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KMLZ VAT NEWSLETTER

ECJ confirms right to deduct input VAT for management holding companies

1. Problem

A holding, the main purpose of which is to acquire and hold shares in subsidiary companies and which is not involved in the company's management, is not considered a taxable person and is therefore not entitled to deduct input VAT (financial holding). The mere acquisition and merely holding the company shares are not deemed to be considered an economic activity which would qualify the holding as taxable person. This may be different, however, if the holding supplied services to the company whose shares had been acquired (management holding). The holding is then acting as a taxable person and is entitled to deduct input VAT. Input VAT deduction would be only restricted to some extent if the holding was a mixed holding or carried out VAT exempt supplies.

In its preliminary rulings XI R 17/11 and XI R 38/12 dated 11 December 2013, the Federal Fiscal Court questions these principles. The Court was of the opinion that management holding companies would only ever be entitled to a restricted input VAT deduction. The supplies would not be rendered solely in connection with the later supplies but also with the non-taxable acquisition and holding of the shares. Therefore it would be necessary to calculate a pro-rata input VAT deduction.

2. Facts

The claimants had been holding companies who had acquired shares in limited shipping companies. They had

ECJ rejects Federal Fiscal Court's position regarding holdings

The Federal Fiscal Court expressed doubts that a management holding company could be entitled to fully deduct input VAT. This is based on the assumption that the supplies purchased are partly connected with the acquisition and holding of shares in the subsidiary companies which is not to be regarded as an economic activity. This is contradicted by the ECJ. The ECJ acknowledges that there is a right to fully deduct input VAT if the holding is involved in the subsidiary's management and is thus rendering supplies subject to VAT. The ECJ has repeatedly confirmed the principle that costs, which occurred in connection with the acquisition of shares in subsidiary companies, are always deemed to be part of the general expenses. It is therefore not necessary to prove that the expenses are part of the cost elements of the output transactions subject to VAT. The ECJ does not, however, comment on the Federal Fiscal Court's questions on the calculation method as regards input VAT deduction in the case of mixed holdings.

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acquired assets in order to be able to fund the acquisitions of its shareholdings. The claimants then rendered supplies (of services) subject to VAT to the limited partnerships, as initially intended. In connection with the acquisition of capital/fundraising, the claimants had received supplies for which they deducted input VAT.

3. ECJ Judgment

In its judgment dated 16 July 2015, in the joint cases C-108/14 *Larentia* + *Minerva* and C-109/14 *Marenave,* the ECJ opposes the Federal Fiscal Court's view and confirms its hitherto jurisdiction.

If a holding is involved in the management of the companies from which it had acquired shares, it is deemed to be an economic activity if the management services are rendered for remuneration. The holding is thereby rendering supplies subject to VAT to its subsidiary company, in the manner of e.g. administrative, financial, commercial and technical supplies of services. The holding is thereby granted the right to deduct input VAT from supplies. Basically, it is only possible to deduct input VAT if the supplies are directly linked to output transaction giving rise to the right to deduct.

However, it is also possible to deduct input VAT even if the supplies are not directly linked to output transaction giving rise to the right to deduct if the costs for the subject supplies of services are part of the taxable person's general costs and are components of the price of the goods or services which he supplies. Such costs have a direct link to the taxable person's economic activity, as a whole.

Here, the EJC expressly confirms that the holding's costs, in connection with the acquisition of shares in companies and in whose management the holding is involved, are deemed to be considered part of the holding's general expenses. Consequently, the holding is entitled to fully deduct input VAT from the supplies. Only in the case where the holding renders VAT exempt supplies, which do not give rise to the right to deduct input VAT, would the input VAT deduction be only possible on a pro rata basis. In these circumstances, the provisions of Art. 173 – 175 of the VAT Directive apply.

The VAT Directive does not, however, provide for any provisions as regards the allocation of input VAT to economic and non-economic activities. Therefore, it is for the Union legislator and the national authorities to specify this.

4. In practice

The following consequences arise from the ECJ judgment:

- Input VAT deduction for management holding companies will not be restricted.
- The fiscal authorities must not request any evidence that the supplies related to the acquisition of shares are cost elements of the output transactions. In its guiding principle, the ECJ expressly confirms that costs arising in connection with the acquisition of shares are part of the taxable person's general expenses and are therefore always belong to the price elements of all supplies of the company.
- The ECJ does not make any restrictions as regards the methods for apportioning input VAT deduction in the case of a mixed holding. Thus, it remains true that, due to the lack of statutory provisions, a transaction formula, an investment formula or any other appropriate formula may be used. However, care should be taken, as the Federal Fiscal Court might potentially set down further restrictions in subsequent decisions.