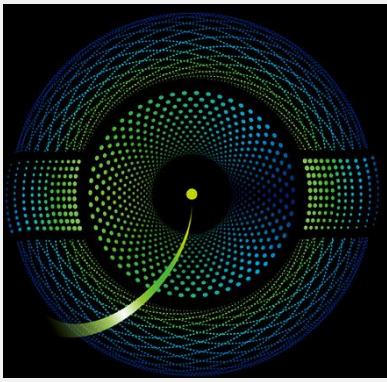

Indirect Tax I VAT

Alert December 16, 2024

Policy changes for holding companies opens the door to new discussions on VAT recovery on costs

On December 10, 2024, the Dutch State Secretary of Finance published two new decrees impacting the VAT position of holding companies. As of July 1, 2025, the policy notice on holding companies (in Dutch: Holdingresolutie) and the policy notice on 'Levying of VAT with respect to the sale of shares' (in Dutch: Heffing van omzetbelasting met betrekking tot de verkoop van aandelen) will officially be repealed. Below, we have included a summary of the most important changes..

Background

The VAT position of holding companies has been a matter of dispute between the Dutch Tax Authorities (hereinafter: 'DTA') and taxpayers for many years. The VAT consequences of acquiring, holding, and selling shares have been defined by case law, primarily from the Court of Justice of the European Union (hereinafter: 'ECJ'). The Dutch policy is over 20 years old and no longer aligns with this case law.

Most important changes as of July 1, 2025

Below we have outlined the five main changes regarding the taxable person status and the right to input VAT recovery for holdings.

1. Holding in the VAT group:
    - **Legislation and case law principles:** a holding does not qualify as a taxable person for VAT if it has no activities other than the holding shares. Such a 'mere' holding company cannot, in

principle, be part of a VAT group, as only VAT taxable persons can be included based on Dutch VAT law.

- Situation until July 1, 2025: the policy notice on holdings includes the possibility of including 'top holding companies', which act as a policy-determining and steering body within the concern, in the VAT group.
- Situation after July 1, 2025: the new policy explicitly extends this possibility to ‘intermediate holding companies’ that also perform such a policy-determining and steering function. We believe this is a welcome clarification that aligns with the role of these entities within concerns. The policy still requires a written request to the DTA.

2. Pre-pro rata VAT recovery limitation:
    - Legislation and case law principles: merely holding shares is not an economic activity. If a holding company holds shares in subsidiaries to which it provides activities against consideration and subsidiaries where it only holds shares, the holding company may only recover VAT on costs related to its economic activities in proportion to its total activities. This ratio is known as the 'pre pro rata'.
    - Situation until July 1, 2025: the policy notice on holding companies includes the approval that merely holding shares by a taxable person already designated as an ‘entrepreneur’ does not negatively impact the right to recover VAT on costs. This means that no pre pro rata recovery limitation needs to be considered. In practice, this position is no longer approved by the DTA due to case law from the ECJ.
    - Situation after July 1, 2025: the approval from the policy notice on holding companies lapses, in line with the aforementioned case law.

3. Extension concept
    - Legislation and case law principles: according to case law from the ECJ, holding shares is an economic activity if (i) there is involvement in the management of the subsidiary, meaning that activities for consideration are provided to the entity, (ii) one acts as a share broker, or (iii) the holding of shares forms the direct, permanent, and necessary extension of other economic activities.
    - Situation until July 1, 2025: holding shares as an 'extension' of the economic activities is only evident from case law and is not codified in legislation or policy.
    - Situation after July 1, 2025: the new passages in the ‘Policy notice on VAT recovery’ (in Dutch: Besluit Aftrek van omzetbelasting) establish that holding shares as a direct, necessary, and permanent extension of the economic activity also leads to the acquisition, holding, and selling of shares falling within the scope of the economic activity. If the holding company incurs costs for such actions, it generally has access to the right to recover VAT on those costs.

4. Allocation of share sale costs
    - Legislation and case law principles: to determine the right to VAT recovery on costs, it must first be established whether the costs are incurred for a specific activity. VAT on costs directly attributable to a sale of shares is generally not recoverable, as the sale of shares is a non-economic or VAT-exempt transaction. This is only different if the transaction qualifies as an economic activity and the buyer is located outside the European Union.
    - Situation before July 1, 2025: in the Policy Notice of August 3, 2004, a distinction is made between the sale of shares by a holding company which is actively involved in the relevant subsidiary and receives a consideration in return for this ('active holding company') and the share broker. In both cases, the Policy notice qualifies the transaction as an economic activity. For the active holding company, however, it is also stated that costs incurred for the sale of shares must be considered costs which are not directly attributable to the share transaction. VAT on those costs is recoverable in accordance with the 'pro rata' VAT recovery right of the holding company (see also point 5). For the share broker, however, such costs are generally classified as directly attributable costs. Therefore, VAT on these costs is not recoverable at all unless the buyer is located outside the European Union.
    - Situation after July 1, 2025: in all cases where a taxable sale of shares occurs, a cost allocation must be made to determine the extent of input VAT recovery. If the costs were incurred prior to the sale and transfer of the shares, the costs are deemed directly attributable to the share transaction if the underlying services were objectively purchased solely with a view to the share transaction. If the costs are incurred afterward, they are not deemed directly attributable to the share transaction, provided the underlying services do not – objectively viewed – arise solely from the share transaction. This seems to align with the allocation methods used by the ECJ, but no consideration is given to whether the costs are included in the price (a test also applied).

5. Proceeds share transaction in pro rata:
    - Legislation and case law principles: if costs are considered general costs, VAT on these costs is recoverable following the 'pro rata' of the selling entity (apart from any pre pro rata limitation as described under point 1). The pro rata reflects the ratio between the revenue from activities eligible for VAT recovery compared to the total revenue of the taxable person. Since the sale of shares qualifies as an exempt activity, the proceeds from the sale lower the pro rata of the taxable person (unless the buyer is located outside the European Union).
    - Situation until July 1, 2025: if an active holding company sells shares, the proceeds from the share transaction do not need to be included. This is only different for a share broker or if the sale

forms the direct, permanent, and necessary extension of the economic activity of a business.

- Situation after July 1, 2025: the sale proceeds can only be excluded from the taxable person's pro rata if the share transaction is an incidental financial transaction. This is the case if such a sale occurs incidentally. This can also occur if the holding of shares qualifies as a direct, permanent, and necessary extension, if the subsidiary forms a concern or VAT group with the holding company. If the sale is executed by a share broker, or by a participation or investment company or a related entity, the sale cannot be classified as an incidental transaction. The sale proceeds therefore count as exempt revenue in the pro rata for which (in principle) no right to recovery applies.

Impact on practice

The new policy, in cases where applicable, provides the desired clarity by eliminating contradictions between the old policy and case law. At the same time, it raises many questions. We mention a few:

- More holding companies will face a pre pro rata recovery limitation. However, the new policy provides no new guidelines on how this limitation should be determined. Furthermore, we foresee uncertainty about the application of the extension concept.
- For the allocation of costs to a sale of shares, the new policy refers to the moment at which the costs are "incurred". The policy does not specify when costs are deemed to be incurred and how this concept relates to the VAT liability.
- Additionally, the decision specifically addresses entities related to a participation or investment company involved in investments with Private Equity, specifically regarding whether the sale proceeds should be part of the pro rata calculation. The concept of "relatedness" does not appear within the VAT legislation in this context, raising questions about the scope of this concept.

The potential discussions emphasize again the importance of timely analysis and substantiation of the VAT recovery position on (transaction) costs within group structures. Timely action can prevent a (new) recovery limitation from July 1, 2025. Of course, we are happy to assist you with this.

How can we help?

If you have any questions regarding the topics in this alert or their impact on your situation, please feel free to contact your regular contact person for tax-related matters or one of the Deloitte contacts below.

Get in touch with our experts below or find more on our VAT services via deloitte.nl.

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