VAT Groups in Poland

On 1 January 2023, provisions regarding VAT grouping are to enter into force in Poland. From that date onwards, Poland will make use of an option provided under article 11 of the VAT Directive and forming VAT groups will (finally) be allowed. In this article the author provides a detailed analysis of the main features of the new legislation, as clarified in the draft administrative guidance, and briefly discusses the relationship between VAT grouping and other forms of grouping under Polish VAT law.

1. Introduction

Article 11 of the VAT Directive¹ states that after consulting the advisory committee on value added tax (VAT), 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 organizational 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.

Most Member States of the European Union have already introduced VAT grouping regimes or at least allowed joint registration for VAT purposes.²

Polish rules on VAT groups – analysed by the author in this article – were initially expected to enter into force on 1 July 2022. Their entry into force was postponed until 1 January 2023. The rules on VAT groups are included in the *ustawa z dnia 11 marca o podatku od towarów i usług* (the VAT Law).³

2. Who Can Form a VAT Group?

The rather generally worded provisions of the VAT Directive regarding VAT groups were implemented in the VAT Law via noticeably more elaborate provisions.

Under article 15a(1) of the VAT Law, a group of persons linked in financial, economic and organizational terms who conclude a written agreement of establishing a VAT group may also be a single taxable person for VAT purposes. A VAT group may be established by taxable persons:
- having a seat in the territory of Poland; or
- not having a seat in the territory of Poland, to the extent that they carry out economic activity in the territory of Poland via a branch situated in the territory of this country (article 15a(2) of the VAT Law).

Although article 15a(1) of the VAT Law refers to a very broad category of “persons” that may form a VAT group, this category seems to be limited in article 15a(2) of the same statute where reference is made to “taxable persons”. Considering the case law of the Court of Justice of the European Union (ECJ), one should consider the former provision to be decisive. The ECJ consistently holds that non-taxable persons may be included in the VAT group.⁴ This approach also extends to holding companies.⁵

One person may be a member of one VAT group only (article 15a(7) of the VAT Law). A VAT group may not be a member of another VAT group (article 15a(8) of the VAT Law).

3. Financial Links

Under article 15a(3) of the VAT Law, taxable persons are deemed to be linked in financial terms if one of the taxable persons, as a VAT group member, holds directly more than 50% of shares in the initial capital; more than 50% of voting rights in control, decision-making or managing bodies; or more than 50% of the right to participate in the profits of each of the remaining taxable persons, as members of that group.

Therefore, a VAT group may be created by entities connected vertically. Moreover, the requirement of direct capital involvement makes the potential scope of a group narrower. On the other hand, the existence of just one of the prerequisites (capital, voting or participation in profits) mentioned above is sufficient. It is the prerequisite of voting rights that opens up the broadest possibilities if the same person enjoys more than 50% of such rights in a number of persons.

4. Economic Links

Taxable persons are deemed – under article 15a(4) of the VAT Law – to be linked in economic terms, if:


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– the object of the core activity of the VAT group members is of the same nature (an example from the draft administrative guidance – all members provide audit services);
– the types of activity carried out by the VAT group members are complimentary and interdependent (an example from the said guidance – one member manufactures electronic equipment and another member provides repair services); or
– a VAT group member carries out activity from which other members of the VAT group benefit fully or to a large extent (an example from the draft administrative guidance – one member supplies services to another member).

Neither the nature of the activity nor the relationships mentioned are defined. In such a case, the similarities to other fields of activity not only can be assessed by reference to the classification of services or economic activity in general but also by a reasonable overview of business structures.

It is worth noting that, although the ECJ allows limiting the VAT grouping regime to selected branches only, no such restrictions have been introduced in Poland.

5. Organizational Links

Under article 15a(5) of the VAT Law, taxable persons are deemed to be linked in organizational terms, if:
– they are legally or actually, either directly or indirectly, under the joint leadership; or
– they organize their activities completely or partly in cooperation.

Persons forming a VAT group cannot function entirely independently. Their functioning – as a group – must either be coordinated vertically or horizontally. On the other hand, factual leadership or cooperation is sufficient. According to the draft administrative guidance, shared highest tier management or common management in certain fields of activity may serve as examples of organizational links.

6. VAT Group Agreement

An agreement of establishing a VAT group must be drawn up in writing and contain at least:
– the name of the VAT group with an additional designation “VAT group” or “GV”;
– identification data of the taxable persons making up the VAT group, including the data of the branch in the case of a taxpayer not having a seat in the territory of Poland, and the amount of initial capital of each such taxpayer;
– an indication of the VAT group representative appointed from among its members;
– identification data of the shareholders and the amount of their share in the initial capital of the taxable persons making up the VAT group and holding more than 50% of shares in the initial capital of those taxable persons; and
– an indication of the period for which such VAT group was established, no shorter than three years (article 15a(10) of the VAT Law).

7. Registration

A VAT group representative must file an application for registration with the head of a tax office (naczelnik urzędu skarbowego) – a typical first instance tax authority in VAT matters – competent for such representative along with the agreement of establishing a VAT group (article 96(3b) of the VAT Law).

Under article 15a(12) of the VAT Law, a VAT group must acquire the taxable person’s status on the day set out in the agreement to establish a VAT group but not earlier than on the day of effecting the registration referred to in article 96(4) of the VAT Law. Therefore, the existence of the group – as a taxable person – is dependent on the official registration.

The head of a tax office will not register a VAT group as a taxable person for VAT purposes if the conditions for recognizing a VAT group as a taxable person are not met, in which case the head of tax office must communicate the lack of registration to the VAT group representative (article 96(4d) of the VAT Law). This rule seems to be controversial, at least from the procedural point of view. It is clearly an assessment of the head of a tax office, who can disable a group from functioning as a VAT group. Therefore, a group that is not registered should have a right to appeal against this lack of registration. There are no clear provisions as to this effect.

Upon registration of a VAT group as a taxable person, the head of a tax office, must, ex officio, remove the VAT group member from the register as a taxable person (article 96(7ba) of the VAT Law). The VAT group becomes registered as one taxable person, replacing the registrations of all its members. The members’ registrations are still valid for purposes of taxes other than VAT.

8. Requirements Applicable to Existing Groups

The condition of joint existence of financial, economic and organizational links among the VAT group members must be met uninterruptedly throughout the period in which such group has a taxable person’s status (article 15a(6) of the VAT Law). No new members may join a VAT group, and no existing members may leave it (article 15a(9) of the VAT Law).

According to article 15a(11) of the VAT Law, a VAT group representative will represent a VAT group in the scope of the rights and duties of that VAT group.

A VAT group representative is obliged to communicate to the head of a tax office any changes to the state of fact or legal state resulting in the infringement of the conditions for considering the VAT group as a taxable person.

9. Taxable Activities and a VAT Group

A VAT group forms one taxable person. Therefore, supplies made within such a group should be disregarded for VAT purposes. There are three basic functions regarding taxable activities and the limits of a VAT grouping. First of all, the supply of goods and the provision of services made by a member of a VAT group for the benefit of another member of the same VAT group will not be subject to taxation (article 8c(1) of the VAT Law). Interestingly, the VAT group members are obliged to keep, in electronic form, the records of acts referred to in article 8c(1) of the VAT Law (article 109(11g) of the VAT Law). The records should be transmitted to tax authorities electronically on a monthly basis. Secondly, the supply of goods and the provision of services made by a member of a VAT group for the benefit of a person other than a member of such VAT group will be deemed to have been made by such VAT group (article 8c(2) of the VAT Law). Thirdly, the supply of goods and the provision of services made for the benefit of a member of the VAT group by a person other than a member of such VAT group will be deemed to have been made for the benefit of such VAT group (article 8c(3) of the VAT Law). One should remember the judgments of the ECJ regarding the scope of taxation in the case of dealings between a fixed establishment and a headquarters:

- of 23 March 2006 in FCE (case C-210/04) (deals between establishments in two Member States when there is no mention of a VAT group);
- of 17 September 2014 in Skandia America Corporation (case C-7/13) (deals between establishments in a non-EU and an EU country when the latter belongs to a VAT group); and
- of 11 March 2021 in Danske Bank (case C-812/19) (deals between establishments in two EU countries, one of them included in a VAT group).

The above-mentioned judgments have been incorporated into Polish legislation. The supply of goods and the provision of services made by a branch being a member of a VAT group for the benefit of:

(1) by a taxable person not having his seat in the territory of the country that established such branch; or
(2) by another branch of the taxable person referred to in subparagraph (1), situated outside the territory of the country

is deemed to have been made for the benefit of the VAT group by a person other than a member of such VAT group (article 8c(5) of the VAT Law).

The supply of goods and the provision of services made for the benefit of a branch being a member of a VAT group established in a Member State other than the Poland by a taxable person having a seat in the territory of the country that established such branch is deemed to have been made for the benefit of such VAT group (article 8c(6) of the VAT Law).

The supply of goods and the provision of services made by a branch being a member of a VAT group established in a Member State other than Poland for the benefit of a taxable person having a seat in the territory of the country that established such branch is deemed to have been made by such VAT group (article 8c(7) of the VAT Law).

10. Right to Deduct

A VAT group is a single taxable person for VAT purposes. Therefore, all rules applicable to taxable persons – at least as a matter of principle – apply to VAT groups as well. This means that a VAT group as a whole benefits from the right to deduct.

There are a few provisions regulating specific problems connected mostly with establishing a VAT group and dissolving it.

Under article 8d(1) of the VAT Law, in the settlement for the first settlement period, a VAT group must take into account the amount of the surplus of input tax over output tax to be carried forward to the next settlement period resulting from the last tax return filed by its members as taxable persons.

A VAT group must file the tax return for the settlement period in which it lost the taxable person’s status (article 8d(2) of the VAT Law). The amount of the surplus of input tax over output tax resulting from the return referred to above will be refunded to the VAT group representative or deducted in the settlement for the next settlement period of the VAT group representative (article 8d(3) of the VAT Law).

After a VAT group has lost the taxable person’s status, a VAT group representative may make the corrections of settlements of tax for the settlement periods during which the VAT group was a taxable person (article 8d(4) of the VAT Law). In the period of a VAT group holding a taxable person’s status and after such VAT group has lost such status, the VAT group members will be jointly and severally liable for its tax obligations (article 8e of the VAT Law).

Some problems are connected with the recoverability of input VAT if it is lower than 100%.
In the case of a VAT group, the deductible proportion is to be assumed separately for each member of that group, with a proviso that in the year in which that VAT group obtained the taxable person’s status, such proportion is to be assumed in the value determined by the VAT group members at the time of its establishing (article 90(10c) of the VAT Law). If a VAT group intends to make acquisitions of goods or services that are being used by that VAT group to perform the acts that involve the right to deduct input tax and the acts that do not involve such right, and if it is impossible to allocate such acts to individual VAT group members, the VAT group is obliged to separately determine the amounts of input tax related to such acts with respect to which that group has the right to reduce the output tax. If it is impossible to segregate, in full or in part, the amounts referred to in the first sentence, a VAT group is obliged to determine the deductible proportion. The proportion referred to above must be calculated as an estimation on the basis of the forecast agreed with the head of a tax office in the form of a record (article 90(10d) of the VAT Law). In the case of a taxable person for whom the head of a tax office restored the registration pursuant to article 96(9k), the deductible proportion that was determined for that taxable person separately before the VAT group lost the taxable person’s status will not be changed until the end of the year in which that group lost that status (article 90(10e) of the VAT Law).

If the taxable person for whom the head of a tax office restored the registration pursuant to article 96(9k) finds that, with respect to him, the turnover amount for purposes of determining the proportion referred to in article 90(10e) of the VAT Law would not be representative, he will assume for purposes of calculation of the input tax amount deductible from the output tax amount the proportion calculated as an estimation on the basis of the forecast agreed with the head of a tax office in the form of a record (article 90(10f) of the VAT Law).

The turnover referred to in article 90(3) earned by the taxable person who was a VAT group member in the preceding tax year and for whom the head of a tax office restored the registration pursuant to article 96(9k), must be taken to mean the turnover:
- that may be allocated to that taxable person for the period during which he was a VAT group member; and
- earned by that taxable person after a VAT group has lost the taxable person’s status (article 90(10g) of the VAT Law).

11. Winding Up a Group
A VAT group will lose the taxable person’s status:
- on the day preceding the day of occurrence of changes to the state of fact or legal state resulting in the infringement of the conditions for considering the VAT group as a single taxable person; or
- upon expiry of the time limit for which it was established (article 15a(15) of the VAT Law).

In order to extend the period of operation of a VAT group, a VAT group representative must file a request for prolongation, along with a new agreement concluded among the members of the existing VAT group, with the head of a tax office competent for taxation of the existing VAT group, within 30 days before the expiry of the existing agreement (article 15a(13) of the VAT Law).

The head of a tax office will, ex officio, remove the VAT group that lost the taxable person’s status from the register as a taxable person and communicate such removal to the VAT group representative (article 96(7bb) of the VAT Law). Upon removal of a VAT group from the register, the head of a tax office must restore the registration of a member of that VAT group as a taxable person with the status that that member had before the day of removal, without the need to file an application for registration (article 96(9k) of the VAT Law). Such a former group member obtains its previous registration number for VAT purposes (the number is valid throughout the existence of the group for taxes other than VAT).

12. VAT Group and Other Grouping Regimes
The VAT group functions only in the sphere of VAT. However, corporate income taxpayers in Poland can create a tax capital group (podatkowa grupa kapitałowa). The conditions for creating a tax capital group are far more elaborate than those applicable in the sphere of VAT. Once the conditions for creating these two types of groups are met, the same persons can create them simultaneously. Obviously, many persons that can form a VAT group cannot set up tax capital groups as they are not subject to corporate income tax (personal scope of the VAT is broader and non-taxable persons can additionally be included in VAT groups).

The transfer pricing connotations of the VAT groupings are also worth mentioning. Although transactions among VAT group members are not recognized at all for VAT purposes (save for the duty to report such intra-group dealings), they still exist and are of relevance to other taxes. This means that an open-market value regime is not applicable, but the arm’s length regime under corporate or income tax provisions can apply.

13. Conclusions
From 1 January 2023, taxable persons in Poland will have an opportunity to be part of a VAT group. This will be a purely facultative solution for taxable persons. Persons fulfilling conditions for creating a VAT group will have a choice of whether they want to form it or not.

This can certainly facilitate the administration of VAT, as fewer documents have to be produced and reported to tax authorities. As a matter of principle, a VAT group submits VAT documentation for the group.

Moreover, considering the lack of branch restrictions, the VAT grouping scheme in Poland opens up opportunities for tax mitigation. Taxable persons that do not foresee any benefits connected with setting up a group will not bother to create one. VAT grouping is not obligatory, even if taxable persons meet all the requirements to form a group.
Tax risks connected with the grouping regime are rather limited. The group cannot start functioning without prior registration by tax authorities. However, if the conditions allowing the group to function are not maintained after the registration, certain controversies over a taxable status and, therefore, the level of tax (arrears), may appear.