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By PwC Deutschland | 04 January 2017

10 percent threshold for input VAT deduction for private use only

The right to deduct input VAT may be excluded only in cases in which the goods acquired are used, to an extent greater than 90%, for purposes other than the taxable person’s business, and not where the goods are used for non-economic purposes (such as: in the course of public activities).

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According to local VAT law input VAT may be deducted in respect of the tax due on the supply of goods and services by another commercial operator for the purposes of his or her business. If the entrepreneur uses the intra-Community supply, importation or acquisition of goods for the purposes of his business for less than 10%, such supply, importation or acquisition is deemed not to have been made for the purposes of his business (Section 15 sub-sec. 1 VAT Act) and - as a result - an input VAT deduction would not be possible. This is in accordance with a relevant Authorizing Decision of the EU Council.

A public body (the *Landkreis Potsdam-Mittelmark*) purchased assets which were almost exclusively used for non-economic activities (in the case on hand, they were used in the course of the activities as public authority), but also to a minor decree (2,7%), for business activities. The tax authorities denied deduction of the underlying input VAT since the assets were used for business activities below the set minimum threshold of 10%. The Supreme Tax Court had presented the case to the ECJ. The ECJ (case reference: C?400/15, *Landkreis Potsdam-Mittelmark*) has held that the above Council Decision in which member states are authorized to refuse an input VAT deduction presumes that the respective assets are used more than 90% for purposes other than those of a taxable person's business; the term "non-business use" (where an input VAT deduction is denied) refers to the private use of the assets only, and is not meant to include other non-economic activities such as the activities of a public body.

Accordingly, the Supreme Tax Court now agreed with the applicant (the *Landkreis*). The refusal to grant the VAT deduction is contrary to EU law. Germany is not authorised to exclude the right to deduct input VAT in cases where the use of the goods relates to non-economic activities is greater than 90%. Non-economic use falls outside the scope of VAT, contrary to the use for non-business purposes. The *Landkreis* is therefore entitled to a proportional deduction of 2.7% of the input VAT.

Note: The above ECJ/Supreme Tax Court decision relates to the year 2008. The situation is different from 1 January 2016.

Supreme Tax Court judgment XI R 15/13 of November 16, 2016 published on January 4, 2017

Keywords

input VAT deduction, non-business use, private use