

Indirect Tax | VAT

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CJEU: Opinion AG Kokott on the concept of 'open market value' and single vs. multiple supplies

On March 6, 2025, an [Opinion](#) from Advocate General Kokott ("AG Kokott") of the Court of Justice EU ("CJEU") has been published in the Höggullen AB case (C-808/23). This concerns one of the cases currently pending at the CJEU which concern the interaction between transfer pricing and VAT.

In the case at hand, the VAT concept of 'open market value' is in dispute in relation to a controlling holding company managing its subsidiaries in return for consideration. AG Kokott argues that the open market value should be determined for each of individual services rendered by the holding company to the subsidiary (i.e., not a compound service for which there is no open market value). If the value of individual services cannot be determined, not all costs incurred in the year must be taken into account. Instead, only the expenditure made by the holding subject to VAT and allocated to that (year's) services is to be taken into account to determine the open market value.

Background

Legal framework

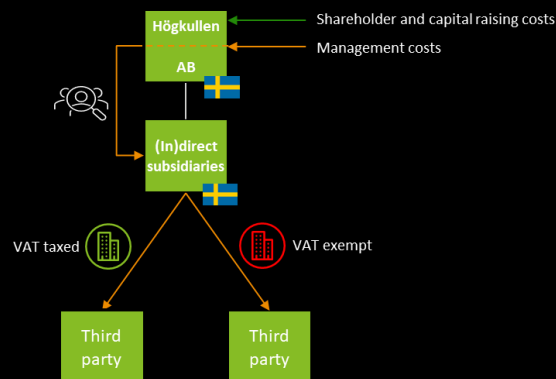
The general rule is that the taxable amount for the supply of goods or services is the actual consideration for the supply (i.e. the subjective value). However, to prevent tax evasion or avoidance, Member States may apply the 'open market value' as taxable amount in specific cases. This applies, for example, when there are management or ownership ties, the consideration is below open market value, and the recipient has no full right of deduction. Sweden has implemented this measure.

For services, the 'open market value' is the consideration that would be paid on the open market for a comparable supply under similar circumstances ("**comparable price**"). If no comparable price exists, the open market value is at least an amount not less than the full cost incurred for the services (Art. 72 VAT Directive).

Högkullen AB is the parent company (holding company) of a real estate management group, overseeing its subsidiaries. The holding company provides various intra-group services to the subsidiaries for a management fee, which includes company management, financing, real estate management, IT, and personnel management. These services have been fully subject to VAT. The holding company does not engage in other economic activities. The subsidiaries cannot fully deduct the input VAT charged on the management fees as a consequence of VAT exempt activities. Sweden has introduced the Open Market value for some services. Considering the intergroup nature of the services and the limited entitlement to VAT recovery it applies to the services at hand.

The management fee of SEK 2.3 million for 2016 is determined using a cost-plus method. This is a transfer pricing method taking service provision costs, excluding shareholder costs and capital-raising expenses, and adding a markup. Högkullen AB's total expenses for 2016 amount to SEK 28 million, with approximately half of these expenses subject to VAT. The company deducted all input VAT incurred on its expenses.

The Swedish Tax Agency ("Swedish TA") re-evaluated the management fee for VAT purposes, concluding that it was below open market value. Since no comparable market services were available, the taxable amount was adjusted to reflect the full costs, including the shareholder and capital raising costs.



Preliminary questions referred

Högkullen AB and the Swedish TA are in dispute regarding the application of the concept of 'open market value' and how the taxable amount should be determined. For this case, preliminary questions have been referred by the Swedish Supreme Administrative Court to the CJEU:

1. If a parent company provides subsidiaries with various services, should those services always be regarded as unique services for which there is no comparable service?
2. If the open market value is to be determined based on the full costs incurred, should the shareholder costs and costs of raising capital incurred by the holding company be included?

Opinion AG Kokott

AG Kokott begins by outlining the background regarding issues with holding companies. The Swedish tax authority disputes Högkullen AB's claim for the full deduction of input VAT on its services, because the subsidiaries have a limited right to deduct input VAT on costs. If the group operated as a sole trader instead of a holding structure, the deductible input VAT would be restricted.

AG Kokott repeats her previous point of view (e.g. in the Ryanair and Sonaecom case) that these problems could be avoided if the CJEU would recognise in the

future that a controlling holding company carries out an indirect economic activity, even without providing services for consideration to its subsidiaries, and is thus a taxable person in that respect.

First preliminary question – uniqueness management services

To determine whether there is a comparable supply for the open market value, it must first be established whether Högkullen AB is supplying a single (unique) service or multiple services.

According to the AG, the holding company provides five distinct services each with its own character. These services can also be accessed separately, meaning there is no requirement to obtain them in a bundled form. Consequently, despite a single price being paid based on the cost-plus method, the five services must be assessed separately for VAT purposes. It is up to the Swedish referring court to ascertain if a comparable supply and price can be determined under the open market value rules for each individual service, for which the purchase price of the same services are a relevant fact to consider.

Second preliminary question – shareholder costs for 'full costs incurred'

If the open market value cannot be determined based on a comparable price, it should be based on the full costs incurred. AG Kokott argues only expenditures subject to VAT should be included when the open market value is based on full costs. This position is based on the fact that the purpose of the rule is to prevent tax evasion or avoidance. Hence costs without VAT (e.g., wage payments) do not have to be included.

Furthermore, the open market value must be calculated separately for each service and cannot rely on total annual expenditure. For example, costs related to the future acquisition of shareholdings are not linked to services provided to existing subsidiaries. Additionally, investment costs for capital goods amortised over a longer period cannot be fully included; they may only be considered pro rata in the year they are incurred.

Importance for the practice

The view of AG Kokott that distinct services are rendered makes the VAT treatment of TP charges more complex. It does not only impact the taxable amount, though may also impact application of exemptions or place of supply rules.

In the Netherlands, the concept of open market value has been implemented in a very limited way (i.e. for private use of cars where the lease price is below the open market value). The answer to the second question on which costs should be included in the cost base, could be relevant to determine the open market value for these supplies.

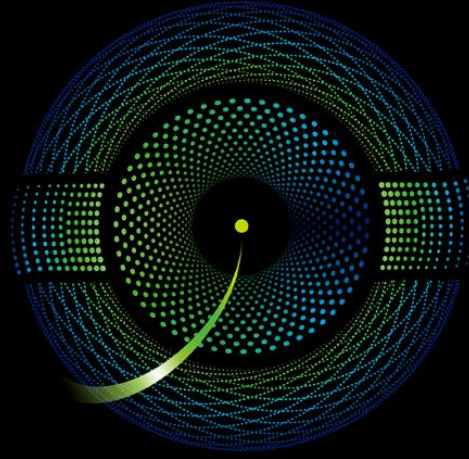
This Opinion highlights the ongoing challenges faced by concerns operating under a holding company structure and the discussions on intra-group transactions with tax authorities, especially if group members have limited right of deduction. It also exemplifies that services and prices determined from a transfer pricing perspective, which may adopt a more holistic approach and apply more often single price for certain services, may not be used without additional analysis for VAT purposes, creating complexities for taxpayers. It will be interesting to follow the CJEU's decisions on this matter and to which extent AG Kokott's Opinion will be followed.

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Michel Schrauwen
Partner Indirect Tax
mschrauwen@deloitte.nl

Lex Neijtzell de Wilde
Director Indirect Tax
lnelijzell@deloitte.nl

Thomas van Ditzhuijsen
Director Indirect Tax
tvanditzhuijsen@deloitte.nl



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