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Sale of shares in a subsidiary may not lead to VAT costs

The European Court of Justice (ECJ) released its judgment in the AB SKF case on 29 October 2009.

In the case, the ECJ was asked to consider the VAT treatment of the sale of shares in a subsidiary and whether VAT incurred in relation to the sale (on legal and other professional fees) is deductible. The ECJ has decided in favour of the taxpayer and contrary to the opinion of the Advocate-General.

The judgment could have implications for some businesses that have incurred costs in relation to share sales, which may now be able to recover significant amounts of the VAT incurred, subject to limitation periods.

ECJ judgment

The ECJ found that the sale of shares by SKF was more than a passive disposal of securities, due to the active involvement of SKF in the management of the subsidiary and the controlled company. The ECJ also considered that it was apparent that the sale of shares was directly linked to and necessary for SKF's economic activity. Accordingly, the ECJ held that the sale of shares was within the scope of VAT but that it was an exempt supply for VAT purposes.

The key issue was whether the VAT incurred in relation to the sale is deductible. On this point, the ECJ contemplated two situations. First, that there is a right to deduct VAT paid on services supplied for the disposal of shares, provided there is a direct and immediate link between the costs associated with the services and the overall economic activity of the taxable person (following the Court's previous analysis in cases such as Kretztechnik). Secondly, that in some circumstances the sale of shares (where it effectively transfers the totality of a business's operations) is analogous to a transfer of a business as a going concern. Simply because the sale is affected by the sale of shares rather than assets, the Court suggested this should not produce a different result in terms of the VAT recovery treatment of associated costs.

The ECJ considers that it is for the national courts of Member States to determine whether there is the requisite link between the costs and the economic activity.

Implications

Under current practice in several countries (including Belgium), share sales are treated as exempt from VAT and any VAT on costs associated with a share sale is not deductible. The ECJ judgment suggests that current practice in these countries may be incorrect and that there could be more scope for businesses to reclaim VAT

than had been thought.

The judgment could have implications for businesses that have incurred costs in relation to share sales. These businesses may now be able to recover significant amounts of the VAT incurred, subject to limitation periods.

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