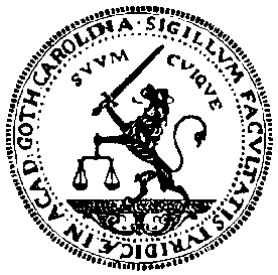

FACULTY OF LAW

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Deduction when selling shares in a subsidiary- out of scope, exempt or VAT?

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program

30 higher education credits

Supervisor: Mats Tjernberg

Semester of graduation: Period 2, Spring semester 2018

Contents

Summary

The right to deduct input value added tax ("VAT") depends on a direct and immediate link to a taxable persons taxable activities. The disposal of shares is either out of scope of VAT, since it is not considered an economic activity, or exempt from VAT. Consequently there is, in general, no right to deduct input VAT for costs relating to such a disposal. However, the Court of Justice of the European Union ("CJEU") has stated that when there is a direct and immediate link to a taxable persons overall economic activity there can be a right to deduct the input VAT on such related acquisitions. How this direct an immediate link is to be decided has however been the question for many cases in front of the CJEU.

During 2017 the Swedish Supreme Administrative Court ("HFD") held its judgment in the Sveaskog's case. The court concluded that Sveaskog should have a right to deduct input VAT for costs acquired in connection to the exempt disposal of shares. Since the purpose of the disposal was to liberate capital to Sveaskog's remaining taxable activities, HFD considered that there was a direct and immediate link to Sveaskog's overall economic activities.

As a consequence of the judgment, the Swedish Tax Agency ("SKV") published an opinion (ställningstagande) in which it states that only in case the purpose of the disposal is to liberate capital to the remaining economic activity in the company, there can be a right to deduct. Providing management services should be excluded from such remaining economic activity. SKV hence excludes the possibility to deduct when the disposal is for the benefit of the subsidiaries of the selling company.

Since VAT is harmonized within the EU, the national courts and authorities have to interpret the Swedish VAT Act (Mervärdesskattelagen) in conformity with the case law from the CJEU. The question subsequently arising is, if the Swedish legal position is in line with EU-law and the CJEU's case law. The authors conclusion is that the case law from the

Swedish court post Sveaskog is in line with the case law from CJEU, but that SKV's opinion (ställningstagande) of the right to deduct is infringing the principle of neutrality.

Sammanfattning

Avdragsrätt för ingående mervärdesskatt (”VAT”) förutsätter att det finns ett direkt och omedelbart samband med den beskattningsbara personens beskattningsbara verksamhet. En försäljning av aktier faller normalt utanför tillämpningsområdet för mervärdesskatt på den grund att det inte anses vara en beskattningsbar transaktion, eller, för det fall det faller inom mervärdesskatteområdet, är transaktionen undantagen från mervärdesskatt. Följaktligen finns det ingen rätt att dra av ingående mervärdesskatt för kostnader som är inköpta i samband med en avyttring av aktier. EU-domstolen (”CJEU”) har dock slagit fast att när det finns ett direkt och omedelbart samband mellan aktieförsäljningen och den beskattningsbara personens beskattningsbara verksamhet i allmänhet, kan avdrag ändock medges för relaterade kostnader till en aktieförsäljning. Hur man bedömer om ett sådant direkt och omedelbart samband föreligger har varit föremål för prövning i CJEU vid flera tillfällen.

Under 2017 kom ett avgörande från Högsta Förvaltningsdomstolen (”HFD”) avseende bolaget Sveaskog. Domstolen fastslog att Sveaskog skulle ha rätt att dra av moms på kostnader de haft för konsulter i samband med försäljning av aktier i två dotterbolag. Eftersom försäljningen skett på basis av att Sveaskog ville frigöra kapital för att utveckla den kvarvarande beskattningsbara verksamheten i det säljande bolaget, ansåg HFD att det fanns ett direkt och omedelbart samband mellan konsultkostnaderna och bolagets kvarvarande beskattningsbara verksamhet.

Efter avgörandet kom Skatteverket (”SKV”) med ett ställningstagande där de klargjorde sin uppfattning av rättsläget efter domen. Avdrag för mervärdesskatt på kostnader som uppkommit på grund av en försäljning av dotterbolagsaktier är enligt SKV endast tillåtet när syftet med försäljningen är att frigöra kapital till den kvarvarande beskattningsbara verksamheten i det säljande bolaget. Att förse sina dotterbolag med förvaltningstjänster räknas i detta hänseende inte som kvarvarande beskattningsbar verksamhet

enligt SKV. På så vis har SKV exkluderat avdragsrätten för ingående mervärdesskatt, för relaterade kostnader, när försäljningen är till förmån för verksamheten i dotterbolagen.

Eftersom mervärdesskatt är harmoniserat inom EU måste nationella domstolar och myndigheter tolka den svenska mervärdeskattelagen i ljuset av EU-rätten. Frågan som således uppkommer är ifall svensk praxis är i linje med EU- rätt och fastlagd praxis från CJEU. Författarens slutsats i detta hänseende är att svensk praxis numera är i linje med CJEU:s praxis men att SKV:s ställningstagande begränsar avdragsrätten i strid med neutralitetsprincipen.

Preface

Law studies require the ingredients of a big portion of stubbornness, motivation, good teachers and great friends to study with and complain to when the going gets tough. My 4,5 years at the Faculty of Law at Lund University and my last year at the School of Economics at Lund University has brought me together with some of the most inspiring people I have ever met and some of my, from now on, best friends. It is sad, yet a huge relief, to finally be done and get back to business.

First and foremost I would like to thank my family who has unconditionally supported me throughout my 4,5 years of studying. A certain thank you to my amazing daughter, Toulouse, who has had the patience and understanding of me being caught up in law studies with everything it implies. But also for giving me motivation and being the wiser one when she has let me know that I need a break during my studies.

I would also like to thank my colleagues at PwC who gave me the idea for the topic and have given me important input throughout the process.

Last, but certainly not least, I would like to thank my supervisor, Mats Tjernberg, who, even though VAT is not his cup of tea, has helped me with valuable input and pushed me forward to the finish line. Your support has been truly important.

Kristianstad 6th of August 2018

Madeleine Mogren

List of Abbreviations

IBFD	International Bureau of Fiscal Documentation
CJEU	The Court of Justice of the European Union
EU	European Union
HFD	Swedish Supreme Administrative Court
KRS	Kammarrätten Stockholm
ML	Mervärdeskattelag (1994:200)
SKV	Swedish Tax Agency
SRN	Skatterättsnämnden
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
RÅ	Regeringsrättens årsbok
VAT	Value Added Tax

1 Introduction

1.1 Background

Selling shares is either out of scope of VAT, since it is not an economic activity, or exempt from VAT[1]. Hence, in general, no deduction of input VAT is allowed for acquiring goods or services related to the sale of shares. However the CJEU case law states that, due to the neutrality principle, there is an exception to this rule. Deduction is allowed when the acquisition has a direct and immediate link to the company's overall economic activities.[2] Due to recent case law from the Swedish Supreme Administrative Court[3] ("HFD") and the Swedish Chamber Court[4] (Kammarrätten) together with the Swedish Tax Agency's ("SKV") opinion[5] (ställningstagande), the legal position in Sweden regarding the limits for deduction is unclear at the moment.

In May 2017 HFD announced its decision in the so called Sveaskog case[6]. The question at stake was if a parent company should be able to deduct input VAT for buying consultancy services adherent to selling shares in a subsidiary. The court referred to the case law of the CJEU and eventually concluded that Sveaskog was entitled to deduct the input VAT they had paid since the services were considered to have a direct and immediate link with the company's overall economic activities.[7] The outcome was on the

[1] SKV's ställningstagande 2017-12-19, dnr. 202 377722-17/111, 'Avdragsrätt för mervärdesskatt på inköp i samband med försäljning av dotterbolagsaktier', accessed online 2018-03-23, art. 135(1)(f) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("VAT directive") and 3 chapter 9 § Mervärdesskattelag (1994:200) (ML).
[2] Judgment of 16 July 2015, *Larentia + Minerva*, C-108/14, EU:C:2015:496; judgment of 22 October 2015, *Sveda*, C-126/14, EU:C:2015:712 and judgment of 5 July 2018, *Marle Participations*, C-320/17, EU:C:2018:537.
[3] HFD 2017 ref. 20 Sveaskog.
[4] KRS case no. 5986--5987-15 Leg II Swe Holdings and KRS case no. 4678-17 Pomona.
[5] SKV's ställningstagande 2017-12-19 (n. 1), accessed 2018-04-06.
[6] Sveaskog (n. 3).
[7] Sveaskog (n. 3).

contrary to previous case law from HFD, where deduction had not been permitted.[8]

Later, in 2017, SKV delivered their opinion, with regards to the change of the legal status, in which they opened up to the possibility for a deduction of VAT in certain situations.[9] However SKV's conclusion was that there can only be a right to deduct when the purpose of the disposal of shares in a subsidiary is to streamline and liberate capital for the parent company's remaining economic activity, not including management services provided to subsidiaries.[10]

The Chamber Court (Kammarrätten) in Sweden does however not seem to agree with SKV's interpretation of the legal position and a right to deduct has been given in opposite to what SKV states with support from the Sveaskog's case[11].[12] Consequently it seems to be possible to argue that a holding company should have the right to deduct based on the Sveaskog's case. However since the SKV's opinion is opponent to what is found from the decisions delivered in the Chamber Court (Kammarrätten) cases the legal position remains unclear. Swedish tax consultants are left torn in what direction they should advise companies in this matter[13], deduct or don´t deduct?

1.2 Objective and research question

The objective of this thesis is to analyse the outcome of the Sveaskog's case[14] in the context of the CJEU case law with a focus on the direct link test and the principle of neutrality.

[8] RÅ 2010 ref. 56 SKF.
[9] SKV's ställningstagande 2017-12-19, dnr. 202 377722-17/111, (n. 1), accessed 2018-04-06.
[10] Ibid.
[11] Sveaskog (n. 3).
[12] Leg II Swe Holdings and Pomona (n. 4).
[13] See for e.g. <https://home.kpmg.com/se/sv/home/nyheter-rapporter/2017/12/se-news-nytt-stallningstagande-fran-skatteverket-om-avdragsratt-vid-forsaljning-av-dotterbolag.html> or <https://skattenatet.ey.se/2018/01/05/avdragsratt-for-moms-vid-forsaljning-av-aktier-i-dotterbolag-en-uppdatering/> accessed 2018-06-23.
[14] Sveaskog (n. 3).

In order to achieve the objective the research question was formulated in the following:

When is it allowed to deduct input VAT for related expenses to a disposal of shares?

1.3 Method and material

In order to achieve the objectives of this thesis the author has applied a legal dogmatic method. The purpose of this method is to find out what the applicable law is by presupposing a concrete formulated question.[15] The question will then be analysed in the context of law, preparatory works, doctrine and case law from the courts.[16]

One of the main purposes of the European Union is to establish an internal market.[17] To achieve its purpose one of the main objectives is to ensure the free movement of goods and services.[18] When adopting provisions for VAT it is important that this tax does not distort competition, may it be on a national or EU level.[19] The system of VAT is harmonized within the EU through a directive[20] which the Member States need to implement into their domestic laws.[21] The domestic courts of the Member States accordingly needs to take EU law and the case law of the CJEU into consideration when applying these rules on questions relating to VAT.[22] The CJEU has interpretative prerogative of EU law and the national courts can hence ask for a preliminary ruling for a clarification on how a provision should be understood.[23] The Swedish VAT act[24] ("ML") is the implementation of the VAT directive into the Swedish domestic law and it should hence be interpreted in conformity with the directive. Consequently the author has

[15] Jan Kleineman in Fredrik Korling and Mauro Zamboni (2013), *Juridisk metodlära,* p. 23.
[16] Ibid. p. 21.
[17] Art. 3(3) TEU.
[18] Art. 3(1)(b) and 26 TFEU.
[19] See preamble 4 to the VAT directive and art. 110 and 113 TFEU.
[20] VAT directive (n. 1) and the predecessing versions of the VAT directive.
[21] Art. 197(1) and 288 TFEU.
[22] Art. 260(1) and 260(2) TFEU.
[23] Art. 267 TFEU.
[24] Mervärdeskattelag (1994:200).

used the VAT directive and the case law from the CJEU as the basis for the analysis of the Swedish legal position.

Since the reason to why the author chose this topic is HFD's judgment in the Sveaskog's case[25] together with the opinion from the Swedish Tax Agency[26], the referred cases in the judgment has been used as an outset when looking further into the topic. The author has i.e. used the cases mentioned in the Sveaskog judgement as a clue for finding further cases which deals with the same topic, both in domestic and in EU law. When it comes to the case law from the CJEU, these cases has been included in full or only by a reference depending on their value for the thesis. The selection has been done based on which case law has been considered by the doctrine to highlight the issue, but with a focus on the more recent cases from the CJEU.

1.4 Delimitation

The chosen topic is very broad and can be analysed from many perspectives. Hence the task of delimitating the research has been an important task in order to be able to follow a common thread throughout the thesis. The focus has been set on the deductibility of VAT when *selling* shares in a subsidiary whilst the deductibility when *acquiring* shares has not been dealt with.

The case law from the CJEU and the analysis of it in the doctrine has been used as an outset for analysing the Swedish legal compliance and hence the case law from CJEU has not been analysed further in this thesis.

The author has chosen to look at the right to deduct in the perspective of the principle of neutrality inherent in the system of VAT, expressed as a right to deduct, which is one of the most important principles for the purpose of VAT[27]. Since VAT is a general tax on consumption it should as such not

[25] Sveaskog (n. 3).
[26] SKV's ställningstagande 2017-12-19, dnr. 202 377722-17/111 (n. 1), accessed online 2018-04-06.
[27] Oskar Henkow (2016), *Mervärdesskatt i teori och tillämpning*, Gleerups utbildning AB, p. 28 – 29.

affect the producers or consumers consumption behavior and should not affect the allocation of resources within the society (as opposite to income tax).[28] The principle of fiscal neutrality is the principle of equality[29] but in the system of VAT[30] and has a bilateral function, since it, first, ensures neutrality throughout the deduction mechanism and, secondly, ensures competition neutrality in that equal situations will be treated equal for VAT purposes.[31]

Given the conclusion of the research it would be interesting to look at the outcome also from a perspective of legal certainty. In order to make the thesis manageable, given the complexity of the topic and limited time of research, the principle of legal certainty has however been left out of scope of this thesis.

1.5 Previous research

Deduction of VAT in connection to the disposal of shares has been the topic of many articles throughout the years and in particular how the direct link test should be applied.[32]

In the article 'The direct and immediate link test regarding deduction of input VAT: a consumption-based test versus an economic-based test?' the different ways of applying the direct link test and how the outcome varies has been discussed. The authors Dennis Ramsdahl Jensen and Henrik Stensgaard are criticizing the CJEU for not giving enough guidance on which test to apply. Oskar Henkow published in 2016 his article 'Sveda—

[28] Ibid, p. 28 and preamble 7 VAT directive.
[29] Art. 9 TEU.
[30] See for instance judgment of 10 April 2008, *Marks &Spencer*, C-309/06, EU:C:2008:211, para. 49.
[31] See preambel 7 and 30 of the VAT directive.
[32] See for instance Ad van Doesum, Herman van Kesteren and Gert-Jan van Norden (2010), 'Share Disposals and the Right of Deduction of Input VAT', EC Tax Review p. 64; John Watson, Tom Cartwright and Eleanor Dixon (May/June 2010), 'A Recipe for Chaos' International VAT Monitor p. 183; 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, vol 3 issue 2, p. 71 and Oskar Henkow (2016) 'Sveda—The increasing obscurity of the direct link test in EU VAT', World Journal of VAT/GST Law, 5:1, p. 48.

The increasing obscurity of the direct link test in EU VAT' where he gives his analysis in what guidance could be found from the CJEU judgment in *Sveda*[33] regarding the direct link test.

Eleonor Kristoffersson has published an article in Skattenytt during 2017 regarding deduction of VAT according to the CJEU case law *Larentia + Minerva*[34] and *Sveda*[35].[36]

Lastly, Gina Hedin has put an effort into interpreting the consequences of Sveaskog[37].[38]

Although there, evidently, has been a lot of articles published on the topic, the author lacked a consequence analysis based on the outcome of the Sveaskogs case compared to SKV's opinion, in the light of CJEU's case law. The sought contribution with this thesis is hence to try to clarify the Swedish legal position or, what is more, what it should be.

1.6 Terminology

The territory of VAT contains a wide variety of terminology specific for the subject. Although the author has written the thesis with the outset that the reader has some basic knowledge about VAT, a short introduction to the VAT system has been included in the initial chapter. For readers who are not familiar with VAT, it is recommended to return to this chapter for guidance when necessary. When referring to the VAT directive the author refers to the Councils directive 2006/112/EC of the 28 November 2006 on the common system of value added tax, including amendments as up to 31 May 2016. In case any reference is made to any of the preceding VAT directives this will be explicitly mentioned.

[33] *Sveda* (n. 2).
[34] *Larentia + Minerva* (n. 2).
[35] *Sveda* (n. 2).
[36] Eleonor Kristoffersson (2017), 'Avdrag för ingående mervärdesskatt enligt rättsfallen Larentia + Minerva och Sveda', Skattenytt, p. 111.
[37] Sveaskog (n. 3).
[38] Gina Hedin (2017),'Sveaskog-domens betydelse för avdragsrätt avseende rådgivningstjänster i samband med aktieöverlåtelser', Skattenytt, p. 658.

In order to avoid any confusion for Swedish readers, about what legal term or authority is being referred to when writing about the Swedish legal system in English, the author has included the Swedish translation in parenthesis for specific Swedish legal terminology or bodies of government. The author has also intentionally utilized the Swedish abbreviation for the Swedish Tax Agency ("SKV"), the Swedish Supreme Administrative Court ("HFD"), the Chamber Court in Stockholm ("KRS"), the Board of Taxation ("SRN") and mervärdesskattelagen ("ML").

The author has referred to the case law from the CJEU in italics in order to easily assess whether the author is referring to case law from the CJEU or from any of the Swedish courts. The Swedish case law is consequently referred to in regular text.

1.7 Structure

The thesis will be initialized with a short introduction to the system of European VAT with a focus on the relevant circumstances for this thesis.

This will be followed by the rules about the right to deduct and the disposal of shares. The direct and immediate link test will then be presented with a focus on the recent years' interpretation in doctrine. After that the author will go through the critic case law from HFD regarding the change in legal status followed by the SKV's opinion (ställningstagande). Lastly the author will analyse the legal position in Sweden in the light of the direct link test, as it stands according to EU law analysed in doctrine, and in the light of the principle of neutrality.

2 Introduction to European VAT

2.1 The common system of VAT

The framework for the European system of VAT is found in the VAT directive.[39] According to EU primary law, Member States have an obligation to implement and follow the directive within its domestic law.[40] This means that the system of VAT is harmonized within the EU, but differentiation may exist due to the discretion left for the Member States when implementing into its domestic law. The VAT directive should however always be interpreted in the light of EU law and in case that the national law is infringing a provision from the directive, it is possible for the Commission to impose an infringement proceeding against a Member State.[41] In case the CJEU finds that a Member State has failed to fulfil its obligation under Community law it entails that the provision, which infringes EU law, is prohibited to be applied by both the judicial and administrative authorities of that Member State. It also entails an obligation to take all appropriate measures to ensure that Community law is applied.[42]

The purpose of the common system of VAT is to impose a general tax on personal consumption. This includes the consumption of goods as well as the consumption of services.[43] The tax is imposed proportional to the price on every transaction within the supply chain, until arriving in the hands of the end consumer.[44] Since VAT should only burden the end consumer, and not the persons supplying the goods or services, taxable persons within the supply chain are in general entitled to deduct the input VAT for goods and services acquired. These taxable persons also act as collectors of VAT for

[39] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("VAT Directive").
[40] Art. 4(3) and 288 TFEU.
[41] Art. 258 TFEU.
[42] Judgment of 19 January 1993, *Commission v Italy*, C-101/91, EU:C:1993:16, para. 24.
[43] Art. 1(2) VAT directive.
[44] Ibid.

the government and are required to report and pay in output VAT collected on their disposals to the Tax Agency in each Member State.[45]

In case of a taxable supply of goods or services for consideration, performed by a taxable person within a Member State, output VAT shall be charged on the transaction.[46] A taxable person is a person who independently carries out any economic activity whatever the purpose or result.[47] The CJEU has in its case law consistently held that when a company doesn't supply any goods for consideration they cannot be considered a taxable person and that the concept of economic activity[48] is broadly defined.[49]

Financial activities[50] are usually outside the scope of VAT since they are not considered an economic activity.[51] However a direct or indirect involvement in the management of a subsidiary has been considered otherwise.[52]

2.2 Fiscal neutrality

For the purpose of VAT, the principle of equality takes the shape of fiscal neutrality.[53] While the principle of equality has the status as a constitutional principle of EU-law, the principle of neutrality needs to be drafted and enacted in legislation to have effect. This is achieved through secondary EU

[45] Art 1(2) section 3, art. 193 and 195 VAT directive compare to 1 chap. 1- 2 §§ ML. Please note that certain exceptions may apply in specific cases, see for e.g. art. 197 VAT directive.
[46] Art. 2(1)(a) VAT directive compare to 1 chap. 1 -2 §§ ML.
[47] Art. 9 VAT directive compare to 4 chap. 1 § ML.
[48] Se chapter 3.2 and 3.3 for a relevant definition of economic activity for this thesis.
[49] Judgment of 1 April 1982, *Hong Kong Trade*, C-89/81, EU:C:1982:121; judgment of 26 March 1987, *Commission v Netherlands*, C-235/85, EU:C:1987:161, para. 8 and judgment of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243, para. 31.
[50] A definition of financial activities relevant for this thesis is holding shares in a subsidiary, please see chapter 3.2 for further explanation.
[51] O. Henkow (2016) (n. 27), p. 43.
[52] Judgment of 14 November 2000, *Floridienne and Berginvest*, C-142/99, EU:C:2000:623, paras. 18-19; judgment of 29 October 2009, *SKF*, C-29/08, EU:C:2009:665, para. 28, 30-31 and *Larentia + Minerva* (n. 2) para. 20-22. See also SKV, Rättslig vägledning (2018), 'Verksamhetsöverlåtelse är inte en omsättning', <https://www4.skatteverket.se/rattsligvagledning/edition/2018.4/350547.html#h-Overlatelse-av-dotterbolagsaktier> accessed online 2018-06-23.
[53] *Marks & Spencer* (n. 30) para. 49 and judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, para. 41.

law and hence the principle of neutrality cannot be seen as an independent principle of EU law, merely a principle limited to the subject of VAT.[54]

The principle of fiscal neutrality within the system of VAT is defined in two different ways. One definition is to achieve neutrality within the system of VAT.[55] This is achieved by the objectives that VAT is a general tax on consumption which covers all stages of production, distribution as well as services whatever their purpose or result.[56] In this sense the principle of fiscal neutrality comes to specific expression in the VAT directive.[57] This objective is also achieved through the deduction mechanism which ensures complete neutrality of taxation of all economic activities.[58] Since the purpose of VAT is to tax the end consumer and not the trader, the deduction mechanism relieves the trader entirely of the burden of VAT.[59] This objective is visible from the *PPG Holdings* case[60]. PPG was a company which by law was obliged to arrange for pension savings and hence set up a separate entity for employees' pension funds savings. PPG wanted to deduct the input VAT which they paid to a company for safeguarding the pensions rights. The Tax Inspecteur did not consider VAT deductible and the question was later referred from the national court to the CJEU for a preliminary ruling.[61]

The CJEU held that in order for VAT to be deducted there needs to be a direct and immediate link between the input and output transaction. However even if no such link exists a deduction can be allowed if there is a direct and immediate link to the taxable person's economic activity as a

[54] Ben Terra and Julie Kajus (2018), *Introduction to European VAT (Recast), Commentaries on European Directives IBFD*, ch. 2.5, p. 43, downloaded from IBFD 8 February 2018 and judgment of 15 November 2012, *Zimmerman*, C-174/11, EU:C:2012:716, paras. 48 and 50.
[55] Judgment of 3 May 2001, *Commission v France*, C-481/98, EU:C:2001:237, para. 22.
[56] See art. 1(2) VAT directive.
[57] See preamble 5 and art. 1(2) VAT directive where the objective of the principle is expressed.
[58] Preamble 30 VAT directive. See also judgment of 14 February 1985, *Rompelman*, C-268/83, EU:C:1985:74, para. 19 and judgment of 21 February 2006, *University of Huddersfield*, C-223/03, EU:C:2006:124, para. 47.
[59] *Zimmerman* (n. 54) para. 47.
[60] Judgment of 18 July 2013, *PPG Holdings*, C-26/12, EU:C:2013:526.
[61] *PPG Holdings* (n. 60) paras. 11-17.

whole. Since PPG was obliged by law to arrange for pension savings for their employees, the administrative cost should be considered to have a direct and immediate link with PPG's overall economic activities and hence VAT was deductible. If not, the neutrality within the system of VAT would no longer be guaranteed.[62] The fact that PPG had chosen to set up a separate entity for pension purposes did not change the outcome of the case. Otherwise that would restrict the freedom of a taxable person to choose the organizational structure and form of transaction which they considered most appropriate for their economic activities.[63]

The other objective of the principle of neutrality is to achieve competition neutrality, which implies that similar transactions should be treated equal,[64] but also that different transactions should not be treated equal.[65] Since fiscal neutrality requires that all *economic activities*[66] are treated in the same way it assumes that the activity can be classified as an economic activity.[67] Consequently, since the purpose of the principle of neutrality is to assure equality *within*[68] the system of VAT it first requires that the transaction falls within the scope of VAT. In case it falls out of scope or in case there is a provision which allows the unequal treatment, it cannot be unequal treatment incompatible with the principle of neutrality.[69]

A transaction can fall inside the scope of VAT but be exempted.[70] Since exemptions are a derogation from the main rule, that a supply should be subject to VAT[71], the CJEU has clarified that the principle of neutrality

[62] *PPG Holdings* (n. 60) paras. 21-22 and 25-27.
[63] Ibid. para. 28.
[64] Preamble 7 VAT directive, *Zimmerman* (n. 54) para. 48; *Marks & Spencer* (n. 30) para 47 and judgment of 10 November 2011, *The Rank Group*, joined cases C-259/10 and 260/10, EU:C:2011:719, para 32.
[65] Judgment of 12 September 2002, *Mertens*, C-431/01, EU:C:2002:492, para. 32.
[66] My emphasis added.
[67] *Wellcome Trust* (n. 49) para. 38.
[68] My emphasis added.
[69] Compare to judgment of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, para. 24; judgment of 5 March 2015, *Commission v France*, C-479/13, EU:C:2015:141, paras. 41-44; and judgment of 26 October 2017, *BB Construct*, C-534/16, EU:C:2017:820, paras. 44-46.
[70] See for e.g. art. 135 VAT directive, compare to e.g. 3 chap. 9 § ML.
[71] Art. 1(2) VAT directive and 3 chap. 1 § ML.

requires that the interpretations of exemptions should be done strictly.[72] They do however need to be interpreted in consistency with the objectives underlying the exemptions and complying with fiscal neutrality inherent in the system of VAT. This means that the strict interpretation should not deprive the exemptions of their intended effects.[73] Since the principle of neutrality is not an independent general principle of EU law it needs to be applied alongside with the strict interpretation of exemptions.[74]

A Member State's capacity to decide upon certain limits of the VAT system must be done within their limits of discretion, taking EU law into consideration and in particular the principle of fiscal neutrality.[75] In the *Zimmerman* case[76] the CJEU applied the principle of neutrality in a comparability sense. Ms. Zimmerman was a freelancing registered nurse who, on the 1 June 1993, registered to provide out-patient care service. The German law constituted that providing sick- or health care was exempt given that the provider was a public body or that the cost was borne by two thirds by the social security or welfare authorities in the preceding calendar year. The German law also had a provision which allowed certain charitable welfare associations to be exempt. Those welfare associations were specified in a provision in the domestic law and consisted of eleven organizations.[77] Ms. Zimmerman claimed in her VAT returns for 1993 and 1994 to be exempt from VAT due to the domestic rule of the cost being borne by the welfare system.[78] The Finanzamt found that, during 1993, Ms. Zimmerman had treated 68 percent private patients, and that the requirement of two thirds for the purpose of the welfare system hence was not fulfilled. They therefore refused to treat Ms. Zimmerman's transactions as exempt.[79] The question was later referred to the CJEU for a preliminary ruling where

[72] *Zimmerman* (n. 54) para. 22.
[73] *Zimmerman* (n. 54) para. 22.
[74] Ibid. paras. 49-50 and *NCC Construction Danmark* (n. 53) paras. 41-42.
[75] *Zimmerman* (n. 54) paras. 27-28 and 33 and *Marle Participations* (n. 2) para. 42.
[76] *Zimmerman* (n. 54).
[77] Ibid. p. 3 and para. 42.
[78] Ibid. paras. 9 and 11.
[79] Ibid. paras. 10-11.

the national court wished to know in case the two third threshold and the requirement of the preceding year were in line with EU law.[80]

The CJEU first observed that the provision in the German law had as a purpose to implement article 13A(1)(g) in the VAT directive[81].[82] The CJEU continued with stating that requiring the two third threshold did not go beyond Germanys limits of discretion when implementing the current article.[83] However the article in the Sixth directive did not leave permission to require that only the preceding year should be the basis to decide upon the right to be exempt.[84] The CJEU found that the fact that eleven organizations was exempt, on the basis that they were considered to fall under the certain regulation as charitable associations, might be an infringement of the principle of neutrality.[85] In order for a Member State to comply with fiscal neutrality they have to collate all comparable organizations with each other (hence excepting organizations governed by public law) and these organizations needed to be treated equally in terms of recognition as charitable.[86] It was hence not possible to treat non-profit making and profit-making entities differently. The fact that no threshold applied to the organizations recognized as charitable whereas a threshold of two third applied in the case of entities such as Ms. Zimmerman, was an infringement of the principle of neutrality when the goods or services supplied was considered primarily the same.[87] Hence it was not compatible with EU law, and the principle of neutrality within the system of VAT, to treat two comparable situations unequal.[88]

I order to determine if the principle of neutrality is in breach it is thus important to decide whether the goods or services provided can be

[80] Ibid. para. 18.
[81] In this case the Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment ("Sixth directive") was applicable.
[82] *Zimmerman* (n. 54) para. 20.
[83] Ibid. para. 37.
[84] Ibid. para. 41.
[85] Ibid. para. 42-43.
[86] Ibid. para. 48 compare to *The Rank Group* (n. 64) paras. 40-44.
[87] *Zimmerman* (n. 54) paras. 58-59.
[88] Ibid. para. 63.

considered comparable. The comparability test should be taken primarily of the point of view of a typical consumer.[89]

[89] *K* (n. 69) paras. 24-25.

3 Deduction of VAT

3.1 Deduction as a main rule

As long as goods and services are used for the purpose of the taxable persons economic activities, the taxable person shall be entitled to deduct the input VAT.[90] The deduction is dependent on a positive link between the incurred expense and the output taxed transaction or to the overhead costs of the company.[91] A link immediately to an output transaction implies that the expense incurred is a direct cost and in this event the character of the output transaction sets the right to deduct. In case the output transaction is fully taxable there is a full right to deduct the input VAT and consequently in case of a non-taxable output transaction there is no right to deduct the input VAT. If no such link exists the input transaction might have a direct and immediate link to the taxable persons overall economic activity. If such a link exists it would make the input transaction part of the company's overhead costs and give rise to deduction of VAT in relation to the taxable activities performed by the company, i.e. full, partial or no deduction.[92] Further guidance in how the direct link test should be applied is described in chapter four.

Input VAT is deductible when it becomes chargeable, i.e. when the goods or the services are supplied.[93] Since the deduction of VAT is considered to be such a fundamental right inherent in the system of VAT, every exemption should be interpreted strictly in order to achieve neutrality.[94] When applying the Swedish rules on VAT it should be interpreted in the light of EU law.[95]

[90] Art. 168 VAT directive, implemented in the Swedish law in 8 chap. 3 § ML.
[91] 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, vol. 3 issue 2, p. 71.
[92] Ibid. p. 72. See also art 173-175 VAT directive and 8 chap. 13 § ML.
[93] Art. 63 and 167 VAT directive and 8 chap. 2 § ML.
[94] *Rompelman* (n. 58) paras. 18-19 and 23; judgment of 21 March 2000, *Gabalfrisa and Others*, joined cases C-110/98 to C-147/98, EU:C:2000:145 paras. 43-45 and *Zimmerman* (n. 54) para. 22.
[95] Prop. 2015/16:19 p. 37. See also RÅ 1999 not. 282.

3.2 Holding shares is not an economic activity

Holding shares in a subsidiary is normally not considered to be carrying out any economic activity hence it is usually out of scope of VAT.[96] The CJEU has however held that there are two types of holding companies; pure holding companies which only hold shares; and manage holding companies which, besides holding shares, also provides e.g. management services to their subsidiaries for consideration.[97] Consequently, mixed holding companies are considered taxable persons as well, as far as they provide management services for consideration to their subsidiaries and non-taxable persons in the part where they are holding shares.[98]

Since holding shares is not considered to be an economic activity, a pure holding company is not a taxable person within the meaning of article 9 of the VAT directive. Hence there is no obligation for a pure holding company to register for VAT but neither any right for pure holding companies to deduct input VAT on goods and services acquired; it falls outside the scope of VAT.[99]

Holding companies that directly or indirectly provide services, such as administrative, financial, technical or commercial services to their subsidiaries have, however, a different position, since they are considered to be a taxable person performing economic activities within the scope of VAT.[100] Since the deduction of VAT is such an integral part of the VAT system it must only be limited when it is expressly permitted in the VAT directive.[101] Hence when there is a direct and immediate link between an input transaction and an output transaction, the cost for acquiring the goods

[96] Judgment of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243, para. 59; judgment of 8 February 2007, *Investrand*, C-435/05, EU:C:2007:87 para. 25 and judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166 para. 30.
[97] *Larentia + Minerva* (n. 2) paras. 18 and 21.
[98] Madeleine Merkx (2016), 'VAT and Holding Companies: Position Finally Clear?', EC Tax Review 2016-1 p. 2.
[99] *Larentia + Minerva* (n. 2) paras. 18 and 19; judgment of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495, para. 22; compare to art. 2(1), 9 and 168 in the VAT directive.
[100] *Floridienne and Berginvest* (n. 52) paras. 18-19; *SKF* (n. 52) paras. 28, 30-31 and *Larentia + Minerva* (n. 2) paras. 20-22.
[101] *Gabalfrisa and Others* (n. 94) para. 43 and *Larentia + Minerva* (n. 2) para. 22.

or services is considered to be a cost component of the taxable person's output transactions, and the taxable person consequently has a right to deduct the input VAT.[102] In order to ensure fiscal neutrality through the deduction mechanism the CJEU has also confirmed that when there is a direct and immediate link to the taxable person's economic activities as a whole[103] there is a right to deduct input VAT.[104]

3.3 Disposal of shares

A disposal of shares is normally considered out of scope of VAT, either on the basis that it is not a taxable person selling the shares[105], or in case of a transfer of a going concern[106] the transaction is not considered an economic activity within the meaning of the VAT directive.[107] It is considered a transfer of a going concern only when certain requirements is fulfilled[108], i.e. when the shares are included in a package of assets which allows the acquirer to perform independent economic activity and the acquirer would have the right to deduct the input VAT due on the transaction.[109] The CJEU has held that, in order for a transaction to be seen as an economic activity within the scope of VAT, it needs to be an activity of producers, traders or persons supplying services- including the exploitation of tangible/ intangible property, for the purpose of obtaining income on a continuing basis.[110] Holding, acquiring or selling shares does not fall under the definition of economic activity since it is not considered an exploitation of an asset in order to obtain income on a continuing basis.[111] A profit might as well exist

[102] *Larentia + Minerva* (n. 2) para. 23 and C*ibo Participations* (n. 99) para. 31.
[103] I.e. when the cost for acquiring goods form part of general costs in the company and hence becomes cost components in the goods and services which the taxable person supplies.
[104] *Larentia + Minerva* (n. 2) para. 24 and *Cibo Participations* (n. 99) para. 33.
[105] *Larentia + Minerva* (n. 2) paras. 18-19 and HFD 2014 ref. 1 AB Cerbo.
[106] Whereas there is an explicit rule in the directive which Member States may choose to adopt. Sweden has adopted this rule in 2 chap. 1 § ML.
[107] Art. 19 and 29 VAT directive compare to 2 chap. 1 § ML.
[108] SKV, Rättslig vägledning (2018), (n.52) accessed 2018-06-23 and 2 chap. 1 § ML.
[109] *SKF* (n. 52) paras. 36-37; art. 19 and 29 VAT Directive, compare to 2 chap. 1 § ML. SKV, Rättslig vägledning (2018) (n. 52), accessed 2018-06-23.
[110] *SKF* (n. 52) paras. 27-28 and the case law there cited and art. 9(1) subpara. 2 VAT directive.
[111] Ibid. See also Oskar Henkow (2016), (n. 27), p. 53 f.

but in general this comes from dividends paid out from the subsidiary to the holding company which in fact is not a supply for consideration. Neither is selling the shares considered an economic activity since it only happens once and does not happen on a continuous basis. Hence, the disposal falls outside the scope of VAT.[112]

In contrast to this, when a financial holding in another company is accompanied by a direct or indirect involvement in the management by providing services which is subject to VAT, it can be considered an economic activity.[113] This is also the case when the transaction constitutes a direct, permanent and necessary extension of the taxable activity.[114] In this case the disposal falls under the exemption of VAT meaning that no VAT should be charged on the transaction.[115] The question that subsequently arises is if it is possible to deduct input VAT for costs related to this disposal.

3.3.1 Summarized

A disposal of shares from a passive holding company is always out of scope of VAT, either on the basis that a taxable person is not performing any economic activity or based on that it is a transfer of a going concern and hence not an economic activity.[116] The latter is depending on, if the Member State in question has implemented this rule since this is an optional provision according to article 19 and 29 in the VAT directive.

[112] *SKF* (n. 52) paras. 27-28 and Oskar Henkow (2016), (n. 27), p. 53 f.
[113] Judgment of 20 June 1991, *Polysar Investments Netherlands*, C-60/90, EU:C:1991:268 para. 14; *Cibo Participations* (n. 99) para. 20; judgment of 30 May 2013, *X*, C-651/11, EU:C:2013:346, para. 37 and *Larentia + Minerva* (n. 2) paras. 20-21. The view is confirmed by the Swedish Tax Agency in SKV, Rättslig vägledning (2018), (n. 52), accessed 2018-06-23.
[114] *Wellcome Trust* (n. 49) para. 35 and judgment of 6 February 1997, *Harnas & Helm*, C-80/95, EU:C:1997:56, para. 16.
[115] HFD 2014 ref. 1 AB Cerbo and art. 135(1)(f) VAT directive compare to chapter 3 § 9 ML.
[116] See note 105 and 106..

An active holding company's disposal of shares has however been found inside the scope of VAT in the case law from the CJEU, but is exempt.[117] The right to deduct is then depending on if there is a direct and immediate link to the output transaction or to the company's overall economic activities. How this direct link test should be applied, according to the doctrine, will be presented in the next chapter.

[117] *Polysar Investment Netherlands* (n. 113) para. 14; *Cibo Participations* (n. 99) para. 20; *X* (n. 113) para. 37 and *Larentia + Minerva* (n. 2) paras. 20-21.

4 Direct and immediate link

4.1 Direct and immediate link test

Deduction of input VAT paid to acquire goods or services in a company can be claimed in case the goods or services acquired are used for the purpose of the taxable person's taxable activities.[118] In the CJEU's case law a test has evolved in order to assess whether there is a direct and immediate link, either to a certain output transaction or to the overall economic activity performed by a company.[119] There can either be a link to a direct cost or to an overhead cost.[120] In case the cost can be considered a direct cost, which is linked to an exempt or out of scope transaction, there is no right to deduct.[121] How this link should be assessed can be decided either on a consumption-based test or an economic-based test based on the term *used for* and *cost-component* as mentioned in the VAT directive.[122]

Depending on which test is applied to a certain transaction, the outcome varies. Whereas a cost might be seen as a direct cost with, for instance, the consumption-based test this same cost can be considered an overhead cost with the more economic approach.[123] This is problematic since it leaves uncertainties regarding whether deduction can be claimed or not. Both the economic-based test and the consumption-based test can be seen in the CJEU case law but the court has rejected to clarify further which approach is prevailing the other.[124] The position has however been considered in the doctrine to be clear after the CJEU's judgment in the *Sveda* case.[125]

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[118] Article 168 VAT directive.
[119] See for instance judgment of 8 June 2000, *Midland Bank*, C-98/98, EU:C:2000:300; judgment of 21 February 2013, *Becker*, C-104/12, EU:C:2013:99; *X* (n. 113) and *Sveda* (n. 2).
[120] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 72.
[121] Ibid, p. 73 f. Compare to *SKF* (n. 52) para. 60.
[122] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 72; see also art. 1(2) and art. 168 VAT directive.
[123] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 74.
[124] *Becker* (n. 119) para. 21.
[125] See chapter 4.2.

4.1.1 Consumption- based test

The consumption-based test applies a functional approach and hence analyses, if the cost incurred is a direct consequence of a specific output transaction or activity (i.e. analysed in the context of *used for*). The direct and immediate link between the input and output transaction is hence present if the input transaction is fully consumed in connection with the realisation of an identifiable output transaction.[126] In case such a link exists, the expense is considered a direct cost for which full or no deduction can be allowed, depending on if the output transaction is taxable or not. If no such link exists, and only in that case, should it be assessed whether the expenses can be considered an overhead cost bought for the company's overall economic activities.[127] In the event of a link between the input transaction and the company's overall economic activities, a right to full, partial or no deduction can arise depending on the nature of the activities performed in the company.[128] The CJEU applied the consumption-based test for example in the *BLP* case[129] and the *Becker* case[130].[131]

BLP was a management/holding company which provided services to a group of trading companies in the furniture business. In 1989 it bought the shares in a German company but two years after the purchase BLP subsequently sold 95% of the shares in order to pay off its debts.[132] In connection to the disposal of shares in the German company, BLP acquired consultancy services for which it deducted the input VAT. The Commissioners held that since the disposal of shares was an exempt transaction, BLP should not have a right to deduct the input VAT.[133] BLP

[126] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 72 and 75.
[127] Ibid. p. 72.
[128] Art. 168 VAT directive and Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 72.
[129] Judgment of 6 April 1995, *BLP Group*, C-4/94, EU:C:1995:107.
[130] *Becker* (n. 119).
[131] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014) (n. 91), p. 75.
[132] *BLP Group* (n. 129) para. 3.
[133] *BLP Group* (n. 129) paras. 4-5.

appealed against the decision and eventually the question was referred to the CJEU for a preliminary ruling.[134] The CJEU made it clear, that even if the ultimate purpose of the transaction was to perform a taxable transaction when acquiring the services, there was no right for the acquirer to deduct input VAT when the services supplied would be used for an exempt transaction (the disposal of shares[135]).[136]

Becker was a sole trader (enskild näringsidkare) and a majority shareholder in a limited company under German law (A) which carried out transactions in the construction business. A was linked to Becker for tax purposes (by a so called Organschaft under German law) according to which Mr Becker was considered the controlling entity. Criminal proceedings were brought against Becker after A had won and performed a construction contract of which Becker was suspected to have won due to the usage of confidential information.[137] Becker had to hire a lawyer to defend himself. The lawyer sent an invoice including VAT addressed to A, which Becker deducted. The Finanzamt Köln-Nord considered that the VAT should not be deductible and the question was later referred to the CJEU.[138] The CJEU referred to its older case law and stated that when the national courts and tax authorities apply the direct and immediate link test, they should consider all circumstances surrounding the specific transaction and account should be taken only to transactions which are objectively linked to the taxable person's taxable activity.[139] The CJEU concluded that there was no legal link between A and the criminal proceedings. They held that the existence of a direct and immediate link between a given transaction and the taxable person's overall economic activity is dependent on the objective contents acquired by the taxable person. Hence there was no right to deduct the input VAT.[140]

[134] *BLP Group* (n. 129). paras. 6 and 11.
[135] My notice added.
[136] *BLP Group* (n. 129) para. 28.
[137] *Becker* (n. 119) paras. 8-10.
[138] Ibid. paras. 12-15.
[139] *Becker* (n. 119) para. 22.
[140] Ibid. paras. 31 and 33.

4.1.2 Economic- based test

The economic-based test makes a distinction of direct costs and overhead costs, meaning if the cost of an input transaction can be seen as a part of the price of the output transaction, it is considered a direct cost. In case the input cost is not part of the price of the output transaction it is considered an overhead cost.[141] This approach was for example used by the CJEU in the case *X*[142] and in the *SKF* case[143]. According to Ramsdahl Jensen and Stensgaard[144], in the light of the economic-based test, when the ultimate aim of the transaction is to benefit the overall taxed economic activity of the taxable person, it cannot be excluded that there is a right to deduct only because an input transaction seems to be consumed by an output transaction which does not give a right to deduct.[145]

4.2 Sveda

The concept of the direct and immediate link to a business' overall economic activities has again been tested in the *Sveda* case[146]. Sveda was a taxable person in Lithuania whose business activities consisted of providing accommodation, food/beverage, trade fairs, conferences and leisure activities and services connected to that. Through an agreement with the National Paying Agency, Sveda undertook to construct a Baltic mythology recreational path which would be available for the public free of charge. The Agency committed to assume up to 90 percent of the cost and Sveda would pay the remaining 10 percent.[147] Sveda intended to perform economic activities in the area in the future and hence claimed a deduction of the input VAT related to the constructing. Their claim was contested by the Tax Agency in Lithuania.[148]

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[141] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), (n. 91), p. 73 and 79.
[142] *X* (n. 113).
[143] *SKF* (n. 52) paras. 60 and 62. Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), (n. 91), p. 81. Please see chapter 5.1 for the *SKF* case.
[144] (n. 91).
[145] Dennis Ramsdahl Jensen & Henrik Stensgaard (2014), (n. 91), p. 81.
[146] *Sveda* (n. 2).
[147] Ibid. paras. 8-9.
[148] Ibid. paras. 10 and 13.

The CJEU held that the expenses were ultimately intended for carrying out economic activities, which was supported by objective evidence. Hence the court confirmed that Sveda, when investing in the capital goods, acted as a taxable person within the meaning of article 9(1) in the VAT directive when performing its economic activity.[149] Even though the capital goods were intended to be used free of charge of the public it was clear that it was also for the purpose of Sveda's objective to subsequently supply taxed transactions.[150] Thus, the CJEU deemed that there seemed to be a direct and immediate link between the costs for the capital goods and Sveda's overall economic activities, although the CJEU left it up to the referring court to decide upon the matter. However, if such a link existed, Sveda should be entitled to a deduction of input VAT on the capital goods.[151]

In the doctrine it has been pointed to that the CJEU considered Sveda's building of a recreational path for free as an economic activity since this was given as a premise from the referring court.[152] However the CJEU did not discuss whether or not performing activities for free could be considered as economic activities in its judgement and therefore further guidance in this matter is needed.[153]

Post Sveda the doctrine discussed that the direct link for a right to deduct more and more has become an indirect link and that this is necessary in order to achieve complete neutrality within the system of VAT.[154] According to Henkow the CJEU's ruling in *BLP*[155] must be seen as overruled and the correct approach for the direct link test is the economic-based test.[156] Kristoffersson agrees, regarding the functional approach and the economic- based test, with Henkow.[157] Furthermore Henkow concluded

[149] *Sveda* (n. 2) paras. 22 and 23.
[150] Ibid. para. 26.
[151] Ibid. paras. 35 and 37.
[152] Madeleine Merkx (2016) (n. 98), p. 3.
[153] Ibid.
[154] Oskar Henkow (2016), 'Sveda—The increasing obscurity of the direct link test in EU VAT', World Journal of VAT/GST Law, p. 48 f.
[155] (n. 129).
[156] Oskar Henkow (2016) (n. 154), p. 52.
[157] Eleonor Kristoffersson (2017), (n. 36) p. 128.

that, after Sveda, the ultimate aim of the transaction is of relevance for the right to deduct. Only if a cost specifically is connected to an exempt output transaction can there be no right to deduct. Deduction should be allowed when it can be proved that the cost relates to the business as a whole.[158]

[158] Oskar Henkow (2016) (n. 154), p. 52.

5 Swedish case law

5.1 SKF

SKF was a parent company of an industrial group for which it played an active role by providing management-, administrative services and marketing policy for consideration on which SKF paid output VAT.[159] Due to a restructuring of the group, SKF wanted to dispose of shares, in one wholly owned subsidiary and one former wholly owned subsidiary in which SKF still held 26,5 percent of the shares, in order to obtain capital for the remaining activities within the group. With regards to the disposal SKF considered to acquire services for the valuation of shares, assistance with negotiations and specialised legal advice for the drafting of the contracts.[160] SKF applied for a preliminary ruling to SRN with regards to the question, if the input VAT they would pay for this services could be deducted. SRN decided in favour of SKF upon which SKV appealed to HFD claiming that the VAT should not be deductible.[161] HFD decided to stay the proceedings and ask the CJEU for a preliminary ruling.[162]

The CJEU held that when selling shares in subsidiaries, to which SKF had supplied services subject to VAT, in consistency with the principle of equal treatment and fiscal neutrality, SKF's disposal of shares came within the scope of VAT.[163] But, since it was considered a transfer of the totality of assets within the meaning of article 5(8) Sixth VAT directive[164] (article 19 VAT directive 2006/112), it could be deemed an economic activity out of scope of VAT, given that Sweden had implemented this provision. Since Sweden had implemented such a rule the disposal of shares should be considered out of scope in case the totality of assets was transferred.[165]

[159] *SKF* (n. 52) para. 20.
[160] Ibid. para. 21.
[161] Ibid. paras. 22-24.
[162] Ibid. para. 25.
[163] Ibid. paras. 26, 33-34.
[164] (n. 81)
[165] *SKF* (n. 52) paras. 36 and 40.

However if the disposal of shares was considered in scope of VAT it should be exempted under art 135(1)(f) of the VAT directive.[166]

The CJEU also held that treating a transaction differently depending on if it was exempt or fell out of scope of VAT, whereas a deduction would be allowed in case of the latter[167], would be an infringement of the principle of neutrality.[168]

The CJEU finally came to the conclusion that in case there was a direct and immediate link between the costs associated with the input services and the overall economic activities of the taxable person, there was a right to deduct. The CJEU held that it was up for the national court to decide whether the costs incurred were likely to be incorporated in the price of the shares sold or only cost components of transactions within the scope of the taxable person's economic activities.[169] The CJEU's reasoning is an example of the economic-based test.[170]

HFD held that SKF did not have a right to deduct input VAT on related expenses since there was considered to be a direct and immediate link with the exempted disposal of shares.[171]

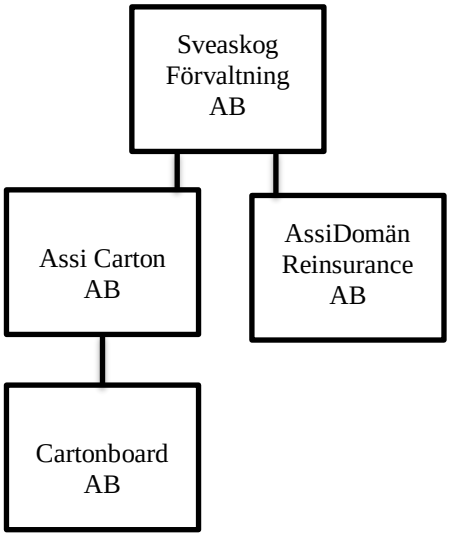
As a consequence from the decision from HFD in the SKF case, the legal position in Sweden was that it was not possible to deduct input VAT related to the disposal of shares.[172] This legal position remained until the Sveaskog's case.

[166] *SKF* (n. 52) para. 53.
[167] As was the case in the judgment of 26 May 2005, *Kretztechnik*, C-465/03, EU:C:2005:320, see para. 36, since the related cost to an out of scope activity was considered part of the general cost of the business as a whole.
[168] *SKF* (n. 52) para. 66.
[169] Ibid. para. 73.
[170] Dennis Ramsdahl Jensen and Henrik Stensgaard (2014) (n. 91), p. 81.
[171] SKF (n. 8).
[172] SKV's opinion (ställningstagande) 2011-01-19, dnr. 131 780946-10/111, 'Avdragsrätt för mervärdesskatt på förvärv i samband med försäljning av aktier i en ekonomisk verksamhet', accessed 2018-07-13.

5.2 Sveaskog

On the 16 May 2017, HFD delivered their decision in the so called Sveaskog's case.[173] Sveaskog was a concern with Sveaskog Holding being the parent company, which mainly focused on forest management. Sveaskog's subsidiaries were focused on cartonboard manufacturing and insurance activities. In order to streamline the business and liberate capital to Sveaskog's forest management, Sveaskog disposed of its subsidiaries by selling the shares in AssiCarton AB and AssiDomän Reinsurance AB. In connection to the disposal, Sveaskog acquired consultancy services for which they deducted the input VAT. SKV argued that Sveaskog did not have a right to deduct the input VAT since the disposal of shares should be considered a sale of shares outside the scope of VAT, based on the fact that Sveaskog did not provide its subsidiaries with any taxable supplies. Sveaskog however argued that the costs they had experienced for hiring consultants was not possible to pass on to the buyer of the shares and hence these costs should be considered to be a part of Sveaskog's overall economic activities.[174]

[173] Sveaskog (n. 3).
[174] Ibid.



The question the court was confronted with was if a holding company may deduct input VAT for consultancy costs acquired in connection to selling shares in a subsidiary. [175]

The court observed that the acquiring, holding and disposal of shares is not considered to be an economic activity in the meaning of the VAT directive, since it is not a question of utilisation of property with the purpose to gain earnings. Hence it is normally considered outside the scope of VAT. When the disposal of shares is part of a business' economic activity, such as the exchanging of stocks, it is in the scope of VAT, but exempted. In neither of the above situations is it possible to deduct VAT on expenses which have a direct and immediate link to the disposal of shares.[176]

However when the costs for acquiring the services is part of the general costs in the taxable persons overall economic activities, it is possible to deduct input VAT even if there is no connection to an output transaction. This is given that there is a direct and immediate link to the taxable persons overall economic activities. The direct and immediate link is decided upon if the costs for acquiring the services is a cost component in the goods and services that the taxable person supplies within the frame of his economic

[175] Sveaskog (n. 3).
[176] Ibid.

activities, rather than a cost component in the price of the disposed shares. Even if the subsidiary was not performing any taxable activities, it would be in contradiction to the principle of neutrality to treat similar transactions different depending on if the disposal happened inside or outside the scope of VAT.[177]

The court then referred to the *SKF* judgement[178] and that the CJEU in that case confirmed that hiring lawyers and consultants to assist when negotiating contracts and signings agreements, was considered to have a direct and immediate link to the disposal of shares. Hence it was not possible to deduct the input VAT. However, the court said, in recent case law from the CJEU it has applied a more functional view on the right to deduct with cases such as *Sveda*[179], *Becker*[180], *PPG*[181] and *AES*[182].[183]

The HFD's conclusion was that Sveaskog had a right to deduct input VAT. This was based on the circumstances that Sveaskog before and after the disposal of shares was performing taxable activities inside the scope of VAT. But also that the restructuring of the company had as a purpose to make the business more effective and to gain capital to the remaining taxable activities. The court then presumed, as Sveaskog argued, that the cost for consultants was not possible to pass on to the buyer of the shares and hence it was a cost component in the general supplies of Sveaskog. Therefore, the direct and immediate link to the business overall economic activities was given.[184]

According to Gina Hedin, HFD applies an economic approach in the Sveaskogs case and that with great certainty the reasoning in the SKF case is now overruled.[185]

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[177] Sveaskog (n. 3).
[178] *SKF* (n. 52).
[179] *Sveda* (n. 2).
[180] *Becker* (n. 119).
[181] *PPG Holding* (n. 60).
[182] Judgment of 18 July 2013, *AES- 3C Maritza East 1,* C-124/12, EU:C:2013:488.
[183] Sveaskog (n. 3)
[184] Ibid.
[185] Gina Hedin (2017), (n. 38), p. 666.

6 Swedish Tax Agency opinion

6.1 SKV's opinion post Sveaskog

SKV distinguishes between passive holding companies and active holding companies. The passive holding company is not considered a taxable person since the holding of shares is not considered performing economic activities. Hence the passive holding company does not have any right to deduct input VAT for related costs to the holding of shares.[186]

An active holding company is a company which takes direct or indirect part in the management of its subsidiaries for which it charges the subsidiary and is hence considered a taxable person performing economic activities inside the scope of VAT. Deduction of input VAT is normally allowed for costs related to the taxable activities but not for costs related to non-economic activities.[187]

Deduction for costs relating to the disposal of shares is not deductible in case it has a direct and immediate link to a non-taxable disposal[188].[189] But in case the costs have a direct and immediate link to the taxable person's overall economic activities, a deduction can however be claimed. According to SKV the objective purpose with the purchase needs to be assessed in order to determine whether a transaction has a direct and immediate link to the out of scope/exempted transaction or to the business overall economic activities.[190] In case the objective purpose is to liberate capital to the remaining taxable activities in other subsidiaries there is no right to deduct. This is based on the view that every company is considered a separate legal entity for tax purposes and a liberation of capital for subsidiaries cannot be connected to the holding company's overall economic activities. Hence a

[186] SKVs opinion (ställningstagande) 2017-12-19, dnr 202 377677-17/111, <https://www4.skatteverket.se/rattsligvagledning/365766.html?date=2017-12-19>, accessed 2018-06-23.
[187] Ibid.
[188] Either out of scope of exempted, see chapter 3.3.
[189] SKV's opinion (ställningstagande) 2017-12-19, dnr. 202 377722-17/111, (n. 1), accessed 2018-04-06.
[190] Ibid.

cost related to the disposal of shares in a subsidiary, when the holding company does not perform any other economic activity than management services to its subsidiaries, is considered to have a direct and immediate link to the disposal.[191]

In case the services acquired do not have a direct and immediate link to the disposal of shares, e.g. the services would have been acquired anyways, it can be considered to have a direct and immediate link to the general costs in the holding company. The right to deduct is then depending on if the general requirements for deduction as according to the Swedish VAT act (ML) and the VAT directive is fulfilled with regards taken to the objective purpose of acquiring the services.[192]

After SKV delivered their opinion the Chamber Court (Kammarrätten) in Stockholm has decided two cases where they, in opposite to SKV's opinion, allowed for deduction for related costs to a disposal of shares when the objectives of the disposal was to liberate capital to the remaining taxable activity within the group.[193] SKV decided to appeal against the first decision[194] but was not granted a leave to appeal (prövningstillstånd) from HFD.[195] SKV has, in a commentary, held that it believes KRS made a too wide interpretation of the Sveaskog's case and that the outcome of the case in the KRS is against the case law from the CJEU. SKV has however not yet commented on the fact that it did not receive a leave to appeal to HFD.[196] Although the case law from the Chamber Court (Kammarrätten) does not have the status as legally binding as it does from HFD, the fact that the

[191] SKV's opinion (ställningstagande) 2017-12-19, dnr 202 377677-17/111 (n. 186), accessed 2018-06-23.
[192] Ibid.
[193] Leg II Swe Holdings and Pomona (n. 4).
[194] Leg II Swe Holdings (n. 4). SKV did not appeal against the decision in KRS 4678-17 Pomona according to the registrator at the Chamber Court in Stockholm, Tina Rockström, as reported by phone 2018-07-13.
[195] According to decision from HFD determined 2018-06-13 as reported by the registrator at HFD, Therése Strand, by phone 2018-07-12.
[196] SKV commentary (rättsfallskommentar) 2018-01-23, dnr. 202 29473-18/111, 'KRNS, mål nr 5986-15 och 5987-15 Avdrag för ingående mervärdesskatt vid försäljning av dotterbolagsaktier', <https://www4.skatteverket.se/rattsligvagledning/367685.html?date=2018-01-23&q=5986-17> accessed 2018-08-03.

Chamber Court allows for deduction shows upon the uncertainty of the legal position.

7 Analysis and conclusion

7.1 Analysis

In order to achieve the objectives of this thesis the author wants to refer to the research question: When is it allowed to deduct input VAT for related expenses to a disposal of shares?

CJEU has held that a direct or indirect involvement in the management of a company's subsidiaries, for consideration, is considered to be an economic activity.[197] In this case the company acts within the scope of VAT and has as a main rule a right to deduct input VAT on purchases made for its economic activities. Although a disposal of shares is either out of scope or exempt from VAT, a right to deduct might exist in the event of a direct and immediate link to the taxable persons overall economic activities, i.e. an overhead cost in the company.

In *Sveda*, the CJEU held that the direct link should be decided upon by looking at the *ultimate aim*[198] of the transaction. SKV, however, holds that the *objective purpose*[199] of the transaction should be the basis for deciding the direct link.[200] The CJEU applied an economic approach already in the *SKF* case, whereas the HFD merely applied a consumption-based test in its domestic judgement, stating that the right to deduct was consumed in the event of a direct and immediate link with the exempt disposal of shares.[201] Sveaskog is different to SKF in the sense that Sveaskog did not provide its subsidiaries with any taxable supplies but instead performed economic activities in the company. It was thus possible for the HFD to find a direct and immediate link between the exempt disposal of shares and the remaining economic activity in the company on the basis of objective

[197] See chapter 3.2.
[198] My emphasis added.
[199] My emphasis added.
[200] SKV's opinion (ställningstagande) 2017-12-19, dnr. 202 377722-17/111, (n. 1), accessed 2018-04-06
[201] See chapter 5.1.

criterias. HFD did however not consider the scenario if Sveaskog was a management holding company, who did not perform any taxable activities besides management services to its subsidiaries, would it then be possible to find a direct link to the business overhead costs?

According to the doctrine, the CJEU's approach towards the direct link test post *Sveda* is a more functional one, i.e. an economic-based test.[202] I agree with the doctrine in this sense. This implies that in case the cost of the input transaction can be seen as a cost component in an output transaction, it is considered a direct cost for which full or no deduction can be claimed. However in case such a link exists the right to deduct is not consumed and it can also be considered that a direct and immediate link exists to the taxable persons overall economic activities.

In the light of the case law from the CJEU, together with the purpose of the VAT directive, one may ask if SKV's interpretation actually is infringing EU law to the extent that the principle of neutrality is bypassed. SKV states that a deduction can be claimed in case the disposal of shares is made in order to liberate capital for the company's remaining economic activities. Excluding the right to deduct if the same transaction is made with a purpose to liberate capital for the benefit of the remaining economic activities in its subsidiaries, seems to be against the principle of neutrality with the CJEU case law such as *SKF*, *PPG Holding*, *Kretztechnik* and *Sveda* in mind. In *PPG* the CJEU held that the choice of organisational structure should not affect the right to deduct input VAT, thus otherwise it would be an infringement of the principle of neutrality.[203] In line with what the CJEU held in *SKF,* by refusing a company a right to deduct when it is performing taxable activities in the shape of management services, but allowing it when the taxable activities consist of forest administration (as in Sveaskog), they treat similar situations unequal. Both are performing economic activities inside the scope of VAT but SKV has decided that only one should have a right to deduct. Since it is clear that providing management services to

[202] See chapter 4.2.
[203] See footnote 57.

subsidiaries is considered an economic activity, SKV's opinion leads to treating similar transactions differently and in this sense the neutrality within the VAT system is lost.[204]

The CJEU has also held that treating exempt transactions differently from transactions which fall out of scope of VAT also infringes the neutrality within the system of VAT. Hence in case the deduction would be allowed for an exempt transaction,[205] it should also be allowed in the event that the transaction falls outside the scope of VAT, since the two situations are comparable, given that the taxable person performs economic activities within the scope of VAT.

7.2 Conclusion

The author's conclusion is consequently that, in order to comply with the principle of fiscal neutrality inherent in the system of VAT, and the CJEU's case law, when a holding company which performs economic activities inside the scope of VAT, disposes of shares, there should be a right to deduct the input VAT in case there is a direct and immediate link to the taxable persons taxable activities as a whole. When assessing whether there is a direct and immediate link, the ultimate aim should be taken into consideration. Even though the ultimate aim of the transaction is to liberate capital for the remaining taxable activities in the holding company's subsidiaries, there should be a right to deduct if the requirements above is fulfilled, otherwise the neutrality principle would be infringed. It does not matter, for the deductibility, whether there is a direct and immediate link to an exempt output transaction, the right to deduct cannot be consumed. Only if no direct link can be found to the taxable person's activities as a whole, can a deduction be denied.

Looking at the ultimate aim instead of the objective purpose of the transaction in order to decide upon the right to deduct, might lead to a

[204] Compare to the *Zimmerman* case (n. 54), chapter 2.2.
[205] *Kretztechnik and SKF* (n. 167 and 168).

higher extent of arbitration in every assessment. Although, it seems like this is necessary in order to comply with the principle of fiscal neutrality. With the purpose of VAT in mind, a derogation from the main rule of deduction can only be allowed when it is explicitly regulated in the directive. VAT should not burden the traders, but in the event of an exemption it does. If allowing for deduction when the ultimate aim is to benefit the remaining taxable activities in the company, including its subsidiaries, it is at least possible for every company to argue for deduction, not excluding a right to deduct based on the choice of organisational structure of the company. In this sense similar transactions would be treated equal to a higher extent than what is suggested by SKV in its opinion.

Since the principle of neutrality has as a purpose to ensure equal treatment within the scope of VAT, pure holding companies, which does not perform any activities inside the scope of VAT, can be denied a right to deduct without infringing the principle of neutrality.

In order to comply with EU law and the case law from the CJEU, SKV should, in my opinion, change its opinion (ställningstagande) towards a more functional approach with the economic-based test and the ultimate aim of the transaction as a basis for assessment of the right to deduct.

Legislation

EU primary law

Consolidated version of the Treaty on European Union, published in the Official Journal of the European Union 9 May 2008, C 115/13

Consolidated version of the Treaty of the Functioning of the European Union, published in the Official Journal of the European Union 26 October 2012, C 326/47

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Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment (6th VAT directive).

COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax

Swedish law

Mervärdeskattelag (1994:200)

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Judgment of 20 June 1991, *Polysar Investments Netherlands*, C-60/90, EU:C:1991:268

Judgment of 19 January 1993, *Commission v Italy*, C-101/91, EU:C:1993:16

Judgment of 6 April 1995, *BLP Group*, C-4/94, EU:C:1995:107

Judgment of 20 June 1996, *Wellcome Trust*, C-155/94, EU:C:1996:243

Judgment of 6 February 1997, *Harnas & Helm*, C-80/95, EU:C:1997:56

Judgment of 21 March 2000, *Gabalfrisa and Others*, joined cases C-110/98 to C-147/98, EU:C:2000:145

Judgment of 8 June 2000, *Midland Bank*, C-98/98, EU:C:2000:300

Judgment of 14 November 2000, *Floridienne and Berginvest*, C-142/99, EU:C:2000:623

Judgment of 3 May 2001, *Commission v France*, C-481/98, EU:C:2001:237

Judgment of 27 September 2001, *Cibo Participations*, C-16/00, EU:C:2001:495

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Judgment of 29 April 2004, *EDM*, C-77/01, EU:C:2004:243

Judgment of 26 May 2005, *Kretztechnik*, C-465/03, EU:C:2005:320

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Judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166

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