



VAT alert Belgium

CJEU widens scope for VAT recovery on costs related to (aborted) takeover bids

On 17 October 2018, the CJEU decided that VAT is recoverable on acquisition costs incurred by Ryanair Ltd with a view to provide the company to be acquired with taxable management services, even if the transaction was aborted and therefore no actual services were provided by Ryanair. (C-249/17). Currently, many EU Member States (including Belgium) take a restrictive view on the right to deduct VAT on acquisition costs made by holding companies if there is no direct and immediate link with a taxable turnover.

Background

In 2006, Ryanair made a takeover bid for Aer Lingus, another Irish airline, with the former's intention of making the latter more profitable by bringing its expertise and experience there after the takeover. This would result in VAT taxable services to the newly acquired company.

There was no discussion on the fact that Ryanair intended to provide taxable management services to Aer Lingus. Nevertheless, the Irish High Court held that the deduction of input VAT on professional fees paid by Ryanair in relation to the takeover negotiations was not allowed since the bid was unsuccessful and no taxable supplies were eventually made by Ryanair to Aer Lingus.

The Irish Supreme Court referred questions to the CJEU to resolve the matter.

CJEU decision

According to the CJEU, costs incurred by the acquiring company have a direct and immediate link with its taxable activity. The fact that the acquisition did not proceed and the intended VAT taxable services were not performed does not limit the right to deduct VAT.

The CJEU confirms previous case law that allows VAT deduction for (holding) companies that provide management services to their subsidiaries. It repeats a condition that appears to apply on top of the direct link requirement, namely that the exclusive reason for the acquisition relates to the taxable management activity.

In her [Opinion in the Ryanair case](#), AG Kokott proposed an interesting argument to expand the possibility for VAT recovery on acquisition costs beyond existing case law, by applying a functional test which would also allow full VAT deduction if the acquisition has a direct and immediate link with a broader taxable activity of the acquirer (e.g. Ryanair's takeover of Aer Lingus would allow it to expand its airline business). The Court however remained with the questions referred to it and based the VAT deduction on the direct link between acquisition costs and the intended taxable services to the target company.

This judgment provides additional VAT recovery options for holding companies that incur acquisition costs with the intention to perform (management) services to the target company after takeover, but where these services never materialise given an aborted transaction. This reasoning is in line with older case law, where the CJEU also stated that the only crucial factor to qualify as a taxpayer with a right to deduct VAT is the intention to commence a VAT taxable economic activity supported by objective evidence and not that activity's actual realisation. It is thereby necessary for the holding company to register for VAT when the intention to perform taxable services starts to exist.

Impact in Belgium

Tax authorities in many EU Member States (including Belgium) take a restrictive view with respect to the right to deduct VAT on acquisition costs for holding companies, especially if there is no direct and immediate link between the costs and an outgoing turnover subject to VAT realised with the target company.

The Ryanair case opens opportunities for VAT recovery on costs related to acquisitions that ultimately never go through, including the possibility to retroactively reclaim VAT incurred on costs related to such aborted takeover bids in periods for which the VAT deduction right is not yet prescribed (in Belgium: 2015 and later years).

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