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Partnerships to join VAT groups?

The Supreme Tax Court has asked the ECJ for a ruling on the determination of the amount of deductible input VAT of holding companies with taxable outputs and on the conditions for joining VAT groups.

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Two cases of shipping groups disputing the amount of input tax currently accepted by the tax office as deductible are pending before the Supreme Tax Court. One group is led by an AG and the other by a limited partnership (GmbH & Co. KG). The AG holds and effectively manages four subsidiaries with a 99% share in each. The GmbH & Co. KG holds and effectively manages two subsidiaries with a 98% share in each. Each subsidiary is a limited partnership (KG) and operates its own cargo vessel. Each parent has incurred input tax on its costs of raising capital to finance its partnerships and each receives its income from management fees charged to the partnerships, from interest on its loans to the partnerships, on profit shares from the partnerships and from interest from banks on amounts temporarily deposited pending their investment in business operations. In both cases, the disputes with the tax office centre on two points, the method of allocating expense between asset and business management of a holding, and the acceptability under community law of the narrower German requirements for membership of a VAT group.

The first area of uncertainty derives from the lack of a precise formula in either the VAT Directive or the VAT Act. Various methods of determining the portion of deductible input tax can be found in practice, but, ultimately, they are all based on one of two alternative principles – allocation in proportion to gross receipts and allocation by assets employed. The gross receipts basis is geared to the concept of the holding entity as primarily a service provider, whilst the assets employed basis see it mainly as an investor. Unfortunately, both taxpayers and tax offices tend to see the only acceptable method in the circumstances as that suiting their own best interests in the particular case.

The VAT group provision in the VAT Directive permits member states to allow VAT groups between entities with close financial, business and organisational connections. The German VAT Act requires financial, business and organisational integration onto the parent and also requires that the subsidiaries be corporations. The German provision is therefore more restrictive and thus might be acceptable as a partial implementation of an option. However, it might also be objectionable as a discrimination against partnerships without a valid justification. Similarly, the demand for integration as opposed to close connections might be seen as introducing an unnecessary and unreal restriction to the detriment of groups without a strong, or consistent, hierarchy. In both cases at issue, subsidiary membership of a VAT group would force input tax deduction on the basis of group third party turnover, leaving, if any, only a minor irrecoverable amount.

Supreme Tax Court decisions XI R 38/12 and XI R 17/11 of December 11, 2013 published on March 5, 2014

Keywords

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