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German Tax and Legal News

New guidance issued on VAT grouping rules

Partnership businesses may be affiliated companies in a VAT group

Germany's Federal Ministry of Finance (MOF) issued new guidance on May 26, 2017 that amends the VAT grouping rules in response to the decision of the Court of Justice of the European Union (CJEU) in the Larentia + Minerva case and decisions of the Federal Tax Court (BFH), in which both courts concluded that partnerships can be members of an affiliated VAT group. The amendments to Germany's VAT group rulings are scheduled to come into effect in 2019, but may be applied immediately if the parties refer to it by mutual agreement.

Background

VAT grouping allows qualifying groups to be treated as a single taxable person for VAT purposes, which means that VAT does not have to be accounted for on goods or services supplied between group members and the group can file a single consolidated VAT return. Various requirements must be met to qualify as a group, and in Germany, this includes the financial, economic and organizational integration of an affiliate with the parent company of a VAT group.

On July 16, 2015, the CJEU ruled in Larentia + Minerva that VAT grouping rules may not be limited to entities with legal personality unless the restriction is appropriate and necessary to combat tax avoidance or tax evasion. The CJEU held that German VAT law does not comply with the EU VAT directive, because it does not allow partnerships to be members of a VAT group. In decisions issued on 2 and 3 December 2015, the BFH followed the CJEU decision holding that a GmbH & Co KG (a limited commercial partnership in which the general partner is a limited liability company) is a legal person for purposes of Germany's VAT grouping rules and should be allowed in a VAT group. The BFH also followed the CJEU when it concluded that a partnership whose business had been integrated into the business of its controlling/parent company was a member of the VAT group of its parent company.

MOF guidance

The MOF guidance clarifies that, in general, any type of entity can be an "affiliated company" for VAT grouping purposes, provided the financial integration requirement under the VAT grouping rules is met. In the case of a partnership, however, the partners of the partnership also must be financially integrated with the controlling company. In other words, the controlling company must hold directly or indirectly all of the shares of the partnership business for the financial integration requirement to be met.

With regard to the organizational integration requirement for VAT grouping, the MOF guidance states that organizational integration can exist even where there is no common representation on the management boards of the controlling and the affiliated companies. Organizational integration will be deemed to exist when the controlling company is able to exercise ultimate decision-making authority over the affiliated company (but will not necessarily exist merely because the affiliated company's decision-making process is the same as that of the controlling company). The guidance also clarifies that an employee of the controlling company may carry out such decision-making authority for purposes of this rule.

The tax authorities will apply the new guidance to all pending cases, although the necessary legislative amendments to the VAT law to include partnership businesses in VAT groupings will not be effective until at least January 1, 2019. However, taxpayers may follow the amended rules immediately, provided they do so consistently and the relevant tax assessments are not final.

Comments

The guidance clarifies that a partnership business, under certain conditions, can be part of a VAT group. Whether only a GmbH & Co KG can be integrated into the business of its majority shareholder and whether the presence of a nonintegrated minority shareholder necessarily precludes integration remain open issues. Moreover, it remains to be seen

whether the legal provisions governing VAT grouping will be amended to reflect the recent case law, and/or whether taxpayers can create a higher degree of legal certainty around their VAT groupings by implementing decision-making authority and procedures. Because the new rules will not apply until 2019, potentially affected businesses will have time to determine whether their affiliated partnerships are members of their VAT group under the guidance.

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