By PwC Deutschland | 28. Januar 2022

German VAT group regime tested before the ECJ

Pending before the ECJ are currently two questions of relevance regarding the German regulation of consolidated tax groups for VAT purposes (VAT group). In her Opinion on both cases the Advocate General takes the view that the sole taxable person is, in principle, the VAT group itself and not (as under German VAT law) the controlling member of the group.

Background

VAT groups are a legal fiction for VAT purposes under the Sixth Directive allowing groups to be treated in the same way as a single taxable person registered for VAT. They are aimed at simplifying VAT compliance and at combating tax abuse. Moreover, VAT is not to be accounted for on goods and services supplied between group members.

Questions of key relevance were submitted to the ECJ by the German Supreme Tax Court in two decisions dated 11 December 2019 (case ref. XI R 16/18) and 7 May 2020 (case ref. V R 40/19). The matter to be clarified is whether the distinction made in the German provisions on VAT grouping between the controlling company and the controlled company is compatible with EU law - specifically: Who is liable for VAT in the case of fiscal unity for VAT purposes. Is it the group as such or – as currently the case in Germany – the controlling company?

Opinion of 13 January 2022 on case C-141/20, *Norddeutsche Gesellschaft für Diakonie:*

Following the referral from the German Supreme Tax Court, case XI R 16/18, the Advocate General (AG) concluded in clear terms, among other things, that the only taxable person liable for VAT is the VAT group itself and not - as provided for under German VAT law - the controlling company of that group, which holds the majority of the voting rights and a majority stake in the controlled company. In addition, the AG referred to the ECJ decision in the case *Larentia + Minerva* (judgment of 16 July 2015 in the **joined cases C?108/14 and C?109/14**) , namely that 'the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding national legislation which reserves the right to form a VAT group, as laid down by that provision, solely to entities with legal personality and linked to the controlling company of the group, except where those requirements constitute measures which are appropriate and necessary in order to achieve the objectives seeking to prevent abusive practices or to combat tax evasion or tax avoidance'. It follows from ECJ's case-law that very specific justifications are needed when seeking to prove that the restrictive conditions imposed on VAT groups serve the purpose of combating tax fraud or evasion. The AG is of the opinion that the arguments raised by the German Government in that respect are not convincing in the present case.

Opinion delivered on 27 January 2022 on case C-269/20, *Finanzamt T:*

The AG continues to follow her chosen course. This referral from the German Supreme Tax Court (case V R 40/19) also deals with the interpretation of Article 4(4) and in addition with point (b) of the first sentence of Article 6(2) Sixth Council Directive 77/388/EEC (Directive) regarding services provided by the subsidiary (GmbH) to its parent, a foundation (S) for its public sector: The GmbH provided cleaning services at S's premises and throughout the building complex occupied by the university school of medicine which includes, in addition to patient rooms, corridors and operating theatres, lecture rooms and laboratories. While hospital space is dedicated to patient care and falls within the sphere of S's economic activities, lecture rooms, laboratories and so forth are used for student training and, consequently, fall within the sphere of activities carried out by S as a public authority.

The **first question** asked by the Supreme Tax Court (as in the parallel case) is whether second subparagraph of Article 4(4) of the Sixth Directive precludes a Member State from identifying not the VAT group itself but a specific member of that group, that is, the controlling company as a taxable person for VAT purposes.

The purpose of the **second question** is to clarify, in the case of an entity that carries out both taxable economic activities and exempt activities within the context as sovereign public authority, whether - in the case of dispute - the provision of services free of charge to the foundation (as sovereign public authority) is taxable under Article 6(2) of the Sixth Directive.

In her **answer to the first question** the GA recommends - as she did in the aforementioned parallel proceeding - the court rule that the German provision is not in line with EU law. - Persons who are legally independent but closely linked by financial, economic, and organizational ties may be treated as a VAT group and as one taxable person. On the other hand, the above provision of the Sixth Directive would not preclude that each member of that VAT group continues to be an independent taxable person. But that provision **precludes national rules** (i. e. the German VAT Act) where only the controlling company of the VAT group is identified as the taxable person for the whole VAT group, whereas the other members of that group are considered as non-taxable members.

The AG points out that the disputed provision in Sec. 2(2) no. 2 of the German VAT Act, whereby the controlling company is treated as the sole taxable person, goes way beyond the mere simplification of taxation of affiliated companies. This provision in the VAT Act ignores, first, the independent legal identity of each of the related companies and, second, their potential specifics, such as public bodies (here: the foundation). Moreover, it restricts the freedom of the tax group (VAT group) to appoint its representative.

It follows from the answer given to the first question that **there is no need to answer question 2**. For the sake of completeness, however, the GA points out that Art. 6(2), first sentence, letter b of the Sixth Directive (according to which services provided free of charge are treated as services provided for consideration and thus are taxable) is not applicable to the sovereign activities of the foundation, i.e., to its non-economic activities (for more details, see point 45 et seq. of the Opinion).

Source:

ECJ case reference **C-141/20 *Norddeutsche Gesellschaft für Diakonie*** Opinion of 13 January 2022; ECJ case reference **C-269/20, *Finanzamt T*** Opinion of 27 January 2022

Schlagwörter

VAT group, controlling member, taxable person