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**VAT COLLABORATION GROUP**

April 19, 2024  
09:15 -10:00 AM



# **German update on ECJ Case**

**Norddeutsche Gesellschaft für Diakonie**



LEA GLOBAL EUROPEAN REGIONAL CONFERENCE



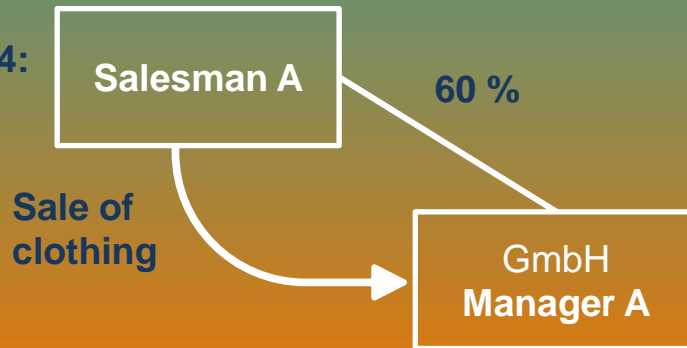
# Today

- **German History of the VAT Group**
- **Development in the EEC / EU**
- **Definitions VAT Group EU / Germany**  
German definition | Practical relevance
- **ECJ Case Norddeutsche Gesellschaft für Diakonie**  
Questions of the German court | Opinion of the Advocate General Medina  
Assessment of ECJ | Echo in Germany | Possible Effects
- **Subsequent Judgements**
- **Legal situation in other EU countries**

# German History of the VAT Group

- Until end of 1967 Gross VAT: VAT on every production level without the possibility to deduct the VAT accumulation
- The VAT group was developed 1920 by Imperial Finance Court

**Case of 1924:**



# German History of the VAT Group

## Assessments of the court

- Two separate legal entities could be considered as one economically unified company
- A „sole ruler“ can control the entire company in such a way that a deviating decision-making process is excluded
- **Tax consequences:** Sales between the separate legal entities are not taxable

→ **In 1934:**  
Implementation of a legal regulation



# Development in the EEC / EU

- **As of 1968:** Harmonization within the EEC ➡ change to net VAT (input VAT deduction)
- **Goal:** VAT should not be used to flatten competition (one company produces the entire product to avoid the accumulation of VAT)
- **Implementation in Germany:** VAT Group should be maintained to avoid administrative work
  - One declaration
  - No invoices between the members of the VAT group

# Definitions VAT Group EU / Germany

The EU regulation is based on the regulations of the member states before implementation of the EU VAT law.

***EU directive (implementing the existing construction)***

***Article 11***

*After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.*

*A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.*

No further definitions for the required links.

# Definitions VAT Group EU / Germany

## 1) Purpose of the regulation

- Less administration
- To avoid abusive practice

## 2) EU principles regarding the VAT group

- Precession by the member states
- However, the interpretation must be autonomous and uniform in the EU
- Member states may at their own discretion, subject the implementation to certain restrictions to avoid tax fraud

**EU commission:** VAT group is a fictional entity whereby the **economic essence** is given precedence over the legal form

# Definitions VAT Group EU / Germany

## German definition

### **A superior and subordinate relationship**

- Financial integration: Possession of the decisive majority of shares in order to enforce the will with a majority vote
- Economic integration: the controlled company is, according to the controlling company's will, economically active within the framework of the overall company, namely in close economic connection with it
- Organizational integration: the controlling company actually controls day-to-day management of the controlled company



# Definitions VAT Group EU / Germany

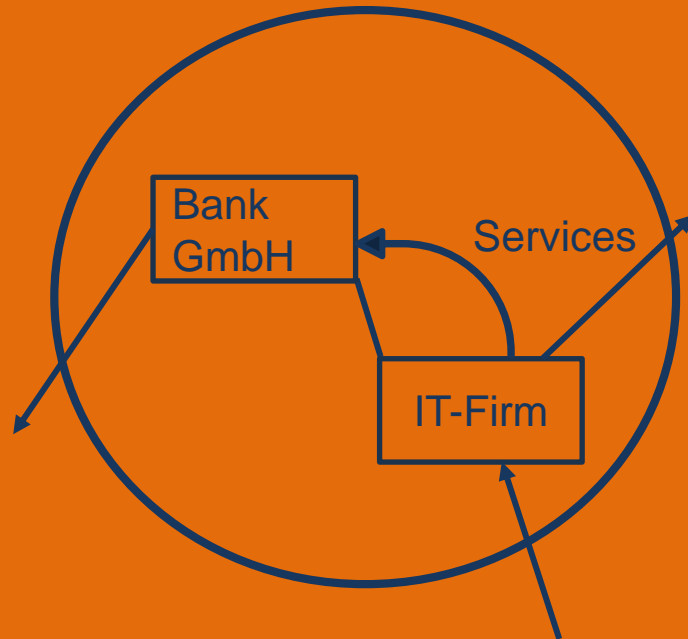
## Practical relevance

- Financial services, health sector (no input VAT deduction)

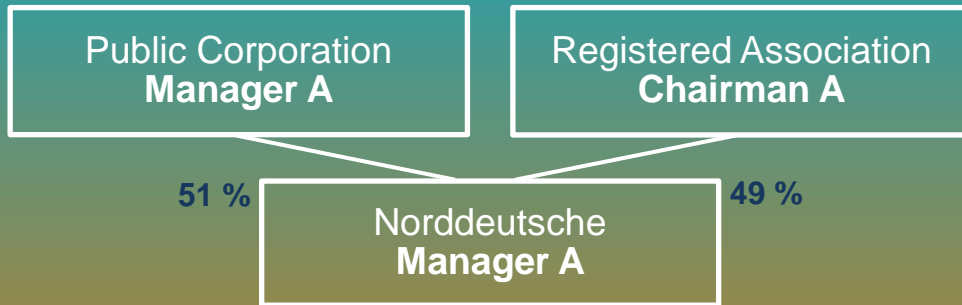
## Effects

- Services between the entities are not VAT-able
- Input VAT deduction depends on the fact on what kind of outgoing services the purchased services or goods are used

## VAT Group



# ECJ Case Norddeutsche Gesellschaft für Diakonie



## Articles of association:

Each shareholder has 7 representatives in the shareholder meeting

## Missing:

In case of an uniform voting the votes are counted according to the company share

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Questions of the German court:

1. Determination of the taxable person in the VAT group: Is a member state allowed to designate a member of the VAT group as the taxable person instead of the group?
2. [...]
3. Regarding financial integration and the avoidance of tax evasion: In examining whether the requirement of financial integration pursuant to Paragraph 2(2) No. 2 sentence 1 UStG constitutes an allowable measure that is necessary and suitable for achieving the objectives of preventing abusive practices or behaviors and avoiding tax evasion or avoidance, should a strict or lenient standard be applied?
4. Regarding financial, economic, and organizational integration: Are Article 4(1) and (4), first subparagraph, of the Sixth Directive 77/388/EEC to be interpreted as allowing a Member State, by means of typification, to regard a person as not independent in the sense of Article 4(1) of this Directive if it is integrated into the business of another entrepreneur (controlling company) in such a way financially, economically, and organizationally?

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Background of question 4:

The VAT group in Germany and Austria are based on the jurisdiction of 1920 codified 1934:

- Requirement to lose the independence and be part of the VAT group:
  - Subordinate relationship and therefore no own will
  - Still part of definition of the German VAT group
  - Typifying approach is possible according to the German law

**EU law?**

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Opinion of the Advocate General Medina

“A discharges the tax obligations of the members of the VAT group and pays the VAT owed by the group. The transactions between taxable persons referred to in (ii) and (iii) are completely neutralized. Where B sells its goods to A, the VAT charged by B is equal to the VAT which A may deduct. Those transactions are therefore not taken into account in determining the amount of VAT payable by the VAT group. In accordance with Article 4(1) of the Sixth Directive, A carries out economic activities independently. As a taxable person, A received EUR 40 by way of VAT. It sold the goods to final consumers and was able to deduct input tax of EUR 20 in respect of that acquisition. For that transaction, it must pay VAT of EUR 20. B is not required to pay VAT in respect of the resale transaction, since that transaction was carried out at cost price.”

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Assessment of ECJ

1. The German regulation is in accordance with the EU law. There is no risk of losses if par example the controlling company is the taxable person
2. [...]
3. A member state regulation which requires for the economic link that the controlling company has not only the majority of the shares but as well the voting majority contradicts EU law.

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Assessment of ECJ

4. According to Article 4 (2) of Sixth Council Directive 77/388/ECC a VAT group can be formed because of the financial, economic and organizational links. However, this has not the effect that that the members, who are not the controlling company, does not excise non-independent economic activities.

Members state are not permitted to classify entities as non-independent by way of categorization if they are financially, economically and organizationally integrated into the VAT group.

*"[...]It follows that those entities must be regarded as carrying out independent economic activities, with the result that they cannot be classified, by categorization, as 'non-independent entities' for the purposes of Article 4(1) and the first subparagraph of Article 4(4) of the Sixth Directive simply because they belong to a VAT group."*

# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Echo in Germany

- **Answer 2**

VAT group between affiliated companies are possible.

- **Answer 3**

**Interpretation 1:** The services between members of a VAT group are taxable.  
VAT group has only administrative effects

**Interpretation 2:** In connection with the ECJ C-269/20 of the same date the services within the VAT group are not taxable



# ECJ Case Norddeutsche Gesellschaft für Diakonie

## Possible Effects

- VAT group with taxable services between the members under the condition that the members are independent.
- VAT group without taxable services if the members are not independent.

# Subsequent Judgements

## 1. Decision of the eleventh senate of BFH

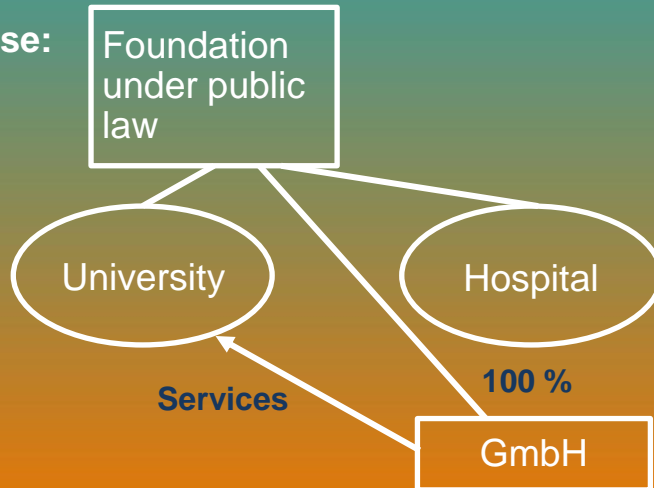
1. Controlling company is taxpayer of the VAT group.
2. In general the voting majority is required. However, the links can vary in intensity. The voting majority is not required in case the controlling company can enforce its will.

The eleventh senate did not have to deal with the question of the services between the members are taxable or not.

# Subsequent Judgements

2. Resubmission to the ECJ (C-269/20, now C-184/23) of Fifth Senate of the BFH based in the ECJ Case Norddeutsche Gesellschaft für Diakonie

Initial facts of the case:



# Subsequent Judgements

## Questions

1. Is the VAT group itself the tax payer or can the law of the member state designate an entity of the VAT group as tax payer?
2. Are services provided by a controlled company within a VAT group to the controlling company subject to VAT as 'benefit of kind' if these services relate to the sovereign (governmental) area?

## Answer of the ECJ

1. Yes, the EU-law allows a designation under the condition that there is no risk of tax losses.
2. The services within the group are not considered taxable under Article 6(2)(b) of Directive 77/388/EEC.

# Subsequent Judgements

## Question of the court (ECJ C-184/23)

1. Does the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of Directive 77/388/EEC, have the effect of removing supplies of goods or services made for consideration between those persons from the scope of value added tax as defined in Article 2(1) of that directive?
2. Do supplies of goods or services made for consideration between those persons fall within the scope of value added tax in any event in the case where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses?

Services and goods between members of the VAT group seem to be taxable

# Subsequent Judgements

## Dogmatic considerations of the court

- **Wording of Article 2 No. 1 of Directive 77/388/EEC**

Subject to tax are the supplies of goods or services by a taxable person acting as such within the member state independently if a member of a group is providing services to another group member or to third persons.

- **History of development**

Change gross system to net system (input VAT deduction), no justification required.

- **Context**

ECJ case Norddeutsche Gesellschaft für Diakonie:

Being member of the group can not typical have the tax consequence to lose the independence.

- **Purpose of the VAT group**

Simplification of administrative work, this regulation should not have the effect of tax losses.

- **Distortions of competition / no tax losses**

# Subsequent Judgements

Decision of the ECJ



# Legal situation in other EU countries

- Definition of the VAT group?
- Effects?

**Spanish VAT group only administrative effects**



# Thank you for your attention

