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GmbH & Co. KG can be member of VAT group

The Supreme Tax Court has held that a GmbH & Co. KG can rank as a corporation for the purposes of entitlement to membership as a subsidiary of a VAT group.

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An AG operated a ship chartering business through a selection of subsidiaries – one for each ship – formed as GmbH & Co. KGs (limited partnerships with no natural person bearing unlimited liability). It maintained that it should be allowed to deduct the input tax on the costs of raising capital for further investment in shipping and also that it formed a VAT group with its subsidiaries. The tax office disputed both points – as a managing holding company it could not deduct input tax on the costs of further investment and, under the VAT Act, only legal persons could be subsidiaries in a VAT group. The case went to the ECJ which held that a managing holding company could deduct the input tax on the cost of raising capital for a managed subsidiary, the management being its business purpose. The ECJ also held that the restriction in the VAT Act of VAT group members to legal persons had no basis in the VAT Directive and should be disapplied unless it was necessary for the prevention of abuse (ECJ judgment C-108/14 *Larentia + Minerva* of June 16, 2015)..

The Supreme Tax Court has now followed the ECJ judgment as it stands in respect to the input tax. It has taken a different line, though, on the question of the VAT group membership. Nothing was apparent to suggest that restricting the membership to legal persons (corporations) might help to prevent abuse – the official justifications for VAT grouping all being based on efficiency and expediency – but it was appropriate to see a GmbH & Co. KG as a legal entity in this context. Accordingly, there was no need to disapply the VAT Act provision defining a VAT group in order to achieve a result in conformity with EU law. Essentially, the argument was that no natural person ultimately bears management responsibility for a GmbH & Co. KG, making the body akin to a corporation. The court also cited other examples of departures from company law definitions when looking at the tax status of legal forms.

Supreme Tax Court judgment XI R 38/12 of January 19, 2016 published on March 9

Schlagwörter

GmbH & Co. KG, VAT group, corporation