

OLD SQUARE
TAX CHAMBERS

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Recovering VAT: *Sveda & Norseman Gold*

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The Basic Proposition

- Deductible input tax:
 - taxable person
 - acting as such
 - input supply to be used for purposes of taxable transactions
- Non-deductible input tax:
 - not taxable person or taxable person not acting as such
 - input supply to be used for purposes of exempt transactions or ...
 - ... activity other than making of taxable supplies?

Sveda, C-126/14

- Taxpayer:
 - for-profit legal person
 - activities:
 - provision of accommodation and food & beverages
 - organisation of trade fairs, conferences & leisure activities
 - engineering
 - consultation on above activities
- Baltic mythology recreational (discovery) path
- Construction costs – 90/10 split (national agency/taxpayer)
- Free access (five years)

Sveda: Question

- Tax authority objection: input supplies not intended to be used for purposes of activity subject to VAT
- Question: is input tax deductible where recreational path:
 - (i) directly intended for use by public free of charge; but also
 - (ii) may be means of carrying out taxed transactions?

Sveda: Referring Court Findings

- Input supplies ultimately intended for carrying out economic activities
 - recreational path = means of attracting visitors with view to providing them with e.g. souvenirs, food & drinks, access to attractions, paid-for bathing
- Input costs should come partly within price of goods or services provided under planned economic activity

Sveda: Answer

- Direct and immediate link between input supplies and taxable output transactions?
- Input costs can be linked to planned economic activity
- Access to recreational path not exempt
 - link to taxable output transactions not severed
- Immediate use of recreational path free of charge has **no** effect on existence of direct and immediate link between input supplies and output transactions or with economic activities as a whole

Lennartz, C-97/90

- “... whether ... a taxable person has acquired goods for the purposes of his economic activity ... is a question of fact which must be determined in the light of all the circumstances ...”
- “... a person who acquires goods for the purposes of an economic activity ... does so as a taxable person, even if the goods are not used immediately for such economic activities”
- “... [no] rule excluding the right of deduction where the use of goods for the purposes of economic activities falls below a certain threshold ...”
 - so even “very limited” use does not displace right of deduction

From *Lennartz* To *Sveda*

- *Lennartz*, C-97/90
- *Abbey National*, C-408/98
- *CIBO Participations*, C-16/00
- *Kretztechnik*, C-465/03
- *Securenta*, C-437/06
- *VNLTO*, C-515/07
- *Portugal Telecom*, C-496/11
- *Larentia + Minerva*, C-108/14 & C-109/14

Non-Deductible Scenarios

- *Securenta*, C-437/06
 - taxpayer found to carry out three types of activities:
 - (i) non-economic activities;
 - (ii) exempt economic activities; and
 - (iii) taxed economic activities
- *VNLTO*, C-515/07
 - activities in question:
 - (i) unrelated to activities subject to VAT; and
 - (ii) held not to be direct, durable and necessary extension of economic activities
- *Larentia + Minerva*, C-108/14 & C-109/14
 - **would** be apportionment if some shareholdings were in subsidiaries in the management of which taxpayer was not involved

Non-Economic Activities

- Use for private purposes
- “Mere” acquisition of financial holdings
- Supply effected other than for consideration
- Activity funded entirely by outside-the-scope income?

Two Art Galleries

- X (non-profit organisation) vs Y (commercial coffee house)
- 50% of space = exhibition space
- Remainder of space = shop + coffee bar

Norseman Gold [2016] UKUT 69

- *Floridienne*, C-142/99
 - “... involvement ... in the management of subsidiaries must be regarded as an economic activity ... in so far as it entails carrying out transactions which are subject to VAT ...”
- FTT [2014] UKFTT 573
 - taxpayer was actively engaged in managing subsidiaries
 - its services capable, in principle, of amounting to taxable supply BUT ...
 - ... they were not made for consideration

Norseman Gold: Supply Of Services

- *Apple and Pear Development Council, C-102/86*
 - direct link between thing done and payment
 - “... no relationship exists between the level of the benefits which individual growers obtain ... and the amount of the mandatory charges which they are obliged to pay ... The charges ... are always recoverable from each individual grower ... whether or not a given service ... confers a benefit upon him”

- *Tolsma, C-16/93*
 - “for consideration”
 - legal relationship
 - reciprocal performance
 - payment = value actually given in return for the thing done

Norseman Gold: Judgment

- “... supplies were made without ... any common understanding of what was payable, when and in what circumstances”
- “... supplies were not made for consideration; they were made gratuitously”

Dividends

- *Floridienne*, C-142/99
 - “Certain features of dividends account, in particular, for their exclusion from VAT ...
 - [(i)] ... the existence of distributable profits is generally a prerequisite of paying a dividend ... payment is thus dependent on the company's year-end results ...
 - [(ii)] the proportions in which the dividend is distributed are determined by reference to the type of shares held, in particular by reference to classes of shares, and not by reference to the identity of the owner of a particular shareholding ...
 - [(iii)] ... dividends represent, by their very nature, the return on investment in a company and are merely the result of ownership of that property”