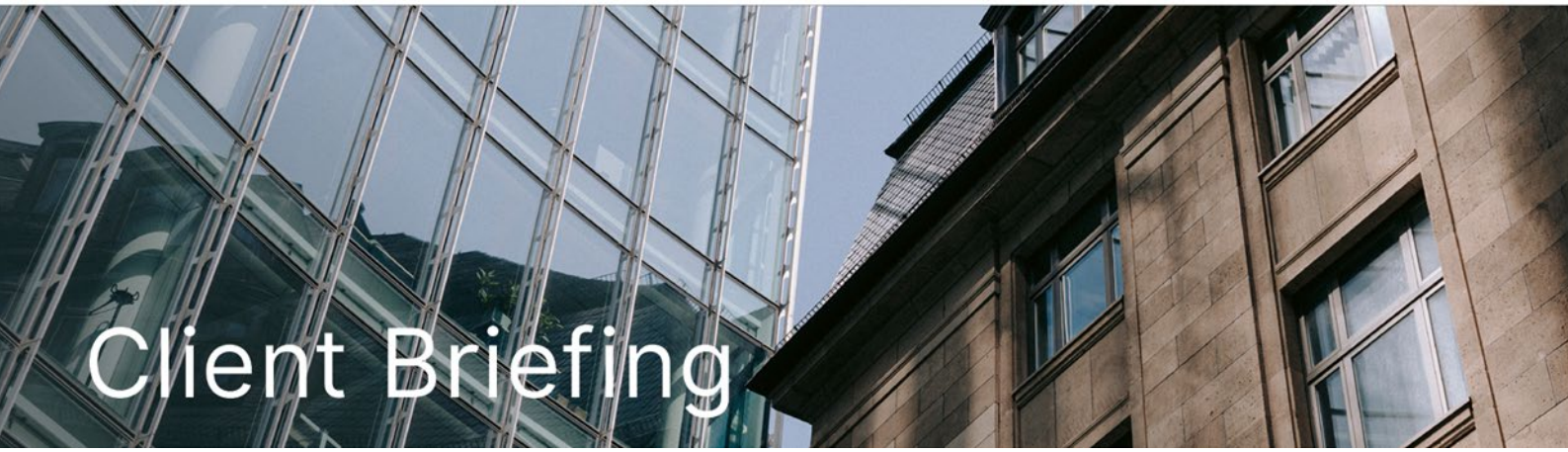

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Tax deductibility of legal and consulting costs in case of a share deal – Tax Court Düsseldorf confirms deduction of operating expenses at the level of the parent company

Legal and consulting costs borne by the selling corporation in the event of a sale of shares are subject to the deduction restrictions of Section 8b of the Corporate Income Tax Act. This does not apply if the group parent company commissions such consulting services in its own name. In this case, it is a fully deductible business expense.

The decision concerns a constellation that is often encountered in practice in which advisory services in connection with the sale of shares are not commissioned and borne by the selling company, but by the parent company of the group. The question of whether such costs are deductible as business expenses at the level of the parent company or are subject to the deduction restrictions of section 8b of the Corporate Income Tax Act has not yet been conclusively clarified and is regularly the subject of tax audits. The decision is particularly important for group structures with a centralised legal and tax function. The appeal is pending before the Federal Fiscal Court (I R 7/25).

I. Background and significance of the decision

In its judgment of 26.02.2025 (7 K 1811/21 K), the Düsseldorf Finance Court commented on the tax treatment of legal and consulting costs in connection with the sale of a shareholding by a subsidiary within the framework of a corporate tax group. The decision concerns a constellation that is often encountered in practice in which advisory services in connection with the sale of shares are not commissioned and borne by the selling company, but by the parent company of the group. The question of whether such costs are deductible as business expenses at the level of the parent company or are subject to the deduction restrictions of section 8b of the Corporate Income Tax Act has not yet been conclusively clarified and is regularly the subject of tax audits.

II. Facts of the case

In the case at hand, the plaintiff held all the shares in a subsidiary (B-GmbH) and was the head of a corporate income tax group with B-GmbH as a controlled company. In 2011, B-GmbH sold its shares in a sub-subsidiary (J-GmbH). The legal and consulting costs incurred in connection with the transaction (including the drafting and negotiation of the term sheet, creation of the data room, drafting of the purchase agreements, support for the contract negotiations) were commissioned and borne by the parent company in its own name. The tax office treated these costs as disposal costs within the meaning of Section 8b (2) of the Corporate Income Tax Act (KStG) and thus subjected them to the deduction restriction (tax effect: only 5% of such costs were effectively deductible pursuant to Section 8b (3) sentence 1 of the Corporate Income Tax Act). The plaintiff, on the other hand, requested the full deduction of business expenses.

III. Reasons for the decision of the Tax Court Düsseldorf

The Tax Court of Düsseldorf upheld the claim of the plaintiff and clarified that the legal and consulting costs borne by the parent company are fully deductible as operating expenses. The main considerations of the court can be summarised as follows:

1. No application of Section 8b of the Corporate Income Tax Act at the level of the parent company

The consulting costs are not subject to the deduction restrictions of section 8b (2) of the Corporate Income Tax Act (KStG), as the parent company itself has not sold any shares. Section 8b (2) of the Corporate Income Tax Act presupposes a sale of own shares, which was not the case here at the level of the group parent company, since it was not the owner of the shares sold. An application via the tax group provisions (section 15 (1) no. 2 sentence 1 of the Corporate Income Tax Act) is also ruled out, since the costs are not part of the income components of the controlled company attributed to the parent company.

> The deduction restrictions under section 8b (2) of the Corporate Income Tax Act are also not applicable in the case of an aborted transaction: if the M&A process fails, so that there is no sale of shares, the transaction costs incurred in vain are also fully deductible as operating expenses.

Pursuant to section 8b (3) of the Corporate Income Tax Act, reductions in profits incurred in connection with shares in corporations within the meaning of Section 8b (3) of the Corporate Income Tax Act (KStG) are to be regarded as reductions in profits arising in connection with shares in corporations within the meaning of Section 8b (3) of the Corporate Income Tax Act. Section 8b (2) of the Corporate Income Tax Act is not deductible. However, § 8b (3) KStG only covers substance-related impairments, but not all expenses economically related to the share. Therefore, the prohibition of deduction under section 8b (3) of the Corporate Income Tax Act does not apply either.

2. No economic attribution or hidden contribution

The court denies an economic attribution of the costs to the subsidiary. German tax law does not recognise the attribution of business expenses from an economic point of view, contrary to the legal structure. There is also no hidden contribution, as there is no contributable financial advantage at the level of the subsidiary. The assumption of the costs by the parent company merely represents an insignificant contribution for use.

3. No use of the abbreviated contract or payment method

The requirements for an allocation of costs by way of the abbreviated contractual or payment channel are not met. The parent company commissioned and paid for the consulting services in its own name and on its own account.

4. No claim for reimbursement of expenses or management without mandate

The parent company has no claim against the subsidiary for reimbursement of expenses, as the consulting services were provided in its own interest and not as a business for another. The requirements for management without a mandate (Section 677 et seq. of the German Civil Code) are also not met.

IV. Summary and practical information

1. Income taxes: Business expense deduction

The decision of the Tax Court of Düsseldorf is particularly relevant in practice for M&A transactions: If legal and consulting costs in connection with the sale of shares are borne by the parent company in its own name and on its own account, these are fully deductible as operating expenses. The costs are not to be allocated to the selling subsidiary – with the consequence of a limitation of deduction pursuant to section 8b of the Corporate Income Tax Act – to be made. The court's reasoning is based on the relevance of the legal structure and rejects an economic approach.

The decision is particularly important for group structures with a centralised legal and tax function. This is because an essential aspect for the Tax Court of Düsseldorf in the case decided was that the plaintiff commissioned the consulting services in its own interest in order to conduct its own business. It enables a tax-advantageous structure by allowing the actual transaction costs to be deducted at the level of the parent company, provided that the parent company bears and commissions the costs itself. However, final clarity for practice on this issue will only be available once the Federal Fiscal Court has decided on the pending appeal.

The same should apply to the buyer: There, the transaction costs are usually to be treated as incidental acquisition costs and therefore to be capitalized. This refers at least to those costs that arose after the fundamental purchase decision was made. If, on the other hand, the transaction advice is commissioned at the level of the group parent company, these expenses should be fully deductible as business expenses there, as no acquisition transaction has taken place at that level.

2. Value added tax: input tax deduction

The judgment did not have to make any statements about the VAT treatment of transaction costs. Usually, input VAT deduction is excluded at the level of the selling company, as the consulting services are input services in connection with the sale of shares as a tax-exempt output supply according to sec. 4 no. 8 lit. e) or lit. f) of the German VAT Act (and there is no option for VAT). The input VAT deduction is only preserved in exceptional cases if the transaction costs are to be regarded as a cost element of the overall economic activity of the selling company, i.e. as its overhead costs.

If the transaction costs are now borne by the group parent company, there should be no connection at this level with a VAT-exempt sale of shares. Therefore, the transaction costs should be included in the overhead costs at the parent company, so that the input tax deduction is maintained.

Moreover, it may also be the case that the selling holding company itself is not an entrepreneur in the sense of VAT. This would be the case in the case of a purely financial (intermediate) holding company (section 2.3 para. 3 sentence 2 of the German VAT Circular). But a mixed holding company can also have a non-entrepreneurial area. The sale of a participation held in the non-entrepreneurial sector would then not be subject to VAT and would exclude input VAT deduction. As a rule, the group parent company will be a VAT entrepreneur, so that the entitlement to input VAT deduction will be easier to prove there

V. What is next?

The appeal to the Federal Fiscal Court is pending under the file number I R 7/25. Until clarification has been made by the highest court, it is advisable to keep comparable cases open and to refer to the pending appeal proceedings.

These legal principles are also likely to be important with regard to cases of reorganizations. In this case, the deduction of business expenses is usually excluded because the costs are considered as part of the transfer of assets (see § 4 (4) sentence 1, § 12 (2) sentence 1 UmwStG)

VI. Summary and recommendation

The Tax Court of Düsseldorf confirms the full deductibility of legal and consulting costs in the case of the sale of shares in the group if the parent company bears the costs in its own name and on its own account. Neither section 8b KStG nor the legal concepts of the concealed contribution or the abbreviated contractual route stand in the way of this. In practice, it is advisable to clearly document the legal structure of the assignment and cost bearing and to keep ongoing proceedings open with regard to the pending appeal.

In both a sell-side and a buy-side constellation, it is advisable to commission the consulting services in relation to the sale of shares at the level of the group parent company in order to create the basis for full tax deductibility of transaction costs as operating expenses and to have the possibility of input VAT deduction.

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