Studi Tributari Europei. Vol.10 (2020)
ISSN 2036-3583

# Italy's new VAT Group regime in front of the EU VAT grouping scheme.

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Published: April 26, 2021

**Abstract**

Based on the Council Directive n. 2006/112/EC, the Italian Budget Law for 2017 has introduced in the d.P.R. 26 October 1972, n. 633, articles from 70-bis to 70-duodecies, regulating the VAT Group regime. The article aims to analyse such regulation and, in particular, to evaluate the conditions of access and the effects of the VAT Group regime, also minding the amendments made after the EUCJ's decision on the so-called Skandia Case. Moreover, the article assesses the differences between the VAT Group and the VAT Group settlement regime.

La Legge di Bilancio 2017, in attuazione della Direttiva europea n. 2006/112/EC, ha aggiunto al d.P.R. 26 ottobre 1972, n. 633, gli articoli da 70-bis a 70-duodecies, introducendo in Italia il regime del c.d. Gruppo IVA. Il contributo si propone, dunque, di analizzare la disciplina relativa a tale regime e, in particolar modo, di valutarne i requisiti di accesso e gli effetti – anche alla luce delle modifiche successivamente apportate sulla base delle conclusioni raggiunte dalla CGUE nel c.d. Skandia Case –, nonché le differenze esistenti con il regime di liquidazione dell'IVA di gruppo.

**Keywords**: VAT Group; requirements; consequences; Council Directive 2006/112/EC; Skandia judgment.



## 1. Introduction

By Law No. 236 of 11 December 2016[1] (herein after the "Budget Law for 2017"), the Italian law-maker introduced the VAT grouping scheme into the national legislation, in accordance with Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter the "VAT Directive"),[2] whereby a Member State, after consulting the advisory

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1. Cf. Article 1, par. 24.

2. The possibility of implementing the VAT grouping scheme in national legislation has existed since the Council Directive No. 67/228, 11 April 1967 on the harmonization of legislation of member State concerning turnover taxes (Second VAT Directive) and, after, in Article 4, par. 4, of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (Sixth VAT Directive). The Sixth VAT Directive provided that, after consulting the VAT Committee, each "Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links." The Sixth VAT Directive was subsequently amended by introducing a subparagraph proving that a member State exercising the option

committee on value added tax (herein after the "VAT committee"), may regard two or more persons established in that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links, as a single taxable person for VAT purposes.[3]

As set out in the Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of VAT Directive No. 325 of 2 July 2009 (herein after "COM(2009)325") "a VAT group can be described as a 'fiction' created for VAT purposes, where economic substance is given precedence over legal form. (…) Thus, by joining a VAT group, the group member for VAT purposes dissolves itself from any possible, simultaneously existing legal form and instead becomes part of a new separate taxable person for VAT purposes – namely, the VAT group."

The effect of implementing the VAT grouping is to allow taxable persons, who are bound to each another by financial, economic and organisational links, no longer to be considered as separate taxable persons for VAT purposes, but rather as a single one. Hence, on the one hand, the transaction between members of a VAT group disappeared from a VAT perspective; on the other, with respect to third parties, the VAT group represents a single taxable person. Moreover, rights and obligations of each members of a VAT group are transferred to the VAT group, in turn subject to all the provision of the VAT legislation as any other taxable person.

As well known, Article 11 is the only provision in the VAT Directive which refers to VAT grouping scheme and Member States have to implement the VAT grouping scheme into their national legislation. With the aim of ensuring a uniform application of the provisions in Article 11, the European Commission released the COM(325)2009 already mentioned. Moreover, the critical issues arising by the VAT group legislation – and application in the member States – have been discussed in several Working paper by the VAT Committee and the VAT Expert group, as well as subject to judgments of the European Court of Justice,[4] further mentioned in this article.

Briefly, pursuant to the Italian VAT grouping provisions the VAT group can be formed by taxable persons established in the territory of the State closely bound to each other by financial, economic and organisational link. The VAT grouping scheme is not limited to specific sectors[5] and applies as an option according to the "all-in, all-out" principle; namely, members of a group can decide whether or not to establish a VAT group but, once the regime has been opted for, all entities fulfilling the conditions required by the law must be included in the VAT group. The option is binding for a three years period and is automatically renewed for each subsequent year, unless the option is repealed.[6]

In this article, the author analyses how the VAT grouping scheme has been implemented in the Italian VAT legislation, focusing on the most relevant issues.

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for VAT group may adopt any measures need to prevent tax evasion or avoidance. Following the recast of the Sixth VAT Directive, Article 11 of the VAT Directive now contains the provisions on VAT groups.

3. Under par. 2 of Article 11 the "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."

4. Cf. F. Pitrone, *Il Gruppo Iva italiano alla luce di alcuni orientamenti europei, l'utopica omogeneità applicativa degli istituti comunitari*, in *Strumenti finanziari e fiscalità*, n. 38/2018, p. 13 ss., and E. Mencarelli, *Il Gruppo i.v.a. secondo gli orientamenti della Corte di Giustizia U.E. (rassegna di giurisprudenza)*, in *Riv. Dir. Trib. – Supp. online*, 17 January 2017. Cf also C. Dias Soares – A. Arnaldo, *VAT Grouping Schemes-Standpoint, International VAT Monitor,* IBFD*,* 2015, vol. 26, no. 2, p. 86 ss.

5. Cf. the COM(2009)325 in which the Commission express the view that "a VAT grouping scheme need to be open to all sectors of economic activity in the Member State which introduces such scheme. (…) Limitations to the availability of the VAT grouping scheme could be justified only if there is a need to take action against abuse for clearly identified transactions." Cf., also, CJEU, Judgment of 25 April 2013*, Commission v Kingdom of Sweden,* C-480/10 and CJEU, Judgment of 25 April 2013, *Commission v Republic of Finland*, C-74/11.

6. Cf. E. Mencarelli – F. Padovani, *Il gruppo di imprese nel sistema dell'imposta sul valore aggiunto*, Pacini Giuridica, 2020, p. 85 ss.; G. Melis – L. Giancola, *Cross-Border VAT Groupings: The Effects of the New Italian Regulation*, *European Taxation*, IBFD, 2018, vol. 58, no. 8, p. 381 ss.; B. Giancola, *Il Gruppo Iva*, *LexActa Papers*, G. Giappichelli ed., 2018; G. Corasaniti, *Il Gruppo Iva tra esigenze di semplificazione e finalità antiabuso, in Strumenti finanziari e Fiscalità*, n. 38/2018, p. 7.

## 2. Regulatory Framework of the Italian VAT grouping scheme

As anticipated above, Article 1, par. 24, of the Budget Law for 2017 added Articles from 70-bis to 70-duodecies to the Presidential Decree No. 633 of 26 October 1972 (herein after the "VAT Decree"), laying down the rules of the Italian VAT grouping scheme. This provisions – applicable as of 1 January 2018 and effective from 2019 – were subsequently amended by Law No. 205 of December 2017[7] (herein after the "Budget Law for 2018"), in order to directly introduce into the Italian law the outcome of the Court of Justice of the European Union's decision in the Skandia Case,[8] and by Law Decree No. 119 of October 2018,[9] which provides for the VAT Group to be accessed also by members of a Cooperative Banking Group (*Gruppo Bancario Cooperativo*), meeting the requirement of the financial link *de jure*.

Moreover, on 6 April 2018, the Ministerial Decree providing the implementing details of the Italian VAT group was published in the Official Gazzette (hereinafter, the "Ministerial Decree") and, on 19 September 2018, the Revenue Agency approved the form "AGI/1" to be used to opt for the Italian VAT group. The Revenue Agency also provided clarification by Circular Letter No. 19/E released on 31 October 2018 and by Resolutions No. 487 of 15 November 2019, No. 72/E of 1 August 2019, No. 222 of 1 July 2019, No. 194 of 17 June 2019 and No. 54/E of 10 July 2018.

## 3. Eligibility for VAT group membership

Under Article 70-bis, par. 1, of the VAT Decree, a VAT group can be formed by taxable persons carrying out business or crafts or professional activities established in the territory of the State as long as jointly complying with the financial, economic and organisational links laid down in the subsequent Article 70-ter. According to par. 2 of the abovementioned article, fixed establishments of Italian companies located in another Member State or outside EU cannot be part of a VAT group.

Moreover, under par. 2 of Article 70-bis of the VAT Decree, persons whose companies are subject to seizure pursuant to Article 670 of the Code of Civil Procedure, persons being subject to bankruptcy proceeding pursuant to Article 70-decies of the VAT Decree and persons under standard liquidation procedure cannot be part of a VAT group. Such provisions are intended to ensure the recovery of the tax by the Revenue Agency.

It follows from the Italian legislation that only taxable persons physically present in the Italian territory may join a VAT group.

With regard to the criteria for being eligible to become a member of a VAT group, the Italian scheme is consistent with the notion of "person" as set out in the Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of VAT Directive No. 325 of 2 July 2009 (hereinafter "COM(2009)325"), which convey the opinion that the reference to "persons" in Article 11 applies only to those who fulfil the criteria for being taxable person for VAT purposes.

Therefore, non-taxable persons, such as non-commercial entities for their "institutional" activities, *consortia* that merely carry out internal activities and pure holding companies[10] – whose sole pur-

7. Art. 1, par. 984.

8. CJEU, judgment of 17 September 2014, *Skandia America Corporation USA, filial Sverige v. Skatteverket*, C-7/13.

9. Art. 20, par. 1.

10. Cf. G. Carpenzano – A. Alcara, *L'ambito soggettivo del gruppo Iva e profili di carattere transazionale*, in *Corr. Trib.*, n. 26/2017, p. 2052 ss.

pose is to acquire holdings in other undertakings without involving themselfs directly or indirectly in the management of those undertakings – are excluded from being part of a VAT group.[11]

It must be pointed out that VAT Committee, in the Working paper No 933 of 8 November 2017 (taxud.c.1(2018)1220166), referring to some cases law of the Court of Justice of the European Union,[12] concluded that "persons" being able to form a VAT group in accordance with Article 11 of the VAT Directive may cover both taxable and non-taxable persons. However, the VAT Committee agreed that Members States which makes use of the VAT grouping scheme are not required to recognise non-taxable persons as members of a VAT group but may restrict the application of the scheme by excluding non-taxable persons as members, provided that the principle of neutrality is complied with.

Also with regard to the territorial criterion, the Italian scheme is consistent with Article 11 of the VAT Directive which restricts the territorial scope of a VAT grouping scheme implemented by a Member State to persons established in the territory of that Member State, in order to avoid the infringement of the tax sovereignty of another Member State.[13] The main consequences are that fixed establishment of Italian companies situated abroad would be excluded from being eligible for a VAT group while Italian fixed establishment of a company with its head office in another Member State, or outside EU, could became a member of a VAT group in Italy.[14]

As mentioned above, non-taxable persons and persons established abroad are not eligible to take part in VAT group. However, a VAT group can be formed by taxable persons that are directly or indirectly controlled by a non-taxable person or by a person established abroad provided that such person is established in a country with which Italy has signed an agreement that ensures an effective exchange of information.

Indeed, the subjective conditions to form a VAT group provided by Article 70-bis of the VAT Decree must be read together with the subsequent Article 70-ter, par. 1, lett. b), under which the financial link shall be deemed to be existent among taxable persons established in the territory of the State (also) when those (taxable) persons are directly or indirectly controlled by the same "person" resident in the territory of the State or "in a country with which Italy has signed an agreement that ensures an effective exchange of information."[15]

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11. As resulting from the Working Paper No 939 of 27 February 2018 of the VAT Committee (taxud.c.1(2018)1220166), the Italian delegation "confirmed in particular that only taxable persons can be members of a VAT group in application of the anti-abuse measure under the second paragraph of Article 11 of the VAT Directive. Pure holding companies are therefore excluded from membership in a VAT group whereas other legal entity such as foundation and partnership that carry out an economic activity can be eligible members."

12. Cf. CJEU, judgment of 9 April 2013, *Commission v Ireland,* C-85/11; CJEU, judgment of 25 April 2013, *Commission v Czech Republic*, C-109/11; CJEU, judgment of 25 April 2013, *Commission v Denmark*, C-95/11; CJEU, judgment of 25 April 2013, *Commission v UK*, C-86/11;CJEU, judgment of 25 April 2013, *Commission v the Netherlands*, C-65/11.

13. The European Commission, in the Green Paper on the future of VAT – Towards a simpler, more robust and efficient VAT system, SEC(2010)1455 final, of 1 December 2010, express the opinion that "extending the territorial scope of VAT groupings could reduce VAT compliance costs on a large number of transactions within the EU. On the other hand, it would have to be ensured that such a move would not create unfair advantages for big business compared to smaller ones, on new means of fraud or tax avoidance." However, this solution has yet to be adopted.

14. Cf. COM(2009)325 in which the Commission clarified that "the main justification for excluding fixed establishment, situated abroad, of businesses with their seat of economic activity in the Member State implementing the VAT grouping scheme is the fact that they are not physically established in the territory of that member State. Since the VAT grouping is an optional mode, chosen by one Member State, it should not have the effect of extending beyond the physical territory of the Member State which has introduced the VAT grouping scheme. Otherwise the fiscal sovereignty of another Member State may be infringed. Moreover, if two Member States were to choose to introduce VAT grouping schemes, it is possible that the fixed establishment located abroad could form part of a VAT group in both Member State. Such a result is neither compatible with the basic principles of the common VAT system, nor manageable at national administration level. From the point of view of control, this is not an acceptable outcome."

15. I.e. the State or country listed in the Ministerial Decree of 4 September 1999 or that ensures an effective exchange of information through a Convention for the avoidance of double taxation or through an international agreement, or with which the rules on mutual administrative assistance on tax matters applies.

On the one hand, this provision does not specify if the controlling person has to be a taxable person; on the other, it allows that the controlling person is established outside Italy, insofar as it is established in a country that has signed an agreement with Italy that ensures an effective exchange of information.

As a consequence, non-taxable persons or persons not established in Italy will be taken into account for the purpose of verifying the existence of a financial link among controlled taxable persons established in Italy, although will not be eligible for VAT grouping. A VAT group, therefore, can be formed by all subsidiaries directly or indirectly controlled by non-taxable persons, such as pure holding, or by persons established in a country having signed an agreement with Italy that ensures an effective exchange of information.[16]

The provision of Article 70-ter of the VAT Decree also implies that the "controlled subject" in a VAT group has to be an entity with legal personality.

Indeed, the controlling relationship that must exist between members of a VAT group is defined with reference to Article 2359, par. 1, n.1 of the Civil Code, whereby "subsidiary companies" are considered to be those where another company holds the majority of the votes cast at the ordinary shareholders' meeting ; namely, under Article 70-ter of the VAT Decree a financial link arises when a controlling relationship through a direct or indirectly participation granting the majority of the vote cast (i.e. 50% or more of the voting rights) at the ordinary shareholder's meeting exists among the potential participants of the VAT group .

It follows from the wording of the abovementioned provision that only taxable persons, established in Italy in a corporate legal form, for which the special voting right rules apply, can participate in the VAT group as "controlled" entities.[17] On the contrary, taxable persons other than companies, such as individual carrying out business or craft or professional activities, can be part of VAT group only as "controlling subject."[18]

## 4. The condition of financial, economic and organisational link

Articles 70-bis and 70-quarter of the VAT Decree requires members of a VAT group to be closely bound by "financial, economic and organisational links" laid down in the subsequent Article 70-ter.

Under Italian legislation, the financial link shall be deemed existing between taxable persons established in the territory of the State when, in accordance with Article 2359, par. 1, of the Civil Code there is, directly or indirectly, a controlling relationship between those persons or, as mentioned above, those persons are directly or indirectly controlled by the same person resident in the territory of the State or in a country that has signed an agreement with Italy that ensures an effective exchange of information. Moreover, the financial link must exist from 1 July of the previous year.

The economic link shall be deemed existing between taxable persons established in the territory of the State on the basis of at least one of the following forms of economic cooperation: (i) carrying

16. In the event that the foreign controlling person has a permanent establishment in Italy the VAT group will include all subsidiaries directly or indirectly controlled by the latter and its permanent establishment in Italy.

17. P. Centore, *La via italiana al Gruppo Iva*, in *Corr. Trib*., n. 46/2016, p. 3525.

18. In the joined cases *Larentia + Minerva* and *Marenave Schiffahrt*, C-108/14 and C-109/14, of 16 July 2015,the CJEU ruled that national legislation which restricts the right to form a VAT group, solely to entities with a legal personality and linked to the controlling company of that group in a relationship of subordination is precluded, except where those two requirements constitute measures which are appropriate and necessary in order to achieve the objectives to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance, which is it for the referring court to determine. The Court also ruled that (now) Article 11 of the VAT Directive does not have direct effect and it is for Member State to define actual scope of the links required between the members of a VAT group.

out a principal activity of the same nature; (ii) carrying out a complementary or interdependent activity; (iii) carrying out an activity that is wholly or substantially to the benefit of one or more of the other persons.[19]

The organisational link shall be deemed existing among taxable persons established in the territory of the State when, between such persons, there is an organisational coordination in law pursuant to the Fifth Book, Title V, Chapter IX of the Italian Civil Code,[20] or in fact between their decision-making bodies, even if such coordination is carried out by another person.

The concept of the financial, economic and organisational links can be considered consistent with those provided in the COM(2009)325.[21] However, the Commission opinion has been further elaborated by the VAT Committee in Working Paper No 918 of 16 February 2017, focusing notably on the meaning of the financial link, although no further guidelines have been drawn up.

In the aforesaid Working Paper, the VAT Committee highlighted that, on the one hand, the Commission Communication was based on the idea that only taxable persons could be eligible for a VAT group and, therefore, the definition of the financial link was focused on VAT groups formed by companies only; on the other hand, since the publication of the Commission Communication, several judgments by the CJEU may be seen as having had an impact on the interpretation of the requirement of the financial link. In particular, the VAT Committee referred to the CJEU Judgment of 9 April 2013, *Commission v Ireland*, C-85/11 – whereby the Court concluded that allowing non-taxable persons to be VAT group members is compatible with the objectives of a VAT groups – and to the CJEU Judgment of 16 July 2015, joined cases *Larentia + Minerva* and *Marenave Schiffahrt*, C-108/14 and C-109/14 - whereby the Court concluded that a national legislation which limits the right to form a VAT group solely to entities with legal personality and linked to the controlling company of that group in a relationship of subordination is incompatible with the VAT Directive, except where such limitation is necessary and appropriate to prevent unfair activities.

Therefore, the VAT Committee argued that the financial link ought to be defined by reference to concepts which are not specific and limited to certain types of legal persons (e.g. companies).

The VAT Committee suggested that the minimum content of the financial link test could be based on one of the two options below (or a combination of both):

(i) Option 1: "two persons would be closely bound by financial link were one person has substantial rights or liabilities in respect of the other, or has a substantial participation in the equity of the other (in the case of companies); or where such a person has a substantial financial rights and/or liabilities in respect of the other (in the case where VAT group members are not companies)."

(ii) Option 2: "two persons would be closely bound by financial link where they are financially dependent, that is, where one of them is not acting independently form the other financially

19. Where the acquisition of control in another company is made for the purposes of debt collection or results from conversion of debt of companies in financial difficulties into new equity, the economic link is presumed not to exist, unless otherwise proven. In order to demonstrate that the economic links exists a tax ruling must be submitted to the Revenue Agency pursuant to Article 11, par. 1, let. b) of the Law. No. 212 of 27 July 2000.

20. Article 2497-sexies of the Italian Civil Code provides that "it is assumed, unless otherwise proven, that the management and coordination activity of companies is performed by the company or entity required to consolidate their financial statement or that controls them in accordance with Article 2539."

21. The Commission take the view that the financial link, which is aimed at guaranteeing that one company has the actual control of another, is defined by a reference to percentage of participation in the capital or in voting rights (over 50%), or defined by reference to a franchise contract; the economic link, which is aimed at guaranteeing that there is actual economic cooperation between the members of the VAT group, could be defined by reference to the existence of at least one of the following situations of economic cooperation: (i) the principal activity of the group members is of the same nature; or (ii) the activities of the members are complementary or interdependent; or (iii) one member of the group carries out activities which are wholly or substantially to the benefit of other members; the organisational link, which is aimed at guaranteeing that the strategy, overseeing and control of the affairs of the group members are shared, could be defined by reference to the existence of a shared, or at least partially shared, management structure.

> speaking and, therefore, his financial risk is not mainly borne by himself but buy the other person."

In the light of these remarks, the European guidelines should be updated and included into Italian legislation. Indeed, as mentioned above, under Italian legislation the financial link is defined (now) referring exclusively to the concepts of "voting rights" that, as pointed out above, does not allows entities other than companies – for which the provision of Article 2359, par. 1, n. 1 do not applies – to be eligible for VAT groups as "controlled subjects." On the contrary, extending the minimum content of the financial link, as suggested by the VAT Committee, would allow subjects other than companies to participate in a VAT group also when they do not play the role of "controlling subject." Moreover, the extension of the minimum content of the financial link according to the above-mentioned conclusion, would also allow persons not linked by a controlling relationship through a direct or indirect participation granting the majority of the votes, but nevertheless actually financially closely bound to one another, to be treated as a taxable person for VAT purposes, being a VAT group.

## 4.1. The presumption connected to the financial link

From the three links that must exist among VAT group members, the financial link is the one that can be assessed in most objective terms: as explained above, under Italian legislation, the financial link is defined by a reference to a percentage of participation in the voting rights that can be exercised in the ordinary shareholder's meeting. This requirement is easily ascertainable by both the potential members of a VAT group and the Tax Authorities. The Italian lawmaker, moreover, consider that "when a subject is financially tied to another, in general, it is also from an economic and organizational point of view."[22]

For these reasons, the Italian lawmaker set up a presumption, provided by Article 70-ter, par. 4, of the VAT decree whereby the economic and organisational links are taken to be there as soon as the financial link exist. Indeed, under Article 70-ter, par.4, of the VAT Decree "if the financial link arises between the taxable persons, the economic and organisational link shall also be deemed existing between the same."

As the option for a VAT group applies according to the "all-in, all-out" principle (i.e. once the regime has been opted for, all entities fulfilling the conditions required by the law must be included in the VAT group), the effect of the presumption is that, once the VAT group regime is opted for, all members for which the financial link is assessed – regardless of the existence of others two links – must participate in the VAT group.

The presumption is rebuttable and, therefore, members of a VAT group are allowed to prove the opposite (i.e. that at least one of the economic or organisation links does not exist). In particular, under Article 70-ter, par. 5, of the VAT Decree, in order to demonstrate the non-existence of the economic and/or organisational links, group members must submit to the Revenue Agency an Advance Tax Ruling pursuant to Article 11, comma 1, let. b), of Law No. 212 of 27 July 2000.

This provision explicitly refers to the so-called "evidentiary ruling" which allow taxpayers to request an opinion about the fulfilment of the conditions and the assessment of the evidences required for the adoption of specific tax regimes, in cases expressly provided by law. The Revenue Agency will provide a written reply to a ruling petition within 120 days from the day the petition is filed.

It seems from the very wording of the abovementioned provisions that the submission of the evidentiary ruling to the Revenue Agency is the only way through which the members of a VAT group can rebut the presumption provided in by Article 70-ter, par.5, of the VAT Decree. This consideration is also supported by the fact that under Article 70-decies of the VAT Decree each person being member of a VAT group ceases to be part of the same group if "the fact that the economic or organisational link with such person no longer exist is recognized pursuant to Article 70-ter, paragraph 5" (i.e. by

22. Cf. the Explanatory Report of the Budget Law for 2017.

submitting the evidentiary ruling to the Revenue Agency). In this case the participation in the VAT group terminates from the year following the year in which it is recognized that the link no longer exists.[23]

Under Italian legislation, therefore, VAT group members are automatically dragged into a VAT group on the basis of there being a financial link, unless they submit a request to the Revenue Agency to prove that the economic and organisational links do not exist in accordance with Article 70-ter, par. 5, of the VAT Decree.[24]

On this matter, the VAT Committee considered that setting up a presumption whereby all other links are taken to be there as soon as one link exists (i.e. economic and organisational links are presumed to exist, one there is a financial link) is not possible. Indeed, according to Article 11 of the VAT Directive the possibility for Member States to regard two or more persons as a single taxable person for VAT purposes is closely related to the existence of the financial, economic and organisational link. This condition aims at ensuring that only persons with close ties in terms of financial ownership, economic activities and management structure can benefit from VAT grouping provisions and is to be interpreted as meaning that all three links have to be met during the entire time a VAT group exist, with the consequences that each of them has to be assessed independently.[25]

However, the Italian delegation explained that the presumption must be regarded as a simplification measure and "in case of doubt VAT group members would have to prove their simultaneous existence." This explanation seems to leave the door open to possible dispute by the Tax Authorities with regard to the inclusion of a person in a VAT group only on the basis of the existence of the financial link and the presumption provided by the law.[26] Thus, if the evidentiary ruling is not submitted to the Revenue Agency and only the existence of the financial link is assessed, the non-existence of the economic or organisational links seem to be questionable by the Tax Authorities, that could dispute the legitimate or abusive use of the advantages deriving from joining the VAT group regime.[27]

However, the possibility to introduce a presumption connected to the financial link seems to be taken into consideration by the VAT Expert Group.[28] On this ground, further clarification is needed to ensure legal certainty and level play-field among Member States.

## 5. Establishment of a VAT group

As already mentioned, the VAT group is formed as the result of an option exercised by all taxable persons established in the territory of the State provided that they jointly comply with the financial,

23. Cf. G. Fransoni, *L'interpello ad excludendum nella disciplina del Gruppo Iva*, in *Rass. Trib*., n. 1/2019, p. 13.

24. The evidentiary ruling must be submit by both the representative of the VAT group and by the taxable person for which the financial link is ascertained but the economic and/or organisational links do not exist. In the event that the Revenue Agency considers that the evidence provided by the (potential) members of a VAT group does not demonstrate the non-existence of the economic and/or organisational link, the latter are not obliged to establish a VAT group, since they might considered non beneficial for VAT purposes to form a VAT group.

25. Cf. Working paper No 933 of 8 November 2017 (taxud.c.1(2017)6142196)). On this matter, the Italian delegation explained that "for the sake of simplification the had decide to make the identification of those links as easy as possible. The presumption that with the existence of the financial link also the economic and organisational link are given should not to be regarded as absolute but rather as a simplification measure. All three links have been precisely defined in order to exclude abuse. In case of doubt, VAT group members would have to prove their simultaneous existence" (cf. Working Paper No 939 of 27 February 2018 (taxud.c.1(2018)1220166)).

26. Although in the Explanatory Report of the Budget Law for 2017, indeed, has been clarified that "the presumption can ben rebutted only by the taxpayer according to the procedure indicated under paragraph 5."

27. Cf. L. Salvini, *Il perimetro del gruppo IVA*, in *Nuove problematiche e prospettive di evoluzione del sistema dell'IVA. Atti del VII Convegno annuale del 23 marzo 2017*, Aracne Editrice, Roma, 2018, p. 26–27.

28. Cf. VAT Expert Group, Paper on topic discussion, Meaning of "financial, economic and organisational links" among VAT group members, of 19 March 20198 (taxud.c.1(2018)1668166).

economic and organisational links. Once the election for VAT group regime is made, all entities fulfilling the requirements must join to the VAT group ("all-in, all-out" principle).

The option shall be exercised by the group representative – i.e. the persons who exercise the control referred to in Article 70-ter, par. 1, of the VAT Decree or, if the controlling person is not in the group, the member with the highest turnover – by submitting the "AGI/1" form to the Revenue Agency[29] in which there must be indicated: *(i)* the name of the VAT group; *(ii)* the identification data of the VAT group representative and the persons participating in the same group; *(iii)* the declaration of the existence, among the persons being part of the group, of the links referred to in Article 70-ter of the VAT Decree; *(iv)* the activity or activities that shall be carried out by the VAT group; the choice of domicile at the group representative by each person being part of the group, for the purpose of notifying the deeds and measures relating to the tax periods for which the option is exercised;[30] *(v)* the subscription of the group representative, that submit the return, and of the other persons participating in the group.

If the AGI/1 form is submitted from 1 January to 30 September, the option shall take effect from the following years; if the AGI/1 form is submitted from 1 October to 31 December, the option shall take effect from the second following year. The option is binding for a period of three years as from the year in which it has effect. After the first three years, the option is automatically renewed for each subsequent year, until the group communicates the repeal of the option.[31]

If during the period of validity of the VAT group the financial, economic and organisational link are established for those person that had been excluded from the VAT group due to the lack of one or more of the aforementioned links, the aforesaid person participates in the VAT group starting from the year following the one when such links have been established.

On the contrary, if during the period of validity of the VAT group the financial link with one or more persons participating to the group ceases to exist such person ceases to be part of the VAT group from the date when the event occurs. Instead, in the case that the economic or the financial link with one or more persons participating to the group no longer exists the participation in the group terminates from the year following the year in which is recognized that the link no longer exists.[32]

## 5.1. Breaching of the "all-in, all-out" rule

Under Article 70-quater of the VAT Decree, should the option not be exercised by one or more of the persons fulfilling the requirements provided by the law the actual tax advantage earned is recovered from the VAT group and the VAT group is terminated the year following the one when the option is verified not to be exercised, unless the aforementioned persons exercise the option to participate in the same group.

The "actual tax advantage earned" by the VAT group should be identified with the "net advantage" achieved by the group, deriving from not having included in its taxable basis the operations made with third parties by taxable persons who had not exercised the option despite the fulfilling of the requirements.

29. https://www.agenziaentrate.gov.it/portale/web/guest/schede/istanze/costituzione-gruppo-iva/modello-costituzione-gruppo-iva

30. The domicile is irrevocable until the end of the periods for forfeiture of the assessment action or imposition penalties relating to the last year of validity of the option.

31. The repeal of the option must be communicated by the group representative through the form AG1/1 and applies to all persons being part of the VAT group. If the form is submitted from 1 January to 30 September, the repeal shall take effect from the following year. If the form is submitted from 1 October to 31 December, the repeal shall take effect from the second following year.

32. Moreover, a person ceases to be part of the VAT group if, during the period of validity of the VAT group regime, that person is subject to seizure pursuant to Article 670 of the Code of Civil Procedure, or to bankruptcy proceeding pursuant to Article 70-decies of the VAT Decree or is put under ordinary liquidation

To mitigate the consequences of the breach of the "all-in, all-out" rules, on the one hand, the VAT group shall be terminated the year following the year when the breach of the law has been assessed and, on the other hand, taxable persons, who have not exercised the option, shall be allowed to join the VAT group by exercising the relevant option (in this case, the VAT group shall not cease to exist).[33]

The actual tax advantage is also recovered in the case in which the option for the VAT group is exercised by a person for which the requirements provided by the law are not fulfilled; in this case, the VAT group does not ceases to exist but the option shall be without effect for that person.

# 6. Consequences of joining a VAT group

The effect of implementing the VAT group option provided for in Articles 70-bis and following of the VAT Decree is that taxable persons are no longer treated as separate taxable person for VAT purposes, but as one single person. As pointed out in the introduction, the transaction between members of a VAT group disappeared from a VAT perspective and, with respect to third parties, the VAT group acts as a single taxable person. Moreover, rights and obligations of each members of a VAT group are transferred to the VAT group subject to all the provision of the VAT legislation as any other taxable person.

## 6.1. Supplies to or from third parties and intra-group supplies

As regards third parties, the VAT group acts as a single taxable person. Therefore, the supplies of goods and the provisions of services by a person being part of a VAT group to a person that is not part of it shall be deemed to have been made by the VAT group. In the same way, the supplies of goods and provisions of services to a person being part of a VAT group by a person that is not part of it shall be deemed to have been made to the VAT group. This principle also applies to intra-EU supplies and acquisitions, as well as for extra-UE transactions.[34]

As regards the VAT group's internal transaction, the supplies of goods and the provisions of services by a person being part of a VAT group to another person being part of the same VAT group shall not be regarded as supplies of goods and provisions of services for VAT purposes; namely, they do not exist for VAT purposes. Therefore, VAT group internal transactions are not subject to the obligation of invoicing and VAT bookkeeping, and do not has to be included in the annual VAT return. For tax purposes other than VAT, VAT group's internal transactions are subject to the standard requirements provided by the law.

## 6.2. Transaction between main establishment and fixed establishment members of a VAT group

As anticipated in the introduction, the Italian Budget Law for 2018 ha implemented, effective January 2018, the principles set out in the Court of Justice of European Union *Skandia* judgment, in which the Court has ruled that "Articles 2(1), 9 and 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State

33. Cf. E. Mencarelli, *Violazione del principio all-in all-out e cessazione del gruppo i.v.a.*, in *Riv. Dir. Trib. – Supp. Online*, 18 maggio 2017.

34. With regard to the "habitual exporter regime" – set out in Article 8, par. 2, of the VAT decree under which habitual exporters are entitled to purchase VAT-free services and goods up to the amount (i.e. the plafond) of the zero rated supplies made in the preceding calendar year or in the previous 12 months –, according to Article 2, par. 2, of the Ministerial Decree the VAT group will inherit the plafond that the participants might have accrued in the year before joining the VAT group.

constitute taxable transaction when the branch belong to a group of persons whom it is possible to regard as a single taxable person for value added tax purposes."[35]

Indeed, according to the Court, when a VAT group regime applies, each member of the VAT group form a single taxable person with the other members and, therefore, the services supplied by a third party to a member of a VAT group must be considered to have been made by the VAT group to which that member belongs; as a consequence, the services supplied by a company to its branch, which belong to a VAT group, are considered not to be supplied to that branch but rather must be regarded as being supplied to the VAT group.

Hence, transactions carried out between the head office and its branch, that is part of a VAT group, are within the scope of VAT. On the contrary, whether a VAT group has not be established, transactions incurred between the head office and its branch are out of the scope of VAT.[36]

The principle expressed in the Skandia judgment have been confirmed by the VAT committee which expressly agreed that a supply of goods or services by one entity of the same legal person,[37] if just one of the aforesaid entities is part of a VAT group (or where the entities are members of separate VAT groups), shall constitute a taxable transaction for VAT purposes.[38]

In particular, Article 1, par. 984, of the Budget Law for 2018 added paragraphs form 4-bis to 4-sexies to Article 70-quinquies of the VAT Decree providing that:

(i) the supplies of goods and services carried out by an Italian main establishment or an Italian branch being part of an Italian VAT group to one – or *by one* – of the main establishment branches or the branch main establishment set up abroad are deemed carried out by the Italian VAT group to a subject other than part of it;

(ii) the supplies of goods and services carried out to an Italian main establishment or an Italian branch belonging to an Italian VAT group by one of the main establishment branches or the branch main establishment set up abroad are deemed carried out to the Italian VAT group by subject not part of it;

(iii) the supplies of goods and services carried out to a main establishment or a branch belonging to a VAT group set up in another Member State by one of the main establishment branches or the branch main establishment set up in Italy are deemed carried out to the VAT group established in the other Member State by a subject other than part of it;

(iv) the supplies of goods and services carried out by a main establishment or a branch belonging to a VAT group established in another Member State to one of the main establishment branches or the branch main establishment set up in Italy are deemed carried out by the VAT group established in the other Member State to a subject other than part of it.

For these transactions, the taxable basis must be determinate according to Articles 13 and 14 of the VAT Decree. Therefore, the taxable basis is determined according to the contractual condition or to the fair value of the goods and services supplied, in the circumstances set out in Article 13, par. 3, of the VAT Decree, for transaction between related entities, in order to avoid that the very strict link existing between the main establishment and its branch could influence the amount consideration.

35. D. Muratori – F. Pitrone, *Il Gruppo Iva alla luce della sentenza della Corte di Giustizia Skandia*, in *Strumenti finanziari e fiscalità*, n. 28/2017, p. 67 and M. Abramo – M. Zanetti, *VAT Grouping in Italy and the Skandia Judgment*, *International VAT Monitor*, IBFD, 2018, vol. 29, no. 3, p. 110.

36. Cf. CJEU, judgement of 23 March 2006, *Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) and Agenzia delle Entrate (Revenue Agency) v FCE-Bank plc,* C-210/04.

37. I.e. head office to branch, or vice versa, and branch to branch.

38. Guidelines resulting from the 105th meeting of 26 October 2015 – Document A – taxud.c.1(2016)7465801 No. 866.

### 6.3. Other consequences of joining a VAT group

The VAT group must have an independent identification number which all members are obliged to use for their transactions as group members. However, members of the VAT group retain their individual VAT identification numbers as they serve other purposes non related to VAT whereas for VAT purposes only the group VAT identification number is valid.[39]

Once the VAT group become effective, the options for VAT purposes exercised by members of a VAT group, such as the option for the separation of the activities provided in Article 36 of the VAT decree, ceases to exist and the VAT group becomes entitled to apply for all the option provided for by the VAT legislation.[40]

The VAT group representative is the main responsible for compliance and must file the annual VAT return, report periodical VAT settlements and pay the output VAT on recurrent basis. Other obligations, such as invoicing and VAT bookkeeping, can be discharged by the VAT group representative or, separately, by each of the member.[41]

The deductible tax surplus resulting from the annual return for the year prior to the first year of participation in the VAT group shall not be transferred to the group, but may be either claimed for reimbursement[42] or compensated to offset other taxes or social security contributions.[43] However, this provision must not apply to the portion of the deductible surplus amount equal to the payment of value added tax made in respect of that of the previous year.[44]

VAT liabilities of the VAT group cannot be offset with other tax or social security contribution credits of the VAT group and the deductible tax surplus resulting from the annual return (or the interim VAT credit) of the VAT group cannot be offset with tax and social security contribution liabilities of the members of the same group.[45]

## 7. Liability of VAT group members

According to Article 70-octies, par. 1, of the VAT Decree, the group representative is responsible for fulfilling the obligations associated with the exercise of the option. As mentioned above, the group representative is responsible for compliance and must file the annual VAT return, report periodical VAT settlements and pay the output VAT on a recurrent basis.

However, under the subsequent par. 2, the other persons being part of the VAT group will be jointly and severally liable with the group representative for the amounts due as tax, interest and penalties following liquidation and control activities carried out by the Tax Authorities.

In view of the Revenue Agency, the joint and several liability is due to the fact that members of a VAT group are considered as a "single taxable person": therefore, each member of a VAT group shares equal responsibility.

This provision raises some concerns. Firstly, it derives from the provision of a joint and several liability among the members of a VAT group that each member may be required to pay the tax due in connection with transactions even when not taking part in. Secondly, the application of penalties is subject to the principle that punishment should apply only to the offender.[46]

39. Cf. Article 1 of the Ministerial Decree of 6 April 2018.

40. Cf. Circular Letter of the Revenue Agency No. 19/E released on 31 October 2018.

41. Cf. Article 3, 4, 5 of the Ministerial Decree of 6 April 2018.

42. Even in the absence of the conditions referred to in Article 30 of the VAT Decree.

43. According to Article 17 of Legislative Decree No. 241 of 9 July 1997.

44. Cf. Article 70-sexies of the Vat Decree.

45. Cf. Article 4, par 2, of the Ministerial Decree 6 April 2018.

46. C. Attardi, *Gruppo IVA: regime delle responsabilità*, in *Il Fisco*, n. 26/2018, p. 2536.

Therefore, tax and related liability should be attributed to the companies based on the operations carried out by each. In particular, on the one hand, for transactions and obligations referring exclusively to the Group representative, it does not seem possible to configure a jointly and severally liability of the other members of the VAT group, given their extraneousness to the tax assumption. On the other hand, for transaction referring to the other members of the group it will be more appropriate to provide a severally and jointly liabilities only among the Group representative and the member to whom is attributable the infringement.

## 8. Differences between VAT group regime and group VAT settlement regime

The VAT grouping scheme is different, and alternative, from the group VAT settlement regime.

The latter is (also) an optional regime provided for by Article 73, par. 3, of the VAT Decree and implemented by the Ministerial Decree of 13 December 1973, recently amended by the Ministerial Decree of 13 February 2017.

The group VAT settlement regime allows group of companies linked by a controlling relationship and meeting specific requirements to offset receivables and payables arising from its regular periodic VAT settlements, as well as from the year-end assessment. Therefore, periodic payments (monthly or quarterly), as well as the year-end assessment, are made by the parent company which determine the VAT to be paid by the group. This results in a single credit or debit position obtained through the sum of payables and receivables arising from the settlement of all the companies within the group.

The option for the group VAT settlement regime is valid until repealed and could be exercised by group of companies – included partnership – whereby the parent company held more than 50% of the share capital or stock in the subsidiaries as of the 1 July of the year prior to the one when the option is exercised.

Unlike the VAT group regime, when a group VAT settlement procedure is established, participating companies maintain their own identity for VAT purposes and are not treated as a single taxable person. Therefore, transactions between companies participating in the same group VAT fall within the scope of VAT – as considered different taxable person – and each company maintains its VAT identification number and its responsibilities for compliance.

## 9. Conclusions

With regard to the criteria for being eligible to become a member of a VAT group and the territorial scope of the VAT grouping scheme, the Italian VAT grouping scheme comply with the European Commission opinion and with the principles laid down by the CJUE in the *Skandia* judgment.

Improvement are expected in the future on the meaning of the financial, economic and organisational link. In particular, the extension of the minimum content of the financial link would be advisable in order to allow persons, other than companies for which the special rules on the voting rights apply, to joining a VAT group as "controlled subject." Moreover, this would allow persons not in a controlling relationship but actually and closely bound to another from a substantial point of view to be considered as a single taxable person.

With regard to the concerns arising from the presumption connected to the financial link (i.e. the possibility for the tax Authorities to dispute the non-existence of the economic and organisational link only once the financial link is assessed), could be envisaged, in terms of legal certainty, to oblige the (potential members of a VAT group) to submit an evidentiary ruling to the Revenue Agency in order to ask for confirmation that criteria to form a VAT group are met.

The VAT grouping scheme appears to be particularly attractive for group of companies operating in economic sectors characterized by mainly or only VAT exempt activities, such as banking, financial and insurance sectors. When a VAT group includes members with no – or partial– right of deduction the setup of a VAT Group would thus lower the non-deductible VAT costs incurred by such taxable persons, since VAT exempt supplies of goods and services to the VAT group members are no longer relevant for VAT purposes, offering therefore a financial advantage to the VAT group.

For economic sectors that can cover VAT in full, VAT grouping provisions allow the members to offset VAT outputs and inputs, reducing the impact of VAT on the cash flow of business where one member of a group is in a payable VAT position whilst another member claims refund, offering financial advantages.

Moreover, VAT grouping can offer administrative simplification both to taxable person, reducing their cost of compliance, and tax authorities.

However, it must be taken into consideration that all members of the VAT group are jointly and severally liable for the VAT debts of any of the VAT group members.

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