

This translated ruling is provided for information purposes only. Only the Swedish-language versions are the official rulings.

In cases no. 6463–6465-22, the **Swedish Tax Agency** (Appellant) v. **SynAct Pharma AB** (Respondent), the Supreme Administrative Court delivered the following judgment on 28 May 2024.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the claim to obtain a preliminary ruling from the European Court of Justice.

The Supreme Administrative Court grants the appeal and overturns the judgments of the administrative court and the administrative court of appeal in so far as pertains to deductions of input value added tax and affirms the decision of the Swedish Tax Agency in this respect.

The Supreme Administrative Court grants SynAct Pharma AB compensation for costs incurred in the Supreme Administrative Court in the amount of SEK 85,000.

BACKGROUND

1. Any person who carries out economic activity that entails an obligation to pay value added tax is entitled to deduct the input tax relating to acquisitions in the course of the activity. Anyone who intends to conduct such activity shall notify the Swedish Tax Agency, which shall register the person for value added tax.
2. A parent company's holding of shares in a subsidiary does not in itself constitute economic activity. A parent company which participates in the management of a subsidiary or which engages in preparatory measures in anticipation of such management may, however, be deemed to carry out economic activity.

Mål nr
6463–6465-22

3. SynAct Pharma AB (the company) was registered in 2016 for value added tax. The company stated in conjunction with the application for registration that the business was to consist of the development and commercialization of medications for the treatment of inflammation and other diseases and therewith compatible activities as well as the ownership and management of shares.
4. In 2016–2018, the company owned SynAct Pharma ApS as a subsidiary. As regards the accounting periods during those years, the Swedish Tax Agency decided not to grant the company deductions of input value added tax regarding consultancy fees, project and communications costs as well as management and rental costs since the company, according to the Swedish Tax Agency, did not carry out any economic activity. The reasons given for the Swedish Tax Agency's decision were that the pharmaceutical activity had been carried out by the subsidiary during the relevant years, that the company had not invoiced the subsidiary for any services and that the company's only activity was to own and manage shares as a holding company.
5. The company appealed to the Administrative Court in Malmö which granted the appeal and awarded the company deductions for the input value added tax. The administrative court held, *inter alia*, that it would be contrary to the principles of the protection of legitimate expectations and of legal certainty to deny the company deductions on the basis that it did not carry out economic activity.
6. The Swedish Tax Agency appealed to the Administrative Court of Appeal in Gothenburg which rejected the appeal based on principally the same reasons as the administrative court.

Mål nr
6463–6465-22

CLAIMS, ETC.

7. *The Swedish Tax Agency* claims that the Supreme Administrative Court shall modify the judgment of the administrative court of appeal and deny the company deductions of input value added tax.
8. *SynAct Pharma AB* is of the position that the appeal shall be rejected and claims that the Supreme Administrative Court shall obtain a preliminary ruling from the European Court of Justice and submits the following. Already at the registration for value added tax, the intention was that the company would provide the subsidiary with taxable services once the business carried out by the subsidiary had developed sufficiently to give rise to a need for the company's services, which first came to be the case in 2019. To act as a passive holding company was never the intention. During the relevant years, the purpose of the purchased services was to enable the development of the subsidiary's drug candidate sufficiently for commercial transfer or licensing. The company claims compensation for costs of counsel in the amount of SEK 196,180 regarding 57.7 hours' work.

REASONS FOR THE RULING

The question in the cases

9. The main question in the cases is the significance of the principles of the protection of legitimate expectations and of legal certainty in the assessment of the right to deductions of input tax for a company which has been registered for value added tax.

Legislation, etc.

10. The Value Added Tax Act (2023:200) entered into force 1 July 2023. According to the transitional provisions of the act, however, it follows that the

Mål nr
6463–6465-22

former Value Added Tax Act (1994:200) is applicable to the circumstances in the present cases. The following references are to the provisions in the 1994 act. There are corresponding provisions in the new act.

11. Pursuant to Chapter 1, section 1, first paragraph (1), value added tax shall be paid on such supply of services within the country that is taxable and made by a taxable person acting as such.
12. *Taxable person* shall, according to Chapter 4, section 1, first paragraph, mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services shall, according to the second paragraph, be regarded as *economic activity*.
13. Any person who carries out a taxable activity may, pursuant to Chapter 8, section 3, first paragraph, deduct input tax that relates to acquisitions in the course of said activity.
14. The Swedish Tax Agency shall, pursuant to Chapter 7, section 1, first paragraph (3) of the Tax Procedures Act (2011:1244) in applicable wording, register anyone who is a taxable person within the meaning of the Value Added Tax Act. Anyone who intends to conduct business activity and who is to be registered shall, pursuant to section 2, first paragraph, sign up for registration by the Swedish Tax Agency prior to the commencement or takeover of the business activity.

The Court's assessment

Request for preliminary ruling

15. The Supreme Administrative Court finds that the precedent of the European Court of Justice pertaining to the principles of Union law raised in the cases

Mål nr
6463–6465-22

provides sufficient guidance to decide them. The claim that a preliminary ruling from the European Court of Justice should be obtained is thus to be rejected.

Economic activity

16. Prior to answering the main question in the cases, an examination should be conducted as to whether the company, during the relevant accounting periods, may be deemed to have carried out economic activity and thereby is entitled to deductions on that basis.
17. It appears that the administrative court and the administrative court of appeal were of the opinion that the input tax pertains to costs relating to the planned management of the subsidiary, i.e. that the company had taken such preparatory measures as constitute economic activity.
18. The company has stated that the intention never had been to act as a passive holding company but, rather, that the idea from the outset was to provide management services to the subsidiary, although this did not occur until 2019. The services purchased by the company during the years prior were used for the purposes of enabling the subsequent commercial licensing or transfer of ownership of the drug candidate being developed by the subsidiary.
19. The Supreme Administrative Court consequently observes that the services were purchased by the company and used either by the subsidiary in its ongoing operation – but without the company further invoicing the subsidiary – or by the company in its capacity as a managing parent company, but without the company invoicing the subsidiary for its management. Thus, the costs did not pertain to services used by the parent company in its activity to prepare for an impending taxable management of the subsidiary. Since the company also did not invoice the subsidiary for any management services, the company

Mål nr
6463–6465-22

cannot be deemed to have conducted any economic activity during the relevant periods. Accordingly, the company is not entitled to deductions on this basis.

Principles of the protection of legitimate expectations and of legal certainty

20. The Supreme Administrative Court then turns to the question whether the company, pursuant to the principles of the protection of legitimate expectations and of legal certainty, nonetheless is entitled to deductions.
21. The administrative court and the administrative court of appeal have found that it would be contrary to the principles of the protection of legitimate expectations and of legal certainty to deny the company deductions of input value added tax on the basis that the company, during the relevant periods, did not conduct any economic activity. In this assessment, the courts have relied on HFD 2021 reported case 52.
22. That case pertained to a company which had been registered for value added tax for certain activity, upon which the Swedish Tax Agency later denied the company deductions of input tax on the basis that the activity was not carried out for the purpose of regularly generating revenue and that the company consequently could not be deemed to carry out economic activities. According to the Swedish Tax Agency, the agency had, upon registration, made an erroneous assessment of whether the criteria for economic activity had been fulfilled, meaning that the decision to register was incorrect even at the time it was made. The Supreme Administrative Court referred to the principles of EU law regarding the protection of legitimate expectations and of legal certainty, and stated that the company must be able to rely on the permanence of the agency's assessment until such a time as otherwise notified.
23. The case thus regarded a company that carried out its activity in accordance with what had been described in conjunction with the registration for value

Mål nr
6463–6465-22

added tax but upon which the Swedish Tax Agency subsequently altered its assessment of the activity. In the current case, the circumstances are different.

24. SynAct Pharma AB stated in its application for registration that its business would consist of the development and commercialization of medications and therewith compatible activities as well as the ownership and management of shares. The pharmaceutical activity described in the application was not, however, carried out by the company but, rather, by its subsidiary. The registration was thus based on conditions which were not met and could consequently not per se have provided the company reason to expect that the Swedish Tax Agency, upon a closer examination of the facts, would find that the company was carrying out economic activity. The principles of the protection of legitimate expectations and of legal certainty thereby do not prevent the company from being denied deductions of input value added tax for the periods at issue in the cases.
25. Accordingly, the appeal of the Swedish Tax Agency shall be granted and the judgments of the administrative court and the administrative court of appeal shall be overturned in so far as pertains to deductions of input value added tax for the 2016–2018 accounting periods.

Compensation for costs

26. The cases involve a question that is of importance for the guidance of the application of law and the company is therefore entitled to reasonable compensation for costs of counsel.
27. The compensation claim amounts to SEK 196,180 regarding 57.7 hours' work. The work has been performed by two counsel whose hourly rate amounts to SEK 3,400. In light of the character and degree of difficulty of the cases, the hourly rates may be considered reasonable per se. As regards the reasonableness of the stated time expenditure, it may be noted that the

Mål nr
6463–6465-22

correspondence in the Supreme Administrative Court has not been very extensive. It may be further observed that the submitted account of expenses does not state how the work has been allocated between the two counsel nor the time expended on the various measures. Against this background, the Supreme Administrative Court finds that reasonable compensation may be assessed at SEK 85,000.

Justices Margit Knutsson, Kristina Ståhl, Inga-Lill Askersjö, Leif Gäverth and Martin Nilsson have participated in the ruling.

Judge Referee: Lena Åberg.