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SOME REMARKS ON THE POSSIBILITY OF VAT GROUP'S INTRODUCTION INTO THE BULGARIAN TAX LEGISLATION

Abstract

The provision of Art. 11 of the Council Directive 2006/112 of 28 November 2006 on the common system of value added tax (VAT Directive) introduces the VAT group's concept. It should be noted that it grants a right and not an obligation on a Member State (MS) to transpose this text into its domestic law on appropriate way. So far, Bulgaria has not such provision in its national legislation.

The current study is dived into three main parts. The first examines some relevant case law of the Court of Justice of the European Union (CJEU) in this matter that will be followed by author's comment. The second emphasizes certain VAT group's specifics through the prism of the domestic legislation of some MSs. The third refers to its possible future transposition into the Bulgarian tax law. Taking into account both the European and the national practice on this issue, the author will try to design an exemplary VAT group's provision from Bulgarian perspective.

Key words: VAT; Bulgaria; Member States; Directive 2006/112; VAT group; taxable person.

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1. Introduction

In general, VAT group unites two or more persons who are considered as one single taxable person for VAT purposes. They shall meet certain conditions outlined in the provision in question in order to apply this regime. First, there should be an explicit consultation with the VAT Committee on its transposition into national law. Second, the subjective and the territorial criteria are essential as they play crucial role for the fair taxation. Third, persons, who are members of this VAT group, are in certain relations with each other – financial, economic and organisational. The lack of explicit specification of these criteria suggests the possibility of different approaches followed by the MSs. Pursuant to Art. 11, para 2 VAT Directive there may be adopted other 'measures needed to prevent tax evasion or avoidance'. All this is a proof both for the cumulative preconditions for the application of that provision and for their various possible implementations under the MS's domestic law.

At European level, there a lot of publications on this issue. They are based mainly on the VAT group's domestic perspective. In this regard, the book 'VAT Grouping from European Perspective' by Sebastian Pfeiffer should be taken into account. As related articles may be mentioned 'EU VAT Grouping from a Comparative Tax Law Perspective' and 'VAT Grouping in the European Union: Purposes, Possibilites and Limitations' by Kenneth Vyncke, 'Cross-Border Entities and EU VAT: A Contradictory Concept?' by Christian Amand, 'Cross-Border VAT Grouping' by Ruud Zuidgeest, 'The Phenomenon of VAT Groups under EU Law and Their VAT-Saving Aspects' by Joep Swinkels, 'VAT Grouping versus Freedom of Establishment' by Casper Eskildsen etc.

2. CJEU's Case Law

CJEU provides diverse practice on this matter. It helps to outline the VAT group's main features. In this connection, some landmark cases will be examined.

Case C-162/07 Ampliscientifica is a typical one for the VAT group through the Sixth Directive's prism. It outlines both the VAT group's characteristics and the procedure for its introduction in the respective MS. Even if a written document exists (in current case - a Decree), it should be analyzed and approved by the Advisory Committee on VAT in order to have effect (para 18). If this step is not followed, it 'does not constitute a measure transposing the second subparagraph of Article 4 (4) of the Sixth Directive' (currently Art. 11 VAT Directive). Such procedure is necessary condition in order domestic legislation to

be in line with the EU law (para 22, 23). It may be concluded therefrom that this is the first necessary condition for the VAT group's application.

Another essential point in this judgement is the subjective criterion, i.e. persons who can constitute a VAT group. CJEU explicitly states that they are 'legally independent' and 'no longer to be treated as separate taxable persons for the purposes of VAT' (para 23). This leads to the understanding that only taxable persons can be VAT group's members. The other features do not deviate from the accepted postulates – the persons should be established only within the territory of the respective MS. They should also be closely bound with each other in a specific way.

Last but not least, Ampliscientifica clarifies that VAT group's constitution 'must therefore be distinguished from the setting up of a mechanism to simplify VAT declarations and payments which enables, inter alia, companies within the same group to remain separate taxable persons' (para 21). The understanding, that the persons in the VAT group lose their independence and they are one single taxable person, is confirmed once again.

Another landmark case, in which a position other than Ampliscientifica is expressed, is C-85/11 Commission v Ireland. Advocate General Jääskinen analyses the concept's historical development in his opinion. For this purpose, he starts with its introduction in the Second VAT Directive (para 29). Indeed, at that time there was a requirement for the person to be taxable (para 30). However, this did not appear in the Sixth directive, which leads to the understanding for a wider scope of that provision on comparison with its previous version (para 31, 34). Proof of this may be found in the Explanatory Memorandum thereto.

Advocate General also clarifies the VAT group's legal nature (para 40, 42, 43). Attention is paid to the liability and to the VAT deduction. According to Jääskinen the gain of economic benefits should not be construed as something negative or unacceptable, but it is directly linked to the concept (para 46). He follows the traditional view that 'it is the activity and not the legal form that defines status as a taxable person for VAT purposes' (para 50).

Finally, Jääskinen concludes that non-taxable persons may also participate in a VAT group (para 52, 54), which is also followed in the CJEU's judgement (para 41, 50). The latter draws again a parallel between the text in the Sixth Directive and in the VAT Directive, where the general term 'person' is used (para 39). CJEU expresses its position on its previous practice – case Ampliscientifica. It is explained that it concerned the old version of that provision which explicitly states that only taxable persons may constitute a VAT group.

Case Commission v Ireland focuses on several crucial VAT group's issues. First, it comments on the advantages on its constitution, which are not considered as abuse of law. Second, both members' obligations (e.g. their liability) and their rights (e.g. VAT deduction) are discussed. This is another proof of the VAT group's perception as one single taxable person. Last but not least, it is essential to point out that non-taxable persons may also be included therein. A valid argument is the use of the term 'person' that is associated with broad field of application rather than strictly specifying the subjective criterion. Comparison is made with the provision of Art. 9 VAT Directive, which explicitly refers to taxable persons. Same arguments are expressed in case C-86/11 Commission v United Kingdom.

Advocate General Szpunar draws attention to the VAT group as a possible VAT system's manifestation in his opinion in Case C-340/15 Nigl, analysing its main objectives (para 24). He points out that it has a wide scope, as it applies to 'both actual or potential separate taxable persons and persons not having the status of a taxable person' (para 23). However, Advocate General clarifies that this regime cannot be applied directly by the MS and a special procedure is required (para 26, 27, 30, 32). Compliance with the necessary domestic measures is in the national jurisdictions' competence (para 32, 34, 35).

Szpunar's views on the possibility of retroactively VAT group's constitution of independent taxable persons are intriguing. Advocate General examines two hypotheses depending on the non/existence of abuse. If it is aimed at avoidance, it is permissible for the relevant persons to be considered retrospectively as a VAT group by the competent authorities. Typical example is 'the artificial splitting-up of one undertaking' (para 40, 43). In the second hypothesis, the retrospective application is not possible (para 41).

CJEU is more emphatic on the taxable persons' presence in its judgement. In this regard, it begins with the traditional perceptions of this concept and its wide scope (para 26, 27). The view on the distinctive features regarding the economic activity's definition as independent shared in the opinion is confirmed (para 28). Despite the joint performance, expressed in the sale of products under common brand, there is a clear independence in the relationship with the counterparties in this case. This is also a valid argument that the civil-law partnerships are regarded as independent taxable persons (para 34). Based on this understanding, CJEU considers as irrelevant to analyze the VAT group's legal nature in detail, as well as the possibility of retroactive effect and abuse of law.

The following conclusions can be drawn from this case. A tendency that non-taxable persons to be part of the VAT group is evident in the more recent CJEU's practice. An

intriguing view is its possible retrospective constitution in conjunction with Art. 11, para 2 VAT Directive. Indeed, Art. 11, para 1 VAT Directive does not provide any time limits regarding the membership. However, question remains as to how far back in time they can be included, especially in cases where they are already part of a VAT group.

Case C-7/13 Skandia can be defined as one of the most disputable in this matter. For the purposes of the current paper and due to the many issues raised in this judgement, attention will be paid to only some of them. According to Advocate General Wathelet the branch should not be included in the VAT group because of its dependent legal nature (para 46). Based on his opinion, the use of term 'person' in Art. 11 VAT Directive should be used according to its ordinary meaning. Therefore, Wathelet shares the view that the national court's decision that allows the branch to be VAT group's member is unlawful (para 60).

Advocate General sets out two cumulative preconditions for the inclusion of person in a VAT group (para 73, 74, 79). First of all, he should express its will to participate therein in a clear and unambiguous way. Second subsequent step is the relevant competent authority's authorization.

Wathelet's views on this issue are not fully reasonable. His position on the usual use of the term 'person' is controversial. It should be noted that it is not a typical tax concept. Proceeding from the tax law's subject matter, it may model different terms for its purposes or even introduce new one. For example, the contribution payment centres and the unincorporated associations are exclusively subjects according to the Bulgarian tax law. Therefore, Wathelet's arguments should be elaborated in more detail, as the literal reading of the term 'persons' rather speaks for its comprehensiveness.

CJEU's judgement can also be defined as disputable. Like the opinion, it confirms the branch's non-independent legal nature (para 26, 27). CJEU allows its possibility to be part of the VAT group separately from the main establishment (para 37 and 38). In this way, it takes the opposite to the opinion view without any detailed arguments. This means, according to the CJEU, that supplies between the branch, part of a VAT group in one MS, and the head office, located in a third country, are taxable.

Both the opinion and the judgement raise a number of issues that are commented in the tax literature. They are also subject of in-depth analysis by the European Commission. Part of the disputable questions are regarding the judgement's territorial scope, its applicability to the types of transactions (e.g. supply of goods) and other regimes related thereto. The

inquiries raised show that CJEU's practice is not always the thorough mechanism to solve such issues.

Case C-77/19 Kaplan International Colleges UK Ltd is also relevant in this respect. It examines one of the VAT exemption's hypotheses r– Art. 132, para 1, l. f VAT Directive in conjunction with Art. 11 VAT Directive. In her opinion, Advocate General Kokott analyses detailed the relationship between these two provisions. Belonging to a VAT group determines the existence of 'multiple persons 'who are closely bound to one another' which does not reflect to their civil independence (para 37, 43). Kokott also mentions the purpose of Art. 11 VAT Directive – VAT obligations' simplification for both the taxable person and the tax authorities (para 38, 39, 41). An example is the submission of one single VAT return for the whole VAT group (para 40).

Advocate General draws particular attention to the scope of these two provisions. The territorial scope of Art. 11 VAT Directive extends to the MS concerned (para 54, 57, 102). Another essential point is that 'two systems (group taxation and exemption of services supplied by a CSG) are not therefore mutually exclusive in principle. They merely have to be coordinated with one another (para 108). The use of the expression 'in principle' seems to allow the possibility for exception of this understanding in certain cases. Finally, Kokott concludes that Art. 11 VAT Directive has a wider scope than Art. 132, para 1, l. f VAT Directive (para 109).

CJEU reaffirms the understanding in its judgement that person, part of a VAT group, loses its independence under Art. 9 VAT Directive, relying on the relevant practice (para 45, 46, 47). Therefore, the VAT group 'cannot benefit from the exemption', 'in so far as those services are supplied within the objectives for which such a group has been set up and are therefore provided in accordance with its purpose' (para 51, 52, 55). It can be summarized that this judgement does not differ from the generally accepted VAT group's understanding and it confirms once again its independent legal nature.

Both the opinion and the judgement follow the same approach. For this purpose, the territorial criterion has been examined. The difference is outlined that VAT group is one single taxable person for VAT purposes, but its members continue to have its independent nature with the subsequent rights and obligations [Papis-Alamanda 2021]. However, the supplies of services cannot be divided among them. It can be summarized, that in the event that if all VAT group's members are also members of cost-sharing group, then the VAT exemption is possible.

The latest CJEU case on this issue is C-812/19 Danske Bank, also known as the 'reversed Skandia case'. The judgement provides an answer whether the main establishment, situated in a MS and part of a VAT group and the branch in another MS may be treated as separate taxable persons. Taking into account Skandia, CJEU shares the view that the existence of reciprocal performance between the main establishment and the branch is a solid argument for their taxability. Otherwise, this may be construed as non-taxable internal flows (para 20, 21). The main VAT group's features are also confirmed, paying attention to the reversed factual background compared in Skandia (para 25, 27). Finally, CJEU concludes that the branch and the main establishment are separate taxable persons. Therefore, costs for the services rendered between them are chargeable (para 30, 33, 34, 35).

Regarding cases C-7/13 and C-812/19, it is essential to determine whether such supplies are taxable under the MS's national legislation. The following points should be taken into account – the the legal entities' existence and in particular their kind (in/dependent), the territorial criterion, an accurate assessment of the VAT group members' rights and obligations, as well as the liability issue [Deloitte 2021].

3. Comparative analysis of the VAT group's provision in some Member States' legislations

The examination of the VAT group's features involves an analysis of some MS's legislations. It should be noted that not all of them have introduced this regime (Poland, Portugal, etc.). As already mentioned above, Bulgaria has not introduced such provision into its domestic legislation.

Regarding VAT group's registration, two main possible solutions are known. The first one – the mandatory, is applicable, when the necessary criteria for VAT group's constitution are met. This is regardless of members' will. A typical example of such approach are Germany and Austria. The second option is the voluntary registration that is followed in Belgium, Sweden, Italy etc. It allows the members to choose whether to constitute a VAT group or not.

VAT group's existence can be for a certain minimum period. In this case, it should not be deregistered before the time outlined. This is typical for Romania and Spain, for example. The minimum standard threshold varies from one to three years. Such approach is symbiosis of the voluntary VAT group constitution's beginning with mandatory follow-up criteria thereafter. The author considers as logical that this term should not be shorter,

because this would may lead to many incidental VAT group's constitutions, respectively terminations. Another approach is followed by Estonia, where there is no such deadline and the VAT group can be terminated at any time.

Many domestic legislations have already introduced the joint and several liability for the VAT group's members. This is due to the fact that the VAT group is treated as single taxable person and the members therein have common rights and obligations. Such measure may be interpreted as a guarantee against persons that are members only because of the benefits of this regime.

Another very common view is the impossibility one person to be part of several VAT groups in the MS in question at the same time. An intriguing approach is followed by Latvia, where the non-taxable persons can belong to several VAT groups simultaneously. Probably, this possibility is eliminated if they become taxable persons. In this case, the membership to only one VAT group should be specified.

Based on the understanding for one taxable person, it is typical for the VAT group to have one VAT number and to submit one VAT return. However, every member has a separate VAT number when carrying out taxable supplies to his own counterparties in Luxembourg. Different regime is observed in Romania- both a consolidated VAT return and a separate VAT return for each VAT group's member are submitted.

Several arguments can be outlined as advantage for the VAT group's membership. One of them is that supplies between its members are normally out of VAT scope (Italy, Luxembourg, Denmark etc.). Romania is exception, as these supplies are treated as taxable under its national legislation.

One of the most disputable issues is the subject criterion – who can be a VAT group's member. In this regard, MSs choose different approaches. Some of them, such as Belgium and Germany, allow only taxable persons to be part thereof. In other countries, this possibility is extended also to certain categories of persons or fixed establishments of foreign companies. There is also the opposite hypothesis – the impossibility for certain categories not to be part of a VAT group. Such are the natural persons in Slovak Republic and the cooperations in the Netherlands.

Regarding the geographical criterion, MSs follow the view that the persons - VAT group's members, should be located within its territory.

VAT group's members continue to be independent persons with separate VAT numbers and intragroup transactions are subject to VAT under Spanish law [Llopis 2021: 35]. The regime itself is characterized by numerous additional complications that raise the question

on their effectiveness. The author shares Llopis' opinion that there are two main aspects to determine whether the Spanish regime complies with Art. 11 VAT Directive. First of all, disputable is the study for an equivalent result. It is directly related to the second criterion – whether the domestic law is in line with the VAT principles and the other CJEU judgements on this issue (e.g. case Ampliscientifica). Llopis draws attention to another aspect – whether Scandia case concerns only the VAT group of certain MSs, based on the particular regime's specifics, or whether it is applicable to all EU countries. Finally, she concludes that the Spanish VAT group concept may be in conflict with the EU law.

As can be seen from the brief analysis of the VAT groups in the different MSs, the following summarry can be made. First, VAT group is implemented in most EU countries, but there are different variations thereof. It is disputable in some MSs, however, whether it is in line with the EU law and more precisely whether it actually meets the VAT groups' conditions under the secondary EU law. Second, different approaches lead to a different VAT treatment under domestic law. In some cases, VAT groups' members are subject to intragroup VAT taxation, while in others – not. For example, the prerequisites for its constitution as well as the minimum duration of its existence are different. Third, both good and bad practices can be seen from its implementation into the national legislations. This is kind of proof of the challenges regarding the VAT group's application.

4. VAT group from Bulgarian perspective

Although Bulgaria has not introduced VAT group in its domestic legislation, the author will try to outline what it might look like in order to fulfil the requirements under Art. 11 VAT Directive. Such analysis is consistent with the Bulgarian tax law's specifics.

Value Added Tax Act (VATA) is the Bulgarian material tax act that regulates this issue. Art. 3 VATA introduces the concepts 'taxable person' and 'independent economic activity', which follow the postulates set out in the VAT Directive. It is welcoming idea that the VAT group to be separated in a subsequent provision, as it directly corresponds to both concepts.

Regarding the territorial scope, the author shares the view held by the majority of the MSs that the VAT group should be constituted only within the territory of Bulgaria.

The subject criterion, as one of the most vital VAT group's elements, should include both taxable and non-taxable persons. Such approach is conditioned by several arguments. First, it is directly linked to one of the basic EU law's principles – the freedom of establishment.

Second, upon careful reading of Art. 11 VAT Directive the term 'person' is used and not 'taxable person' as under Art. 9 VAT Directive. This view is confirmed and further developed by the CJEU's recent practice. The opposite perception would give rise to both theoretical, such as why the text Art. 11 VAT Directive does not explicitly include the term 'taxable person', and practical issues – what should be the fixed establishment's fair treatment, for example. The idea of excluding certain categories of persons or sectors seems not appropriate and rather controversial. Even if it is followed, it should be seriously examined and motivated.

Regarding the subjects, it is necessary to pay attention to the joint and several liability, which corresponds to the VAT group's perception for one single taxable person. It is also not recommended that persons are members of several VAT groups within the territory of Bulgaria due to some practical difficulties concerning their taxation, declaration and administration.

The procedure of VAT group's registration may be challenging, too. On the one hand, it may be mandatory, similar to Art. 96 VATA by exceed of certain taxable turnover. Another option is the voluntary that can be from certain moment and for certain period. The author does not consider the retrospective VAT group's constitution as a suitable method, as it may lead to significant practical complications. If it is introduced, time threshold back in time should be outlined again. It would be rather challenging to constitute it immediately, when the necessary preconditions are met. A valid argument therefor is the possible abuse of law, as well as who should make this assessment.

Therefore, the author is on the view that the voluntary registration is better option, providing the opportunity to choose how the persons manage their business. This corresponds to the idea that Art. 11 VAT Directive is a right and not an obligation. A certain period may be introduced when the VAT group cannot be deregistered. For example, Art. 108, para 2 VATA sets a minimum 12-month period in the event of voluntary registration. This would reflect to those who wish to be permanently in various VAT groups at the same time. It is also a guarantee for its lasting and non-incidental existence in the trade turnover.

Regarding the other three prerequisites – financial, economic and organisational relations, MSs use different methods. One of the most applicable are certain percentage threshold of control, general or similar genuine economic activity, common management etc. It is welcoming idea to follow the already established criteria under the Bulgarian tax law. For

example, § 1, p. 4 of the Additional Provisions of the Tax and Social Security Proceedings Code contains the definition of 'control'.

5. Conclusion

Before implementing Art. 11 VAT Directive into the Bulgarian tax law, two questions are vital at least – why and how. However, they are numerous subquestions that follow to further discussions, but this is typical for every new legislative measure.

Regarding the first – the reason for its introduction, different legislations of the MSs may be a solid argument. The majority of them have such provision which shows its significance. Art. 11 VAT Directive provides an easy tax administration both from two parties' perspective (tax administration and taxpayer). It has also important practical influence, directly related to two of the major concepts – 'taxable person' and 'independent economic activity'.

In author's view, it is about time for Bulgaria to rethink its position regarding its implementation. That is why, a through analysis before its introduction, taking into account domestic needs and trends, is essential. This includes consultations of Bulgarian academics, practitioners and tax administration, examining the best practices and its relation from Bulgarian perspective. Such approach is typical for all provisions that should be implemented on domestic level.

Nowadays, it is challenging to predict its position. Despite the many issues raised, several aspects should be taken into account. First and more disputable is the subject criterion, as we talk about the fiction of one single taxable person. In this regard, broad interpretation (inclusion of both taxable and non-taxable persons) is a welcoming idea, as it will follow the newest CJEU's tendencies and thus does not contradict the secondary EU law perceptions. It also provides the equal treatment and does not lead to divergent practice.

Another key issue is the registration's procedure – mandatory or voluntary. Following the broader approach and the idea that its right, the latter seems more appropriate. However, there are pro and contra arguments and the respective internal procedural mechanism is required.

Voluntary registration reflects the business' needs. In that way, it is easier to design and restructure the business models. An open question, however, is the possibility for mandatory registration for certain sectors/categories of entities. Because of the

uncertainty and the lack of detailed analysis of the subsequent impacts, this approach may be risky.

Another point is the member's liability within the VAT group. Applying the principle of equal and fair treatment, it should be several and joint.

As the geographical criterion is quite clear, no special in-depth analysis is required. VAT group is applicable only within the territory of Bulgaria.

The issues mentioned above are not all that should be considered from domestic point of view. They only show the challenges of its introduction at domestic level. Its implementation would be a positive step for EU 's VAT harmonisation and will develop the indirect tax doctrine.

VAT group is significant and debatable topic in the VAT field both at European and at national level. Proof of this is that the most MSs contain similar provision into their national legislation. Although it is not sure whether and when Bulgaria may introduce it, the current study raises essential questions for the concept. Its different variations in the different national legislations seem to pose more challenges than to give a proper answer which is the most appropriate option. Future case law on this issue, as well as the subsequent introductions and amendments in some MSs, will play crucial role on this matter, which is characterized by certain complexity and dynamics.

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