

Sale of shares in a subsidiary company
AB SKF

The ECJ has decided that the input VAT incurred on the costs of selling shares in a subsidiary may be recoverable on the basis that the costs are residual, and not (as the UK has maintained) wholly irrecoverable because they are directly attributable to an exempt supply.

Any business involved in a sale of shares which incurred significant advisory and other costs, whether now or in the past, should urgently consider claiming additional input VAT in the light of this decision.

Issue

Retrospective claims have been lodged for VAT previously blocked on share disposal costs, in the hope the ECJ would conclude the sale was not an economic activity but that it also did not consume the VAT incurred on the sale costs. This would leave the input VAT open to be claimed as a business overhead, to the extent the capital raised supported the taxable economic activities of the vendor, (effectively an extension of the Kretztechnik policy on share issues to share sales).

The ECJ has however gone down a slightly strange route. It has left many of the key decisions around VAT recovery to the referring court. What it has said is that the sale of shares in a managed subsidiary is an economic activity, because of the management involvement, and this activity is covered by the exemption for share transactions. On the face of this, in light of the much earlier BLP ECJ decision which concluded that the exempt supply of shares broke the chain of deduction no matter what the capital was used for, one might have thought that was the end of the matter and the taxpayer had lost. However the ECJ has not opined on whether there is a link between the costs and the exempt share sale (a direct and immediate link to an exempt supply is needed if VAT is to be blocked), but has suggested that link will not exist if the price of the shares does not reflect the costs of the professional fees. The absence of said link would allow the input tax to be treated as a business overhead, as above. Since share prices are market driven and bear no relation to sale costs this might be viewed as a taxpayer win.

Attempts by HMRC to apply a similar pure cost component approach to VAT recovery by hire purchase companies (that make their profit from exempt interest and sell the financed assets at cost) have been widely viewed as unacceptable. In addition recent cases such as DAP, DFS, Skipton and Garsington have used other ways to establish whether a link to particular supplies exists – such as the intention of the purchaser, the inexorability of a supply occurring and even, for advertising costs, whether the wording on adverts mentions the exempt activity at all. That type of approach in an AB SKF situation would seem to restore the link to the exempt supply that

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is absent if a pure cost plus model is used and UK courts might well adopt that same approach when considering the validity of claims.

There is one extra nuance which the referring court did not ask about but which was raised by the Commission at hearing stage. This concerned whether the exempt share sale could be desupplied by becoming a Transfer of Going Concern (TOGC) of the management business operated by the parent, thus putting asset sales and share sales on an equal footing. This approach would again mean the VAT on the sale costs becoming overhead VAT. The ECJ declined to comment on this as the question had not been asked of it, and again said this was for the national court.

Such an extension to the TOGC rules would presumably require a change to the UK law, and again creates a potential claim opportunity. However it seems quite hard to reconcile a share sale and the transfer of the assets of a business as being one and the same.

Next steps

As identified above, the position remains far from clear with respect to recovering VAT on the costs of share sales that would be exempt economic activities if they are not desupplied as TOGCs. Although the door has not been absolutely shut on such claims the ECJ has not really given the go ahead for such claims to be paid either and we are some way away from HMRC making any payments. However all the while the debate continues, taxpayers who might benefit from either of the arguments here (the input tax attribution or the TOGC point) should protect their position by ensuring protective claims for the VAT on exempt share sale costs are made, within time.

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