



# Case alert

## C&D Foods Acquisition ApS

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### Summary

Over the last two decades, there has been a constant stream of cases referred to the Court of Justice of the European Union (CJEU) relating to the recovery of input tax by holding companies in relation to both the acquisition and sale of shares in subsidiary undertakings.

In this case, C&D Foods incurred input VAT in relation to professional costs associated with the proposed sale of shares in a subsidiary. Ultimately, no buyer could be found and the shares were not sold. The company reclaimed the VAT incurred on the costs but the Danish tax authority refused to refund the VAT on the basis that there was no direct or immediate link with the company's taxable activities. The company considered that it was entitled to a refund on the basis that it had been involved in the management of the subsidiary by providing it with management services.

The CJEU proceeded to judgment without requiring an Advocate General's opinion, agreeing with the Danish tax authority, it concluded that the purpose of the proposed share sale was to extinguish the company's indebtedness to a bank and not for the purposes of its taxable economic activity.

### Court of Justice of the European Union - Judgment

Over the last 20 years or so, the Court of Justice has been asked to rule on whether VAT incurred on costs relating to the purchase or sale of shares by a holding company. The Court has stated previously that the mere acquisition and holding of shares is not an economic activity but is akin to an investment activity outside the scope of Value Added Tax. Case law has developed over the years and the above rule does not apply in cases where the shareholding is accompanied by a direct or indirect involvement in the management of subsidiaries by a holding company. Such involvement can take the form of the provision of services (such as management services) or the letting of property – what matters is that the provision of services is a taxable economic activity for VAT purposes. Provided that a taxable economic activity exists, the CJEU has confirmed that input VAT can be reclaimed. The Court has also ruled in a previous case that, where the proceeds of a share sale are earmarked for the reorganisation of a group of companies, that is an extension of the group's taxable activity and input VAT could be reclaimed.

In the case of C&D Foods Acquisition ApS, the company incurred VAT on costs relating to the proposed sale of shares in a subsidiary. The reason for the proposed sale was stated to be so that the holding company could extinguish a loan debt that it owed to Kaupthing Bank. Nevertheless, as it also provided taxable management and IT services to the particular subsidiary, the company relied on the Court's previous case law to deduct the input VAT. However, the Danish tax authority took a different view and refused the deduction. This was on the basis that, even though there was clearly a supply of taxable services between the company and its subsidiary, there was an insufficient link between the costs incurred and the company's supply of taxable services. The Court agreed with the Danish tax authority.

The CJEU considered that, objectively, the principal reason for the sale of the shares was to extinguish the group's indebtedness to the bank. There was no direct or immediate link between the costs incurred and the company's taxable transactions. In such situations it is necessary to determine the exclusive reason for the transaction and if, as here, there is no link to the taxable economic activity, the company is not entitled to reclaim the VAT incurred. Indeed, the CJEU considered that the intention to use the proceeds of the share sale to settle the debts owed to Kaupthing Bank was nothing to do with its taxable activities. In such circumstances, the sale of the shares does not constitute an economic activity for VAT purposes and does not come within the scope of VAT. On that basis, the VAT incurred on the proposed sale costs cannot be reclaimed by the holding company.

**Comment – this is yet another case revolving around the recovery of input tax by a holding company. In a previous case (SKF), the Court accepted that using the proceeds from a sale of shares to reorganise a group was an extension of the group's taxable activities and the input VAT could be reclaimed. Here, the Court distinguished SKF on the basis that C&D Foods was not intending to use the proceeds to further its taxable activities but, rather to extinguish its indebtedness to the bank. According to the CJEU, this is not an economic activity for VAT purposes and so the costs incurred in relation to that activity cannot be reclaimed. Holding companies should take note.**

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