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UK Supreme Court confirms no deduction for expenses related to share and asset sale

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On 16 July 2024, the UK Supreme Court (SC) published its judgment in the case of *Centrica Overseas Holdings Ltd (COHL) v HMRC*. The ruling addresses the issue of whether professional advisory fees incurred in contemplation of a sale of a group company (actually resulting in a sale of a business) can be deducted as expenses of management by a holding company when calculating its liability for corporation tax.

In summary, the SC affirmed the previous decision of the Court of Appeal (CA) which held that the expenses were capital, rather than revenue, in nature and therefore could not be deducted as an expense of management notwithstanding that they related to the period prior to when the decision as to how to sell the business had been taken by the group.

This confirms the position that expenses are likely to be non-deductible from an early point in the decision making process around a share or business sale.

Background

The Centrica group made the decision to sell a Dutch subsidiary called Oxxio in 2009. The transaction was actually completed as a sale by Oxxio in 2011 of certain assets of its four Dutch subsidiaries. Between 2009 and 2011, COHL, a holding company in the group which owned Oxxio, incurred expenses for services related to these transactions and claimed a deduction for the expenses under section 1219 CTA 2009 as expenses of management of its investment business. Expenses of management do not, under section 1219(3) CTA 2009, include any expenses “of a capital nature”. HMRC determined that the taxpayer was not entitled to relief because either the expenses were not expenses of management or were capital in nature.

Decisions in lower courts

Previously, the First-tier Tribunal (FTT) had found against COHL on the basis that COHL had not itself made the decisions relating to the sale, so the expenses were not expenses of management by COHL (although they were expenses of management as a general matter). Subsequently, the Upper Tribunal (UT) had found in favour of COHL that the expenses incurred up to the identification of a specific purchaser for the relevant assets in 2011 were deductible. That decision had been made on the basis that the expenses were expenses of management of COHL and that the "capital in nature" exclusion was limited and applied only to expenses which were intrinsically linked to the sale itself. This was applying a narrower scope to the "capital" nature of the relevant expenses that would apply to a general law distinction between whether an expense was income (or revenue) or capital in nature.

On appeal by HMRC the CA then concluded that all expenditure incurred from Centrica's decision to sell the Oxxio business in 2009 was capital in nature and, therefore, none of it was deductible, noting the questions of whether the costs were "expenses of management" and the question of whether such costs were revenue or capital in nature were separate issues. For a more detailed summary of the CA decision please refer to our *UK Tax Round Up* from November 2022.

SC decision

The SC affirmed the decision of the CA, noting that, although the expenditure incurred on professional and advisory services qualified as expenses of management, such costs were incurred in connect with the disposal of a capital asset and that the CA was correct in its conclusion that the question of whether the expenses were capital in nature was a general law question rather than one that should be coloured by the scope of the capital exclusion in the provision for deduction of trading expenses. The SC noted that the objective purpose of the expenditure in question was to bring about a disposal of the Oxxio business, in whatever form the transaction ultimately took. Further, the SC clarified that the fact that a transaction is aborted or that there is uncertainty as to whether the transaction will proceed does not mean that expenses incurred in connection with the contemplated disposal of a capital asset become revenue, or are not capital, in nature.

Effectively, this decision clarifies that once a seller has formed a firm idea that it will enter into a capital transaction (such as selling a subsidiary or business) related costs incurred, even before a decision is made as to what transaction will be entered into, are very unlikely to qualify as deductible expenses because they will be capital in nature.

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