

VAT grouping – an alternative view

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VAT grouping EU legislation

Council Directive 2006/112 EC article 11:

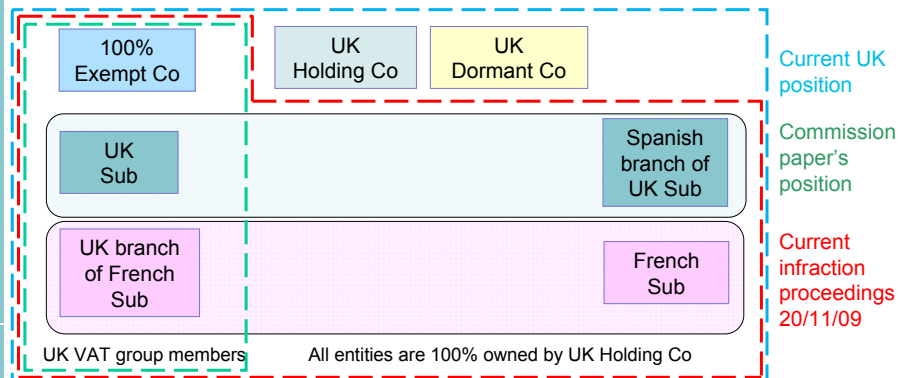
"After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and 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."

VAT Grouping infraction proceedings

* Commission Communication 2/7/09 stated (inter alia):

- Only taxable persons (i.e. engaged in economic activity) may join a VAT group
- Only establishments situated in the member state of the VAT group can be included, i.e. excluding foreign establishments even of the same legal entity



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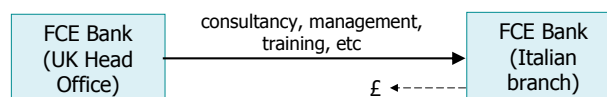
The Commission's rationale

The Commission's reasons include:

- * Formation of a VAT group creates a new separate taxable person and has precedence over legal form of entities
- * Wide divergences between VAT grouping schemes in different member states:
 - threaten neutrality and create fiscal competition
 - especially where effects are not limited to national territory
- * Art 11 restricts VAT group eligibility to "persons established in the territory of that Member State". They say this:
 - includes fixed establishments in that Member State
 - excludes fixed establishments abroad (which are not established in that Member State's territory)

* A few thoughts in response...

1. Separate persons myth: FCE Bank



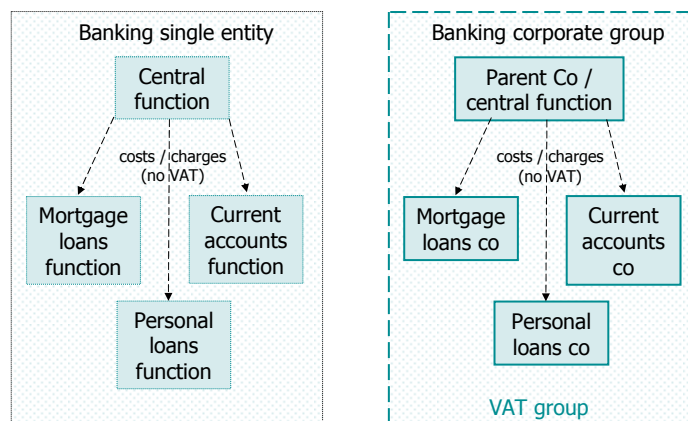
- * Was this a supply for VAT purposes?
- * Held:
 - Recharge of costs to the branch was not a supply
 - Supplies require:
 - a legal relationship of reciprocal performance
 - branch would need to be carrying out an independent economic activity
 - branch did not separately bear economic risks of the business and was dependent on its main company
 - so they together constituted a single taxable person
- * Why should this analysis change if one of the branches joins a VAT group?

Separate persons myth (cont)

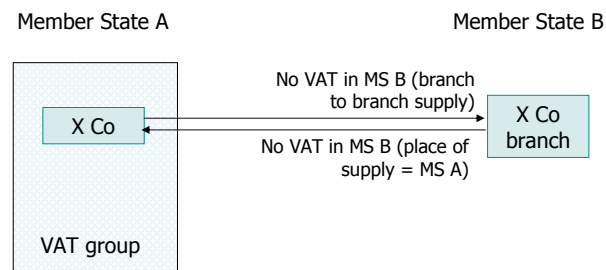
Ampliscientifica (C-162/07)

- * Commission use this case as authority:
 - creating a VAT group forms an entirely new taxable person
 - fiction of VAT group takes precedence over legal form for VAT purposes
- * But case simply says:
 - persons joining a VAT group no longer treated as separate taxable persons and become single taxable person
 - not authority that fiction of VAT group takes precedence over legal form
 - simply says VAT group supplants registration of an individual member in that territory
 - members of a VAT group cease to be able to maintain separate VAT registrations within that member state
 - instead adopt registration of VAT group as a whole

2. The neutrality myth



3. The territoriality myth



- * Once you accept FCE Bank still applies to VAT groups, so branch to branch supplies are not VATable even where one branch is in a VAT group:
 - the VAT group is only having an effect in MS A
 - the rules on not charging VAT in MS B are not affected by the existence of the VAT group in MS A

The answer

- * Allow wide regime of VAT grouping
- * Introduce anti-avoidance rules to stop abuse
- * Wide variations in implementation are result of discretion given to member states and not a cause for concern
- * Provide certainty to business as to future direction of the rules