



KMLZ VAT NEWSLETTER

VAT groups - need for action

Good things come to those who wait: After more than one year of internal discussion, the German Ministry of Finance has now announced the new principles of “organizational links”. The fiscal authority has attempted to make the new jurisdiction as business-friendly as possible.

1. Background to the German Ministry of Finance's circular of 7 March 2013

The requirements for the assumption of a VAT group are, inter alia, the financial, economic and organizational links. If these requirements are fulfilled, the subsidiary company is not to be considered as independent. The supplies between the parent company and the subsidiary company are therefore considered to be internal transactions and not subject to VAT.

In particular, the legal institution of a VAT group develops its effects/results if restrictions for VAT-deduction exist (i.e. health sector, finance sector) and the VAT liability of the internal transactions therefore would ultimately constitute a cost factor.

Recent jurisdiction has dealt with the characteristics of organizational links (see Supreme Tax Court, judgment of

German Ministry of Finance (BMF) published circular on 7 March 2013

On 7 March 2013, the German Ministry of Finance passed the long awaited administrative circular on VAT groups. The tax authority has changed its opinion on the characteristics of organizational links. The new principles will apply from 01 January 2014. Companies should therefore make use of the transitional period and check whether they comply with the requirements for a VAT group.

05 December 2007, V R 26/06; Supreme Tax Court, judgment of 20 August 2009, V R 30/10 and Supreme Tax Court, judgment of 07 July 2011, V R 53/10). Organizational links imply that the possibility of controlling the subsidiary company that is connected to the financial link is indeed perceived in the ongoing management. Furthermore, it is also essential that there are no policy-forming activities on the part of the subsidiary company which conflict with the will of the parent company.

2. The new scheme of the German Ministry of Finance

The German Ministry of Finance has sought to illustrate these requirements for organizational links by means of the following scheme:

Stage 1: Personal union of management bodies

Organizational link can principally be expected if there are the same persons on both executive boards. It would also be sufficient if individual CEOs of the parent company acted as CEOs in the subsidiary company.



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Apart from the normal case of personnel relations, organizational link can also result from senior executives of the parent company acting as CEOs in the subsidiary. The German Ministry of Finance points out that a pure general commercial power of representation (without an employment relationship) is not sufficient – see section 2.8 para 9 of the German Administrative VAT Circular (new version).

Stage 2: Partial personal union

If the same individuals are not on both executive boards, further pre-requisites have to apply in order to affirm organizational links. The latter is the case if, for example, there is at least one further (third-party) CEO in the subsidiary.

What is decisive then is the shaping of the management powers in the subsidiary company. According to the German Ministry of Finance, organizational link can be expected if general management power is agreed on and the same CEOs own the majority of votes. If this is not the case, additional institutionally assured measures are necessary. These measures might be:

- The parent company has extensive management powers over the executive board of the subsidiary company and is entitled to appoint and remove all CEOs of the subsidiary company; or
- the right of final decision of the same CEOs in both executive boards was agreed to in writing.

Stage 3: Not the same individuals on both executive boards of the management bodies

There are exceptional cases in which there is organizational

integration in the absence of any personnel relations within the executive boards of the parent company and the subsidiary company. In this case, it is vital that there are institutionally assured direct intervention possibilities in the core area of the ongoing management of the subsidiary company. Such intervention possibilities can be expected if the parent company and subsidiary company have both either signed a controlling agreement according to sec. 291 of the German Stock Corporation Act (AktG) or if the subsidiary company has been integrated into the parent company according to sec. 319, 320 of the German Stock Corporation Act.

It is a good thing that the German Ministry of Finance also allows agreements set out in writing, such as a management directive or corporate guidelines to be sufficient. This applies when the parent company can make the CEO of the subsidiary company liable on the basis of these regulations if he violates the instructions.

3. Recommendations for practice

The German Ministry of Finance' letter creates legal certainty. All VAT groups must be checked thoroughly. If the requirements are questionable, corporate law measures should be taken.

There is a transitional period until 31 December 2013: The new principles of the German Ministry of Finance apply retroactively until 01 January 2013. However, it is not prohibited to apply the rules on VAT groups based on the former version of the German Administrative VAT Circular even for the period until 31 December 2013, if the companies, before 01 January 2013, assumed to have organizational links.