



Input VAT apportionment for mixed-use properties

1 Background

In the construction of buildings, a direct allocation of costs - in contrast to mere maintenance expenses - to the areas used for taxable or tax-exempt output supplies is, in practice, almost impossible. Therefore, in the case of the acquisition and construction costs of a mixed-use building, the deductible input VAT is determined based on the percentage of use of the building as a whole. The choice of the appropriate scale of apportionment has always been a matter of dispute. Since 2013, the German Federal Fiscal Court has been in the process of implementing ECJ case law by gradually developing clear guidelines for determining the input VAT apportionment pursuant to sec. 15 para. 4 of the German VAT Act by way of interpretation in conformity with the EU VAT Directive (cf. KMLZ VAT Newsletter 35 | 2013 and 06 | 2021). However, the tax authorities have, to date, not really reacted to this development and instead have often, in many cases, advocated a more inconvenient input VAT apportionment option. Now, the Federal Ministry of Finance is implementing the long-standing Federal Fiscal Court case law by means of its letter dated 20 October 2022.

2 Content of the Federal Ministry of Finance's letter

In its letter, the Federal Ministry of Finance initially shows the detailed status of the case law and then presents the possible allocation formula for the input VAT amounts attributable to the acquisition or construction. These are still to be divided uniformly into deductible and non-deductible parts (the so-called "one-pot theory"). The tax authorities' (new) principles, derived from the Ministry's letter, are inserted in sec. 15.17 para. 7 of the German Administrative VAT Guidelines.

The input VAT must be apportioned based on an appropriate apportionment formula. If other apportionment keys, in addition to the total turnover key, are possible, another apportionment key must be used if it provides a more precise result. In



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particular, the following may be considered: an object-related area key, an object-related turnover key, a key according to the building volume or other appropriate apportionment keys in individual cases (e.g. times of use).

If, in addition to the total turnover key, several other economically more precise apportionment keys are available, the most precise method must not necessarily be applied. In these cases, the taxable person is responsible for selecting the method to be used. The tax office can only check whether the method is suitable.

- **Object-related area key**

As a rule, input VAT is apportioned according to an object-related area key, as this regularly represents the economically more precise apportionment method compared to the total turnover key. In this case, the area calculation is to be carried out according to the building's internal areas, without including e.g. outdoor parking spaces. Furthermore, the letter of the German Ministry of Finance provides details on the determination of the area key and does not exclude other recognized methods for area calculation. Ultimately, the calculation must be appropriate.

- **Object-related turnover key**

An object-related turnover key is not considered per se but is relevant in terms of the conditions established by the Federal Fiscal Court in its previous case law (ruling of 07.05.2014 - V R 1/10 and ruling of 03.07.2014 - V R 2/10). The object-related turnover key is generally more appropriate and economically more precise than the area key if the furnishings of the differently used rooms vary considerably. Only in exceptional cases can an apportionment using the total turnover key be applied in such cases, e.g. in the case of administrative buildings if these serve the turnover of the entire enterprise. It is pleasing that the Federal Ministry of Finance provides the taxpayer with indications of the circumstances in which significant differences in a building's equipment are (not) considered to be relevant.

- **Building volume**

The input VAT allocation according to the building volume is cited as a further appropriate and economically more precise method in relation to the total turnover key for cases in which significant deviations in floor height exist, but the furnishings in the different parts of the building are predominantly uniform.

- **Allocation**

The above principles apply accordingly to the allocation to the taxable activity of a mixed-use property (cf. sec. 15.2c para. 8 of the German Administrative VAT Guidelines).

3 Scope of application

The letter of the Federal Ministry of Finance is to be applied to all open cases. It is not considered objectionable if, prior to the publication of this letter, taxable persons have permissibly referred to the regulations in the previous version of the German Administrative VAT Guidelines.

4 Consequences for the practice

The letter of the Federal Ministry of Finance is to be welcomed, particularly in light of the fact that the tax authorities will now take into account different equipment and thus, as a rule, it will be easier to enforce input VAT apportionments under the causation principle. As a result, taxpayer will now be given the option of using the most favorable apportionment formula, whereby the tax authorities are only granted a limited scope for review. The binding nature of the German Administrative VAT Guidelines also creates legal clarity for taxpayers.