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Amended VAT guidelines have major consequences for VAT position holding companies

On December 10, 2024 the Deputy Minister of Finance announced that he will be repealing the VAT Holding Resolution and the Decree on the Sale of Shares as of July 1, 2025. At the same time, he published new guidelines in two new policy decrees that will take effect on that same date. The repealed decrees contain important policy on the recovery of VAT on costs that (also) relate to the acquisition, holding and sale of shares. This policy has undergone significant changes in the new decrees. The changes will have a major impact on all organizations with holding activities and action will need to be taken before July 1, 2025.

This Tax Alert addresses the main features of the decrees. We will be organizing a seminar about this in the new year, where more attention will be paid to the details. If you haven't already done so, subscribe to Meijburg News with as area of interest VAT, to ensure you receive invitations for such events.

Background: shares and VAT

The holding of shares does not (automatically) result in a business status for VAT purposes. This means that the VAT on costs (also) attributable to the acquisition, holding and sale of such 'passively held' shares is in principle not (fully) recoverable. The only exception is if the holding of shares is part of another activity that does result in business status and the shares for this are 'drawn into' the business.

Based on settled case law this is in any case so, if the holding company performs services for a consideration for the subsidiary of which it holds the shares (for example, management services). If costs can be attributed to such 'actively held' shares, the VAT is recoverable insofar as the business activities for which the costs were incurred provide a VAT recovery right. VAT-exempt activities (such as the sale by a business of shares and the provision of interest-bearing loans do not generally provide a VAT recovery right. However, this is otherwise - for the sale of shares and the provision of interest-bearing loans - if the purchaser of the service is established outside the EU. In that case, there is a VAT recovery right for costs attributable to those activities.

The repealed and new decrees deal with these complex matters. The decrees mainly address the question when do shares belong to the business for VAT purposes and to what extent there is then a VAT recovery right for costs attributable to activities relating to those shares. The changes have a lot of implications. Unfortunately we cannot discuss all of them in this Tax Alert, and will confine ourselves to the main features. We first discuss when, according to the decrees, shares belong to the business activities and what the consequences of this are for the VAT on the costs (also) attributable to the acquisition and holding of those shares. We then discuss the consequences for the VAT on costs (also) attributable to the sale of those shares.

Holding of shares as part of the VAT business

As mentioned above, the Holding Resolution (decree of February 18, 1991, no. VB91/347) will be repealed as of July 1, 2025. This decree has typically contained important policy for the practice. One component thereof is that a holding company that qualifies as a VAT taxable person due to it performing services for a consideration (such as the performance of management and advisory services for a consideration to a

specific subsidiary or the performance of other activities for a consideration) must not be restricted in its VAT recovery right as a result of it passively holding shares (in other subsidiaries). Although the Dutch tax authorities no longer always accepts reliance on this policy (due to new case law insights), in practice this decree is still relied on in order to enable all the shares held by a holding company to be counted as belonging to the business activities.

The new decrees no longer contain that policy. Instead, in the new policy the Deputy Minister of Finance first outlines the general framework for holding shares for VAT purposes, based on case law of the Court of Justice of the European Union (CJEU). The basic assumption is that merely holding shares, especially as investor, falls outside the VAT business activities.

According to the decree, the holding of shares only takes place within the scope of VAT (the business) if:

1. A holding company supplies services or goods for a consideration to its subsidiary.
2. A subsidiary constitutes a direct, permanent and necessary extension (hereinafter: 'extension') of the economic activities (the VAT business) of the holding company.
3. A holding company, in the course of its business, trades in shares and other securities.

The second category in particular stands out here. The extension approach is a well-known doctrine from EU case law, but until now had played a less important role in Dutch practice. This will certainly change now. The policy contains several specific examples of activities that result in an extension as deduced from current case law (also see the following links), such as a restructuring, the expansion of the operating activities or the sale of shares with a view to using the proceeds for the company's remaining economic activities.

However, it is not completely clear when there is such an extension in ordinary situations in which shares are passively held. This may be the case if both the holding company and the subsidiary actively contribute to the economic activities of a group or if the activity in any case reaches beyond solely holding shares as an investment. This 'economic group approach' is however only mentioned indirectly in the decrees. For practical purposes, it will be important to find specific guidelines for when there is an extension, in particular in the situation where it is not possible to perform services for a consideration for the subsidiary.

Recovery of VAT on costs incurred for the acquisition and holding of shares

If the shares belong to the VAT business, the VAT on the costs attributable to the acquisition or the holding of those shares is recoverable in accordance with the business' pro rata. This is the proportion between the revenue from activities with a VAT recovery right and activities for which the party has no VAT recovery right. If costs are both attributable to shares that do not belong to the VAT business and to shares that do, then before the pro rata is applied the VAT recovery should be limited insofar

as costs are attributable to the shares held that fall outside the business realm (the pre pro rata).

Unfortunately, the new policy still has no specific instructions on how to calculate the pre pro rata. In practice, there are many methods available for doing so, all leading to very different results. The uncertainty about this remains, partly because the explanation of the scope of the extension approach still has to take shape in practice.

Recovery of VAT on costs incurred for the sale of shares

The policy on the recovery of VAT on costs incurred for the sale of shares has also undergone major changes. In the Decree on the Sale of Shares (decree of August 3, 2004, no. CPP2004/1709M), which as stated will be repealed as of July 1, 2025, a broad policy has been formulated on the recovery of VAT on such costs (for example on the costs for due diligence and preparations for the sale). According to this old decree, this VAT is recoverable according to the pro rata (calculated without including the proceeds of the sale of the shares), if this (among other things) concerns:

1. the sale of a subsidiary to which the holding company has supplied goods or services for a consideration; or
2. the sale of a subsidiary that, together with the holding company, is a member of a VAT group.

The new decree contains a more comprehensive phased plan whereby three assessments must be completed in order to determine the extent of the recovery (for the part of the costs that is attributable to the VAT business realm):

1. Did the shares belong to the VAT business of the holding company before the sale (see above)? If not, then no VAT recovery is possible.
2. If they did, are the costs directly and solely attributable to the sale of the shares? If so, then VAT recovery is not possible if the purchaser is established in the EU, but the VAT is 100% recoverable if the purchaser is established outside the EU.
3. If not, then recovery is possible in accordance with the pro rata, insofar as the costs are attributable to the entire economic activity of the taxable person (no further instructions on how to assess this have been given). In calculating the pro rata, the income from the shares does not have to be included if there is a sale from an (economically active) 'group' or from the VAT group, although in all other cases it does. The latter may have a significant negative impact on the pro rata, if the sale is to a purchaser established in the EU, given that the sale proceeds of shares are often considerable compared to the other revenue flows.

With regard to the second assessment (directly attributable)
Reading the new policy for the first time could give the impression that the Deputy Minister is advocating a simple split, whereby all costs incurred before the sale are directly attributable to the sale of the sales and all costs incurred later are not. However, this is not the case. A closer reading makes clear that for costs incurred before the sale it must be determined (on objective grounds) whether those costs were solely incurred with a view to the share sale transaction. Costs that, for example, also

relate to the termination of the management activities for the subsidiary do not seem to be directly attributable to the sale transaction. In practice, it will not be easy to apply this assessment correctly.

For costs incurred after the sale transaction, it is clearer that this does not involve directly attributable costs. However, it is not clear which element is decisive for determining that costs are incurred after the transaction. For example, is this the invoicing date, the date of the agreement or the date the services were completed?

With regard to the third assessment (calculating the pro rata)
For situations within the EU, it is good that the new policy also confirms that, for the sale of shares that constituted an extension before the sale, the sale proceeds in some cases are allowed to remain outside the calculation of the pro rata as incidental financial income. This is, among other things, the case if there is a sale from the VAT group or from an economically active group (*concern* in Dutch). However, it is not clear when there is an economically active group. Also, if the sale is not a core activity of the company and there are relatively few general expenses attributable to the sale of the shares, the sale proceeds do not have to be included in the pro rata calculation.

An explicit exception is however made for sales of private equity by a venture capital company or an investment company and 'an entity affiliated thereto'. In such sales, the sale proceeds must always be included in the pro rata calculation. This can have significant consequences for the VAT recovery right of such businesses. Unfortunately, the scope of this exception is not further explained. Most acquisitions and sales generally take place once by companies specially set up for this purpose (BIDCOs). These companies generally do not build up a track record with the regular acquisition and sale of shares, which may make it possible to argue that these are not entities affiliated with the venture capital company, so that the private equity exception does not apply.

Conclusion
With regard to the second and third assessments, under the new policy as of July 1, 2025 there will be more situations in which holding companies will likely be confronted with non-recoverable VAT on sale costs. When this is the case remains vague, because important points of the new policy are not completely clear and lack specific elaboration.

The approval given for the actively involved holding company has been retained

As a final observation, we would like to note that a specific approval from the Holding Resolution has been retained. One of the two decrees in which the new policy is formulated, contains a comprehensive description of the conditions for the VAT group. We will not discuss this further in this Tax Alert. That description again contains the old approval allowing a holding company that does not qualify as a VAT taxable person to be included in the VAT group upon request, provided it performs a policy-setting and managing role. What is new is that intermediate holding companies are also explicitly eligible for this.

What can you do now?

The repeal of the Holding Resolution and the Decree on the Sale of Shares as of July 1, 2025, brings to an end a number of important policy directions with regard to the VAT recovery right for costs incurred for the holding of shares and for share transactions. The new policy contains many uncertainties. We recommend mapping the VAT position of your company or group so that you can determine what the consequences are and whether there are opportunities for optimizing the VAT recovery position of the company or the group.

Also for companies that in the course of their business trade in shares, such as private equity companies and stockbrokers, as well as companies that otherwise frequently buy and sell shares, we recommend taking a closer look at the VAT position, given that the proposed policy changes may have a significant impact on the VAT recovery right.

You can contact your designated Meijburg advisor for this or one of the advisors of the Indirect Tax Team van KPMG Meijburg & Co.

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