VAT Deductibility for Holding Companies

This document should be read in conjunction with sections 3, 59 and 61 of the VAT Consolidation Act 2010 (VATCA 2010)

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Introduction

This guidance sets out the VAT deductibility rules in respect of transactions involving holding companies. It includes the principles governing entitlement to deductibility as set out in a number of Court of Justice of the European Union (CJEU) judgments.

1 General Principles in respect of deductibility

The general principle derived from the CJEU judgments to date confirms that a taxable person's right to deduct VAT is an integral part of the VAT system and is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all economic activities and in principle may not be limited.

> "The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT" **(Sveda C-126/14 Par 17).**

In this context Revenue's view is that:

I. Where VAT is incurred by a taxable person in respect of costs which have a direct and immediate link to that person's taxable transaction and/or qualifying activity, there will be an entitlement to full deductibility in respect of that VAT incurred. This presupposes that such costs are a cost component of that transaction and/or qualifying activity.

II. Where VAT is incurred by a person in respect of costs which have a direct and immediate link to a transaction and/or activity which is not taxable, and which does not constitute a qualifying activity for the purposes of VAT, there can be no entitlement to deductibility in respect of that VAT incurred.

III. Where VAT is incurred by a person in respect of costs which do not have a direct and immediate link to any transaction and/or activity giving rise to a right to deduct, there can be an entitlement to deductibility in respect of such general costs in so far as they are shown to be a cost of the economic activity and are, as such, components of the price of the goods or services which are supplied. Such costs therefore, have a direct and immediate link with the taxable person's economic activity as a whole.

It is important to note that the terms "direct and immediate link" and "use" are interchangeable in the sense that the Court has used the term direct and immediate link in order to determine whether a cost has been "used" for the purposes of an activity giving rise to a right to VAT deduction, within the meaning of Article 168 of Council Directive 2006/112/EC, (section 59(2) of the VAT Consolidation Act 2010 as amended).

2 Entitlement to deductibility

Section 59(2) of the VAT Consolidation Act 2010 (VATCA 2010) provides that a person may deduct VAT incurred on the acquisition of goods or services acquired in so far as those goods or services are **"used by him or her for the purposes of his or her taxable supplies or any of the qualifying activities.".** This reflects both the provisions of Article 168 of Council Directive 2006/112/EC, which states that **"In so far as goods or services are used for the purpose of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:",** and the provisions of Article 169 ("qualifying activities").

According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction(s), giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see paragraph 27 of the judgment, **Sveda** UAB C-126/14).

The Court has also held, that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction(s), where the expenditure incurred is part of the general costs and are, as such, components of the price of the goods or services which the taxable person supplies. Such expenditure does have a direct and immediate link with the taxable person's economic activity as a whole (see paragraph 28 of judgment, **Sveda** UAB C-126/14). The requirement for costs to have either a "direct and immediate link" to a person's taxable economic activities or to form part of a person's general costs **linked** to a person's taxable economic activities, has been stated repeatedly by the courts (e.g. **Portugal Telecom** C-469/11, **AB SKF** C-29/08 and **Cibo** C-16/00).

In the SKF judgment (see par 60) the Court held:

> "It follows that whether there is a right to deduct is determined by the nature of the output transactions to which the input transactions are assigned. Accordingly, there is a right to deduct when the input transaction subject to VAT has a direct and immediate link with one or more output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs **linked to the taxable person's overall economic activity** [emphasis added]. In either case, whether or not there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities."

This requirement that general costs are linked to a person's taxable economic activity in order for a right to deductibility to exist is further illustrated in the case **Larentia + Minerva** (CJEU C-108/14). The court held that;

> "In view of all the foregoing considerations, the answer to the first question is that Article 17(2) and (5) of the Sixth Directive must be interpreted as meaning that:
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> - the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be deducted in full, unless certain output economic transactions are exempt from VAT under the Sixth Directive, in which case the right to deduct should have effect only in accordance with the procedures laid down in Article 17(5) of that directive;
> - the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management only of some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded **as only partially belonging to its general expenditure**, **so that the VAT paid on that expenditure may be deducted only in proportion to that which is inherent to the economic activity, according to the criteria for apportioning defined by the Member States** [emphasis added], which when exercising that power, must have regard to the aims and broad logic of the Sixth Directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to establish"(paragraph 33).

For the purposes of deductibility, the existence of a direct and immediate link between a cost incurred and a particular taxable or qualifying activity, or the existence of a direct and immediate link between a cost incurred and the overall economic activity of the taxable person is a matter of fact in each case. This involves an objective evaluation of all the circumstances surrounding the incurring of costs by a taxable person and the nature of the taxable or qualifying activities in which the taxable person engages. The nature of this link was explored by the CJEU in the case of **Wolfram Becker** (C-104/12) in which it was confirmed that there must be more than a "causal" link between the cost incurred and a person's economic activity as a whole.

> "In that regard, it should be added that the fact that domestic civil law obliges an undertaking such as that at issue in the main proceedings to incur the costs relating to the defence, in criminal proceedings, of its representatives' interests is not relevant for the interpretation and application of provisions relating to the common system of VAT. In the light of the objective scheme of VAT set up by that system, only the objective relationship between the supplies performed and the taxable economic activity of the taxable person is decisive (see, to that effect, Case C-277/09 RBS Deutschland Holdings [2010] ECR I-13805, paragraph 54). Otherwise the uniform application of European Union law in that area would be severely undermined ((C-104/12) paragraph 32)."

3 Deductibility and Apportionment

3.1 Economic and non-economic activity

In calculating the amount of a person's costs in respect of which deductibility can be claimed, it may be necessary to first calculate, whether by apportionment or otherwise, the amount of those costs which has a direct and immediate link to the person's economic activities and the amount which has a direct and immediate link to the person's non-economic activities. There is no requirement to legislate for a prescribed method of apportionment, however the CJEU has provided guidance in respect of apportionment in such cases:

> "In those circumstances, and in order that taxpayers can make the necessary calculations, it is for the Member States to establish methods and criteria appropriate to that objective and consistent with the principles underlying the common system of VAT. In particular, the Member States must exercise their discretion in such a way as to ensure that deduction is made only for that portion of the VAT that is proportional to the amount relating to the transactions giving rise to the right to deduct. They must therefore ensure that the calculation of the proportion of economic activities to non-economic activities objectively reflects the portion of the input expenditure actually to be attributed, respectively, to those two types of activity (see judgment of 13 March 2008, Securenta, C-437/06, EU:C:2008:166, paragraphs 34 and 37)" (MVM C-28/16 par 47).

Revenue's view is that the method used by a taxable person to apportion costs between economic and non-economic activities should be that method which best reflects the degree to which those costs are used for the purposes of the person's economic activities in a specific set of circumstances.

On determining the amount of such costs which have a direct and immediate link to a person's economic activities, VAT incurred on the costs so calculated can be deducted to the extent that the costs relate to the acquisition of goods and services which are used for the purposes of the person's taxable supplies or any of the qualifying activities, in accordance with domestic legislation.

3.2 Deductible and non-deductible economic activity (dual use)

Section 61 of the VATCA 2010, in conjunction with regulation 17 of the 2010 VAT Regulations, provides a basis for calculating the deductible amount of VAT incurred in respect of goods and services acquired for use by a taxable person in the course of that person's economic activities, where those costs are not solely linked to either deductible activities or non-deductible activities. The apportionment of costs in this manner is based on Articles 173, 174 and 175 of Council Directive 2006/112/EC.

Article 173 provides:

> "In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible".

4 Holding Companies and Share Acquisition Costs

This section deals with companies whose sole activity is the holding of shares in other undertakings or the holding of shares together with the provision of taxable management services to those undertakings.

For the purposes of this section, three types of holding companies, in the context of their shareholding activities, are considered:

- passive holding companies
- active holding companies
- mixed holding companies.

4.1 Passive holding companies

Passive holding companies are those companies the sole purpose of which is to acquire and hold shares. It is settled case-law that this activity, of itself, is not an economic activity and does not give rise to any entitlement to deductibility.

This is outlined in the **Polysar** judgment (C-60/90*):*

> "a holding company whose sole purpose is to acquire holdings in other undertakings, without involving itself directly or indirectly in the management of those undertakings, without prejudice to its rights as shareholder, does not have the status of a taxable person for the purposes of value-added tax and therefore has no right to deduct tax under Article 17 of the Sixth Directive. The fact that the holding company belongs to a world-wide group of undertakings, which appears outwardly under a single name, is not relevant to the company's classification as a taxable person for the purposes of value-added tax".

In **Sofitam** (C-333/91) the CJEU outlined that:

> "Since the receipt of dividends is not the consideration for any economic activity within the meaning of the Sixth Directive, it does not fall within the scope of VAT. Consequently, dividends resulting from holdings fall outside the deduction entitlement."

The judgment in **Cibo** (C-16/00) also reiterated that:

> "The Court has consistently held that Article 4 of the Sixth Directive must be interpreted as meaning that a holding company whose sole purpose is to acquire holdings in other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have the status of taxable person and has no right to deduct tax under Article 17 of the Sixth Directive…"

4.2 Active holding companies

Active holding companies are those companies which, in the context of their shareholding activities, acquire a holding in other undertakings to which they provide management services in circumstances where the provision of such management services constitutes an economic activity which is chargeable to VAT. This is clarified in **Floridienne and Berginvest** (C-142/99), as follows:

> "… involvement of that kind in the management of subsidiaries must be regarded as an economic activity … in so far as it entails carrying out transactions which are subject to VAT … such as the supply … of administrative, accounting and information technology services to their subsidiaries."

The concept of what constitutes a management service carrying the right to deduct has been explored in numerous CJEU cases but most recently in **Marle Participations** (C-320/17):

> "It is apparent from settled case-law of the Court that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity, within the meaning of Article 9(1) of the VAT Directive, in so far as it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, accounting, financial, commercial, information technology and technical services (see, inter alia, judgments of 14 November 2000, Floridienne and Berginvest, C-142/99, EU:C:2000:623, paragraph 19; of 27 September 2001, Cibo Participations, C-16/00, EU:C:2001:495, paragraph 22; and of 6 September 2012, Portugal Telecom, C-496/11, EU:C:2012:557, paragraph 34).

In that regard, it must be noted that the examples of activities constituting involvement of the holding company in the management of its subsidiaries set out in the Court's case-law are not exhaustive.

The term 'involvement of a holding company in the management of its subsidiary' must, accordingly, be understood as covering all transactions constituting an economic activity, within the meaning of the VAT Directive, performed by the holding company for the benefit of its subsidiary."

Therefore, it is clear that any supplies made by a holding company to a subsidiary can constitute a taxable economic activity where such supplies are made on a continuing basis and are subject to VAT.

As an active holding company is engaged in economic activities (the provision of management services which are chargeable to VAT), it will have an entitlement to deduct VAT incurred on those costs which have a direct and immediate link to the provision of those taxable services or those costs which are general costs of the holding company having a direct and immediate link to the holding company's taxable economic activity as a whole.

The CJEU decided in **Larentia + Minerva** (C108/14) that acquisition costs are general costs of a holding company and that in the context of an active holding company should be deductible in full. The CJEU stated the following in its decision:

> "…the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be deducted in full, unless certain output economic transactions are exempt from VAT under the

> Sixth Directive, in which case the right to deduct should have effect only in accordance with the procedures laid down in Article 17(5) of that directive;"

4.2.1 Intention and Consideration

The right to deduct arises at the time costs are incurred. Taxpayers should have objective evidence of an intention to supply taxable management services at the time that the costs were incurred. Where a taxpayer does not have objective evidence of an intention to supply taxable management services at the time the costs are incurred there is no right to deduct.

The CJEU in **Rompleman (C-268/83) has stated:**

> "…the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity…". It went on to state in respect of evidencing an intention to commence an economic activity "…that provision does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence…".

The principles were recently reiterated in the judgment in **SMS Group** (C-441/16):

> "It is settled case-law that a person who incurs investment expenditure with the intention, confirmed by objective evidence, of carrying out an economic activity within the meaning of Article 9(1) of the VAT Directive must be regarded as a taxable person".

In Ryanair (C-249/17) the CJEU decided based on the facts of the case that:

> "In the present case, it is apparent from the file before the Court that the services at issue were provided to Ryanair when it intended, by the planned acquisition of shares in the target company, to pursue an economic activity consisting in providing to that company management services subject to VAT. Thus, it appears that, first, Ryanair acted as a taxable person at the time it incurred the expenditure linked to the services at issue. By doing so, Ryanair thus benefits, in principle, from the right to deduct VAT paid on the services at issue immediately, even if, ultimately, that economic activity, which was to give rise to taxable transactions, was not carried out and, accordingly, did not give rise to such transactions. Second, as regards the conditions for the exercise of the right to deduct and more specifically the scope of that right, the expenditure incurred for the purpose of the acquisition of the shares of the target company must be regarded as being attributable to the performance of that economic activity which consisted in carrying out transactions giving rise to a right to deduct.

> On that basis, that expenditure has a direct and immediate link with that economic activity as a whole and, consequently, is part of its general costs. It follows that the corresponding VAT gives rise to the right to deduction in full."

In order for a service to be within the scope of VAT there must be a direct link between the consideration and the service supplied. The CJEU has repeatedly stated that a supply of services is only effected for consideration where:

> "…there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient, Tolsma (C-16/93).

Where a holding company provides management services to a subsidiary and the payment for those supplies is contingent on the profitability or ability to pay of that subsidiary, such supplies are outside the scope of VAT. In such situations the direct link between the supply and consideration receivable, as required per the decision of the CJEU, is not satisfied. There is no supply of a service effected for consideration and the supplies are outside the scope of VAT.

Finally, it is Revenue's position that where the level of management fees charged by a holding company to a subsidiary is less than input costs incurred in relation to the acquisition of the shares, this does not impact the general principles of deductibility as outlined in this document. The level of deductibility for input costs is only determined by how they are used.

This section is equally applicable to mixed holding companies as described below.

4.3 Mixed holding companies

A holding company can be involved in both passive and active shareholding activities simultaneously (i.e. non-economic and economic activities). Such holding companies are referred to as "mixed" holding companies.

In those circumstances it is only those costs which have a direct and immediate link with the company's economic activities giving rise to a right to deduct or those general costs which have a direct and immediate link with that part of the company's economic activities as a whole from which a right to deduct arises.

Where acquisition costs are related to both the economic activity of the provision of taxable management services and the non-economic activity of the passive holding of shares, the input VAT should be apportioned to ensure that VAT deductibility only arises in respect of the portion of those costs that are used for the purposes of the taxable economic activity.

The CJEU, in **Larentia + Minerva** (C108/14*),* also stated:

> "the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management only of some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to that which is inherent to the economic activity, according to the criteria for apportioning defined by the Member States, which when exercising that power, must have regard to the aims and broad logic of the Sixth Directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to economic and to non-economic activity, which it is for the national courts to establish."

5 Holding Company Ongoing Costs

The entitlement to reclaim VAT paid in respect of ongoing costs (being costs other than costs relating to the acquisition of shareholdings in other undertakings) incurred by a taxable person is dependent on such costs having a direct and immediate link with a taxable output or qualifying activity. In addition, an entitlement to deduct also arises where there is no such direct and immediate link with a particular taxable output or qualifying activity but where the costs incurred have a direct and immediate link with the person's taxable economic activity as a whole. See **Larentia & Minerva** (C-109/14 par 24) as follows:

> "However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see, inter alia, judgments in Cibo Participations, C-16/00, EU:C:2001:495, paragraph 33, and Portugal Telecom, C-496/11, EU:C:2012:557, paragraph 37)."

Holding companies can typically incur costs as a consequence of their status as a holding companies, such as group audit fees, group legal fees, stock exchange listing fees, regulatory fees, etc. In general, such costs will fall to be regarded as general costs having a link to the activities of the holding company as a whole.

Determining if a link exists between such general cost and a person's economic activity as a whole is based on an objective evaluation of all the circumstances surrounding the acquisition and use of the inputs in respect of which the claim for deductibility is made. In this context, it is not sufficient that a "causal link" exists between the input costs incurred by a taxable person and the overall economic activity, there must exist an objective relationship between the two. **Wolfram Becker** (C-104/12) paragraphs 31 and 32 states:

> "Secondly, the referring court states that, since the supplies would not have been performed by the two lawyers at issue if A had not exercised an activity which produced turnover and, consequently, which was taxable, there would be a causal link between the costs relating to those services and A's economic activity as a whole. It should, however, be noted that that causal link cannot be considered to constitute a direct and immediate link within the meaning of the Court's case-law. As the referring court itself observes, there is no legal link between the criminal proceedings and A, and those services must therefore be considered to have been performed entirely outside A's taxable activities."

A company may, notwithstanding that it is engaged in carrying out an economic activity, incur costs in respect of certain activities undertaken for the benefit of its shareholders such as:

- Costs incurred in respect of activities such as restructurings that seek to create shareholder value but have no tangible business benefit
- the issue of shares in relation to such restructurings
- defending a takeover bid.

These costs might not have either the direct and immediate link to the taxable economic activities of a company or be considered to be a general cost **linked** to the company's taxable economic activities as a whole.

In such circumstances, an assessment is required to ascertain whether such costs have the required direct and immediate link to taxable supplies or can be classified as general costs or whether they do not have any link to the economic activities being undertaken at all. It is necessary to demonstrate the link between a cost and a taxable output (or overall economic activity) on a case by case basis.

5.1 Passive Holding Company

A passive holding company is not entitled to any VAT deductibility in respect of ongoing costs on the basis that there is no economic activity that would give rise to a right of deduction.

5.2 Holding Company Carrying on a Fully Taxable Activity of Remunerated Management Services

Where a holding company that supplies taxable management services to all of its subsidiaries incurs ongoing costs, these costs are general costs of the holding company for VAT deductibility purposes. This is on the basis that the holding company only carries on a taxable economic activity and does not have any non-economic activities.

There may be certain instances where an active holding company incurs costs that do not relate to its economic activity. In such circumstances, VAT on those costs incurred will not be deductible in accordance with normal deductibility principles.

Examples of transactions that may result in such costs being incurred include:

- share issues or sales, where the proceeds of the share issue or sale are not used for the purposes of the holding company's taxable economic activity (in accordance with the decisions in AB SKF and C&D Foods), and
- restructurings that seek to create shareholder value but do not relate to the taxable economic activity of the holding company.

5.3 Holding Company Carrying on a Mixed Activity of Remunerated Taxable Management Services and Holding of Shares

Where a holding company supplies taxable management services to some of its subsidiaries and passively holds shares in the others, ongoing costs can potentially fall into three different categories for VAT deductibility purposes.

- The first category are costs that have a direct and immediate link to the provision of taxable management services. Full VAT deductibility is available in respect of these costs.
- The second category are costs that have a direct and immediate link to the non-economic activity of passively holding shares. No VAT deductibility is available in respect of these costs.
- The third category of costs are costs that have been used for the purposes of both the economic activity consisting of the provision of taxable management services and the non-economic activity of passively holding shares. In this case apportionment applies and deductibility is only permitted in respect of the proportion of the costs that have been used for the purposes of the provision of taxable management services.

6 Deductibility and Share Transactions

The entitlement to deductibility for costs incurred in respect of share transactions carried out by a holding company is dependent on the facts and circumstances of each case. However, the general VAT deductibility principles, as outlined above, apply equally to costs incurred in respect of share transactions. The CJEU has considered a number of cases from the point of view of the entitlement to deductibility arising from the link between costs and a company's economic activity as a whole.

6.1 Issue of shares by a company

The issue of shares is neither a supply of goods nor a supply of services and the capital raised from the issue of such shares is not consideration payable in respect of the issue of those shares *(***Kretztechnik** C-465/03 paragraph 26 refers). A share issue is not, therefore, an output activity which, of itself, could be used to determine the entitlement to deductibility of the person issuing those shares. Costs relating to the issue of shares are a general cost of the issuer and as such are deductible in so far as they are shown to have a direct and immediate link to the part of the economic activity of the issuer which is chargeable to tax.

It is settled case-law that costs incurred in respect of raising capital by a company, through the issue of shares, which is to be used for the purpose of its economic activities as a whole, form part of the general costs of that economic activity and as such are deductible to the extent that they relate to that portion of the company's economic activities which is chargeable to VAT (see **Kretztechnik** judgment):

> "Article 17(1) and (2) of Sixth Directive 77/388, as amended by Directive 95/7, confer the right to deduct in its entirety the VAT charged on the expenses incurred by a taxable person for the various supplies acquired by him in connection with a share issue, provided that all the transactions undertaken by the taxable person in the context of his economic activity constitute taxed transactions."

Where, however, the issue of shares is to raise capital for the purpose of both the economic activities of the company, and for the purpose of the company's non-economic activities, the costs associated with the share issue can only partly be considered to be a general cost of the company's economic activities. It is only that part of those costs which form part of the general costs of the economic activities of the company which can be deducted, to the extent that they relate to the activities of the company which are chargeable to VAT. In this regard the Securenta judgment (C-437/06) held that:

> "Where a taxpayer simultaneously carries out economic activities, taxed or exempt, and non-economic activities outside the scope of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value-added tax: uniform basis of assessment, deduction of the VAT relating to expenditure connected with the issue of shares and atypical silent partnerships is allowed only to the extent that that expenditure is attributable to the taxpayer's economic activity within the meaning of Article 2(1) of that directive."

6.2 Sale of shares by a company

The sale of shares is a supply of services which is either a non-economic activity, or an exempt economic activity for the purposes of VAT, and therefore costs with a direct and immediate link to the sale of those shares cannot be deductible.

In **BLP** (Case C-4/94) the company incurred costs in respect of a sale of shares which was an exempt economic supply. The Court deemed that the costs relating to sale of those shares were directly linked to the exempt supply of those shares and therefore could not be deductible costs, notwithstanding that the amounts realised from the sale of those shares was used for the purpose of its downstream deductible activities.

This matter was again raised in the **case AB SKF** (C-29/08) where costs were incurred in respect of a sale of shares which was exempt from VAT. The judgment in this case stated that VAT is not deductible where there is a direct and immediate link between the costs incurred and the sale of the shares. However, where it is shown that there is a direct and immediate link between the costs incurred and the taxable economic activity of the seller there is an entitlement to deductibility.

> "there is a right to deduct input VAT paid on services supplied for the purposes of a disposal of shares, under Article 17(1) and (2) of the Sixth Directive, in the version resulting from Article 28f(1) thereof, and Article 168 of Directive 2006/112, if there is a direct and immediate link between the costs associated with the input services and the overall economic activities of the taxable person. It is for the referring court to take account of all the circumstances surrounding the transactions at issue in the main proceedings and to determine whether the costs incurred are likely to be incorporated in the price of the shares sold or whether they are among only the cost components of transactions within the scope of the taxable person's economic activities" (**paragraph 73 AB SKF** (C-29/08).

This concept was reiterated in **paragraph 56 of X BV (C-651/11):**

> "Since the disposal of shares at issue in the main proceedings must be categorised as an exempt transaction under Article 13B(d)(5) of the Sixth Directive, a right to deduct will exist only if the cost of the services supplied to X in relation to that disposal is part of the general costs relating to its overall economic activity, without being incorporated in the sale price of those shares."

In determining if an entitlement to deductibility exists in respect of the sale of shares, it must first be established if a particular cost incurred has a direct and immediate link with the sale. Whereas an evaluation of the individual costs incurred in the context of the transfer of shares must take place in respect of each transaction to determine whether such a direct and immediate link with the sale of shares exists, Revenue's view is that costs in respect of the acquisition of such services as:

- advice in relation to the appropriateness and consequences of selling the shares
- valuing and marketing the shares
- transferring ownership of the shares and related services

are examples of costs which have a direct and immediate link with the sale of the shares and which are not therefore deductible costs for VAT purposes.

The only situation where deductibility can arise in respect of costs that have a direct and immediate link to an exempt sale of shares is where the sale of shares is to a non-EU party. In such circumstances, a sale of shares is regarded as a "qualifying activity" for the purposes of Section 59(1)(d) of the VATCA 2010.

If the costs incurred do not have a direct and immediate link with the sale of the shares, the entitlement to deductibility can arise where such costs are shown to have:

- a direct and immediate link to a transaction which is chargeable to VAT or to a qualifying activity
- a direct and immediate link to the seller's economic activities as a whole.

The existence of such a link is a matter of fact in respect of each cost incurred and should be established on a case by case basis.

The CJEU issued a decision in **C&D Foods** (C-502/17) where it emphasises that the reason a share sale is undertaken can be a key factor in determining whether a sale of shares is an economic activity or not. The Court stated:

> "It follows that, in order for a share disposal transaction to be able to come within the scope of VAT, the direct and exclusive reason for that transaction must, in principle, be the taxable economic activity of the parent company in question, or that transaction must constitute the direct, permanent and necessary extension of that activity. That is the case where that transaction is carried out with a view to allocating the proceeds of that sale directly to the taxable economic activity of the parent company in question or to the economic activity carried out by the group of which it is the parent company.
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> In the present case, it is apparent from the file before the Court that the objective of the disposal of shares at issue in the main proceedings was to use the proceeds of that sale to settle the debts owed to Kaupthing Bank, the new proprietor of the Arovit group. As stated in the preceding paragraph of this judgment, such a sale cannot be deemed to be either a transaction for which the direct and exclusive reason is the taxable economic activity of C&D Foods, or a transaction constituting the direct, permanent and necessary extension of the taxable economic activity of that company. In those circumstances, that sale does not constitute a transaction consisting in obtaining income on a continuing basis from activities which go beyond the compass of the simple sale of shares and, accordingly, it does not come within the scope of VAT. It follows that the VAT relating to the disputed services is not deductible."

7 Single taxable person (VAT group)

Entitlement to deductibility for costs incurred by a VAT group is subject to the same conditions as would apply for any other taxable person.

The entitlement of a VAT group to a deduction for costs incurred by any person, including a holding company, within the group will depend on establishing a link, whether a direct and immediate link or a link as a general cost of the economic activity of the VAT group. As the members of the group are no longer persons in their own right and as transactions between members of the group are deemed not to take place for VAT purposes, the matter of consideration between members of the group is not relevant for the purposes of determining the existence of that link.

The fact that a holding company or any other company is a member of a VAT group with a taxable economic activity does not give an automatic entitlement to deductibility, as within a VAT group it may be incurring costs which are not linked in any way to the economic activities of the VAT group and which would not therefore be deductible under normal VAT deductibility rules.

The CJEU has confirmed in the European Commission v Ireland (C-85/11) that normal VAT deductibility rules must continue to apply, when considering the VAT group's overall position. The effect is that VAT grouping produces the same VAT deductibility outcome as would apply in a situation where all of the activities of the VAT group were carried out by a single legal entity.

A claim for deductibility by a VAT group in respect of costs incurred must be shown as either a cost which has a direct and immediate link to a transaction or activity on which VAT is chargeable, or a cost which is linked to the general economic activities of the VAT group on which VAT is chargeable. This will be a matter of fact in respect of each cost incurred.

It is Revenue's view that when a passive holding company joins a VAT group this does not mean that all non-economic activity of the passive holding of shares is disregarded. Only the non-economic activity of the passive holding of shares in other VAT group members is disregarded. Where there is a passive shareholding in entities outside of the VAT group, the VAT group is considered to have a non-economic activity of the passive holding of shares in those entities. The VAT group should take account of this non-economic activity for VAT deductibility purposes.

The principles outlined in the previous sections can equally apply in the context of a VAT group.

Examples of the Effects of VAT Grouping

Example 1

Company A is a holding company with one subsidiary Company B, a Bank, to which it supplies taxable management services. There is no VAT group in place. Company A is generally entitled to full VAT recovery on its input costs.

Company A and Company B decided to form a VAT group. The outputs of the VAT group are VAT exempt banking activities. No VAT recovery is available for any costs incurred by the VAT group as the outputs of the VAT group are exempt from VAT.

Example 2

Company C is a passive holding company with one subsidiary Company D, a fully taxable entity. There is no VAT group in place. Company C is not entitled to any VAT deductibility as its activities are outside the scope of VAT.

Company C and Company D decide to form a VAT group. The outputs of the VAT group are fully taxable. VAT recovery is available for the costs incurred by the VAT group on the basis that the outputs of the VAT group are fully taxable.

Example 3

Where a holding company within a VAT group raises capital (including through the issue of shares) and lends this capital to other VAT group members for the purposes of being utilised for the benefit of the VAT group's taxable activities, VAT deductibility is allowed for any VAT on inputs associated with raising the capital. This is on the basis that the capital has been raised by the VAT group and has been "used" for the purpose of the deductible activities of the VAT group

Example 4

Where a holding company within a VAT group raises capital (including through the issue of shares) and lends this capital to other VAT group members for the purposes of being utilised for exempt or non-economic activities of the VAT group, VAT deductibility is not available. This is on the basis that the capital has been raised by the VAT group and "used" for the purposes of the exempt or non-economic activities of the VAT group.

Example 5

Where a holding company within a VAT group raises capital (including through the issue of shares) and lends this capital to other VAT group members for the purposes of being utilised for both the benefit of a taxable trade and an exempt trade, VAT deductibility can be claimed on the basis of an apportionment of the costs between those activities.

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