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THE SCOPE OF INVOLVEMENT IN MANAGEMENT AS A PREREQUISITE FOR INPUT VAT DEDUCTION RELATED TO TRANSACTIONS IN SHARES AND POSSIBLE INCOMPATIBILITY WITH ABUSE OF LAW PRINCIPLE

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ABSTRACT

This article analyzes the concept of "direct and indirect involvement of holding companies in the management of subsidiaries", in the light of principle of abuse of the law, practical problems related to the delineation of actual intention of involvement and difficulties arising in determining proportion to what extent a taxable person is entitled to deduct input VAT.

Its conclusions are of relevance to EU Member States and countries who have implemented, or are looking to implement, the VAT system established by "Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax" as part of their national tax regime.

Because of conceptual and practical difficulties emerging in the process of VAT application to dealings in shares, the role of CJEU is significant, however in some cases, it has arguably contributed to increase in ambiguity.

All in all, according to the CJEU the involvement concept and its current practice does not collide with existing abuse of law principle, which puts taxpayers in a far better position to defend their right to deduct. Furthermore, to guarantee the equity of proper function of the system and taxpayers rights, the CJEU acknowledges that tax authorities and policy makers are entitled to introduce measures which will comply with fundamental principles of VAT system.

KEYWORDS: VAT, Deduction, Tax, Abuse of Law, Holding Company, Economic Activity

INTRODUCTION

Acquiring, holding and selling shares constitutes an investment,[1] rather than a consumption activity that usually involves some element of gradual decries in usability or value of the goods/services exploited over time,[2] this approach was unanimously agreed by members of the VAT Committee[3] up until, the Polysar case,[4] in which the Court of Justice of the European Union (CJEU)[5] established that the acquisition, holding and sale of shares do not, in themselves, consti-

1 Oskar Henkow in: Michael Lang/Peter Melz/Eleonor Kristoffersson, „Value Added Tax and Direct Taxation", p. 666-667.

2 Florian Otto,"Share deals as VAT-relevant Transactions" in „Global Trends in VAT/GST and Direct Taxes", edited by Pfeiffer/Ursprung-Steindl, p. 326.

3 Guidelines resulting from meetings of the VAT Committee, 28th Meeting, 9-10 July 1990, XXI/1334/90.

4 Judgment in Polysar, C-60/90, EU:C:1991:268.

5 The court of Justice of the European Union will be referred as the CJEU in the future.

tute economic activities within the meaning of the VAT Directive,[6] however, this determination might differ if the holding of the shares is accompanied by the involvement in the management of the subsidiary.[7]

Later the CJEU explained in three landmark decisions[8] that the involvement in the management of the subsidiaries requires the holding company to provide taxable supplies to its subsidiaries such as the supply of administrative, financial, commercial and technical services for consideration.[9] After assessing holding companies' activities as an economic activity liable for VAT, arises the second question, to what extent the holding company is entitled to deduct input VAT?[10]

Although there had been further CJEU judgments[11] concerning input VAT deduction[12] for expenditure related to the acquisition, holding and sale of shares, the extent of input VAT deduction for holding companies remains a controversial issue and thus indeed considered to be an infinite source of discussion amongst tax authorities and academic word[13], „it is clear that the case law itself gives rise to various difficulties, thereby heightening the sense of legal uncertainty".[14] As a consequence, with the increasing legal uncertainty, the risk of abusive practices grows.

In this paper, the author concentrates on the concept introduced by CJEU, for the deduction right to arise, in case of holding companies, such as „direct and indirect involvement in the management of subsidiaries", how it's wide scope can affect principle of abuse of the law, practical problems related to the identification of companies aim to be involved in subsidiaries and difficulties related to the identification of proportion to what extent a taxable person is entitled to deduct input VAT. For the purpose of the paper „Mixed-holding Companies"[15] and case-law related to them is chosen as a research ground. However, due to limitations, researched case-law is not analyzed in light of fiscal neutrality.[16]

1. MIXED HOLDING COMPANIES

Based on CJEU's case law, a „pure" holding company is the legal entity which's entire activity constitutes only holding of shares[17] and its economic benefit purely depends on subsidiaries making the profit by conducting the separate economic activity and distributing dividends to its shareholders.

According to CJEU case-law, a pure holding company is not a taxable person unless it acquires goods and services for the purpose to conduct an economic activity that might be present in case of supplying those goods and services to its subsidiaries.[18]

On the other hand, a mixed holding company is a holding company that, besides holding shares, is directly or indirectly involved in the management of its subsidiaries and based on the legal relationship it receives direct consideration for services it supplies to subsidiaries.[19] It should be noted that holding company is a taxable person only when it receives consideration that is directly linked to the participation in management.[20]

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6 Judgment in Polysar, C-60/90, EU:C:1991:268.

7 Ibid Par. 14.

8 Judgment in Floridienne SA, C-142/99, EU:C:2000:623; Judgment in Cibo Participations, C-16/00, EU:C:2001:495; Judgment in Welthgrove, C-102/00, EU:C:2001:416 – which is discussed in chapter 3.

9 Judgment in Hong-Kong Trade, C-89/81, EU:C:1982:121; Par. 10; Judgment in MVM, C-28/16, EU:C:2017:7, Par. 44.

10 Joachim Eggers, Björn Ahrens, „The VAT Treatment of Holding Companies – German and EU VAT Practice Perspective", in International Vat Monitor May/June 2015, on IBFD search platform, p. 138.

11 For example: Judgment in Investrand BV, C-435/05, EU:C:2007:87; Judgment in Ryanair, C-249/17, EU:C:2018:834; Judgment in C&D Foods Acquisition, C-502/17, EU:C:2018:888.

12 For example: Judgment in KapHag, C-442/01, EU:C:2003:381; Judgment in Kretztechnik, C-465/03, EU:C:2005:320; Judgment in SKF, C-29/08, EU:C:2009:665; Judgment in Portugal Telecom, C-486/11, EU:C:2013:188.

13 Joachim Eggers, Björn Ahrens, „The VAT Treatment of Holding Companies – German and EU VAT Practice Perspective", in International Vat Monitor May/June 2015, on IBFD search platform, p. 138.

14 Rita de la Feria, „When Do Dealings in Shares Fall within the Scope of VAT?", EC Tax Review 18, no. 1 (2008): p. 24.

15 Characteristics of Mixed-holding companies is discussed in chapter 2.

16 Fiscal neutrality, as one of the most important principles for EU VAT has been discussed on many occasions. For further information, please see inter alia OECD international VAT/GTS guidelines drafts/guidelines on Neutrality December 2010, Marta Papis – Principles of Law: Function, Status and Impact in EU Tax Law – Online Books (Last Reviewed: 1 April 2014) – The Principle of Neutrality in EU VAT, Jose Manuel Macarro Osuna – Non-Reduced Rates for E-Books: Has the ECJ Allowed a Violation of Fiscal Neutrality? International VAT Monitor July/August 2016.

17 Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), „The Distinction between Direct and General Costs with Regard to the Deduction of Input VAT – The Case of Acquisition, Holding and Sale of Shares", World Tax Journal February 2012, page. 9.

18 Terra, Julie Kajus – Introduction to European VAT (Recast), chapter 17.7.9, p. 643.

19 Judgment in Hong-Kong Trade, C-89/81, EU:C:1982:121, Par. 13; Judgment in MVM, C-28/16, EU:C:2017:7, Par. 35.

20 Terra, Julie Kajus – Introduction to European VAT

2. INVOLVEMENT IN MANAGEMENT

2.1. What tType of sServices is Rregarded as Involvement in Management?

The CJEU first mentioned direct and indirect involvement in the management of subsidiaries as a basis for the rise of the right to deduct input VAT in Polysar case.[21] After that, the court had to determine what can be considered as involvement and which type of supplies should be made by the holding company to be regarded as a taxable person for deduction right to arise. These questions had been addressed in three[22] landmark judgments, according to which the involvement in the management of the subsidiaries requires the holding company to provide taxable supplies to its subsidiaries such as the supply of administrative, financial, commercial and technical services for consideration.[23]

The first case related to the involvement in the management of the subsidiaries was, Floridienne SA and Berginvest SA case.[24] Floridienne SA and Berginvest SA performed: Holding activities – for which they received dividends, supplies of Management services to its subsidiaries – for which they received fees, and financial services to its subsidiaries – for which they received interest payments.[25] The CJEU stated that a holding company that has direct or indirect involvement in the management of the companies in which the holding has been acquired shall be considered 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.[26] The CJEU held that the payment of dividends is not a consideration for the management services.[27] Furthermore, the reinvestment of the dividends received as loans to the subsidiaries is not a direct, permanent and necessary extension of the taxable activities of a holding company.[28]

Financial services such as giving loans to subsidiaries only fall within the scope of the VAT if loans are carried out „with a business or commercial purpose characterized by, in particular, a concern to maximize returns on capital investment".[29]

In the Welthgrove case, the CJEU had to interpret, and give guidance on the qualification of the nature of existing transactions between holding company and subsidiaries. The members of Welthgroves' board of directors engaged in the active guidance of its subsidiaries, however, remuneration was not charged for those activities, and only dividends were received from its subsidiaries.[30] As there was no consideration received by the holding company for its activities there was no taxable transaction and no right of deduction.

According to the Court's settled case-law, it is apparent 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.[31]

In the end, not only administrative, accounting, financial, commercial, information technology and technical services, are to be considered as involvement but the concept includes, day-to-day management, follow up of budgets, human resources or financial analytics, legal or accounting recordings, and any advisory help that may be needed for the purpose of conducting economic activity by the subsidiaries.[32]

2.2. Degree of Involvement

When the transaction has actually taken place in real life it is highly possible that tax authorities and taxable persons will not face difficulties to qualify the supplied services as direct or indirect involvement in subsidiaries. However, the situation is vague when input VAT is direct-

(Recast), chapter 17.7.9, p. 643.

21 Judgment in Polysar, C-60/90, EU:C:1991:268, Par. 14.

22 Judgment in Floridienne SA, C-142/99, EU:C:2000:623; Judgment in Cibo Participations, C – 16/00, EU:C:2001:495; Judgment in Welthgrove, C – 102/00, EU:C:2001:416.

23 Joachim Eggers, Björn Ahrens, „The VAT Treatment of Holding Companies – German and EU VAT Practice Perspective", in International Vat Monitor May/June 2015, on IBFD search platform, p. 138.

24 Judgment in Floridienne SA, C-142/99, EU:C:2000:623.

25 Ibid, Par. 6.

26 Ibid, Par. 19.

27 Judgment in Floridienne SA, C-142/99, EU:C:2000:623, Par. 21.

28 Ibid, Par. 30.

29 Ibid, Par. 32, Ben Terra, Julie Kajus – Introduction to European VAT (Recast), chapter 17.7, p. 630.

30 Judgment in Welthgrove, C – 102/00, EU:C:2001:416, Par. 4-5.

31 judgments in Floridienne and Berginvest, C-142/99, EU:C:2000:623; Cibo Participations, C-16/00, EU:C:2001:495; and Portugal Telecom, C-496/11, EU:C:2013:188.

32 Judgment in Polysar Investments Netherlands BV, C-60/90, EU:C:1991:268; Judgment in Floridienne and Berginvest, C-142/99, EU:C:2000:623.

ly linked to the acquisition of shares and deduction right arises before the taxed transaction takes place. How should tax authorities make sure that the company intends to supply taxed transactions? One of the practical solutions to this question might be the evidence related to a level of „decisive" involvement.

Even though, it is apparent from the judgment in the Cibo Participation case[33] that CJEU is not concerned by this question. Cibo has appointed its chairman as the chairman of the three subsidiaries and makes available qualified staff work in the subsidiaries – in general, administrative, financial, commercial and technical management. Cibo received consideration for the supply of these services. It acquired new subsidiaries and deducted VAT on expenses related to this, however, the tax authorities refused the VAT deduction on the ground that most of the revenues of the holding consisted of dividend income.[34] The CJEU recognized the genuine business purpose of Cibo Participations, which consisted of actively managing the share ownership as a whole and getting involved in the management of its subsidiaries: this was referred to as the involvement concept. This 'involvement' was considered a genuine business activity[35] and the right of deduction was granted.

In this judgment, the CJEU does not address the French government argument that a level of „decisive" involvement must be demonstrated,[36] which means that, for the rise of the right to deduct, the holding company which acquires the shares should, in reality, be able to influence the decision of subsidiary to form a contractual relationship that would result in performing taxable transactions.

Given these points, it is apparent that from the CJEU perspective, the degree of involvement does not play a decisive role as far as the holding company intends to conduct genuine business activity. Yet, what if the holding company has not enough voting power to be involved in the decision-making process? How should domestic legislators divide the burden of proof between taxable persons and tax authorities? In spite of the validity of those questions, it seems that the CJEU never addresses the questions of practical matters and always leaves it to domestic courts, to assess the case.

3. ABUSE OF LAW

3.1. Abuse of Law Principle in EU VAT

Abuse of law principle in EU VAT has been introduced as a measure and principle of interpretation of VAT Directive,[37] a concept introduced by the CJEU is a controversial subject, because of difficulties related to its practical application and the possible negative effects on legal certainty.[38] However, according to the case-law of the CJEU, member states have discretion and to some extent obligation to combat the abusive practice.[39]

The decisions of the CJEU on abuse in the field of VAT and direct taxation mixed up general concepts such as tax avoidance, evasion, abuse, and fraud until the Halifax[40] decision which is regarded as the landmark decision on abuse for value-added tax purposes.[41]

In Halifax's judgment, the CJEU defined abuse as a circumvention of taxing rules through transactions essentially driven by tax reasons.[42] Furthermore, the court emphasized on the importance of the existence of objective factors for detecting the abusive practices

33 Judgment in Cibo Participations, C-16/00, EU:C:2001:495.

34 Ibid, Par. 8-10.

35 Odile Courjon (2014) „Deductibility of VAT on expenses incurred for the purchase of shares by a holding: a helpful French Supreme Court decision", World Journal of VAT/GST Law, 3:1, page. 57.

36 Ben Terra, Julie Kajus – Introduction to European VAT (Recast), chapter 17.7, p. 630. There is not any reference to this opinion in the Cibo Participations Judgment, however Ben Terra mentions that „the French argument that a level of „decisive" involvement must be demonstrated was rejected".

37 A. Dourado, Chapter 9. „The Meaning of Aggressive Tax Planning and Avoidance in the European Union and the OECD: An Example of Legal Pluralism in International Tax Law" in „International Tax Law: New Challenges to and from Constitutional and Legal Pluralism – (J. Englisch ed., IBFD 2016), Books IBFD", p. 5.

38 Maduro, Poaires „Foreword." Prohibition of Abuse of Law: A New General Principle of EU Law? Ed. Rita de la Feria and Stefan Vogenauer. London: Hart Publishing, 2011, p. vii.

39 Judgment in SIA 'Kuršu zeme', C273/18, EU:C:2019:588, Par. 34; Judgment in Cussens and Others, C251/16, EU:C:2017:881, Par. 43; Dennis Weber also acknowledges that in some cases there might be consideration of member states obligation to combat abuse of law, „Abuse of Law in the Context of Indirect Taxation: Why We Need the Subjective Intention Test, when is Combating Abuse an Obligation and Other Comments." Prohibition of Abuse of Law: A New General Principle of EU Law? Ed. Rita de la Feria and Stefan Vogenauer. London: Hart Publishing, 2011, p. 399–400.

40 Judgment in Halifax, C-255/02, EU:C:2006:121.

41 Pistone, Pasquale. „Abuse of Law in the Context of Indirect Taxation: From (Before) EmslandStärke 1 to Halifax (and Beyond)." Prohibition of Abuse of Law: A New General Principle of EU Law? Ed. Rita de la Feria and Stefan Vogenauer. London: Hart Publishing, 2011, p. 387.

42 Ibid.

[43] and finally by applying the principle of proportionality,[44] the Court underlined that measures combating the abusive practice could not be applied in a manner which would result in legitimately exceeding the reestablishment of the situation that would have arisen in the absence of the abusive practices.[45]

3.2. Burden of Proof

Along with the question of what is the abuse of right and what kind of anti-abuse provision may be used against it, the question of how the burden of proof should be divided has critical importance.

In Emsland-Stärke's[46] case, CJEU scrutinized that proof for the subjective[47] and objective[48] abuse test „must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined".[49]

Existence of objective and subjective abuse tests, in practice results in a division of the burden of proof. First of all, official authorities should demonstrate that the objective test has been satisfied and then if it appears that there is a suspicion of abuse, an interested party should be allowed to demonstrate that there was not only tax advantage reason for the transaction.[50]

The CJEU permits the legislature to regard specific situations as abusive but with the obligation to offer the taxpayer the opportunity to provide proof to the contrary. It can be assumed that if the taxpayer produces evidence and the tax authorities have doubts about this, it is up to the tax authorities to verify the insufficient nature of the evidence at issue.[51]

How the member states will formulate the law that will be an actual contemplation of the reality is the everyday problem of a legislator and it is always the question of evaluation of substance and subjective element of the transaction by the objective criteria and objective evidence that leads to greater mysteries of everyday life of lawyers.

3.3. Involvement as an Inspiration for Abuse

As it is derived from the case-law of the CJEU regarding „direct and indirect involvement", the concept is broad enough to cover all kinds of transactions that are subject to VAT, still result of Marle Participations[52] case stands as an example of how ludicrous this way of interpretation can be. The CJEU once more clarified the concept of direct and indirect involvement in the management of subsidiaries. The question was whether the letting of a building by a holding company to a subsidiary could be considered as direct or indirect involvement in the management of that subsidiary and as such giving rise to a VAT deduction right.[53]

The CJEU concluded that the letting of a building by a holding company to its subsidiary amounts to involvement in the management of that subsidiary, which must be considered to be an economic activity giving rise to the right to deduct the VAT on the expenditure incurred by the company to acquire securities of that subsidiary, on condition that that supply of services is made on a continuing basis, that it is carried out for consideration and that it is taxed, meaning that the letting is not exempt and that there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary.[54]

This judgment not only clarifies the notion of involvement in the management of a subsidiary but also takes a broad approach concerning this phenomenon. Such a broad interpretation will enable holding companies to recover the input VAT incurred in relation to shareholding acquisitions, to a greater extent and with more simplified planning, if they provide taxable services to these acquired subsidiaries.

The CJEU also clarified that the deduction should be granted regardless of the amount of the output VAT, born by supplied services i.e. even if there is a difference between the amount of the VAT deduction and the VAT chargeable on the other hand.[55] If this

43 Judgment in Halifax, C-255/02, EU:C:2006:121, Par. 75.

44 Proportionality principle is one of the fundamental principles of EU Law and EU VAT, which is not under the scope of this paper and because of is not discussed in depth, for further information plea, see inter alia, Nicholas Emiliou „The principle of proportionality in European law", Kluwer Law International, 1996; Terra, Julie Kajus – Introduction to European VAT (Recast).

45 Pistone, Pasquale. supra n 39, p. 387.

46 Judgment in Emsland-Stärke, C-110/99, EU:C:2000:695.

47 "the subjective abuse intention" – Weber, Dennis, supra n 37, p. 397.

48 "the objective circumstances from which it appears that the envisioned objective of EU law cannot be attained" – Ibid, p. 398.

49 Ibid, Par. 54

50 Weber, Dennis, „Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 2", European Taxation July, 2013, on IBFD search platform, p. 319.

51 Ibid.

52 Judgment in Marle Participations SARL, C – 320/17, EU:C:2018:537.

53 Ibid, Par. 17.

54 Ibid, Par. 45.

55 Supra n 48, Par. 40.

argumentation should be applied in every situation, member states may end up departing from the obligation to fight against abusive practices as in the case where deductible tax is ten or more time higher that chargeable, subjective element for conducting agreements for the tax advantage will dominate, however, due to other existing economical factors based on Halifax case member states will not be able to refuse VAT deduction.

On the one hand, the CJEU recognized that „the right of deduction may be refused when it is established, in the light of objective evidence, that that right is being invoked for fraudulent or abusive ends".[56] Even so, it does not assess case at hand from that perspective and leaves it on member states to solve the problem with the sufficient measures that would comply with the principle of neutrality[57] and proportionality.[58]

Another important case regarding the possibility of abuse is Ryanair Case,[59] which deals with the question whether a company, which intends to acquire all the shares of another company in order to pursue an economic activity consisting in the provision of management services subject to VAT to the latter company, has the right to deduct input VAT paid on expenditure relating to consultancy services provided in the context of a takeover bid, even if ultimately that economic activity was not carried out.

Even though the CJEU acknowledged the importance of the subjective element of the transaction „any person with the intention, as confirmed by objective elements, of independently starting an economic activity, and who incurs the initial investment expenditure for those purposes must be regarded as a taxable person",[60] it did not evaluate on how the subjective element should be determined and what is the proportional value of that element and granted the full input VAT deduction.

Above mentioned interpretation of the CJEU leads to many unanswered questions, as based on Marle participations and Ryanair, it can be considered that if a company will be able to demonstrate with minimal requirements even the minor supplies of taxable services,[61] full input VAT deduction should be granted, that will probably lead to more sophisticated tax planning and conducting not fully artificial but economically insignificant agreements by holding company for the advantage of input VAT deduction.

In this regard, an important question arises from the recent case-law of the court in, direct taxation judgments related to „Danish Beneficial Ownership".[62] What will be the influence and legal importance of those cases in the field of VAT? remains unclear. However, as it seems, nowadays fighting against abuse of law and fraud stands as the number one objective on the political level of the EU and in the future, we might see CJEU emphasizing stricter on abusive practices and the importance of combating against it.

4. RIGHT TO DEDUCT

4.1. Direct Costs or General Costs?

The right of deduction is an integral part of the VAT system and is intended to relieve the trader entirely of the burden of the VAT paid in the course of all his economic activities. For the fulfillment of this Purpose VAT Directive introduces the so-called „direct link test criteria".[63]

Based on the nature of the required link between the individual expenses and the output transactions of the business, it is subsequently possible to divide the incurred expenses into two overall categories, namely direct costs, and general cost.[64]

If there is a direct and immediate link between the

56 Judgment in Marle Participations SARL, C – 320/17, EU:C:2018:537, Par. 41.

57 The CJEU has referred to importance of principle of Neutrality in many cases, for example: Judgment in Becker, C-8/81, EU:C:1982:7; Judgment in Puffer, C-460/07, EU:C:2009:254; Judgment in Zimmermann, C174/11, EU:C:2012:716, and so on.

58 CJEU has referred to importance of principle of proportionality in many cases, for example: Judgment in Rēdlihs, C263/11, EU:C:2012:497; Judgment in Zabrus, C-81/17, EU:C:2018:283 and so on.

59 Judgment in Ryanair, C-249/17, EU:C:2018:834.

60 Judgment in Ryanair, C-249/17, EU:C:2018:834, Par. 18.

61 This question was also raised by Joachim Eggers, Björn Ahrens, „The VAT Treatment of Holding Companies – German and EU VAT Practice Perspective", International Vat Monitor May/June 2015, on IBFD search platform, p. 139-140.

62 Judgment in T Denmark and Y Denmark, Joined cases C-116/16 and C-117/16, EU:C:2019:135; Judgment in N Luxembourg 1 and others, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134 – they are considered to represent new approach on abusive and fraudulent practices in direct taxation field which combats not only holly artificial agreements but agreements with less economical importance that tax advantage, and gives member states wider scope to combat against it.

63 According to article 167 and 168 taxable person has the right to deduct input VAT as far as goods and services received are used for taxed transactions.

64 Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), „The direct and immediate link test regarding deduction of input VAT: a consumption-based test versus an economic-based test?", World Journal of VAT/GST Law, 3:2, p. 72.

input transaction and the specific output transactions, the cost will be treated as a direct cost and will give rise either full or no deduction, depending on whether the output transaction is taxable, exempt or out of scope in nature.[65]

However, the CJEU has developed a long-standing line of favorable case law on VAT deduction on general costs. According to which, if inputs do not have a direct and immediate link with a clearly defined part of a taxable person's economic activities, the VAT on the inputs may still be (partly or fully) deductible if expenses can be characterized as general costs.[66]

If the nature of expenses is qualified as general costs, then there needs to be a direct and immediate link between the expenses and the whole business purpose of the holding.[67] This 'business-as-a-whole' link has become the method for the Court to link business expenditure directly to taxed outputs and thereby allowing a right to deduct. As long as the cost is the consequence of the purpose to serve to business, the Court seems to allow a deduction.[68]

Base on observation of the CJEU case-law[69] on input VAT deduction, It is found that a cost incurred in connection with an acquisition, sale, and holding of shares constitutes a general cost.[70]

4.2. Full or Partial Deduction?

As it is apparent from the case-law of the CJEU and above-mentioned practice, mixed holding companies are considered to represent taxable persons and their activity can be regarded as economic activity in specific circumstances, however, one substantial question is still to be answered „to what extent mixed holding companies are able to deduct input VAT?"

Answer to this question can be found in case Larentia + Minerva and Marenave Schiffahrt, C-108/14, and C-109/14. In both cases, companies were involved in the management of the subsidiaries and deducted fully the input VAT which was connected to the acquisition of shares. [71]

The CJEU once more acknowledged that a holding company does not have the status of a taxable person within the meaning of Article 9 of the VAT Directive and, accordingly, does not have the right to deduct tax under Articles 167 and 168 of that directive when it has as its sole purpose the acquisition of shares in other undertakings.[72]

According to the judgment, expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of those subsidiaries 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.[73]

It should also be mentioned that in the case at hand, holding companies were involved only in taxable transactions and they didn't have exempt or out of scope activities, besides receiving dividends. Input VAT paid on costs incurred in connection with a purpose to acquire the shares can only give rise to

65 Ibid.

66 Ad van Doesum and Gert-Jan van Norden, „European Union – The Right to Deduct under EU VAT" – International VAT Monitor, 2011, No. 5, p. 328.

67 Odile Courjon (2014) „Deductibility of VAT on expenses incurred for the purchase of shares by a holding: a helpful French Supreme Court decision", World Journal of VAT/GST Law, 3:1, p. 56.

68 Oskar Henkow (2016), „Sveda—The increasing obscurity of the direct link test in EU VAT", World Journal of VAT/GST Law, 5:1, p. 51-52.

69 Judgment in Midland Bank, C-98/98, EU:C:2000:300; Judgment in Abbey National, C-408/98, EU:C:2001:110; Judgment in Kretzteknik, C-465/03, EU:C:2005:320; Judgment in Securenta, C-437/06, EU:C:2008:166; Judgment in AB SKF, C-29/08, EU:C:2009:665.

70 Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), „The Distinction between Direct and General Costs with Regard to the Deduction of Input VAT – The Case of Acquisition, Holding and Sale of Shares", World Tax Journal February 2012, p. 18.

71 Judgment in Joind cases Larentia + Minerva and Marenave, C108/14 and C109/14, EU:C:2015:496, Par. 7-8, 12-13, „Larentia + Minerva holds, as a limited partner, 98% of the shares in two subsidiaries constituted in the form of limited partnerships with a limited liability company as general partner. It also provides those subsidiaries, as a „management holding company", with administrative and business services for remuneration. In respect of these services subject to VAT, Larentia + Minerva deducted in full the input VAT paid in raising from a third-party capital which was used to fund the acquisition of its shareholdings in the subsidiaries and its services, in particular administrative and consultancy services. Marenave increased its capital in 2006 and the costs for the issue of shares in connection with that increase gave rise to a VAT payment of EUR 373,347.57. In the same year that company, as a holding company, acquired shares in four „limited shipping partnerships", which are partnerships in which Marenave was involved in the business management for remuneration. From the VAT payable in respect of the revenue from those management activities in 2006, it deducted, inter alia, the entire sum of EUR 373,347.57 as input VAT."

72 Ibid, Par. 18-19; Terra, Julie Kajus – Introduction to European VAT (Recast), chapter 17.7.9, p. 643.

73 Judgment in Joind cases Larentia + Minerva and Marenave, C108/14 and C109/14, EU:C:2015:496, Par. 33.

a right to deduct when those costs can be characterized as overhead expenses, and the VAT will be proportionally deductible relative to the taxable operations of the taxpayer. Even so, since dividends are excluded from the scope of VAT, they are not included in the calculation of the VAT deduction ratio and as a result, the amount of the deductible tax equals full input VAT paid.[74]

The result is different if the holding company is involved in exempt or/and out of scope activities in parallel to taxed economic activity. In that case, input VAT connected to the acquisition of shareholdings in subsidiaries paid by a holding company which does not involve itself in the management of all subsidiaries and which does not 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 the expenditure which is reflected in the economic activity.[75]

From the holding companies perspective, The CJEU interpretation and assertion of the law and existing reality, without any doubt leads to positive results, and extreme understanding of the principle of neutrality could be used as the justification ground for this judgment, „All in all, fiscal neutrality has prevailed over the mere technique of the common VAT system",[76] however, form the tax policy perspective, it seems that, in every situation, acquisition of shares which is accompanied by the intention to be involved in management, overpowers the actual intention to invest the capital and make dividend income, that is not the balanced and proportional assumption of the situation and proportional deduction would more accurately reflect reality.

CONCLUSION

Applying VAT to dealings in shares poses conceptual and practical difficulties, it is also apparent that not only the CJEU significantly contributed to the development of that uncertainty but also, in some cases, it has arguably made matters worse.[77]

Based on the assertion of case-law of the CJEU it is possible to conclude that if a holding company is directly or indirectly involved in the management of its subsidiary, and this involvement is expressed and accompanied by making taxed supplies to the subsidiary, a direct and immediate link between the costs and the taxable person's economic activity as a whole will be established.[78]

The CJEU has shown taxpayers new routes to the deduction of input VAT. A holding company that was involved or plans to be involved in the management of a subsidiary now has new planning possibilities that can lead to mitigation of the VAT burden it otherwise would have to bear.[79]

The CJEU has emphasized the importance of strict observations of the principle of legal certainty upon the interpretation of rules liable to entail financial consequences.[80] Although based on observed cases, abuse of law principle and the legitimate expectations of taxpayers do not seem to be taken into consideration that could lead taxpayers to explore these new routes, despite the remaining open and unanswered questions.

The CJEU's surprising action makes the EU VAT system even more sophisticated than it already is, and it is difficult to analyze and forecast where the limitations of the CJEU's approach are located.[81] According to recital 5 of the preamble to the VAT Directive, VAT should be levied in a general manner to achieve the highest degree of simplicity and neutrality[82] however the CJEU seems to be contributing to the adding of ever-increasing and unnecessary complexity to the EU VAT system[83] that leads to advanced holes in legislation and even more ground for

74 Odile Courjon (2014) „Deductibility of VAT on expenses incurred for the purchase of shares by a holding: a helpful French Supreme Court decision", World Journal of VAT/GST Law, 3:1, p. 57.

75 Judgment in Joind cases Larentia + Minerva and Marenave, C108/14 and C109/14, EU:C:2015:496, Par. 33.

76 Ad van Doesum, Herman van Kesteren, Gert-Jan van Norden „Share Disposals and the Right of Deduction of Input VAT", EC Tax Review, 2010-2, p. 73.

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80 Judgment in Halifax, C-255/02, EU:C:2006:121, Par. 72.

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abusive consequences without possible reciprocal actions.

After all, based on the CJEU case-law it is apparent that approach related to involvement concept does not infringe existing abuse of law principle, in theory, however, one of the restraint outcomes of all these cases is that, while in theory, the burden of proof lies with the tax administration, the taxpayer is obliged to introduce the sufficient evidence that the transactions have actually taken place and their purpose was in accordance to existing law. In practice, this leads to a shift of the burden of the proof from the state to the taxpayer. Yet, it can also be considered that taxpayers are in a far better position after recent judgments to defend their VAT deduction rights.[84]

84 Odile Courjon (2014) „Deductibility of VAT on expenses incurred for the purchase of shares by a holding: a helpful French Supreme Court decision", World Journal of VAT/GST Law, 3:1, page. 60.

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