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By PwC Deutschland | 12 March 2013

Organisational integration for VAT groups newly defined

The finance ministry has redefined the organisational integration requirement for a VAT group.

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A VAT group (*Organschaft*) must meet three basic integration requirements, financial, commercial and organisational. Financial integration implies that the parent holds a majority in voting rights over the subsidiary, commercial integration means that the business of the subsidiary supports or complements that of the parent and organisational integration is held to exist where the subsidiary is unable to set its own management policy. The organisational integration requirement is sometimes expressed as the subsidiary's lack of a will of its own as distinct from that of the parent and has traditionally been seen as being met where both entities are managed by the same directors. However, the exact limits of this integration are not always clear and the finance ministry has now issued a decree setting out in some detail the principles to be followed.

Organisational integration is an extension of, but distinct from, financial integration in that it is the execution of the parent's powers of direction conferred by its majority vote. It must ensure that the subsidiary cannot develop a managerial will of its own. This is a question of fact. The primary example continues to be common directors, although it is not necessary for every director to hold office in both companies. Thus, not every director of the parent need serve on the board of the subsidiary. The position is more complicated where not all the directors of the subsidiary are also directors of the parent. In these cases, regard must be had to the powers of each individual. If the rights are exercised jointly, there will be organisational integration if the common directors of the subsidiary form a majority able to decide the issue under debate. If they cannot, organisational integration will require other institutional measures to prevent action by the subsidiary against the wishes of the parent. These can lie in the combination of extensive management rights of the parent with the power to appoint and dismiss the directors of the subsidiary. They can also lie in a (documented) mechanism forcing a director of the subsidiary alone to submit to resolution of a dispute by the common director appointed parent. The organisational integration can be indirect through intermediary companies, but cannot be through common supervisory board memberships. Organisational integration can also be founded by directors of the subsidiary, who are not, themselves directors of the parent. However, they should hold senior management positions with the parent and be bound to follow the instructions of their superiors on pain of loss of office with the subsidiary should they fail to do so. By contrast, it is not sufficient that an appointee of the parent merely hold a senior position with the subsidiary subordinate to a director answerable to the parent in the latter's capacity as shareholder only.

In exceptional cases, there may be organisational integration without common directorships. However, there must be institutional measures ensuring the obedience of the subsidiary's management to the will of the parent on all matters of importance. Examples can be found in a formal group policy, or in an order for management set specifically for the subsidiary. The parent's management must also be able to demonstrate its control over the subsidiary to third parties. This control must be exercised regularly; the ability to act as a majority shareholder, the establishment of a regular reporting system, approval requirements or consultancy bodies without their own executive power are, of themselves, insufficient.

The new definition is to apply to all open cases. However, no objection will be taken to companies continuing to follow the old definition for the remainder of the calendar year 2013, provided that all members

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of the group do so consistently.

Keywords

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