

ECJ paves the way for broader application of VAT-group



The 'M-GmbH' ruling of the European Court of Justice ('ECJ'), issued on 15 April 2021, paves the way for a broader application of the VAT group than most EU countries currently apply. In line with previous rulings, the ECJ considers that the VAT group is not limited to VAT taxable persons or legal persons only. The ECJ rules that the links required to becoming (part of) a VAT group are EU definitions that should be interpreted by EU countries in the same way.

ECJ ruling

M-GmbH held the majority of the participation rights in a limited liability partnership. M-GmbH and the partnership could not form a VAT group because Germany only allows legal persons to form a VAT group. The partnership did not qualify as such. In its judgement, the ECJ ruled that Germany is not allowed to maintain this rule and that non-legal persons can also be part of a VAT group.

EU countries have the option to implement the rules enabling the VAT group scheme. However, when this scheme is applied, the close financial, economic and organizational links required to forming a VAT group must be interpreted autonomously and uniformly by EU countries. Further, the ECJ considers that the application of the VAT group is not limited to VAT taxable persons or legal persons only.

The ECJ also considers that the conditions for a VAT group are not to be interpreted restrictively. Though EU countries may restrict the application of the VAT group scheme as to prevent abusive practices, tax evasion or avoidance.

What does this mean for you?

This judgement shows that Member States are restricted in their policy freedom when specifying the conditions to form a VAT group. In practice, most EU countries, including the Benelux, will have to broaden the group of persons eligible for the VAT group scheme. This judgment provides opportunities for persons that currently cannot form part of a VAT group to re-examine and optimize their position.

Impact the Netherlands

The Dutch legislation has limited the application of the VAT group to persons that qualify as VAT taxable persons. Hence, non-taxable persons are in principle not allowed to be part of a Dutch

VAT group. A Dutch VAT Decree also allows certain topholding companies, that do not qualify as VAT taxable persons but are involved in the management of their group companies, to be part of a VAT group. In our view, the M-GmbH ruling gives rise to reassessment of the concept of the VAT group in the Netherlands. In particular, the question arises whether other non-taxable persons, like (sub)holding companies, would be eligible for VAT grouping. It is also interesting to see how Dutch courts will react to the ECJ ruling that the VAT group conditions must be interpreted autonomously and uniformly.

Impact Belgium

Only members with the status of taxable person and established in Belgium can form part of a Belgian VAT group. The following entities are expressly excluded by the Belgian Tax Authorities: passive holding companies; public bodies (insofar as they do not have the status of taxable person for certain specific activities); non-legal persons without the status of taxable person (even if they exercise the functions of manager or director of companies in which they hold all or part of the capital) and taxable persons established abroad (except for their permanent establishments in Belgium). This judgment could therefore reshuffle the conditions of access to a VAT group in Belgium.

Impact Luxembourg

In Luxembourg, any person, whether or not a taxable person for VAT purposes, can be a member of a VAT group. Luxembourg's legislation therefore seems to be in line in that regard with this new decision of the ECJ.

However, the law currently requires that the financial link that must exist between the members of the VAT group be ascertained (by a certified auditor or accountant) by reference to the rules relating to consolidated accounts as provided in the corporate law. Such a rule seems to unduly restrict certain persons' right to join a VAT group. This specific point had already been raised by the VAT Committee in its opinion on the implementation, by Luxembourg, of Article 11 of the VAT Directive – to no avail.

This is the second time this year that Luxembourg's rules on the VAT group seem to be irreconcilable with a decision of the ECJ. Earlier this year, the Danske Bank confirmed that members of a VAT group cannot be attributed individual VAT numbers.

What to do?

If you are confronted with VAT inefficiencies due to companies not being allowed to form a VAT group, we recommend assessing the impact of the ECJ's ruling on your business. Please contact your trusted adviser at Loyens & Loeff or get in touch with your dedicated specialists in the Indirect Tax practice group.

