

## **Supreme Court confirms broad interpretation of VAT group**

In the Netherlands, multiple VAT taxable persons can together be regarded as a VAT group. This is particularly favorable in the case of a limited VAT recovery right. In practice, the economic interdependence required for a VAT group raises questions, as it is more difficult to measure than financial and organizational interdependence, which are also conditions for a VAT group. The Supreme Court has confirmed the broad scope of economic interdependence in two judgments. This is particularly important for parties with a limited VAT recovery right, such as educational and healthcare institutions, banks, insurers and, in certain circumstances, holding companies.

### **1. Supreme Court judgments**

In both cases in which the Supreme Court was asked to rule, educational institutions operating as foundations (*stichtingen*) had set up BVs (private limited liability companies; *besloten vennootschappen*) to assist them with the secondment of personnel and with cleaning services in exchange for a fee. The foundations wanted to form a VAT group with these BVs, because they did not want to pay VAT unnecessarily. They believed they had complied with all the requirements for entering into a VAT group. The Dutch tax authorities challenged this, which resulted in two court cases. On Friday, July 5, 2019 the Supreme Court ruled in favor of both educational institutions.

According to the Supreme Court, in the first case the performance of non-economic activities by a foundation, such as education funded by general government resources, did not constitute an obstacle to being able to participate in a VAT group with a subsidiary BV. This also applies if the support provided from the subsidiary BV is, to a large extent, related to the education that is to be regarded as a non-economic activity in the present case. The Supreme Court ruled that services that one VAT taxable person performs for another VAT taxable person and which serve the non-economic activities of the latter, must also be taken into account in determining whether there is economic interdependence between both VAT taxable persons.

In the second case, the Supreme Court ruled that the maintenance of mutually non-negligible economic relationships is sufficient for there to be economic interdependence. This not only applies in the case of groups consisting of a holding company and operating companies, but also in other cases. According to the Supreme Court, this condition was met in the actual situation of the present case, because the subsidiary BV provided more than 27% of its services to the educational foundation. In our view, the Supreme Court thus reiterated and confirmed its ruling in the judgment of October 11, 2013, to which it also referred.

### **2. Practical consequences**

In practice, both judgments are primarily important for VAT taxable persons with a limited VAT recovery right. By forming a VAT group they can work together to (i) avoid VAT on intra-group transactions, and (ii) in some cases optimize their VAT recovery right. We consider that maintaining mutually non-negligible economic relationships is a feasible criterion for determining economic interdependence. It is also good news for the practice that the Supreme Court confirmed that the performance of non-economic activities, in addition to economic activities, is not an obstacle for participating in a VAT group.

Good news for the education and healthcare sectors, but also for other businesses and institutions that, in addition to their economic business activities, also carry on non-economic activities funded by, for example, subsidies. That also applies to holding companies that, besides providing management or other services to participations for a fee (economic activities), also passively participate in other companies (non-economic activities).

The broad interpretation of the VAT group is however also good news for VAT taxable persons with a full VAT recovery right. A VAT group reduces administrative expenses and has a cashflow benefit because no intra-group VAT invoices have to be issued.

The creation of a VAT group always requires that the members are not only economically but also financially and organizationally interdependent. A tax analysis of the facts is therefore essential for the purposes of assessing whether a VAT group should be set up. We would also like to point out that after a VAT group Decision has been issued by the Dutch tax authorities, the members of the VAT group are jointly and severally liable for one another's VAT liabilities.

### **3. What should you do now?**

The Supreme Court judgments have confirmed the broad interpretation of the VAT group, more in particular with regard to the condition for economic interdependence. Where entities work together in a group, it is advisable to assess whether there is (still) a possibility to set up or expand a VAT group. This is particularly interesting in situations where there is a limited VAT recovery right.

The tax advisors of Meijburg & Co's Indirect Tax Group would be pleased to help you identify the potential tax implications of these judgments. Feel free to contact one of them or your regular contact for more information.

Meijburg & Co  
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