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By PwC Deutschland | 01. Dezember 2022

ECJ with two landmark decisions on German VAT group requirements

Today, the European Court of Justice (ECJ) published two long-anticipated decisions dealing with German VAT groups. Following our preliminary, quick review of the decision, a “crash” of the current VAT group concept has not transpired. Whilst on the one hand, the financial integration in a VAT group may be eased in future, on the other hand, the ECJ addresses an “independence” of the VAT group affiliates – the practical impact of which is unclear for the time being.

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Background

Questions of key relevance were submitted to the ECJ in two cases by the **XI** Chamber and the **V** Chamber of the German Supreme Tax Court. The key matter to be clarified was whether the distinction made in the German provisions on VAT grouping (*Organschaft*) 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? The effects of the German VAT group at present are limited to internal supplies between the branches of the business established in Germany. These branches are treated as a single business.

ECJ case C-141/20: Here the ECJ is asked if the relevant Articles in the VAT Directive are to be interpreted as permitting a Member State to designate, instead of the VAT group, a single member of the VAT group ('*Organträger*' as the controlling company) as the taxable person?

ECJ case C-269/20: In addition to the above main question of concern, this referral also considered the services provided by the subsidiary (GmbH) to its parent, a foundation governed by public law active in the public sector. Therefore, and in a second question it was to clarify whether the provision of services to the foundation (as sovereign public authority) is taxable under Article 6(2) of the VAT Directive.

More details on the cases of dispute and the Opinion of the Advocate General on both cases to be found in our **blog post of 28 January 2022**. The Advocate General took 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.

Summary of the ECJ decision on cases C-141/20 and C-269/20:

According to our preliminary, quick review of the decision, the anticpated "crash" of the current VAT group concept did not transpire. However, whilst on the one hand, the financial integration in a VAT group may be eased in future, on the other hand, the ECJ made remarks addressing the "independence" of the VAT group affiliates – the practical impact of which is unclear for the time being.

According to the ECJ, EU law does not preclude a Member State from appointing one of the members of the VAT group as sole taxable person, as long as that member is in a position to impose its will on the other VAT group members.

On the one hand, the ECJ limits the strict requirements of financial integration. As a general matter, the Court discards the requirement of a majority of voting rights as a condition for financial integration. However, on the other hand, with regard to the independence of the affiliated companies, the ECJ's statements are somewhat unclear as to how they are compatible with the above conclusions. We will have to see as to if this has an impact on the current position in Germany according to which transactions between members of a VAT group are out of scope of VAT.

Specific answers of the ECJ to the questions referred:

ECJ case C-269/20, *Finanzamt T* (Supreme Tax Court referral **V** R 40/19)

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Here, the ECJ held *that Article 4 does not preclude a Member State from designating, as the sole taxable person of a group of persons which, although legally independent, are closely bound to one another by mutual financial, economic and organizational links, the controlling body of that group, where the latter is in a position to impose its will on the other members of that group, and provided that this designation does not give rise to a risk of tax losses.*

In answer to the second question (services to the foundation), the ECJ decided that the provision of a service in connection with this public activity by a member of this group may not be taxed. Because the services concerned are supplied for consideration within the meaning of Article 2 of the VAT Directive, Article 6(2)(b) of that directive is not applicable.

ECJ case C-141/20, *Norddeutsche Gesellschaft für Diakonie* (Supreme Tax Court, referral XI R 16/18)

*In answer to the **first question** the ECJ confirmed that (Identical to the case C-141/20) a Member State is not precluded from designating, as the sole taxable person of a group of persons who although legally independent, are closely linked to one another by mutual financial, economic and organizational links, the controlling body of that group, where that entity is able to impose its will on the other members of that group, and provided that that designation does not give rise to a risk of tax losses.* In light of this, the ECJ saw no need to answer the second question referred.

*As to the **third question** the ECJ states that Art. 4 par. 4 subpar. 2 VAT Directive precludes a national regulation which makes the possibility for an entity to form a VAT group with the controlling company subject to the condition that the controlling company holds a majority of the voting rights in addition to a majority holding in the share capital of that entity.*

That does not constitute, a priori, a measure necessary and appropriate to attain the objectives of preventing abusive practices and of combating tax evasion or avoidance and cannot therefore, in principle, be required.

*Responding to the **fourth question**, the ECJ states that it is not permissible to treat entities as non-independent by classification or by way of typification, if they are financially, economically and organizationally integrated into the controlling entity of a VAT group.*

In the present case, although the Controlling Company, as the only taxable person of the VAT group, is in charge of filing the tax return on behalf of all members of this group, these members bear the economic risks associated with their respective economic activities themselves. Consequently, it must be assumed that these members are engaged in independent economic activities and therefore cannot be classified, by categorization, as "non-independent" merely because they belong to a VAT group.

Source:

EuGH, judgment **C-141/20** - *Norddeutsche Gesellschaft für Diakonie* and **C-269/20** - *Finanzamt T*; both published on 1. Dezember 2022.

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Schlagwörter

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