VAT focus

VAT deductibility for fund-raising: clarity at last

Speed read

The Supreme Court in Frank A Smart Ltd & Son distilled the existing CJEU case law to provide clarity on VAT deductibility for those undertaking fund-raising activities. Helpfully, it appears that the receipt of outside the scope of VAT income for a business is not fatal to VAT deductibility, provided it can be demonstrated that the costs incurred in relation to the outside the scope income forms part of either the overheads of the business or ongoing taxable transactions. Despite this helpful analysis of the case law, there is little doubt that the judgment itself will be analysed by the courts in the future as to exactly how it should be applied to a wide variety of cases on input tax recovery.

Giles Salmond
Eversheds Sutherland
Giles Salmond is a partner and head of indirect taxes and tax dispute resolution at Eversheds Sutherland. He advises on all aspects of VAT, customs duties and other indirect taxes and has particular expertise in litigation. Giles regularly advises on the EU law aspects of VAT and indirect taxes. Email: gilessalmond@eversheds-sutherland.com; tel: 020 7919 4700.

Matthew Cummings
Eversheds Sutherland
Matthew Cummings is an associate in the tax group at Eversheds Sutherland. Matthew advises various tax issues, and specialises in advising on VAT and disputes, with a focus on the education sector. Email: matthewcummings@eversheds-sutherland.com; tel: 0113 200 4364.

VAT deductibility in the context of non-economic activities is having its moment in the spotlight. First was the Court of Justice of the EU (CJEU) decision in University of Cambridge (Case C-316/18), concluding that VAT incurred on services relating to the investment of donations and endowments (an outside the scope of VAT activity) is not deductible, unless there is an objective link between the outside the scope activity and the taxpayer’s wider taxable activities. The university failed to obtain the right to recover the VAT incurred on services obtained to manage its investment fund as it could not be proven that the cost of these services formed a component of the university’s prices charged for its taxable activities. Hot on the heels of this judgment, the Supreme Court has provided a timely decision on the VAT deductibility on costs relating to an outside the scope activity, in this case the acquisition of units giving rise to the right to obtain farming subsidies.

The facts

As always with VAT cases, the facts are critical to the legal analysis and need to be considered carefully. FASL is a Scottish farming company that obtained units of entitlements to EU farming subsidies, known as single farm payments (SFPs). SFPs were available to those with eligible land who met the requirements of ensuring plant and animal health and maintaining the eligible land in what was known as ‘good agricultural and environmental condition.’ Units in entitlements to SFPs were initially allocated to farmers, when the scheme began in 2005. The units in the entitlements to SFPs were tradable and a market subsequently emerged. FASL began purchasing the units in SFP entitlements as a method of funding their wholly taxable business activities. FASL used the funds derived from the SFPs to pay off its overdraft and develop further business operations, including farm buildings, the purchase of other farms and scoping to create a wind farm. FASL incurred VAT on the purchase of the SFP entitlements and sought to recover the VAT as input tax on the basis that the SFP funds were used to further FASL’s taxable business activities. It was agreed the sale on the market of units of entitlement to SFPs were taxable supplies. The question throughout the litigation was whether the receipt of the SFPs prevented FASL from deducting the VAT which it had paid on the purchase of the units.

The journey from the First-tier Tribunal in Scotland to the Supreme Court has been one sided, with the FTT upholding FASL’s appeal and the Upper Tribunal and Court of Session dismissing HMRC’s subsequent appeals. The question for the Supreme Court was whether FASL was entitled to deduct the VAT incurred in purchasing the entitlements to the SFPs as input tax which it claimed it used in making taxable supplies or whether, as HMRC argued, the input tax on the purchase of the units had a direct and immediate link to the receipt of the outside the scope SFPs.

The arguments

Broadly, HMRC’s challenge in the Supreme Court contained three core submissions. First was that income derived from the SFPs was investment income and outside the scope of VAT. There was therefore no direct and immediate link between the input tax charged on the SFP entitlements and any taxable activities undertaken by FASL. The only direct and immediate link is between the input tax on the SFP entitlements and the receipt of the SFPs, which is an outside the scope transaction.

Second, HMRC argued that the Court of Session incorrectly concluded that VAT incurred on the SFP entitlements was deductible as input tax as an overhead of FASL’s business.

Third, HMRC submitted all three of the lower courts’ reliance on the evidence of FASL’s director’s intention to use the payments (obtained via the acquisition of the entitlement units to SFPs) to fund FASL’s business was an irrelevant consideration.

HMRC’s submissions relied upon BLP Group Plc v Customs & Excise Commrs (Case C-4/94) to support that VAT incurred on costs directly and immediately related to an exempt supply is not recoverable, regardless of whether the funds obtained were used for downstream taxable activities. HMRC submitted there was no reason why the analysis in BLP relating to exempt supplies should not apply to supplies outside the scope of VAT. HMRC argued if the Supreme Court was in any doubt about this contention, then it should refer to the CJEU.

FASL’s response to HMRC’s appeal, as summarised by the Supreme Court, was based on the principle of neutrality, and continued (at para 23):

‘the VAT system gives fully taxable traders, in other words people, such as FASL, who only make taxable supplies, a right to recover all input tax incurred in raising finance for
The principle of neutrality under article 168 of Principal In fund-raising activities that are either exempt (such as a
Alternatively, there can be a direct and immediate link
is squared with situations such as in
considered again the ability to recover VAT in the context
of an exempt share sale by a parent of a wholly-owned subsidiary. Lord Hodge observed that the CJEU held that
the referring court should look at the facts and determine
whether the costs incurred were likely to be incorporated in the price of the shares sold or whether they were among
only the cost components of transactions within the scope
of the taxable person’s economic activities. Lord Hodge,
importantly for his overall analysis, notes at [46], that the
CJEU itself observed the main difference between an exempt
share sale and a share sale that was outside the scope of VAT
was whether the taxable company was or was not involved in
the management of the companies whose shares were being
sold. He went on to say, that the CJEU must have accepted
the distinction made by AG Jacobs in Abbey National and
Kretztechnik, but recognised the need to modify the result for
the purposes of an exempt initial transaction.

In addition, Lord Hodge noted the CJEU’s determination in SKF that where a taxable person acquires goods or services and
uses them for the purposes of transactions that are exempt
or do not fall within the scope of VAT, no output tax can be
collected or input tax deducted. In relation to this
factor, he said in the context of a fund-raising transaction,
the CJEU must have been referring to the downstream
transactions of which the input tax costs form a cost
component, and not the initial fund-raising transaction itself,
unless the costs of the inputs was a component of the price of
the shares in the initial transaction. Ultimately, Lord Hodge
concluded that it was ‘clear’ that in SKF the CJEU has not
extended the reasoning of BLP to apply to outside the scope
fund-raising transactions.

The court’s review
The court has analysed, carefully, what the CJEU has said in
the long line of leading cases of BLP, Midland Bank (Case
C-98/98), Abbey National (Case C-408/98), Kretztechnik
(Case C-465/03), Investrand BV (Case C-435/05), Securenta
(C-437/06), SKF (Case C-29/08), Iberdrola (Case C-132/16)
and Cambridge (Case C-316/18).

Lord Hodge placed particular weight on the opinion of Advocate General Jacobs in Abbey National (the case
concerning input tax recovery in the context of a TOGC)
where he contrasted the approach of the CJEU in BLP
(input tax used to effect an exempt sale of shares). As Lord
Hodge put it (at para 31): ‘what mattered was whether the
taxed supply was a cost component of a taxable output, and
not whether the most closely-linked transaction was itself
taxable’. He went on to say it was inherent in an exempt
transaction that it fatally broke the chain between a supply
and the taxable person’s taxable activities, such that input tax
used to make that supply was irrecoverable.

However, where no supply of goods or services (taxable
or exempt) takes place in a transaction outside the scope of
VAT, the chain was not broken. One was required to look
beyond the immediate transaction to see whether the supply
giving rise to input tax deduction, formed a cost component
of some other taxable transaction, including in the form of
general overheads. The advocate for FASL contended that
the CJEU has since gone on in later case law to adopt the
reasoning of AG Jacobs. This was the approach of the CJEU
in Kretztechnik where it was possible to ignore the outside
the scope of VAT share issue, in order to recover the VAT on
the costs incurred in making that share issue, as Kretztechnik
was a fully taxable person.

Lord Hodge gives some helpful guidance as to how this
is squared with situations such as in SKF, where the CJEU
considered again the ability to recover VAT in the context
of

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He held that in order to avoid discriminatory treatment of taxable persons, it has extended the reasoning in the cases about outside the scope share disposals to share disposals which are VAT exempt, requiring an examination as to
whether the costs associated with the input services are incorporated in the price of the shares sold in the initial
transaction or in the price of the taxable person’s products in
downstream transactions. If the latter are taxable transactions
the input tax is recoverable. Accordingly, a factual analysis will
be important to determine this question in cases of this type.

In a helpful summary, Lord Hodge, distilled the following
from his CJEU case law review:

- The principle of neutrality under article 168 of Principal
VAT Directive requires a taxable person to be relieved of the
burden of VAT payable or paid in the course of that
person’s economic activity.

- There must be a direct and immediate link between the
incoming goods and services acquired by the taxable
person and the outgoing taxable supplies made by that
person. The link exists if the cost of the goods and services
acquired form part of the cost component of the taxable
supplies.

- Alternatively, there can be a direct and immediate link
between the incoming goods and services and the whole
of the taxable person’s taxable supplies if the cost incurred
forms part of the overheads of the business.

- In fund-raising activities that are either exempt (such as a
share sale) or outside the scope of VAT (such as receipt of
their business so long as (i) the finance which they raise
is spent on funding the business which goes on to make
further taxable supplies and (ii) the financing exercise
itself remains outside the scope of VAT because it does
not involve the taxable person in making any taxable or
exempt supplies. FASL does not dispute that if it were in
the future to use part of the funds, which it has obtained
through the receipt of SFPs and kept in its bank account,
on downstream activities which were outside the scope of
VAT, that use would restrict the input tax to which it had
been entitled and might give rise to an obligation to repay
a proportionate part of any deduction which it had made
or any repayment of VAT which it had received from
HMRC. Disagreeing with HMRC, FASL submits that the
case law of the CJEU is clear and supports its position.

The Supreme Court agreed that FASL is entitled to recover
the VAT incurred in obtaining the SPF entitlements as input
tax. In support of this conclusion, Lord Hodge (giving the
only judgment of the court and with whom the other judges
all agreed) provided a detailed distillation of CJEU case law,
the interpretation of which was disputed by HMRC.

In determining the correct approach to be taken, the
Supreme Court’s CJEU case law review reached the broad
conclusion at para 56 that there could be a ‘direct and
immediate link between an input [i.e. FASL’s acquisition
of the SPF entitlements] and either (i) particular output
transactions or (ii) the taxable person’s economic activity as a
whole. This link would exist if the cost of the input was in the
first case a cost component of the particular transactions and
in the second case if it was a cost component of the price
of goods and services which it supplies.’
a subsidy), VAT may be recovered on professional services relating to the fundraising if the purpose of the fundraising is to fund future taxable supplies. Testing this purpose is a question of fact requiring objective evidence.

There is a rich seam of analysis of the CJEU case law in this judgment that will no doubt be analysed by the courts in the years to come. However, what is striking is that although Lord Hodge has not said the reasoning in BLP has been extended in SKF, in his summary of the case law, he focuses on para 68 of the judgment in the latter, stating:

'It follows that, if the consultancy costs relating to disposals of shareholdings are considered to form part of the taxable person’s general costs in cases where the disposal itself is outside the scope of VAT, the same tax treatment must be allowed if the disposal is classified as an exempted transaction.'

What is critical to the deduction of the input tax, in the latter scenario, is whether the input tax costs are incorporated in the price of an exempt share sale. If so, input tax on the associated costs are blocked, but if not, it appears that there is scope, nevertheless, if an objective analysis of the facts supports it, for the input tax to be recoverable if there are downstream taxable activities.

Reference to CJEU

The Supreme Court rejected HMRC’s request for a reference to the CJEU on the basis that the FTT made findings of fact that entitled it to conclude that FASL, when it acquired units of entitlement to SFPs, was acting as a taxable person because of its aim of accumulating sums to develop its taxable business through capital expenditure on assets which it would use to generate taxable outputs. Lord Hodge held, at para 67, that he did not ‘detect in the jurisprudence of the CJEU any basis for distinguishing expenditure incurred in a fund-raising exercise which takes the form of a sale of shares from a fund-raising exercise that involves the receipt of a subsidy over several years.’ He held that the payment of the subsidies were not separate transactions from the acquisition of the entitlement to the subsidies, which is capable of breaking the link between the purchase of the units and the use of the net proceeds of the subsidies in FASL’s taxable activities.

Conclusions

Thanks to the Supreme Court’s careful distillation of CJEU jurisprudence, there is now some clarity on VAT deductibility for those undertaking fund-raising activities. Helpfully, it appears that the receipt of outside the scope of VAT income for a business is not fatal to VAT deductibility, provided it can be demonstrated that the costs incurred in relation to the outside the scope income forms part of either the overheads of the business or to an ongoing taxable transaction. This case also seems to put paid to HMRC’s valiant efforts to argue that outside the scope of VAT transactions almost automatically create the same chain breaking event as an exempt supply of shares. They do not. As we said earlier, the input tax status depends upon a careful consideration of the objective factors. Despite this helpful analysis of the case law, there is no doubt that the judgment will itself be analysed by the courts in the future as to exactly how it should be applied to a wide variety of cases on input tax recovery.

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