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Fundamentals of VAT grouping in the Netherlands

Simon Cornielje[*] Barry Willemsen[**]

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Abstract

VAT grouping is a complex concept in European VAT law. Due to the optional nature of Article 11 VAT Directive and the judgment of the CJEU in the Larentia + Minerva case that Member States must develop and maintain their own specifications of the so-called link criteria, no strong harmonisation between national VAT grouping regimes is to be expected in the near future. It is beyond doubt that VAT grouping pervades the practice of many Member States, and as such can play a significant role in international business decisions. It is up to VAT practitioners in each Member State to provide their foreign colleagues with the legal particulars of their national VAT grouping regime. In this contribution, the authors take up this challenge by giving a brief overview of the fundamentals of the VAT grouping regime in the Netherlands. The contribution contains a sketch of the history of the Dutch grouping regime and a short examination of the criteria for forming a Dutch VAT group. It also touches on the consequences of being a VAT group for the application of VAT law to the parties concerned, as well as on matters of administrative obligation and joint liability. More in-depth attention is given to the Dutch interpretation of the criteria of close financial, organizational and economic links. Finally, the authors examine on an even deeper level a contemporary discussion in Dutch VAT doctrine as regards the criterion of close economic links, spurred on by recent case law of the Dutch Supreme Court.

Keywords: VAT group; Dutch law; Financial organizational link; close economic link.

1. Introduction

Overall, the inception and ongoing development of the common system of value added tax is a clear highlight in the history of European cooperation in the field of taxation. Ever since the entry into force of the First and Second Directive in the late sixties of the previous century, the Member States have borne witness to countless legislative and judicial developments that introduced or laid bare large strides towards a harmonized – or in some cases, even uniform – interpretation of various elements of European and national VAT legislation.[1] However, this harmonizing force does not extend to every aspect of the VAT system. For example, several years ago, the European

[*] Vrije Universiteit Amsterdam / PwC (Netherlands); ✉ s.b.cornielje@vu.nl

[**] Tillburg University (Netherlands); ✉ b.willemsen@tilburguniversity.edu

1. Examples include, but are not limited to:- the doctrine of direct effect of directives (for VAT purposes first explored in the Judgment of 19 January 1982, Becker, ECLI:EU:C:1982:7); - the judicial insistence on supranational, Unionwide definitions of many terms of which VAT legislation is comprised, explicitly removed from the content of any corresponding term in national law (see, *inter alia*, Judgment of 8 February 1990, Safe, ECLI:EU:C:1990:61, paragraph 8); - the proposition that even traditional national interpretations of more abstract principles of law, in certain circumstances, must be set aside in the light of a differing European interpretation of that same principle (see, recently, Judgment of 8 May 2019, Związek Gmin Zagłębia Miedziowego, ECLI:EU:C:2019:390, paragraphs 38–44).

Court of Justice ("CJEU") ruled that the condition of *close financial, economic and organizational links*, which Article 11 VAT Directive lays down in the context of VAT grouping, must necessarily be specified at national level.[2] As a result, these concepts have not been given any uniform content to be respected Union-wide.

It is quite surprising that it is largely up to the Member States to properly define the content several material criteria for the formation of a VAT group. Such leeway is not granted to other criteria that concern the identification of taxable persons. The case law on Article 9 VAT Directive makes clear that *every* criterion to identify a taxable person is an independent concept of Union law, for which only the CJEU can ultimately provide the supranational definition.[3] Given the judgment of the Court in *Ampliscientifica*, that a VAT group is itself a singular taxable person, of which the constituent parts may by no means be identified as separate taxable persons[4] and which for the remainder of the application of the VAT system is treated much in the same way as a 'normal' taxable person, one would expect the grip of Union law on the definition of the criteria for VAT grouping to be equally strong. Furthermore, the interpretation of VAT law in cross-border cases concerning VAT groups is already a complex matter, due to the optional nature of Article 11 VAT Directive. An added freedom to define the requirements for VAT grouping on a national level only serves to exacerbate these issues.[5] This is not a small-scale problem in practice, either: in the Member States that have chosen to implement Article 11 VAT Directive, including the Netherlands, VAT grouping is widely used and often has important administrative and financial implications for the parties involved.

Be this as it may, the judgment in the *Larentia* case makes clear that we need not expect judicial revelations as to the content of the link criteria of Article 11 VAT Directive in the near future. The European legislator and the European Commission have since been silent on the matter.[6] As things stand, it seems to fall to academics to construct a supranational frame of reference for Union-wide understanding of the norms for VAT grouping, or to at least open the way for a comparative analysis by which a solid base for arguments for or against further harmonization on this front can emerge.[7] Such an ambitious endeavour can, of course, not be completed – or even started – without providing academics in other Member States with an insight into the fundamentals of one's own national VAT grouping rules.

This contribution is written with exactly this purpose in mind: it is a brief primer on the concept of

2. Judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, ECLI:EU:C:2015:496, paragraphs 50–51.

3. See for these definitions, as regards 'any person', *inter alia*, Judgment of 12 October 2016, Nigl, ECLI:EU:C:2016:764, paragraphs 27–28; as regards 'independently', *inter alia,* Judgment of 13 June 2019, IO, ECLI:EU:C:2019:490, paragraphs 38–39; and as regards the 'economic activity', *inter alia*, Judgment of 26 March 1987, Commission v. Netherlands, ECLI:EU:C:1987:161, paragraphs 7–9.

4. Judgment of 22 May 2008, Ampliscientifica & Amplifin, *ECLI:EU:C:2008:301, paragraphs 19–20.*

5. See, for example, the *Skandia America Corporation* case, in which the Swedish interpretation of the VAT group regime, under which only the local permanent establishment of a taxable person – separate from its main establishment – is considered to be part of a VAT group, plays a central role; Judgment of 17 September 2014, Skandia America Corporation, ECLI:EU:C:2014:2225.

6. It should be noted that the European Commission, in 2009, *did* endeavour to provide a description of the different criteria for VAT grouping, though this communication has not been converted into any kind of legislative action. See Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax, 2 July 2009, COM(2009) 325 final, p. 8–9. In fact, the Commission already pointed out the dangers of diverging interpretations of the VAT grouping regime by the Member States and the need for further harmonization in the late nineties; European Commission, Arrangements for Levying VAT on groups, Brussels, 31 October 1997, nr. XXI/2138/97.

7. Comparative analysis of VAT grouping regimes is not new. Vyncke, in his dissertation, analysed and compared in some detail the VAT grouping regimes of several Member States, including the United Kingdom, the Netherlands, and Belgium. K. Vyncke, *De impact van btw op ondernemingsgroepen: btw-eenheid naar Belgisch, buitenlands en supranationaal recht*, Leuven, 2009. For an overview in English, see K. Vyncke, *EU VAT Grouping from a Comparative Tax Law Perspective,* in EC Tax Review, vol. 6, 2009, 299–309. Some comparative analysis of Dutch and German VAT grouping regimes can also be found in H.W.M. van Kesteren, M.M.W.D. Merkx, and C. Sternberg, *Dutch / German Cross-Border VAT Grouping*, in EC Tax Review, vol. 4, 2013, 187–196.

VAT grouping as it is understood and applied in the Netherlands. We do not aim here to describe exhaustively every intricacy of every rule for the formation of Dutch VAT groups, but we do provide the reader with a reasonably comprehensive – if, at certain points, somewhat cursory – overview of the Dutch rules and practices concerning VAT groups. We begin by describing in part [2] the historical development of grouping distinct entities for turnover tax purposes, since this concept in Dutch jurisprudence predates the introduction of the First and Second Directive by about thirty years. Part [3] is devoted to providing a brief exposition of the contemporary rules and practices concerning VAT groups, stating – without treading too much into detail – the main criteria that entities must individually satisfy in order to form a Dutch VAT group. Due to the CJEU's view in *Larentia*, more detailed attention is given to the Dutch interpretation of the criterion of close financial, economic and organizational links in part [4]. Finally, in part [5], we analyse a topical point of contention concerning the interpretation of the criterion of 'close economic links' that is currently one of the centrepieces of debate in Dutch doctrine concerning VAT groups.

2. Historical origins of the Dutch concept of a VAT group

Dutch history regarding turnover taxes can be roughly divided in three time periods, beginning with the introduction of a simple tax on manufacturers in 1933. During the German occupation of the Netherlands in the Second World War, this tax on manufacturers was replaced by a more general, cumulative turnover tax, the basic structure and span of which – owing to quite basic budgetary considerations – was largely retained after the war. The era of this cumulative turnover tax lasted until the implementation of the common VAT system as prescribed by the First and Second Directive in the late sixties.

The concept of *entity grouping*[8] first arose in Dutch jurisprudence with regard to the very first of these taxes – the tax on manufacturers. As the name implies, this non-deductible tax was levied exclusively on entities that themselves manufactured particular goods. The tax due was calculated as a percentage of the price that the manufacturer received upon sale. Supplies of goods by other parties than manufacturers were outside the scope of the tax, and so were all supplies of services.

This distinction prompted several manufacturers to devise avoidance schemes. Such a scheme, in its simplest form, usually consisted of the manufacturer setting up a separate legal person that was nevertheless entirely under the manufacturer's control. The manufacturer would sell his goods to this separate legal person for a very low price – on which a similarly low amount of tax was then due. Subsequently, the controlled legal person would make the 'actual' sales to third parties for normal prices. From the viewpoint of the schemer, no tax was due on these sales, since the separate legal person was not himself a 'manufacturer'. Unfortunately for the schemers, the Commission on Tariffs[9] rejected this interpretation on grounds that the designation of the 'manufacturer' as the taxable person in legislation did not necessarily refer to any singular legal person, and that in such an instance of complete control, both legal persons (the controlling manufacturer *and* the controlled legal person) must for application of the turnover tax together be regarded as *one* 'manufacturer'. As a result, tax was still due on the sales made by the controlled entity.

As time progressed and the tax on manufacturers was replaced by the cumulative turnover tax, the Commission on Tariffs maintained the precept that the legislator's designation of the taxable person[10] in no way precluded any interpretation whereby, for tax purposes, multiple separate legal

8. We refrain here from using the term 'VAT grouping', since the relevant national tax was in no way a VAT; in fact, it was not even a general tax on consumption.

9. The national final authority as regards Dutch VAT law is, in modern times, the Dutch Supreme Court (Dutch: *Hoge Raad*). However, this has not always been the case: until the start of the seventies of the previous century, the Commission on Tariffs (Dutch: *Tariefcommissie*) was the highest instance of adjudication on matters of turnover tax, excise and customs.

10. By the introduction of the cumulative turnover tax, this legal designation was changed from 'manufacturer' (Dutch: *fabrikant*) to 'entrepreneur' (Dutch: *ondernemer*), defined in Article 6(1) Law on turnover tax 1954 (Dutch: *Wet op de*

persons were regarded as one unified subject. It is important to note that this method of *entity grouping*, in the eyes of the Commission on Tariffs, flowed naturally from the text, context and aims of the relevant legislation. Although the precept first surfaced in the context of proceedings concerning anti-avoidance schemes, it was not intrinsically bound to any doctrine of abuse of law. Provided that several material conditions were satisfied, separate legal persons simply *had* to be regarded as *one* taxable person by virtue of the law. The development in Dutch case law from 1945 to about 1970 reflects this attitude: parties and courts emphasized the question *what* the relevant material conditions were and whether they were satisfied in the scenario underlying the procedure.[11] Although the adjudicative reasoning on these questions is often hard to abstract from the particular facts of each case, the normative frame of reference was usually that the legal persons, to be regarded as one *entrepreneur* (i.e., to be a *group* in the sense here considered), must form *a unity in a financial, organizational and economic sense.* It must be kept in mind that, although this criterion seems to fit the contemporary criteria of Article 11 VAT Directive quite neatly, these inventions in national law predate the First and Second Directive by more than a decade. As such, their judicial development initially had no regard whatsoever to the specifics of any VAT system.[12] It is, however, hard to deny the influence of this national pre-VAT jurisprudence on the contemporary Dutch interpretation of the link criteria in the context of VAT grouping. Of course, the Dutch Supreme Court has since had several occasions to steer the interpretation of the link criteria in the context of the modern VAT law. We will return to this topic in part [4].

When the First and Second Directive were implemented into Dutch national legislation by means of the Law on turnover tax 1968, the legislator codified no distinct rules for grouping legally distinct persons into a single taxable person, even though it was clear from the outset that the legislator wished to make use of the option for VAT grouping as Annex A, point 2 of the Second Directive described. This lack of codification can be explained by the historical conception of entity grouping as described before: since Dutch doctrine commonly held that the simple designation of the taxable person as an 'entrepreneur' allowed for the fiscal merger of separate legal persons in and of itself, and the material criteria for such mergers had long since been developed through the ebb and flow of national case law, any further regulation was deemed unnecessary.

This implementation of VAT grouping 'under the radar' led several Dutch undertakings to question the validity of the transposition, arguing that the implementation of VAT grouping required a Member State to make the rules for grouping explicit in national legislation. They also remarked that the European Commission had only been informed on the practice of Dutch VAT grouping through the sharing of the Draft Law and its textual accompaniments by the Dutch government, and as such had not been separately consulted on the Dutch conception of VAT grouping as was (and is) required by the Directive. The CJEU, however, ruled in the *Van Paassen* case that the conceptual inheritance of entity grouping into a VAT grouping regime through the interpretation of legal norms that seemed to refer only to the normal definition of a taxable person was not at odds with the Second Directive. Moreover, the CJEU ruled that by its explications accompanying the

omzetbelasting 1954) as: "*anyone* who independently runs a business or a profession."

11. See, for example: Commission on Tariffs, Judgment of 23 February 1953, no. 6510 O, ECLI:NL:DETARCO:1953:AY3253; Commission on Tariffs, Judgment of 15 March 1954, no. 6500 O, ECLI:NL:DETARCO:1954:AY3059; Commission on Tariffs, Judgment of 7 October 1957, no. 8297 O, ECLI:NL:DETARCO:1957:AY1386.

12. As a nuance, it could be maintained that the Commission on Tariffs, while shaping and developing the criterion of unity, leaned strongly on the concept of the *Organschaft* that was, at that time, already prevalent in German national law. Going by the remarks of the European Commission and Advocate General Mengozzi in the *Larentia* case, the incorporation of the grouping option in the European directives on VAT was also in no small part due to the German concept of the *Organschaft*. See the description of the written submissions of the Commission in the Judgment of 12 June 1979, Van Paassen and Dienstbetoon Denkavit, ECLI:EU:C:1979:151, and the Opinion of Advocate General Mengozzi delivered on 26 March 2015 in the joint cases Larentia + Minerva and Marenave Schiffahrt, ECLI:EU:C:2015:212, footnote 32. If the reasoning of the Commission on Tariffs (concerning entity grouping) and the reasoning of the European legislator (concerning VAT grouping) share the concept of the *Organschaft* as a common interpretive ancestor, it is possible to argue that the content of the link criteria as developed in the Dutch pre-VAT era is not necessarily unsuitable for transposition to the contemporary VAT regime.

documents of the Draft Law as submitted to the Commission in the course of the implementation process, the Netherlands had duly consulted the Commission on its VAT grouping regime.[13] Insofar as the manner of implementation was concerned, the Dutch VAT grouping regime was therefore valid from the perspective of Union law. Consequently, the relatively hidden manner of VAT grouping through the interpretation of the term 'entrepreneur' continued for quite some time.

Despite the CJEU's affirmation and the stance of the Dutch government during the proceedings, the Dutch legislator decided in the same year as the *Van Paassen* judgment to codify the rules on VAT grouping into national legislation after all. The reason for this is closely linked to developments in Dutch case law with regard to the more general concept of the taxable person in the seventies and early eighties. It would go beyond the scope of this contribution to provide a comprehensive summary of those developments. For our current purposes, it suffices to conclude that the contemporary VAT grouping rules in the Netherlands have an explicit basis in national law,[14] while at the same time the interpretation of the material criteria named therein and the interpretation of the material effects of VAT grouping are heavily influenced by developments in historical national case law.

3. The basics of a Dutch VAT group from a contemporary viewpoint

In this section, we will briefly describe the main features of the Dutch VAT grouping regime. For purposes of readability and comprehension, we have categorized these features under several distinct headers: the personal and material scope of application (3.1), the territorial scope of application (3.2), the nuanced compulsory character of the regime (3.3), the effects on administrative obligations (3.4) and the joint liability of group members for various types of fiscal debt (3.5). We will not yet embark on a journey through the Dutch interpretation of the link criteria: to that subject we return in part [4].

3.1. Personal and material scope of application

Dutch law stipulates that participation in a VAT group is possible for any natural person and any entity that is defined as *"lichaam"*[15] in the General Law on State Taxes. The term last mentioned not only encompasses every type of legal person, but also includes partnerships that lack independent legal personality, as well as groups of special-purpose assets. This definition is exceptionally broad. As a result, it is hard – if not impossible – to imagine any kind of legal entity that is *a priori* excluded from the VAT grouping regime. This seems to conform to the principle of neutrality in the sense that legal form, of itself, should not cause differences in VAT treatment.[16]

This seemingly limitless potential for any legal entity to become part of a Dutch VAT group is, however, immediately restrained by the rule that, in order to participate in such a group, the entity must first itself and individually qualify as a taxable person in the sense of the Dutch equivalent of Article 9 VAT Directive. In other words, a Dutch VAT group can only be made up of different

13. Judgment of 12 June 1979, Van Paassen and Dienstbetoon Denkavit, ECLI:EU:C:1979:151, paragraphs 12–13.

14. Article 7(4), Law on turnover tax 1968.

15. There is no satisfactory translation of this term in English that would comprehensively convey the scope of what the Dutch word *"lichaam"* entails; the direct translation would be "body", but this invites Anglo-American notions of "bodies corporate" that are not conducive to a precise description of the relevant entities. Because of this difficulty in translation, we have opted to use the Dutch term. For the remainder of this contribution, we will also refer to this group as 'subjects' in the context of the VAT grouping regime.

16. For comparison as regards the influence of legal form in the context of the application of VAT exemptions, see the Judgment of 7 September 1999, Gregg & Gregg, ECLI:EU:C:1999:390, paragraph 20.

taxable persons.[17] Furthermore, it is not possible for an entity to be a member of more than one VAT group at a time.

This criterion of individual subjective taxability is nowhere to be found in Article 11 VAT Directive. Indeed, in *Commission v. Ireland*, the European Court of Justice ruled that the VAT Directive does not preclude a non-taxable person from joining a VAT group.[18] This judgment has sparked debate in Dutch doctrine with regard to the aforementioned criterion of individual subjective taxability. Some authors maintain that Article 11 VAT Directive not only does not preclude the participation of non-taxable persons in a VAT group, but *obligates* Member States to allow the participation of such entities in VAT groups. In their view, the Dutch law on VAT groups is not in line with Union law. Other authors argue, through application of the principle that he who is allowed to do the greater ought not to be prohibited from doing the less, that Article 11 VAT Directive allows Member States to limit a legal entity's ability to participate in a VAT group by reference to its individual legal status for VAT purposes. Although this issue has since been brought before the Dutch Supreme Court, no judgment in principle on this matter has been given as of yet: the Supreme Court ruled that, given the judgment of the CJEU in the *Larentia* case that Article 11 VAT Directive cannot be directly invoked in national proceedings, the matter must be decided according to Dutch law only, with the result that the criterion of individual subjective taxability remains effective to this day.[19]

There is one exception to the criterion of individual subjective taxability. A holding company whose only activity consists in the holding of shares in other companies, is not engaged in any type of economic activity and therefore not a taxable person.[20] An economic activity might arise if the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been required, but only if this involvement in itself entails carrying out transactions which are subject to VAT.[21] The Dutch rules on VAT grouping, however, allow the participation of a holding company in a VAT group if it is heavily involved in the management of its subsidiaries, *even* if this involvement does *not* entail any transaction which is subject to VAT and thus, by extension, the company does not individually satisfy the conditions to be a taxable person.[22] Unsurprisingly in light of the judgment in *Commission v. Ireland*, the CJEU has judged this extension of the personal scope of application of the Dutch VAT grouping regime to be in line with Article 11 VAT Directive.[23]

In conclusion, the types of entities that can partake of the Dutch VAT grouping regime can be exhaustively enumerated as (1) any entity that is, in itself, a taxable person and (2) any holding company that is not in itself a taxable person, but that is heavily involved in the management of its subsidiaries, and by virtue of this involvement is an important factor for the existence of the group.

As regards the material scope of application of the VAT group, the rules are reasonably simple and in line with the principle set forth in *Ampliscientifica* that a VAT group is a separate and singular taxable person. Every transaction that takes place between members of a VAT group is considered to be a matter internal to that taxable person, and thus does not lead to any taxable supply of goods or services in the sense of Article 2 VAT Directive. Every taxable supply made *by* a member of a VAT group to a non-member is considered to be a supply *by* that VAT group; every taxable supply made *to* a member a a VAT group by a non-member is to considered to be a supply *to* that VAT group.

17. There is *one* exception to this rule, which we will touch upon..
18. Judgment of 9 April 2013, Commission v. Ireland, ECLI:EU:C:2013:217, paragraph 41.
19. Dutch Supreme Court, Judgment of 11 September 2015, no. 14/01003, ECLI:NL:HR:2015:2498, paragraph 2.4.5.
20. See, *inter alia*, Judgment of 20 June 1991, Polysar, ECLI:EU:C:1991:268, paragraph 13.
21. See, *inter alia,* Judgment of 14 November 2000, Floridienne & Berginvest, ECLI:EU:C:2000:623, paragraph 19.
22. Resolution of the State Secretary of Finance of 18 February 1991, no. VB 91/347.
23. Judgment of 25 April 2013, Commission v. Netherlands, ECLI:EU:C:2013:265, paragraphs 47–49.

More generally, for the application of the VAT law, the VAT group is treated as a single taxable person as much as possible. For example, the calculation of the *pro rata* as provided for in Article 174 VAT Directive is in principle made for the VAT group as a whole, and not for its constituent parts.[24] An exception is made for those parts of VAT law where the application of a rule is dependent on certain subjective qualifications of the supplier, for example in the case of medical care (Article 132(1)(b) VAT Directive) or education services (Article 132(1)(i) VAT Directive). In these cases, the fact that one of the group's members has the necessary subjective qualifications does not lead to the conclusion that the entire VAT group has those qualifications. In such a scenario, the application of the relevant exemption therefore depends on which member of the group made the supply.

3.2. Territorial scope of application

Under Dutch law, any subject that has established its main place of business in the Netherlands *or* has a fixed establishment in the Netherlands is allowed to participate in a VAT group. The ideas of 'establishment' of the main business and 'fixed establishment', in this context, correspond to their respective definitions under Union VAT law.[25] It is important to note that, regardless of which of these two criteria the subject fulfils, it is always the subject *as a whole* that is considered to be part of the VAT group. In 2002, the Dutch Supreme Court ruled that, in the specific case where a subject has established its main place of business in a different Member State (or even outside of the European Union altogether), and its presence on Dutch territory is limited to a single fixed establishment, that subject is nevertheless considered to be part of the VAT group for *all* of its activities, including the activities of the foreign seat of business.[26] This interpretation differs from the practice of certain other Member States, for example Sweden, that consider only the fixed establishment as such to be part of the VAT group. It is also the main reason why the judgment in *Skandia America Corporation*[27] had – and still has – no noticeable effect on national interpretation of the Dutch VAT grouping regime.[28]

3.3. Compulsory character

Given the history of the grouping regime and its interpretation that we described in part [2], it should come as no surprise that the formation of a Dutch VAT group is, at its core, not an optional affair, since by tradition it results from the fulfilment of a group of material criteria. Nevertheless, later developments in the VAT grouping legislation, in particular with regard to the joint liability of VAT group participants that we will further explore in [3.5], have tainted the compulsory character of the regime.

Joint liability of the participants was not an aspect of the Dutch VAT grouping regime from the outset; it was first introduced into Dutch tax legislation by the end of the eighties. Up until that point, it was not really a problem if the tax authorities spontaneously judged a collection of subjects to be a VAT group, even retroactively. In fact, the origins of the grouping regime as an anti-abuse mechanism made it rather desirable that tax authorities, given that the material criteria for grouping

24. It should be noted that the Netherlands have not implemented any obligation or possibility to calculate separate *pro rata* for separate sectors of a single taxable person, as described by Article 173(2)(a) VAT Directive, except for a special decree for banking institutions that operate under multiple labels.

25. See, as regards 'establishment' of the main business, *inter alia*, Judgment of 28 June 2007, Planzer, ECLI:EU:C:2007:397; as regards 'fixed establishment', *inter alia*, Judgment of 4 July 1985, Berkholz, ECLI:EU:C:1985:299, as well as the codifications made in Article 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

26. Dutch Supreme Court, Judgment of 14 June 2002, no. 35 976, ECLI:NL:HR:2002:AD6434, paragraphs 3.3.2 and 3.3.3.

27. Judgment of 17 September 2014, Skandia America Corporation, ECLI:EU:C:2014:2225.

28. See on the Skandia America Corporation case and the influence of different national implementations of Article 11 VAT Directive, S. Cornielje and I. Bondarev, Scanning the Scope of Skandia, International VAT Monitor, 26(1), 17–21 and Gert-Jan van Norden, State of Play in Respect of the Skandia America Corporation Case, EC Tax Review 2016(4).

were fulfilled, were able to treat separate persons as a VAT group even with regard to past transactions. As long as there was no abuse of law or otherwise abusive scheme, there generally was no financial downside to being retroactively treated as a VAT group. This relatively carefree situation changed as soon as joint liability for participants in a VAT group was proposed. As the proposed legislation went through parliamentary procedure, it was therefore quickly amended with the rule that, from the moment the new legislation entered into force, subjects could only be treated as a VAT group – and, therefore, could only be held jointly liable – *after* the tax authorities had issued to them a formal notice that these subjects satisfied the material conditions for VAT grouping.

Although the introduction of this formal notice averted the undesirable prospect of unexpected and retroactive joint liability for VAT group participants, it quickly created a new problem in practice. Until the introduction of this formal big stick, companies were free to materially evaluate their own VAT position as new legal persons entered into or existing legal persons were removed from their company structure. If the company or group of companies convinced itself it satisfied the material conditions for VAT grouping, they could immediately act as such, which – especially in the case of subjects with a limited right to deduct – could have tremendous financial benefits. Under the new legislation, given a strict interpretation of the criterion of formal notice, this was not possible: the organization would have to wait until the tax authorities issued their formal notices before the grouping regime could take material effect. Given the sudden influx of companies requesting the authorities for formal notices, especially right after the introduction of the new legislation, this process could take several months, leading to discussions in many cases whether the formal decision indeed should be awaited by a group that – on the basis of its own assessment – clearly met all the requirements

In 2005, such a case came before the Dutch Supreme Court. In its judgment, the Supreme Court rejected the strict interpretation of the criterion of formal notice as described above, and instead followed a line of reasoning that can only be described as a synthesis of the old tradition of compulsory VAT grouping and the – in itself quite legitimate – aim of the criterion of formal notice to prevent that subjects would be unexpectedly and retroactively treated as a VAT group by the tax authorities. The Supreme Court judged that, given the history and context of the grouping regime, the material presence of a VAT group is only dependant on the fulfilment of material criteria. In other words, as was traditionally the case, the VAT group exists as soon as the material criteria are fulfilled, and a subject is free to appeal to the material consequences of grouping even if the tax authorities have not yet issued a formal notice. However, the criterion of formal notice precludes the tax authorities from doing the same: until they have issued the formal notice as required by legislation, they cannot appeal to the consequences of VAT grouping, no matter how long before that moment the material conditions for grouping have been fulfilled in any given case.[29] Most notably, this means that joint liability between members of a VAT group can only arise after a formal decision has been issued.

3.4. Effects on administrative obligations

Administrative obligations and opportunities for a VAT group in the Netherlands are, generally speaking, no different that the administrative obligations and opportunities for a conventional taxable person: Dutch administrative tax law, in general, makes no distinction between different types of taxable persons. This means that, like a normal taxable person, the VAT group periodically files a single VAT return, wherein the VAT due on all the supplies made by the group and all deductible VAT on supplies made to the group is reported. If the VAT return is not filed in time or the VAT payable according to the return is not paid in time, the VAT group as a whole is penalized.

There exists an administrative practice by which the tax authorities allow taxable persons to file several distinct VAT returns with regard to the same time period. This is completely optional and happens only by explicit request of the taxable person: the tax authorities cannot force any

29. Dutch Supreme Court, Judgment of 22 April 2005, no. 38 659, ECLI:NL:HR:2005:AT4477, paragraph 3.4.

single taxable person to file more than one return. Some companies make use of this opportunity because they find it easier to file separate VAT returns for separate parts of their organization. The administrative practice is open to any taxable person with distinct groups of activities. It is not necessary to be a VAT group, although – for understandable reasons – it is most often applied in large conglomerates of companies, which are almost always members of a VAT group. It should be noted that, although applying for the filing of multiple VAT returns is voluntary, once chosen, the practice does entail certain obligations for the subject concerned. Most importantly, the separate returns are treated as separate for just about every part of Dutch administrative tax law. This means, for example, that if a single taxable person has chosen to file five separate VAT returns, and at one point fails to file two out of these five returns in time, he will be subjected to two separate penalties (one for each missed return).

In a few very specific cases, formal obligations for VAT groups *do* differ from those of single taxable persons. This happens mostly where application of the 'normal' administrative obligation risks confusion in cross-border situations. It is, after all, not mandatory for Member States to introduce a VAT grouping regime into their national VAT legislation, and it is quite debatable whether such Member States are required to recognize a foreign VAT group as a separate and singular taxable person. In the context of recapitulative statements,[30] this can cause confusion if, for example, a supplying VAT group marks all its invoices with the identification number of the VAT group instead of the identification number of the member that is making a particular supply, or the supplier uses the identification number of the entire group to designate the supplied party in his recapitulative statement. For this reason, when sending invoices, Dutch VAT groups are required to mark down the individual identification numbers of the relevant group member, instead of the identification number of the group as a whole.

3.5. Joint liability

As mentioned in [3.3], joint liability for participants in a VAT group was introduced into Dutch legislation by the end of the eighties. It is laid down in Article 43 Law on tax collection 1990[31] and provides that the participants in a VAT group are jointly liable for *all* the VAT that is due by (1) the VAT group, or, (2) if there has been no formal notice to the tax authorities that the material conditions for VAT grouping are no longer fulfilled, by the individual subjects that made up the VAT group as identified in the formal notice issued by the tax authorities in accordance with the procedure as explained in [3.3].

The second element requires some further explanation. As previously described, the Dutch Supreme Court holds that the presence of a VAT group is dependant solely on the fulfilment of material criteria, in spite of the criterion of formal notice that was later introduced by the legislator. As regards the termination of VAT groups, the same reasoning applies: as soon as the material criteria for grouping are no longer fulfilled, the VAT group ceases to exist and VAT law is applied to the individual participants as normal. This requires no formal notice from the tax authorities or the subjects themselves; it is a matter decided solely by the material state of affairs at any given moment.

The legislation on joint liability, however, explicitly breaks away from this line of reasoning. The liability for the VAT due on the supplies of group members persists even if the material conditions for VAT group are no longer satisfied and will continue to do so until the subject gives proper formal notice to the tax authorities. In fact, according to the Supreme Court, the liability takes effect and remains applicable even if, in retrospect, it turns out that the relevant subjects *never* materially satisfied the conditions for VAT grouping, but they nevertheless received a formal notice from the

30. See Chapter 6 of the VAT Directive.

31. Dutch: *Invorderingswet 1990*.

tax authorities by which they were appointed as such.[32]

In 2017, the Supreme Court held that it is beyond reasonable doubt that the Dutch joint liability for VAT groups is in line with Union law. This judgment leaned heavily on the consideration that a VAT group is not in itself a legal entity that can, under Dutch claim law, itself or through its constituents be made liable for the VAT debt that it accrues.[33] The Supreme Court apparently saw no reason to refer this question to the European Court of Justice for a preliminary ruling, although the judgment does not specify whether the court considered the problem an *acte claire* or *acte éclairé*.

4. Dutch interpretation of the close link-criteria

As indicated in paragraph [2], the notion that multiple entities may together be treated as a single taxable person for the purposes of indirect taxation on the basis of their financial, organizational and economic links is deeply rooted in the Dutch legal tradition in this field. Moreover, this notion, being closely related to and seemingly inspired by the German *Organschaft*, seems to have been at (or close to) the cradle of the development of the criteria currently provided in Article 11 EU VAT Directive.

4.1. General

It is clear from the *Larentia* case, that the condition of *close financial, economic and organizational links*, which Article 11 VAT Directive lays down in the context of VAT grouping, does not have a uniform meaning and must therefore necessarily be specified at national level.[34] This notion was confirmed by the Dutch Supreme Court.[35] This case law, however, did not lead to any implementation of substantive requirements to be met in order to fulfil the condition of close financial, economic and organizational links in the Netherlands. Also prior to the *Larentia* case, no such requirements were to be found in Dutch VAT legislation. This can be explained by the fact that historically (see paragraph [2]) the concept of VAT grouping in the Netherlands has its roots not so much in legislation but in case law. Apparently, an urge to codify has never been felt.[36] The result is that the specification and interpretation of the condition depends on the cases that are (or are not) brought before the courts and as such is neither comprehensive nor conclusive.

It is striking that, although a substantial body of case law has been developed with respect to the conditions for application of the VAT grouping regime in specific situations, the basic criteria to fulfil the condition of close financial, economic and organizational links are included in a single landmark case from the Dutch Supreme Court in 1989.[37] The case revolves around two legal entities, both fully owned by the same natural person, both active in the automotive industry, that sold cars and caravans to one another. The tax authorities took the position that the VAT charged on these transactions was not due and therefore, no right to recover such input VAT could be exercised. The case provided an opportunity for the Dutch Supreme Court to interpret the substantive requirements of the close financial, economic and organizational links. In this respect, the Dutch Supreme Court ruled first of all that it is not sufficient for the tax authorities to simply substantiate its position that a VAT group exist in a specific case by stating that the close financial, economic and organizational links exist, without specifying for each of the three links why this should be the

32. Dutch Supreme Court, Judgment of 9 November 2012, no. 11/03524, ECLI:NL:HR:2012:BU7276, paragraphs 3.3.3 and 3.3.4.

33. Dutch Supreme Court, Judgment of 17 March 2017, no. 15/03019, ECLI:NL:HR:2017:438, paragraphs 2.3.6 and 2.3.7.

34. Judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, ECLI:EU:C:2015:496, paragraphs 50–51.

35. Dutch Supreme Court, Judgment of 11 September 2015, no. 14/01003, ECLI:NL:HR:2015:2498.

36. Recently, some calls for codification have surfaced in doctrine, see R.D. Dirks and H. Mezouar, *'Een voorstel voor herziening van de fiscale eenheid btw'*, WFR 2019/258.

37. Dutch Supreme Court, Judgment of 22 February 1989, no. 25068, ECLI:NL:HR:1989:ZC3993.

case. This part of the judgment was widely understood to mean that in all cases, the existence of the three links (financial, economic and organizational) is to be assessed independently. This would mean that the assessment should not look at the three links in conjunction, which could open up the possibility of compensation of a weaker link by a stronger link. Recent case law by the Dutch Supreme Court has made clear that some level of compensation is however possible in case of 'weak' economic links, thus raising the question to what extent further assessment in conjunction should be possible (we refer to paragraph [5] below).

With respect to the independent assessment of the three links, in its 1989 decision, the Dutch Supreme Court ruled that a close financial link exists in case more than 50% of the shares in both entities – including the majority of the shareholder vote – is held by the same person. For a close organizational link it is required that the companies are under a joint management, or at least a combined management that functions in unity, or that the management of one entity is in a position of *de facto* subordination in relation to that of the other entity. For a close economic link it is required that the activities of the legal entities are predominantly aimed at the accomplishment of a single economic purpose, such as is the case if the entities serve a shared customer base, or if the activities of one of the legal entities are predominantly exercised for the benefit of the other legal entity.

The 1989 ruling gives a very general interpretation of the condition of close links. As such it has proved to be the stepping stone for almost any discussion on the assessment of the three links in doctrine, case law and practice. In the next paragraph we will look in further detail into the three separate links. In order to provide a concise overview of the requirements, the notion of the possibility of an assessment in conjunction that – as indicated – can be read in recent case law of the Dutch Supreme Court, is temporarily put aside. The possible ramifications of that case law – which may well be substantial – are discussed separately in paragraph [5].

4.2. Financial links

The requirement formulated by the Dutch Supreme Court in its 1989 decision as regards the assessment of close financial links is quite straightforward. To form a VAT group, two (or more) entities must be directly or indirectly held by a single shareholder for more than 50% each, including the majority of the voting rights. If the shareholder is established outside of the Netherlands, this does not preclude a VAT group between its (Dutch) subsidiaries. If the shareholder is established in the Netherlands and is also a taxable person, or an active holding company that is not a taxable person in its own right,[38] such a shareholder can be included in a VAT group with its shareholdings if it holds more than 50% of the shares including the majority of the voting rights. Further case law of the Dutch Supreme Court has made clear that the >50% requirement cannot be deviated from. If two shareholders both own 50% of the shares in a company, neither of those shareholders can be in a VAT group with the company.[39] A shareholding of 49,99% proved insufficient, even though that shareholder had also assumed the economic risks connected to 50,01% of shares not held by him and was granted the factual control over the company by the other shareholder.[40] Also, in principle, holding a depositary receipt or any other instrument that is merely a derivative of shares is not sufficient, although it could be if the holder of the depositary receipt is *factually* in full control over the company.[41]

As indicated in paragraph [3.1], the Dutch VAT group is not only available to legal persons but to any entity that in itself qualifies as an independent taxable person for VAT. This includes (legal)

38. On the basis Resolution of the State Secretary of Finance of 18 February 1991, nr. VB 91/347 an active holding company that is not a taxable person in its own right may be included in the Dutch VAT group. See paragraph [3.1].

39. Dutch Supreme Court, Judgment of 4 April 2014, no. 13/01798, ECLI:NL:HR:2014:792.

40. Dutch Supreme Court, Judgment of 14 February 2003, no. 38 238, ECLI:NL:HR:2003:AF4532.

41. Dutch Supreme Court, Judgment of 31 January 2014, no. 12/01314, ECLI:NL:HR:2014:145.

persons that do not have a capital divided in shares, such as foundations or contractual partnerships. Obviously, the >50% criterion cannot be applied if there is no share capital to be held. In those cases the condition of the close financial link is met if the financial position and/or financial activity of one organization is directly dependent on, or directly influenced by, another such organization.[42] This criterion should be understood not to impose a higher threshold for close financial links on these types of entities than on legal persons with a share capital.[43] The alternative criterion is meant to be a fair comparison to the position of a majority shareholder in the course of the usual application of the >50% criterion. Under this principle, even public bodies can be part of a Dutch VAT group.[44]

4.3. Organizational links

On the basis of the 1989 Supreme Court ruling, a close organizational link requires that the companies are under a joint management, or at least a combined management that functions in unity, or that the management of one entity is in a position of *de facto* subordination in relation to that of the other entity. It is clear in this respect that it is insufficient if the control of one entity over the other entity is limited to a discretion with respect to the hiring and firing of its directors.[45] The criterion requires that the same person or the same group of persons is factually managing or controlling the activities of the (subordinate) entity or entities. For two-tier companies, besides the board of directors, the composition of the supervisory board can also influence the fulfilment of the condition of the close organizational link.

In practice, the organizational link does not lead to much debate. The main cause for this is that the requirement of having the majority of voting rights that is part of the condition of the close financial links, in many cases by definition leads to fulfilment of the condition of organizational links, as the majority shareholder that can exercise its majority voting rights will usually meet the criterion of forming a joint management for the entities involved. In very specific cases, however, it is debatable whether this rule of thumb applies. When the relations between multiple shareholders and a single subsidiary are governed not only by each individual shareholder relation, but also by a variety of contracts that pertain to the management of the subsidiary's activities, for example in the case of a joint venture, the presence of close organizational links with the majority shareholder might well be disputed.[46]

4.4. Economic links

The condition for forming a Dutch VAT group that generally leads to most discussion is the economic link between entities. In its landmark decision in 1989[47] the Dutch Supreme Court ruled that close economic links are present if the activities of the legal entities are predominantly aimed at the accomplishment of a single economic purpose, such as is the case if the entities serve a shared a customer base, or if the activities of one of the legal entities are predominantly exercised for the benefit of the other legal entity.

This definition of the economic link in the sense of Article 7(4) Dutch VAT Act, has led to much debate in Dutch doctrine, case law and practice.

First of all, the question arose to what extent the definition from the 1989 ruling provided an exhaustive criterion. It seems that this is the case in the sense that the predominant aim at the

42. Dutch Supreme Court, Judgment of 30 May 1990, no. 25 722, ECLI:NL:HR:1990:ZC4297.

43. Dutch Supreme Court, Judgment of 26 June 2009, no. 43 872, ECLI:NL:PHR:2009:BF0401.

44. High Court Amsterdam, Judgment of 18 September 1997, no. 96/5431, ECLI:NL:GHAMS:1997:AV9349.

45. Dutch Supreme Court, Judgment of 30 May 1990, no. 25 722, ECLI:NL:HR:1990:ZC4297.

46. e.g. High Court 's-Hertogenbosch, Judgment of 24 May 2019, no. 17/00806, ECLI:NL:GHSHE:2019:1974.

47. Dutch Supreme Court, Judgment of 22 February 1989, no. 25068, ECLI:NL:HR:1989:ZC3993.

accomplishment of a single economic purpose should be seen as the skeleton criterion. The words 'such as' however, suggest that the way the Dutch Supreme Court puts flesh on this skeleton (a shared customer base or activities predominantly exercised for the other legal entity) is merely of an exemplary and as such non-exhaustive nature. From a later judgment by the Supreme Court it may be derived that indeed the examples mentioned in the 1989 ruling are of a non-exhaustive nature, as in that case an entity that specialised in repairs of electronic products purchased almost all the supplies it needed from a wholesaler, that in turn depended on the first entity for approximately 10% of its sales. The Supreme Court ruled that this was sufficient for close economic links, although it was clear that both entities did not share a customer base, nor were the activities of one of the entities predominantly aimed at the other.[48] Obviously, this leaves the question open what other circumstances could be seen as 'the accomplishment of a single economic purpose'.

Moreover, the examples mentioned in the Supreme Court's decision in themselves leave a lot of room for debate. What does it mean to 'serve a shared customer base'? It could mean that legal entities only have economic links if they sell their products to the same clients (i.e. the same persons/companies). If that indeed would be the correct reading of the criterion, then it could – for example - be argued that two legal entities belonging to a banking group do not serve the same customer base if one of the entities provides credit and savings products to customers in Maastricht, while the other does so to customers 270 km away[49] in Groningen. From a 1993 judgment, it can be derived that such an approach is too strict, and that the criterion should be understood to mean that the members of a VAT group should aim their economic activity at the same potential group of customers, which does not mean that they necessarily perform supplies to the exact same customers.[50] The 'shared customer base' can also be interpreted to mean that merely the same *type* of customers should be served. If that would be the case, it follows that businesses that provide products that are ancillary or complementary in nature are aimed at the same type of customers and are therefore economically linked. A Dutch High Court decided in this sense when ruling that an entity that sold hair- and skincare products, a second entity that sold hairpieces and accessories, a third entity that sold cosmetics and (electro)cosmetic appliances, and a fourth entity that sold equipment for barbershops and beauty salon's fulfilled the condition of the close economic links.[51]

Activities that are "predominantly exercised for the other legal entity", are supplies of goods and or services that are internal supplies within the VAT group. Until the case law that will be discussed in paragraph [5], this criterion was interpreted to mean that the internal supplies should amount to at least 50% of the suppliers' total supplies.[52]

A specific point of attention in assessing the existence of a close economic link arises when the entity to be added to the VAT group is a foreign taxable person that is established in the Netherlands through a fixed establishment. As indicated in paragraph [3.2], for Dutch VAT purposes, a foreign head office of a Dutch fixed establishment can be included in the Dutch VAT group by virtue of its fixed establishment.[53] This raises the question whether the assessment of the close economic link should be carried out at the level of the fixed establishment in itself or at the level of the taxable person as a whole (i.e. including the foreign main establishment). Although the Supreme Court did not address this point, it seems to follow from its reasoning in the case that an assessment at the level of the taxable person as a whole is most appropriate. Although, no Dutch case law exists on this question, it seems reasonable to assume that such assessment on the level of the taxable person as a whole may pose greater problems than an assessment on the level of the fixed establishment in its own right, for example because it may well be more difficult to substantiate the existence of a

48. Dutch Supreme Court, Judgment of 21 August 1991, no. 26928, ECLI:NL:HR:1991:ZC4655.

49. 270 km (as the crow flies) is about as far as you can get away from each other on the mainland of the Netherlands.

50. HR 10 maart 1993, nr. 27 845, BNB 1993/157, ECLI:NL:HR:1993:ZC5283.

51. High Court The Hague, Judgment of 15 March 1995, no. 92/1211, ECLI:NL:GHSGR:1995:BI9874.

52. Dutch Supreme Court, Judgment of 16 December 1998, no. 33 987, ECLI:NL:HR:1998:AA2594.

53. Dutch Supreme Court, Judgment of 14 June 2002, no. 35 976, ECLI:NL:HR:2002:AD6434, paragraphs 3.3.2 and 3.3.3.

shared customer base, if that customer base is established in multiple countries. It should be added that more generally, economic links cannot be based on ties with legal persons that have neither their head office nor a fixed establishment in the Netherlands, regardless of whether these legal persons otherwise fulfil the condition of close financial and organizational links. In fact, too many or too strong economic ties with such foreign legal entities can, according to the Dutch Supreme Court, preclude the recognition of close economic links between the legal entities that *are* present on Dutch territory.[54]

In practice, this patchwork of case law on the close economic link condition has led to complicated discussions between tax authorities and taxable persons. Traditionally this has been the bottleneck of many discussions on VAT grouping in the Netherlands. However, we feel that recent national case law is likely to lead to a lowering of the threshold for acknowledging close economic links and to a shift in the type of discussions between taxable persons and the Dutch tax authorities. These developments are addressed in the following paragraph.

5. Recent developments with respect to the condition of the close links

In 2013, the Dutch Supreme Court ruled in a groundbreaking case with respect to the criterion of close economic links.[55] The case concerned a legal entity that had close financial and organizational links to its holding company and two of that holding company's other subsidiaries. The entity obtained 22% of its turnover with services performed for the other subsidiaries. For 3.3% of its turnover, it shared a customer base with the other subsidiaries. The remainder of its turnover was obtained with services to third parties. The question was whether this legal entity could become part of a VAT group together with the holding company and the two other subsidiaries.

On the basis of the classic criterion as discussed in the previous paragraph, it seemed quite clear that, narrowly interpreted, the shared customer base was only accounting for a very small part of the turnover, and the 'internal' activities could also not be regarded as 'predominant', as these only accounted for 22% of the turnover. The case was brought before the Supreme Court, however, because the question arose whether the combination of a strong financial and organizational link, in combination with an economic link that seemed to fall just short of meeting the classic criterion, could be reason to accept a VAT group after all, if the three links would be assessed in conjunction. On the basis of existing case law, this seemed unlikely.[56] Surprisingly, the Dutch Supreme Court ruled that in a situation like this, where a holding company owns all shares in three subsidiaries and performs management services for consideration to each of these, and between the three subsidiaries there exist *non-negligible economic relations*, those entities meet the criterion of the close economic link. Apparently, in this case the *non-negligible economic relations* between the subsidiaries consisted of the internal supplies that made up 22% of the suppliers turnover and possibly the shared customer base of 3.3%. Whereas the Supreme Court previously adhered to a minimum of 50% of internal supplies in order to accept close economic links, the new condition of *non-negligible economic relations* has clearly lowered this threshold.

5.1. Non-negligible economic relations

Obviously, the 2013 judgment by the Supreme Court caused a stir. Although there was little doubt in doctrine that the case meant a lowering of the threshold for close economic links, it was unclear in what type of situations this would be applicable. Also, the case raised the question to what extent

54. Dutch Supreme Court, Judgment of 16 December 1998, no. 33987, ECLI:NL:HR:1998:AA2594.

55. Dutch Supreme Court, Judgment of 11 October 2013, no. 11/05105, ECLI:NL:HR:2013:837.

56. Dutch Supreme Court, Judgment of 16 December 1998, nr. 33 987, ECLI:NL:HR:1998:AA2594.

the approach of the Supreme Court meant that a more holistic approach to the assessment of the three close links was justified.

Part of the initial discussion was aimed at the height of the new threshold. If a total of 25.3% (22% internal supplies and 3.3% shared customer base) is 'enough' for non-negligible relations, one could wonder what the minimum requirement would amount to.[57] Would 10% be enough?

Another point of discussion was the scope of the concept of 'economic relations' (in Dutch: *economische betrekkingen*).[58] It seems that the Supreme Court deliberately stayed away from the more familiar term 'economic activity', in order to leave room for economic relations outside of the scope of taxable transactions for VAT purposes, although it did not explicitly mention this in its judgment. As a result, the scope of the concept remains unclear.

In 2019, the Supreme Court had the opportunity to clarify the new criterion. The case involved a legal entity that was active as a primary school, but also undertook some taxable activity including the secondment of staff members to other schools and the renting out of parts of its building. As such it qualified as a taxable person for VAT. The school also had a subsidiary that employed teachers and teaching assistants. For 27.7% of its turnover, the subsidiary put the teachers and teaching assistants at the disposal of its parent company (the school), and for the remainder of its turnover it undertook the same activity for other schools, that were independent from its parent company. The question was whether in this situation both entities could be seen to have close economic links. Prior to the Dutch Supreme Court's ruling in this case, a High Court had ruled against the existence of a VAT group, arguing that the 'non-negligible economic relations'-criterion should be limited to situations of 'horizontal' relations between the subsidiaries of a single parent company, and as such would be of no avail in a situation where the economic link between a parent company and its subsidiary had to be assessed. If that interpretation would have proved true, it would have substantially limited the scope and application of the 'non-negligible economic relations'-criterion. The Dutch Supreme Court, however, did not adopt this restrictive line of reasoning. In its judgment of 5 July 2019, the Supreme Court ruled that a VAT group was in fact possible between the school and its subsidiary, as non-negligible economic relations existed between the two.[59] With respect to the relation between this 'new' criterion and the criterion formulated in the 1989 case, the Supreme Court makes clear that an independent assessment of the close economic link should still rely on the criterion formulated in the 1989 case, meaning that it is still important to assess whether the activities of the legal entities are predominantly aimed at the accomplishment of a single economic purpose. It goes on to say, however, that a close economic link *also* exists if strong financial and organizational links exist, and there are non-negligible economic relations. Moreover, the Supreme Court explicitly rules that in order to assess whether the conditions to form a VAT group are met requires an assessment of the three close links *in conjunction*.

As a result, in the authors' view, three important conclusions should be drawn from this latest case.

First, the outcome of the case shows that the 'non-negligible economic relations'-criterion is not limited to very specific situations, as was suggested by the High Court in this case.

Second, it is important for the interpretation of the conditions for VAT grouping in the Netherlands that the Supreme Court explicitly indicates that an assessment of the three close links requires an assessment in conjunction, whereas before, an independent assessment of all three links seemed to be required.

Third, it is striking that the Supreme Court indicates that the new 'non-negligible economic relations' criterion is not replacing the 'old' 1989 criterion but is merely applicable in cases where the financial and organizational links are strongly fulfilled. Apparently, the Supreme Court envisages the possibility of a situation in which an independent assessment of the close economic link on the

57. See *inter alia* the case note by C.J. Hummel in BNB 2014/7 and the case note by M.M.W.D. Merkx in FED 2020/9.

58. In Dutch the criterion is: "Onderling niet verwaarloosbare economische betrekkingen."

59. Dutch Supreme Court, Judgment of 5 July 2019, no. 18/01450, ECLI:NL:HR:2019:1118.

basis of the 1989 criterion could still be relevant. It seems that this can only be the case in a situation where either one of the close financial or organizational links are not met or doubtful. That would mean that not only the three close links should be assessed in conjunction, on the basis of which the economic link could in a sense be compensated by strong financial and organizational links, but that the mirror image could also occur: that a strong economic link could compensate for a weaker financial or organizational link. This raises the question if it – for example – is possible to have a VAT group on the basis of a 'weak' financial link (say a shareholder that holds 49,99% of the shares in another company), as long as the organizational and economic link are beyond doubt. This idea would have been unthinkable until the 2019 Supreme Court judgment but does not look entirely fantastical any longer.

It remains to be seen what the wider effects of this ruling will be on the scope and application of the Dutch VAT grouping regime.

6. In conclusion

The notion that multiple persons or entities should under circumstances be regarded as a single taxable person, is strongly rooted in Dutch tax law tradition and was originally developed in case law concerning Dutch turnover taxes that preceded the entry into force of the European VAT system.

Article 111 EU VAT Directive is implemented in the Dutch Law on turnover tax 1968. Notable elements of the Dutch VAT group are its limitation to only include taxable persons, with a single exception for a holding company that is not a taxable person but is heavily involved in the management of its subsidiaries. Furthermore, a foreign taxable person that is established through a fixed establishment in the Netherlands, can be part of the Dutch VAT group as a whole, if it meets all criteria. Being part of a Dutch VAT group can entail several specific administrative obligations, especially when it comes to international trade, but generally speaking the administrative obligations and opportunities of a VAT group are identical to those of a singular taxable person. Members of a VAT group are jointly liable for the VAT debt that accrues on the activities of the group as a whole.

With respect to the condition of close financial, economic and organizational links, for a time, the clear rule was that these needed to be assessed independently in order to decide whether or not a VAT group exists. Recent case law has shown that the Dutch Supreme Court now favours an assessment of the link criteria in conjunction. These recent developments will likely lead to a completely new chapter in the development of the concept of VAT grouping in the Netherlands.

Simon Cornielje: Vrije Universiteit Amsterdam / PwC (Netherlands)
✉ s.b.cornielje@vu.nl
Endowed Professor, Faculty of Law, Tax Law Endowed Professor, Kooijmans Institute Endowed Professor, Law, Markets and Behavior.

Barry Willemsen: Tillburg University (Netherlands)
✉ b.willemsen@tilburguniversity.edu
Phd student at Fiscaal Insitute of the Universityof Tillburg