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CJEU: Open door for VAT recovery on transaction costs in case of share disposal

On 8 November 2018, the Court of Justice of the European Union (“CJEU”) released its decision in the C&D Foods Acquisition ApS case (C-502/17) concerning the deduction of input VAT on consultancy costs incurred by a holding company in connection with a sale of a sub-subsidiary’s shares.

C&D Foods carried out 2 activities, respectively the holding of shares in its subsidiary, Arovit Holding A/S, and the provision of taxable management services to its sub-subsidiary, Arovit Petfood. Due to the bank failure of the former shareholder of the Arovit group, the creditor, Kaupthing Bank, assumed ownership of the group and intended to sell all the shares of Arovit Petfood in order to satisfy its debts. For the purpose of this sale, C&D Foods incurred advisory costs and subsequently sought to recover the input VAT on such costs even though the sale in question ultimately never took place.

The CJEU ruled that a sale of shares, in itself, does not constitute an economic activity, implying that no deduction of input VAT on related costs can be granted. However, if the direct and exclusive reason for the share sale relates to the taxable activity of the parent company, or constitutes a direct, permanent and necessary extension of the parent company’s taxable activity, a VAT deduction right may be recognised. According to the CJEU, this would be the case if a sale of shares is carried out with the purpose of allocating the proceeds directly to the taxable activity of the parent company or to the economic activity carried out by the group of which it is the parent company.

In the case at hand, since it was clear that the objective of the sale of shares was to settle the Kaupthing Bank’s debts, such a sale could not be viewed as being performed either for the purposes of the taxable activities of C&D Foods or for the economic activities of Arovit group.

Compared to previous CJEU case law (such as BLP case C-4/94), VAT deduction on share disposal costs is now possible in specific circumstances. In particular, attention should be paid to the underlying purpose of the transaction in order to determine the VAT recovery right on share disposal costs. This being said, this case is casuistic and raises questions such as to what extent and how far should a company have regard to the underlying purpose of a share disposal. On a positive note, this decision actually opens possibilities for holding companies to claim their VAT recovery right on share sale costs. Henceforth, detailed documentation relating to the objective of a divestment of shares might serve as additional arguments to support VAT recovery on the connected costs.

Our VAT team is at your disposal to further discuss in detail any impact this case-law might have on your files and how to deal with it in practice.

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