

CJEU: VAT recovery also permissible for unsuccessful acquisition

On October 17, 2018, the Court of Justice of the European Union (hereinafter: CJEU) rendered judgment in the Ryanair case (C-249/17). The case concerned the Irish airline Ryanair, which had incurred costs in respect of its attempt to acquire its competitor Aer Lingus. The CJEU ruled that for the purposes of acquiring the shares in Aer Lingus, Ryanair could fully and directly recover all the VAT on professional advisor services. According to the CJEU, the acquisition costs incurred relate to Ryanair's intention to provide VAT-taxed management services to Aer Lingus. The outcome of this judgment is important for all businesses involved with acquisitions and is thus not only limited to the holding company practice.

1. CJEU judgment

The CJEU first of all noted that Ryanair acted as a VAT taxable person as soon as it engaged professional advisor services for the purposes of the intended acquisition of the shares in Aer Lingus. Ryanair intended to perform an economic activity for the newly acquired participation by way of providing management services to that participation. In a fairly brief review, the CJEU then ruled that because of that intention Ryanair is entitled to directly recover VAT on professional advisor fees. The fact that the acquisition was ultimately unsuccessful and also that the management services never eventuated, does not hinder the acceptance of a full and direct VAT recovery right.

2. Current Dutch practice

The CJEU judgment is in line with current Dutch practice. In the Netherlands it is also the case that VAT on professional advisor services can generally be deducted if an acquisition is unsuccessful, provided there is an objective intention to provide VAT-taxed services for that company. In our view, it is possible to draw this conclusion not only if there is a draft management agreement, but also, for example, if the acquirer involves itself in the management of the other participations it owns in exchange for a fee and its policy is aimed at doing that for new participations. In the case of Dutch participations, there is also the possibility to include them in an existing VAT group.

In our view, this does not only have to entail management services. The recent CJEU judgment in the Marle Participations case (C-320/17) shows that an acquiring company may also perform other VAT-taxed services for its participation in order to obtain a VAT recovery right. This includes, for example, VAT-taxed property leasing or administrative support services.

3. What are your options?

If you intend to make acquisitions, then it is advisable to review your VAT position on time. The CJEU judgment in the Ryanair case once again shows how important it is in the early stages of an acquisition to objectively substantiate you intend to perform VAT-taxed activities for the intended participation. This will enable you to secure the recovery of VAT as much as possible, even if the acquisition is unsuccessful.

The advisors of Meijburg & Co's Indirect Tax Group and M&A Group would be pleased to assist you further with this issue. Feel free to contact one of these tax advisors or your regular contact for more information.

Meijburg & Co
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