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## Entitlement to deduction of VAT on acquisition costs and costs of sales of participations

- VAT entrepreneur when holding shares?
- Acquisition costs of participations
- Costs of sales of participations

## Introduction

*As an entrepreneur, you only perform activities that are subject to VAT and are therefore entitled to deduct the input tax. You are planning to buy or sell a participation and are incurring costs to do so. Then you are also entitled to a VAT deduction, right? Or perhaps not?*

This may seem a simple question, but nothing could be further from the truth. In this whitepaper, we discuss the points of attention for the right to deduct VAT on acquisition costs and the costs of sales of a participation. If you are about to embark on a buying or selling process or are in the middle of one, please contact your VAT consultant for custom-made advice.

## VAT entrepreneur when holding shares?

To be entitled to a deduction of input tax, you must first qualify as a VAT entrepreneur. By buying or selling shares you become or used to be a shareholder. In principle, the purchase or holding of shares does not result in the qualification as VAT entrepreneur. However, if a shareholder – besides the holding of shares – is also involved in the management of its participation(s) and receives a remuneration for this management activity, the shareholder performs an economic activity and qualifies as a VAT entrepreneur.

There is quite some discussion about the interpretation of the term “involvement”. This is the case, for example, when a shareholder performs management activities for the participation against a remuneration, but also if the shareholder rents out real estate or performs supporting administrative services to its participation.

## Acquisition costs of participations

The purchase of a participation as such is not a VAT taxable activity for the buyer. Whether the VAT on the acquisition costs is eligible for deduction therefore depends on whether the buyer performs or has the intention to perform economic activities for the participation and if the activities are VAT taxable or VAT exempt.

If a buyer becomes involved in the management of the participation for consideration immediately after acquisition and, therefore, carries out VAT taxable activities for the participation, the buyer qualifies as a VAT entrepreneur. This gives rise to the right to a (partial) deduction of input VAT.

If the acquisition costs have a direct and immediate connection to the economic activity consisting of rendering VAT taxable (for example management-) services, the VAT on the acquisition costs can be fully deducted. However, if – in addition to the management services – also VAT exempt interest bearing loans are provided, this economic activity is of a mixed nature, the acquisition costs will qualify as general costs and the deduction of the VAT on the acquisition costs will be based on the pro rata method.

Also if there is no direct and immediate connection between the acquisition costs and VAT taxable services in a later stage, the VAT could (partially) be deducted. This is the case when the acquisition costs qualify as general costs and as such relate to the economic activity as a whole of that entrepreneur (not only to the activities to be performed to the acquired participation).

In that situation the VAT deduction will be determined on the basis of the pro rata that in principle include all economic activities of the VAT entrepreneur/shareholder.

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*Have you incurred costs for the acquisition of a participation, which ultimately does not take place?*

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It may happen that the intended acquisition of the participation fails. There can be various reasons for this. Have you incurred costs for the purchase of a participation which ultimately does not take place? In that situation you can also deduct the VAT on the acquisition costs. The condition is that the buyer had the intention to become involved in the management of the participation against a remuneration after the purchase. Make sure that you can provide the correct (documented) substantiation for this. If you incurred the costs for a service or supply of goods that, due to the failed acquisition, you use for VAT exempt activities and the costs therefore relate to the VAT exempt activities, you are not entitled to a deduction.

## Costs of sales of participations

An “involved” shareholder – who therefore qualifies as a VAT entrepreneur – can of course also sell a participation. The sale of the shares is regarded as a VAT exempt activity. In principle, the seller is therefore not entitled to deduct input VAT, unless the buyer is established outside the EU. There are, however, several scenarios where a (partial) right of deduction of input VAT is allowed.

### *Majority participations*

In the VAT Decree on the sale of shares of August 3, 2004, the State Secretary of Finance indicated that the sales costs of shares are part of the general costs of the company if the shareholder is involved in the participation concerned for a remuneration. This only applies if there is a majority participation or if the sold subsidiary was part of a VAT group. This means that the VAT on the selling costs is deductible according to the pro rata of the seller.

It is important to note that the content of this Decree has actually been overtaken by subsequent case law. However, as long as the Decree has not been revoked, you can still invoke it.

### *Minority participations*

If you cannot invoke the Decree, as in the case of minority participations, the individual facts and circumstances play an important role. The following questions are important:

- Are the selling costs included in the selling price of the shares?
- Is there a transfer of a going concern?
- What is the purpose of selling the shares?

If the selling costs are included in the selling price of the shares, you can directly attribute the costs to the VAT exempt sale of shares. As a seller, you are then not entitled to deduct the VAT. If the selling costs are not included in the selling price of the shares, these are qualified as general costs. This means that the VAT on the selling costs is deductible in accordance with the pro rata method.

Also in case of a transfer of a going concern, the selling costs qualify as general expenses, as a result of which you can deduct the VAT in accordance with your pro rata. There is, however, an essential difference between the sale of shares and a transfer of a going concern; important is what both parties intended to sell/transfer.

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*Do not immediately rule out the deduction of VAT on selling costs.*

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In the C&D case from the European Court of Justice, it was held that the purpose of the share sale can also be important. For example, are you selling the shares in order to restructure and strengthen your VAT taxable activities or are you selling the shares to pay off your debt to the bank? The purpose will determine whether general expenses or direct expenses are involved and will indicate whether or not the VAT on the selling costs is (partially) deductible.

You can ask the same questions if the sale ultimately does not go ahead. Depending on all the answers, you may still be entitled to deduct the VAT on the selling costs, even though the sale of shares is in itself a VAT exempt activity. So stay alert and do not immediately rule out the deduction of VAT on the selling costs.

### Key take aways

- When considering a possible purchase or sale of a participation – even if this is in the (far) future and highly uncertain – attention must be paid to the VAT on costs;
- Planning ahead in an early stage and documenting intended economic activities could lead to a significant VAT saving.

### Contact

Do you have any questions about the deduction of VAT on the purchase or sale of a participation? Please feel free to contact one of our VAT advisors or send an e-mail to [btw@crop.nl](mailto:btw@crop.nl).



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