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By PwC Deutschland | 25 November 2015

Input tax on dual use expenses to be split by turnover unless otherwise prescribed for specific circumstances?

An ECJ advocate general has suggested the court hold that Germany has not properly transposed the input tax split provision of the Sixth directive and cannot therefore demand of the taxpayer any other than a turnover based split.

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The Sixth (and now the VAT) Directive requires the input tax on dual-use costs to be allocated in the ratio of taxable to exempt outputs as measured by their respective turnover, unless another method would lead to more precise results. The German VAT Act, by contrast requires that a turnover based split may only be taken if no other method is possible. A builder of a large house to be rented partly with VAT to other businesses and partly VAT-free as living accommodation split the input tax into recoverable /irrecoverable portions on the basis of the respective turnover. The tax office insisted the split be made by floor space as giving a more accurate (and for the public purse, more favourable) result. Since the argument turns on the compatibility of German law with the VAT Directive, the case came before the ECJ. The Advocate general has suggested the court not answer the specific questions raised by the German court, but rather hold that the VAT Directive provision has been incorrectly transposed into German law. He argues that the VAT Directive prescribes a turnover-based split as the general rule only to be departed from in specific circumstances. German law, on the other hand, sees the turnover split as the fall back position, only to be applied where all else fails. The two concepts stand in direct contrast; thus that of the VAT Directive as the primary law must prevail. Since the German VAT Act makes no mention of specific exceptions, it follows that the authorities can in no circumstances hold a taxpayer to any split other than by turnover.

The ECJ case reference is C-332/14 *Rey* opinion of November 25, 2015.

Keywords

dual use, input tax split, turnover based split