



VAT GROUP REGISTRATION (CL18 AND SCH10, F3B17-19)

Issued 28 August 2018

ICAEW welcomes the opportunity to comment on the **consultation on draft Finance (No.3) Bill 2017-19 legislation: Clause 18 and Schedule 10: VAT groups: eligibility** published by HMRC on 6 July 2018.

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THE MEASURE

1. In the joined Cases **C-108/14** and C-109/14 *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham and Finanzamt Hamburg-Mitte v Marenave Schifffahrts AG*, the Court of Justice of the European Union (CJEU) was requested to give a prejudicial ruling on three questions, one of which was raised separately by two German Courts.
2. In these two cases the German Courts sought to resolve the question as to whether a partnership (not having a legal personality) could be included in a VAT Group within the meaning of (what is now) article 11 of Directive 2006/112/EC. The CJEU held that “The second subparagraph of Article 4(4) of Sixth Directive 77/388, as amended by Directive 2006/69, must be interpreted as precluding national legislation which reserves the right to form a value added tax group, as provided for in those provisions, solely to entities with legal personality and linked to the controlling company of that group in a relationship of subordination, except where those two requirements constitute measures which are appropriate and necessary in order to achieve the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance, which it is for the referring court to determine.”
3. The UK Government following the above decisions, which were issued in July 2015, decided to undertake a review of the UK’s VAT Grouping provisions to determine if they are compatible with the above judgments.
4. HMRC has consulted very widely on the issue and has now produced, in July of this year, draft legislation for discussion as to the proposed changes to be made to section 43A and to add a new section 43AZA to the VAT Act 1994, to bring the UK law into line with the EU legislation (now in article 11 of Directive 2006/112/EC) – following the above CJEU decisions.
5. In the draft legislation a new section 43A (4)¹ extends the VAT grouping regime to include individuals and bodies corporate, where the individual –
 - a) controls the UK body corporate (or bodies corporate)...
 - b) has a business establishment in the UK; and
 - c) is liable or entitled to be registered under Sch 1...
6. The draft legislation defines, ‘body corporate and relevant person’ and new section 43AZA defines the ‘control test’ applied in section 43A.

OUR CONCERNS

7. In our discussions with HMRC we have indicated that by excluding as far as individuals and partnerships are concerned, the right to join a VAT group (subject to HMRC’s anti-avoidance powers) an individual or a partnership which is not liable or is not eligible to be registered under Sch1 means that section 43A (4) (c) and section 43A (5) (c) are contrary to the CJEU decisions in the cases C-86/11 *Commission v UK* (this case was to do with the inclusion of non-taxable persons in VAT groups) and *Commission v Ireland* case C-85/11 (which was to do with the inclusion of businesses making wholly exempt supplies being included in VAT groups).
8. Nonetheless, the CJEU did state, in its response to the questions raised by the German courts, that article 4(4) of the Sixth Directive (now article 11 of Directive 2006/112/EC) does not have ‘direct effect’ (although this was in relation to the notions of “*financial, economic and organisational links*”²). We do not believe the UK legislation can be restricted in its application in the manner as indicated in the draft legislation to include only those individuals (and

¹ A new section 43A (5) extends the UK grouping provisions to include partnerships (of two or more ‘relevant persons’) in a similar manner.

² See for example VEG Paper N° 070 - taxud.c.1(2018)339756 – EN

partnerships which are liable or entitled to be VAT registered³). We believe that it would be appropriate to replace section 43A (4) (c) and (5) (c) by 'is or will become a taxable person. An individual acting solely in a private capacity will not be eligible.'

9. Section 43A (4) (b) and (5) (b) will require the individual or partnership to have a 'business' establishment in the UK to be eligible to join a UK VAT group. Article 11 only refers to 'established'⁴ and the use of the expression 'business establishment' should be avoided as it has its own meaning ('place of establishment of a business') as set down in article 10 of Council Implementing Regulation 282/2011⁵ (Implementing Regulation).
10. In addition, we are not clear as to why an individual or a partnership having a 'fixed establishment' in the UK as provided by article 11 of the Implementing Regulation could not be eligible to join a UK VAT group.
11. In section 43A (4) (a) and (5) (a) the persons eligible to be treated as members of a VAT group are very limited and would exclude for example an individual who was a 51% partner in a partnership holding himself directly 100% of a corporate body. The corporate body would not be eligible to be in a VAT group under the current drafting with the partnership.
12. In section 43A (1) (c), in our view, it would be clearer if rather than using 'individual' – which is very limiting, it would be preferable to use the term 'relevant person' as defined in section 43A (6).

SUGGESTED AMENDMENTS

13. Replace section 43A (4) (c) and (5) (c) by 'is or will become a taxable person. An individual acting solely in a private capacity will not be eligible.'
14. Delete the word 'business' from sections 43A (4) (b) and (5) (b) .
15. Replace 'individual' with 'relevant person' in section 43A (1) (c).

³ This should be extended to allow individuals or partnerships receiving supplies in the UK falling within article 196 of the Directive 2006/112/EC to be eligible to be included within a VAT group by virtue of article 214.1.d of the same Directive.

⁴ Article 11 - Directive 2006/112/EC - 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.

⁵ Article 10 – Council Implementing Regulation (EU) N° 282/2011 - Article 10 1. For the application of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out. 2. In order to determine the place referred to in paragraph 1, account shall be taken of the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets. Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence. 3. The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person. Article 11 1.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).