

The Deloitte logo is positioned in the top left corner of the slide. It consists of the word "Deloitte" in a bold, blue, sans-serif font, followed by a small green dot.

Deloitte.

UK Indirect Tax Conference 2015

Holding company VAT recovery

Jo Fitzgerald
Ali Hai

11 November 2015



Introduction

Purpose of the session:

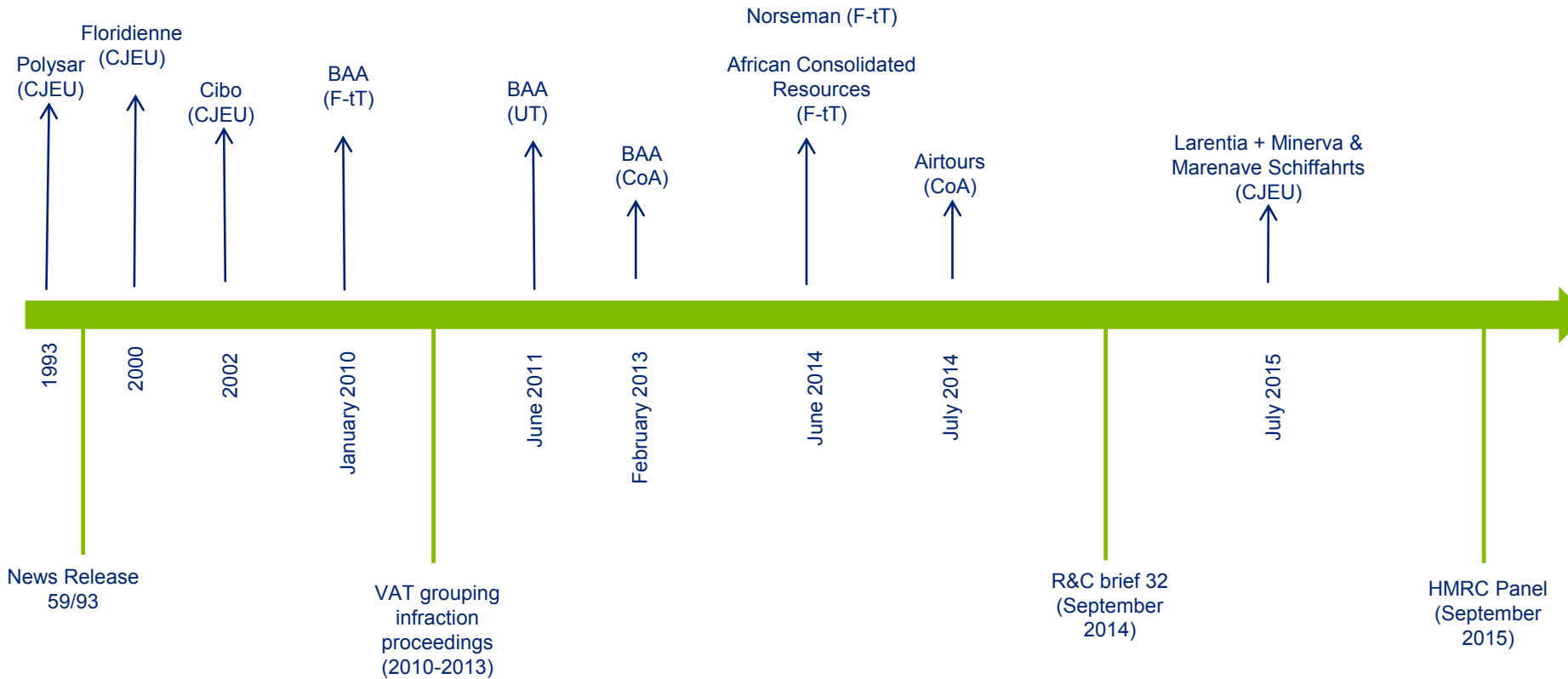
1. History – the story so far
2. HMRC's guidance
3. The most recent caselaw
(*Larentia+Minerva & Marenave Schiffahrts*)
4. What happens next



1. History

History – selected dates

Cases and tax authority practice



Selected case law prior to *BAA*

***Polysar* (CJEU 1993)**

- The mere acquisition and holding of shares is **not** an economic activity.

***Floridienne SA and Berginvest* (CJEU 2000)**

- A holding company's involvement in the management of subsidiaries must be regarded as an economic activity where it entails carrying out transactions **that are subject to VAT**.

***Cibo Participations* (CJEU 2002)**

- Confirmed *Floridienne SA and Berginvest* and that you can only recover the proportion VAT which is attributable to VAT deductible activities.
- VAT on share **acquisition** deal costs formed part of general expenses and was potentially recoverable.
- By drawing a clear distinction between a 'passive' holding company and a 'management' holding company, the court caused a shift in the tectonic plates underpinning deduction, and dramatically changed the VAT landscape.

BAA plc

- The 2006 takeover bid of BAA plc.
- Various advisers invoiced their fees to Bidco, with VAT thereon. Bidco joined the BAA VAT group post transaction (3 months after completion), which then sought to recover that input tax.
- HMRC refused to allow recovery on the basis of two tests :
 - the ‘to whom’ test – that Bidco must be the recipient of the services; and
 - the ‘purpose’ test – that Bidco (or the VAT group) must use these services for the purpose of an economic activity.
- Ultimately confirmed by the CoA in February 2013:
 - Bidco had no ‘economic activity’ at the relevant time, and so no entitlement in principle to recover input tax (this is a worse result than at the Tribunals, who both considered that there was an ‘economic activity’)
 - At the time when Bidco incurred the input tax, there was no direct and immediate link between that input tax and any outputs of Bidco or BAA.
- Unhelpful facts of this case meant that the issues rumbled on.....

Norseman Gold plc and ACR plc

First-tier Tribunal (June 2014)

- Not share acquisition related transactions.
- In both cases, two companies in the taxpayer's corporate group (note: not in the same VAT group) had entered into agreements for 'management services'. The F-T ruled that:
 - the services provided **were** economic activities; but
 - **were not** supplies for VAT purposes due to the vague payment terms.
- This was because, in *Norseman*, no price was agreed before the supply was made and in *African Consolidated Resources* there was no link between the consideration and the services provided.
- These cases bring out the need for **substance, economic reality** and **fulfilment** in respect of management services agreements between holding companies and subsidiaries.

2. R&C Brief 32 (2014)

Revenue and Customs Brief 32 (2014)

- On 25 September 2014, HMRC issued new guidance on VAT recovery by holding companies, and updated the VAT Input Tax Manual.
- The drafting of HMRC guidance suggests that HMRC policy in this area now extends far wider than transaction costs, and to recovery of VAT generally in holding companies.
- The guidance specified several conditions for VAT recovery:
 - VAT is incurred by a taxable person in the course of an **economic activity**;
 - there must be a **direct and immediate link** to the taxable person's taxable supplies;
 - the holding company should be able to demonstrate an **intention to recoup** the transaction costs over a reasonable period (no more than 10 years); and
 - supplies by a holding company to its subsidiaries must be made on a proper commercial basis, and supported by **documentation** such as management service agreements (MSAs), invoices & payments.
- Holding companies may be involved in both economic and non-economic activities – in which case an apportionment will be necessary.
- At the time, the brief noted that HMRC would review the policy in the light of the CJEU's judgment in *Larentia+Minerva* and *Marenave Schiffahrts*.

3. Larentia+Minerva & Marenave Schiffahrts

Larentia + Minerva and Marenave Schiffahrts

CJEU (July 2015)

- Both German cases (*Beteiligungsgesellschaft Larentia + Minerva GmbH KG* (C-108/14) (Larentia) and *Marenave Schiffahrts AG* (C-109/14)) involving share acquisitions through holding vehicles/companies.
- In each case, full VAT recovery on acquisition costs had been claimed by the companies on the basis of economic activities being carried out, in the form of management services to the subsidiaries.
- The German Tax Authority objected to the full VAT recovery, and allowed only a proportion of VAT incurred on share acquisition costs as recoverable, suggesting that there must be some non-economic activity arising from the resulting shareholdings.

Larentia + Minerva and Marenave Schiffahrts

Questions referred to the CJEU

- The first question referred to the CJEU by the German Supreme Court was asking for confirmation of how a holding company should apportion its VAT recovery on transaction costs:

“Which calculation method is to be used to calculate a holding company’s (pro rata) input tax deduction in respect of input supplies connected with the procurement of capital for the purchase of shares in subsidiaries, if that holding company subsequently (as intended from the outset) provides various taxable services to those subsidiaries?”

- The Court also referred questions to the CJEU on the German VAT provisions which preclude partnerships from forming/joining VAT groups.

Larentia + Minerva and Marenave Schiffahrts

Judgment of the CJEU

Holding company VAT recovery on share acquisition costs:

Judgment

- Where the holding company will involve itself in the management (active) of all of the subsidiaries it acquires, **it is entitled to recover input VAT incurred on transaction costs in full**, unless it makes exempt supplies.
- Where the holding company will not involve itself in the management (passive) of all of the subsidiaries it acquires, **only part of the input VAT incurred on transaction costs may be recovered** (i.e. an apportionment must be made to reflect economic vs non-economic activity).

Larentia + Minerva and Marenave Schiffahrts

Judgment of the CJEU

Some interesting paragraphs from the judgment:

Para 24: *“a taxable person has a right to deduct even where no direct and immediate link to a specific output transaction, where the costs have a direct an immediate link with the taxable person’s economic activity as a whole.”*

Deloitte comment:

- This suggests a VAT grouped holding company should be entitled to recover input VAT, where it is involved in management of the subsidiary.

Para 33: *“..the expenditure connected with acquisition of shareholdings must be regarded as belonging to general expenditure....”*

Deloitte comment:

- Acquisition costs should be treated as overheads and recovered subject to partial exemption.

Larentia + Minerva and Marenave Schiffahrts

Judgment of the CJEU

Interesting paragraphs

Para 35: *“..the status of VAT group conferred on the holding company and its subsidiaries could result in that group, in respect of transactions between the subsidiaries and third parties, being eligible for full recovery.”*

Deloitte comment:

- Indicating that VAT grouped holding companies should be entitled to link its VAT recovery to the activities of the group as whole.

4. Next steps

What happens next?

- Norseman Gold plc has been granted leave to appeal and been listed for a hearing on 30 November and 1 December 2015.
- Airtours Holiday Transport Ltd has been granted leave to appeal and been listed for a hearing in February 2016.
- On-going panel meetings with HMRC Policy
- HMRC revised guidance?

What should you be doing

- VAT recovery of Holdco stewardship costs not expected to be challenged for VAT grouped Holdco's.
- VAT recovery of share acquisition costs
 - Follow HMRC Brief 32/14 until HMRC announcement although expect officers to be aware of possible withdrawal of Brief
 - Seek VAT recovery of deal costs by Holdco's but expect to be able to provide evidence of economic activity.
- Speak to Deloitte if you have received a challenge from HMRC.
- HMRC announcement early 2016.

Any questions?



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.co.uk/about for a detailed description of the legal structure of DTTL and its member firms.

Deloitte LLP is the United Kingdom member firm of DTTL.

This publication has been written in general terms and therefore cannot be relied on to cover specific situations; application of the principles set out will depend upon the particular circumstances involved and we recommend that you obtain professional advice before acting or refraining from acting on any of the contents of this publication. Deloitte LLP would be pleased to advise readers on how to apply the principles set out in this publication to their specific circumstances. Deloitte LLP accepts no duty of care or liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

© 2015 Deloitte LLP. All rights reserved.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 2 New Street Square, London EC4A 3BZ, United Kingdom. Tel: +44 (0) 20 7936 3000 Fax: +44 (0) 20 7583 1198.