAT NEWSLETTER

ECJ - VAT group: Much ado about (in the end) nothing? Controlling company as taxable person – Intra-group supplies taxable?

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1 Background

For some years now, the ECJ has had to regularly deal with the subject of the German VAT group. In 2015, the *Larentia and Minerva* case dealt with the question of whether partnerships can be controlled companies (cf. KMLZ Newsletter 18 | 2015). Subsequently, in 2021, the conditions under which such a VAT group could exist, in terms of a partnership, were clarified (cf. KMLZ Newsletter 14 | 2021). In both decisions, the ECJ emphasized that it considered the German jurisprudence and tax authorities' conditions for the existence of a VAT group to be too restrictive.

2 Current proceedings

Most recently, both Senates of the German Federal Fiscal Court (BFH) dealing with VAT law asked the ECJ whether German law may provide for the controlling company to be the taxable person for the group (cf. KMLZ Newsletters 15 | 2020 and 26 | 2020). The other alternative would have been for the group, as such, to constitute the taxable person. In German law, a VAT group has no legal capacity and therefore no VAT could have been assessed against the group. For this reason, the V. Senate of the BFH also pointed out, in its referral decision, that a tax loss in a three-digit billion amount would be threatened annually in the event of the "wrong" answer being given by the ECJ. In the meantime, this outcome also seemed to become more likely after Advocate General *Medina* concluded, in her opinion regarding the two proceedings, that the German regulation did not comply with EU law. Accordingly, interest in the ECJ's decisions was so great that, shortly after their publication, even the ECJ's corresponding website was unavailable for a short time.

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3 ECJ judgments of 01.12.2022 (cases C-141/20 and C-269/20)

The big bang has failed to materialize. At least with regard to the tax debtor, everything remains the same. In this respect, the ECJ's renderings in its two decisions are almost identical in wording. However, in one of the decisions, the ECJ clarified, once again, that the right to intervene is not a mandatory requirement. But let's take it one step at a time:

In both of its decisions, the ECJ states that there must be a single point of contact for the group. Union law allows for this point of contact to be the controlling company, but it need not be. Union law also allows for someone else to be the point of contact. The possibility that this representative is then also the taxable person for the group is permissible under Union law. Since the controlling company must also declare the VAT based on the output services of the controlled company, and that there is liability on the part of the controlled company, there is no risk of tax shortfalls. Despite belonging to the VAT group, the ECJ nevertheless considers the members of the group to be independent. In one of the rulings, the ECJ also assumes that the controlled company can provide supplies to the controlling company for consideration, but it assumes this in the absence of any explicit statement on the taxability of these intra-group supplies.

In the legal dispute submitted by the XI. BFH Senate, a public corporation held 51% of the shares in a limited liability company. However, it only held 50% of the voting rights in the shareholders' meeting of this company. According to the previous national interpretation, there was no VAT group due to the lack of financial integration. However, the XI. BFH Senate asked the ECJ whether this result was correct. The ECJ found that the close (financial) link required by EU law is not to be interpreted restrictively. It reiterated that a relationship of subordination may give rise to a presumption of a close link but is not a prerequisite for this. Only if the requirement of a majority of votes is necessary and suitable to avoid tax evasion, may it be required as a condition of the VAT group. However, this must be investigated by the national court.

4 Practical consequences

Much has been written and assumed about what could happen after the ECJ published its decisions. Which article in the German Fiscal Code could perhaps, after all, prevent a tax loss? Does the legislator even have to intervene? In this respect, the two conflicting BFH submissions have led to maximum confusion and legal uncertainty. In the end, all of these considerations were unnecessary. Germany may continue to treat the controlling company as the taxable person for the group. It is therefore clear that the German VAT group complies insofar with EU law. In this context, the ECJ judgments have no practical consequences other than the restoration of legal certainty. However, the ECJ's position on the taxability of supplies between group members remains unclear.

The ECJ repeatedly demonstrates for the purposes of national jurisprudence, in connection with financial integration, that strict subordination is not a mandatory requirement for a VAT group. It is very questionable, for example, whether the ECJ would follow the BFH, insofar as the BFH recently rejected financial integration between sister companies. However, the reasoning of the ECJ not only applies to financial integration, but also to organizational and economic integration. Even the rental of office premises is, in the opinion of the BFH, insufficient for the existence of economic integration (cf. KMLZ Newsletter 36 | 2022). The strict requirements for economic integration expressed in this ruling should be reconsidered, as well as the currently still strict requirements for organizational integration. The ECJ judgment again clearly demonstrates that the requirements should be significantly less stringent from the perspective of EU law.

Finally, the repeated legal disputes show that there are still many uncertainties regarding the VAT group. These could be resolved in a legally secure manner for the taxable person and the tax office by means of an application procedure. The corresponding proposals for implementation are all on the table.

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