



VAT NEWSLETTER

Right to input VAT deduction by virtue of “subsequent” allocation decision

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1 Background

Sec 15a para 1 of the German VAT Act allows input VAT deduction to be corrected in the event that the actual use of an asset, used for multiple executions of transactions, changes. The benchmark for determining whether a change has occurred, are the circumstances that were decisive for the original input VAT deduction. In accordance with Art 184 of the VAT Directive, the input VAT will be corrected if it is in excess of or below the amount of input VAT deduction that the taxable person was originally entitled to make. Consequently, the wording of both provisions presupposes that a right to input VAT deduction previously existed. The right to deduct input VAT arises if the purchaser of an asset was a taxable person at the time of acquisition and purchased the asset as such (see C-97/90, *Lennartz*). If the entire asset is initially allocated to the non-economic sphere, input VAT correction is then excluded. This is unfortunate in so far as the applicable VAT law has no provision for any subsequent right to deduct input VAT. Therefore, it is generally not possible to subsequently claim input VAT on a pro rata basis where an object is transferred from the non-economic sector to the economic sector.

2 Current ECJ judgment

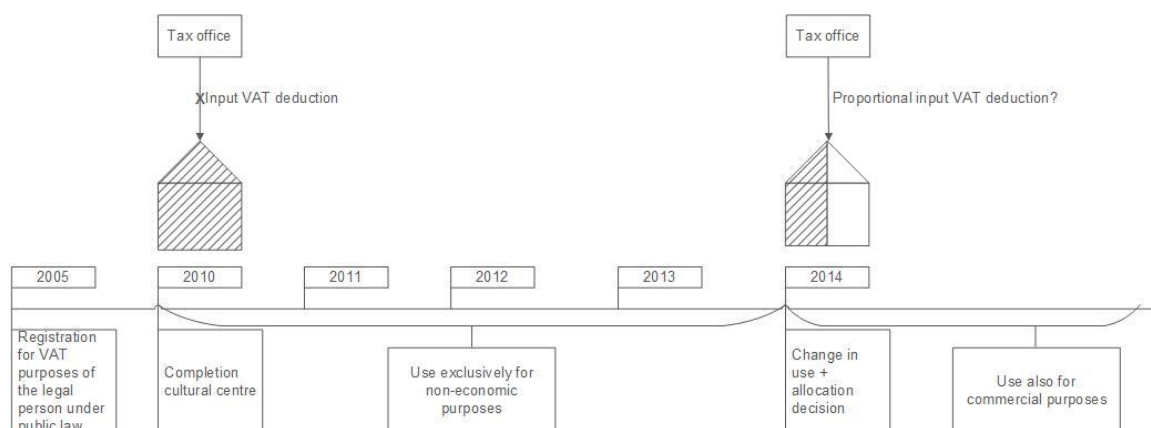
In its judgement of 25.07.2018 in the legal case C-140/17 (Gmina Ryjewo) the ECJ ruled that a municipality could make a subsequent allocation decision for supplies purchased (construction of a cultural centre). The ECJ ruled that the municipality could benefit from the proportional right to deduct input VAT with the allocation decision at a point significantly later than the acquisition. The decisive factor for the ECJ was that the municipality was already registered for VAT



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purposes long before the date of acquisition. Further, the municipality had not made any explicit allocation decision when it acquired the object. Rather, the municipality only made its explicit allocation decision after it had used the cultural centre for four years. From this date, the municipality had used the cultural centre not only for its non-economic purposes but it had also rented it out for commercial purposes.



In its judgement, the ECJ stressed that the nature of the object (here the building) allowed for a simultaneous mixed use. Therefore, as stated by the ECJ in para 48, it could not be concluded, from the initial use of the building solely for non-economic purposes, that this was the sole purpose of use in the long term. Even prior to this case, the ECJ has already considered the type of use immediately after acquisition only as an indication of the allocation of an asset.

3 Consequences for the practice of taxation of public bodies

The judgement marks a turn towards a (de facto) subsequent right to deduction of input VAT. While the ECJ still maintains its view that the allocation decision is decisive at the time the right to deduct input VAT arises (see para 47), it notes that the subsequent deduction of input VAT is only excluded if a clear initial allocation decision for the non-economic area is made for objects that are accessible for simultaneous use for different purposes. In other words: A subsequent input VAT deduction is admissible if the taxable person does not explicitly refuse the input VAT deduction at the outset. Thus, the recommendation for the acquisition of items that are initially used purely for non-economic purposes and for which no input VAT is initially deducted is: Please do not make any statement about an explicit allocation decision to the tax authorities!

4 Hope for individual taxable persons

In the case of individual taxable persons, the fiscal authorities require that, in the case of the acquisition of objects that are accessible for simultaneous use for different purposes, a promptly documented allocation decision must be made, at the latest, by 31.05. of the year following the purchase (sec 15.2. para 16 of the German VAT Circular). Is it still possible to maintain this firm stance, which leads to much controversy amongst those affected? Does it really make any difference whether the individual taxable person or public body acquires this object? The answer is: NO. If only a negative allocation decision is harmful for public bodies it cannot depend on a time-limit for individual taxable persons. This requires the principle of VAT neutrality.