

VAT, DUTIES AND INDIRECT TAX

ALL UK VAT GROUPS CAN BREATHE A SIGH OF RELIEF

**Melanie Hall QC summarises the recently released judgment from
The European Court on VAT grouping**

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Why did the Commission commence infraction proceedings against the UK?

1. The Commission's case was that the UK had acted unlawfully by permitting dormant companies, inactive holding companies and other non-taxable persons to join VAT groups:
 - a. It was concerned that in principle a VAT group could be made up of only non-taxable persons.
 - b. It also argued that as an exception to the general rule that each taxable person is to be treated as a separate unit, Article 11 of the Principal VAT Directive should be construed narrowly by interpreting the reference to "persons" as a reference to taxable persons.
 - c. Support was sought from the Advocate General's opinions in Case C-162/07 *Ampliscentifica* and Case C-60/90 *Polysar*.
 - d. Finally, the Commission was concerned about abuse and a breach of the principle of fiscal neutrality by reason of the advantages afforded to non-taxable persons within a VAT group which were not available to non-taxable persons outside of a VAT group.

Why was the Commission's case dismissed?

2. The European Court had little difficulty in dismissing the Commission's complaint, along with similar complaints made against Ireland, the Czech Republic, Denmark and Finland.
3. The wording of Article 11 of the VAT Directive did not support the Commission's case. The only material condition imposed by that provision is that the entities under consideration are bound to one another by financial, economic and organisational links.

¹ The views expressed in this case note are those of the author, and do not reflect the views of Monckton Chambers or any of its members.

4. The drafting history of Article 11 did not support the Commission's interpretation. Annex A to the Second VAT Directive referred to 'separate taxable persons', words which were abandoned by the council in the Sixth Directive.
5. The reference to "a single taxable person" in Article 11 is a reference to the envisaged *outcome* of a number of persons joining together. Those words do not seek to impose a limitative condition on the right to form a VAT group.
6. The Advocate General's opinions in *Polysar* and *Ampliscientifica* could not be relied upon, since the membership of VAT groups was not the subject matter of the judgments in those cases.
7. It is apparent from the Commission's Explanatory Memorandum to the proposal which resulted in the adoption of the Sixth Directive that Member States should not be obliged to treat as separate taxable persons those whose 'independence' is purely a legal technicality. Such an approach simplifies administration and combats abuse, by discouraging the artificial proliferation of taxable persons so that they can each benefit from a special scheme.
8. Finally, the Court dismissed the Commission's concerns about abuse, pointing out that the second paragraph of Article 11 of the VAT Directive permits Member States to adopt any measure needed to prevent tax evasion or avoidance through the use of a VAT group.

Is this the final word on the lawfulness of the UK's VAT grouping legislation?

9. During the written and oral procedure, virtually every facet of VAT grouping was explored by the Court, the Advocate General, the Commission and other Member States with their own legislation to defend. The coals having been raked over so fastidiously, that those taxpayers who are part of, or who are contemplating forming a VAT group which contains non-taxable persons, can now breathe a sigh of relief. Game over.

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