

No VAT recovery for university's investment activities

On July 3, 2019, the Court of Justice of the European Union ('CJEU') rendered judgment in the University of Cambridge case (C-316/18). This case concerns the VAT recovery right of a university that collects gifts and donations and subsequently invests them in order to use the proceeds to finance part of its business activities. The CJEU ruled that the collection of gifts and donations by the university and their investment are non-economic activities. Therefore, according to the CJEU, the VAT paid on the directly related costs is not recoverable.

This judgment is current and not only important for non-profit organizations. Profit-making corporates are also increasingly looking for alternatives to finance their economic and social activities. This may include fundraising for non-commercial reasons or in the context of corporate social responsibility, or the collection and investment of funds (donations, gifts, other contributions) to strengthen economic activities. This judgment may have consequences for these businesses too.

1. CJEU judgment

The University of Cambridge ('university') is a non-profit-making educational institution which, in addition to providing VAT-exempt education, also performs VAT-taxable activities, such as commercial research, the sale of publications and the provision of advice. The university finances its activities partly through gifts and donations, which are first deposited in a fund and then invested. The university sought to recover part of the VAT on the costs of managing the fund, but this request was rejected by the UK tax authorities.

The CJEU first of all determined whether receiving donations and investing them constitute economic activities. According to the CJEU, this is not the case. When collecting and investing donations, the university acts as a private investor and not as a VAT-taxable person. In such circumstances, the receipt of donations constitutes a non-economic activity. The CJEU then deemed the investment of these donations to be a non-economic activity, since this constitutes a continuation of the collection of funds. According to the CJEU, the costs associated with the investment activities are not included in the price of the goods and services supplied by the university, nor in the activities of the university as a whole. This led the CJEU to conclude that the VAT on the management of the fund is in any case not recoverable.

2. Further analysis of the CJEU judgment

In its considerations, the CJEU fairly quickly assumed that the collection and investment of funds should be regarded as non-economic activities of the university. This may have been prompted by the qualification that the referring court had already given to those activities. In establishing this, the connection between the collection and investment of donations and the university's regular taxable business activities will be severed in advance. In addition, the case did not address whether the investment activities, as commercial securities trading, constitute an independent economic activity. In a number of previous cases, however, the CJEU did allow the partial recovery of VAT in situations where capital was raised through share transactions, also with a view to financing the general business activities. In those cases, too, the raising of capital involved activities that fell outside the scope of VAT, but the CJEU

nevertheless concluded that the share transactions were sufficiently related to the VAT taxable person's overall business activities.

We believe that this is not fundamentally different in the case of the University of Cambridge. After all, the income from the fund's investments is used in its entirety for the university's overall business activities. No investment income is distributed to private investors. We therefore believe that applying a 'look-through' approach (to economic activities) would certainly have been conceivable in this situation, resulting in a pro rata VAT recovery right. In that sense, we find the final outcome in this case to be unsatisfactory.

The judgment may also have an impact on profit-making corporates that collect funds or that invest surplus liquidity. Depending on the way in which these investments are structured (shares, real estate, bonds, etc.), the VAT charged on the accompanying costs may or may not be recoverable.

3. Impact on Dutch practice?

In the Netherlands, a policy statement stipulates that economic and, in principle, non-economic activities of a VAT-taxable person can be so closely connected or interdependent that, taken together, there are only economic activities.

For the purposes of VAT, the non-economic activities are then not regarded as independent activities. If there is such a close connection, a VAT-taxable person has a right to recover VAT in respect of these non-economic activities – which are then not taken into account for VAT purposes – insofar as the economic activities can be regarded as VAT-taxable activities. In practice, this means that such a VAT-taxable person is entitled to a pro rata VAT recovery in accordance with its normal business activities. This approach is also possible under European law when applying the extension theory.

In Dutch practice, it is therefore important to assess, on the basis of the policy statement, whether the collection and investment of funds constitute independent activities or whether they are so closely related to a VAT-taxable person's economic activities that they become part of them.

4. What should you do now?

The CJEU's judgment in the University of Cambridge case may have consequences for non-profit organizations, but also for businesses involved in fundraising and other forms of financing and investment. We therefore recommend that the right to recover VAT be reviewed in such cases.

If, in practice, it turns out that there is indeed a limited right to recover VAT when collecting and investing donations or other funds, there may be other options to reduce the VAT burden. Under certain conditions, for example, the manager of a fund is permitted to apply a VAT exemption to its services.

The tax advisors of Meijburg & Co's Indirect Tax Group would be pleased to help you identify the potential tax implications of this judgment. Feel free to contact one of them or your regular contact for more information.

Meijburg & Co
July 2019

The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.