



VAT NEWSLETTER

ECJ: Input VAT deduction from sale of shares also possible without taxation option

47 | 2018

1 Background

Corporate groups consist of legally independent entities. Entities operating a business are usually taxable persons in terms of VAT and, therefore, are basically entitled to deduct input VAT (see art. 168 of the VAT Directive). Entities with holdings (holding companies) are treated differently. The mere ownership of holdings does not constitute an economic activity. As a consequence, input VAT deduction is not permitted. However, if the holding company engages in the management of the holdings, in terms of supplies of services for consideration, it carries out an economic activity.

The economic activity of such a holding company can be defined by the "link" which is established by the taxable supplies of services rendered to the holdings. Input supplies, which strengthen this link, generally qualify for input VAT deduction. Input supplies rendered for a different purpose are considered not to have been procured for the purposes of the economic activity and, therefore, do not qualify for input VAT deduction. If a holding company wants to sell a holding, the link and associated input VAT deduction come into question.

2 Facts

C&D Food Acquisitions ApS (hereinafter "C&D Foods") was a Danish intermediate holding company of the Arovit group. It rendered supplies of IT and other services to a sub-holding. After the Arovit group proved unable to repay a loan, the lending bank took over the group and attempted to sell its holdings. C&D Foods was therefore required to sell the shares in the sub-holding (including the shares in the holding, where applicable). The bank's sole objective was to obtain the



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sales profit. C&D Foods' economic activity was irrelevant, in terms of the sale process. The sale ultimately failed. C&D Foods then went onto claim input VAT from the Danish tax authorities for, amongst other things, the procured consulting services and a draft sales contract.

3 ECJ judgement

In its judgement of 8 November 2018 (C-502/17), the ECJ denied C&D Foods' right to deduct input VAT. C&D Foods did not procure the consulting services for its economic activity. A sale of shares can only be assigned to an economic activity if the sale is driven by the economic activity or serves to expand it (see recital 38). Whether this is the case or not depends on the objective content. In the present case, however, the expenses resulted solely from the bank's objective, namely to realize a sales profit (see recital 39). C&D Foods' economic activity, i.e. the supply of IT and other services for consideration, was irrelevant.

4 Consequences for the practice

The judgment revives an old discussion. Can taxable persons claim input VAT from procured consulting services for a sale of shares not subject to VAT? The current judgment confirms this to be the case. It is required, however, that the sale strengthens the link between the taxable supplies and the remaining holdings. The sale must therefore be exclusively driven by the economic activity or serve to expand it.

With respect to holding companies, this means: The specific sale of shares must serve to maintain or expand the supplies of services rendered to the remaining holdings. In this event, the procured consulting services are not considered to be an input supply for the purposes of the transfer of the shares but rather as an input supply for the purposes of maintaining and developing the holding company's economic activity. The individual transfer of shares steps back behind the overall economic activity. Input VAT deduction can therefore be considered, in particular, in instances where a holding company renders supplies of strategic consulting services to the holdings. Then, the business development of the entire corporate group is subject to the holding company's economic activity. This includes the acquisition and sale of individual holdings.

The ECJ previously considered assigning procured consulting services to a holding company's economic activity, as a whole, in the *SKF* case (see judgment of 29 October 2009, C-29/08, recital 62). The German Federal Fiscal Court subsequently adopted the ECJ case law. However, it assigned the procured consulting service to the sale of the shares and denied input VAT deduction (see decision of 27 January 2011, V R 38/09). It justified its decision with regard to the service description shown in the invoice for the consulting services. Against the background of the current *C&D Foods'* decision, the adoption of the *SKF* case law needs to be reconsidered. Of course, consulting services, with respect to a sale of shares, are always included in the transfer of the shares. If, however, the sale of shares has to be considered as an "auxiliary business", in terms of the economic activity as a whole, the procured consulting services are, from a VAT perspective, deemed to be input supplies with regard to the taxable supplies of services to the group companies.

In addition, the following question arises: Does this understanding also apply to other asset transfers not subject to VAT, such as supplies of real estate? If, for example, a taxable person operates a hotel business and sells business property exempt from VAT, it is also entitled to deduct input VAT from procured consulting services. It is required, however, that the sale is exclusively driven by the hotel business or serves its expansion.