

ANALYSIS



Tax

Supreme Court clarifies VAT treatment of intra-group transfers of shares carried out by mixed holding companies

The Supreme Court considers it correct to classify the intra-group transfer of shares by a mixed holding company as an independent “financial activity” distinct from the provision of management support services to its subsidiaries, requiring the application of the sector-specific scheme and the separate calculation of the apportionment ratio for each sector.

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In a recent judgment dated 11 March 2026 (app. 4660/2023), the Supreme Court's Judicial Review Division (Second Chamber) has established legal doctrine regarding the treatment for value-added tax (VAT) purposes of intra-group transfers of shares by mixed holding companies.

The origin of the dispute lies in the checks and enquiries initiated by Spain's national tax authority (AEAT) in respect of a VAT group, with the aim of verifying the correct recoverability of the value-added tax paid during the periods between November 2011 and December 2012. The tax audit found that the group's principal company — classified as a mixed holding company — had claimed 100% of input VAT without applying any cap. However, in the tax auditor's view, that company carried out, on a routine and non-incident basis, a financial activity consisting of granting loans and guarantees, as well as the purchase, holding, and sale of shares in subsidiaries, distinct from the activity of providing management services to its subsidiaries (primarily, the provision of management support services and the re-invoicing of certain costs), which established the existence of two distinct sectors of activity for value-added tax purposes and, consequently, the inappropriateness of claiming the full amount of input tax, as different apportionment ratios apply to each sector of activity. The adjustment made by the tax auditor was upheld administratively by the Central Tax Tribunal and judicially by the *Audiencia Nacional*.

The matters of interest for the formation of case law addressed in the judgment are the following two:

- 1) *Whether an intra-group transfer of shares carried out by a mixed holding company must be included in that company's dis-*

inct "financial activity" sector pursuant to Articles 9(1)(c)(a') and 101(one) of the Value-Added Tax Act (LIVA).

The Supreme Court begins by noting that the purpose of the so-called *recovery scheme in differentiated sectors* (Art. 101 LIVA) is to treat the various activities carried out by the same company separately when these activities present substantial differences in the recovery scheme, which requires the company to apply, independently, the recovery scheme in each of the differentiated sectors, as if they were independent companies.

In the present case, the disputed criteria regarding the existence of a distinct sector of activity in accordance with the provisions of Article 9(1)(c)(a') LIVA concern whether the activities related to what the judicial review applicant ('appellant') refers to as *portfolio activity* (sale and purchase of shares in other group companies) may or may not be considered *financial activities* in accordance with Spain's standard industrial classification (CNAE) and whether such portfolio activities may or may not be considered incidental to the main activity, or otherwise non-routine, or unusual.

Contrary to the appellant's contention, the Supreme Court finds that the so-called *portfolio activity* does not fall under the *activities of head offices*, appertaining to the service sector (CNAE 70 activities), but rather is an activity that falls within the financial services provided by the holding company (CNAE 64 activities), and therefore cannot be considered a non-exempt taxable activity. The Supreme Court observes that the characteristics which, according to the appellant company, would distinguish the *portfolio activity* and allow

its classification under CNAE 70 (in particular, serving as a means to manage and reorganise the group) are also present in the activity of granting loans and re-issuing guarantees, which falls under CNAE 64. In any event, the activity of transferring shares in other group companies is a financial activity in its own right that involves the investment or divestment of financial assets; it constitutes a movement of capital and is exempt under Article 20(1)(18) LIVA.

Regarding whether the portfolio activity is incidental or not, the Supreme Court recalls that, in accordance with EU case law (*AJFP Caras-Severin*, C-716/18), the concept of an *incidental transaction* refers to transactions that “are not part of the usual business activity of the taxable person”, such that “an economic activity cannot be classified as ‘incidental’ if it constitutes the direct, permanent and necessary extension of the usual business activity of the enterprise concerned”. Likewise, in accordance with the case law of the Court of Justice of the European Union, the quantitative test of the volume of transactions generated by the activity is not the sole indicator suitable for determining whether the activity is a principal or incidental one (*EDM*, C-77/01, and *Mercedes Benz Italia SpA*, C-378/15). Therefore, and in line with the Supreme Court’s previous case law, each specific case must be analysed, without relying solely on the fact that the 15% threshold referred to in Article 9(1)(c)(a’) LIVA, even though this is a relevant factor for that purpose, and other factors must be taken into account from which it can reasonably be inferred that the activity and objectives pursued by the company through a given activity are essential and constitute the *raison d’être* of the company.

In the case at hand, the Supreme Court finds that the appealed judgment was based on a proper interpretation of EU case law and the prior doctrine of the Supreme Court and, after examining the evidence presented, reasonably concluded that the financial activity of the mixed holding company — the granting of intra-group loans and guarantees and the intra-group transfer of shares — were carried out habitually and repeatedly, not in an incidental manner, forming part of the group’s business strategy. The characteristics of the intra-group financing transactions reflected their substantive nature and independence with respect to the appellant’s other sector, constituting precisely the *raison d’être* or essence of the mixed holding company, aimed at the active management of its subsidiaries and controlled companies.

In particular, regarding the intra-group transfer of shares in a group company, the Supreme Court concludes — contrary to the appellant’s argument regarding the isolated nature of the transaction and its irrelevance for apportionments — that said transfer is part of a series of similar and repeated transactions carried out by the holding company, which reveals its habitual nature. Therefore, it must be included within the financial sector and taken into account in the calculation of the recovery percentage.

- 2) Whether intra-group transfers of shares carried out by a mixed holding company may be exempt from tax when they involve the indirect transfer of an independent economic unit pursuant to Article 7(1) LIVA and, therefore, may not be included in the calculation of the apportionment.

Article 104(3)(5) LIVA establishes that, for the determination of the recovery percentage, transactions not subject to the tax pursuant to Article 7(1) of the same Act shall not be included in any of the terms of the apportionment. This latter provision considers transfers of a set of tangible and, where applicable, intangible assets to be exempt from the tax if, as part of the taxpayer's business or professional assets, they constitute or are capable of constituting an independent economic unit capable of carrying out a business or professional activity on its own.

In the case at hand, the appellant argues that the transfer by the mixed holding company to another group company of the profits of its holding in a group subsidiary, together with certain concession assets and loans linked to those assets, was not subject to value-added tax, since the transferred items constituted an independent economic activity.

The Supreme Court rejects the argument. Although the Court of Justice of the European Union has recognized the possibility of applying Article 19 of the Value Added Tax Directive (and, therefore, Article 7(1) LIVA) to a case involving the transfer of shares by a mixed holding company (*Skatteverket*, C-29/08), the same court has established that the exemption can only apply in cases where two elements are present: *a*) an objective element, consisting of the transferred elements constituting an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets; and *b*) a subjective element related to the transferee's intention to operate the business

or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned (*Zita Modes Sàrl*, C-497/01). Determining whether or not an independent economic unit has been transferred therefore requires a case-by-case examination, in light of the nature of the economic activity in question (*Finanzamt Lüdenscheid v. Christel Schriever*, C-444/10).

Likewise, in accordance with EU case law, the Supreme Court has consistently held that there can be no question of a transfer for the purposes of Article 7(1) LIVA when "no organisational and functional structure has been transferred that would allow that set of elements to be considered an independent economic unit capable of carrying out a business or professional activity by its own means". Consequently, for subsidiaries' transfer activities to be exempt from tax, it must be demonstrated that they involve the transfer of genuine lines of business or economic units capable of carrying out an economic activity independently with continuation of the activity, and not merely the transfer of property and property rights.

In the present case, the Supreme Court concurs with the reasoning that led the tax auditor to deny the existence of a transfer of an independent economic unit, since what was transferred, in accordance with the framework agreement signed between the contracting parties, was a portion of the rights inherent in the ownership interest in a specific undertaking, and the purchaser already possessed the know-how and resources necessary for the management of the business, such that the human and material resources necessary for its operation were not transferred.

Based on the foregoing, the Supreme Court establishes as ‘cassational’ doctrine that intra-group transfers of shares carried out by a mixed holding company must be considered part of a distinct *financial activities* sector for the purposes of Articles 9(1)(c)(a’) and 101(1) LIVA. Likewise, it states that an intra-group transfer of shares carried out by a mixed holding company may not be subject to said tax pursuant to Article 7(1) of said Act, insofar as it involves the indirect transfer of an independent economic unit capable of carrying out a business or professional activity by its own means and, therefore, may not be included in the calculation of the apportionment ratio pursuant to the provisions of Article 104(3)(5) LIVA, which will depend on the circumstances of each case.

This judgment clarifies two issues of particular practical significance for holding companies

that actively participate in the management of their subsidiaries. It confirms, on the one hand, that *portfolio activity* — that is, the purchase, holding, and transfer of shares — constitutes a *financial activity* that is not generally subsumed under management support activities. On the other hand, it expressly acknowledges the possibility that the transfer of intra-group shares may be exempt from value-added tax under the scheme for the transfer of an independent economic unit, although such an exemption is subject to a specific analysis of the circumstances of each situation.

The judgment in question may have a significant impact on groups of companies whose principal company provides services to subsidiaries and engages in intra-group financial transactions; therefore, it is advisable to verify and, if necessary, review the group’s specific situation for value-added tax purposes.