VAT Comment - Chapter 11. Right to deduct (Update on 01.06.2020)

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BOOKWORK III: Right to deduct input tax

Chapter 11: Right to deduct

Updated according to the state of the legislation applicable on **01.0 6.2020**

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Section 2 - Generalities

1. The deduction, main characteristic of the VAT

VAT is a one-off consumption tax that is borne entirely by the final consumer, which is the person who acquires a good or service for personal use, not being an economic activity and therefore bears the tax (Court of Justice of the European Union, Judgment Commission v Ireland, Case C-415/85, 21.06.1988, point 18).

Consequently, the right to deduct is reserved to persons who acquire the status of taxable person through the exercise of an independent economic activity (Article 4 of the VAT Code) or who acquire the status of accidental taxable person by performing a specific act (Article 8 and *8a* of the VAT Code).

The purpose of the deduction scheme is to fully relieve the entrepreneur of the VAT owed or paid in the context of all his economic activities. The system of taxation on the

value added therefore guarantees a completely neutral tax tax of

all economic activities, regardless of the purpose or result of those activities

mits die activiteiten op zich aan de heffing van btw zijn onderworpen (Hof van Justitie van de Europese Unie, Arrest Rompelman, zaak C-268/83, van 14.02.1985, punt 19).

Een belastingplichtige die eindverbruiker is ten aanzien van een handeling die hij van een andere belastingplichtige heeft ontvangen, verliest zijn recht op aftrek van de belasting die op deze handeling drukt. Indien hij pas eindverbruiker wordt nadat hij zijn recht op aftrek heeft uitgeoefend, moet hij overgaan tot een regularisatie.

Het aftrekmechanisme houdt de btw integraal buiten de kostprijs van de goederen en de diensten. Dit omdat de betaling - door de klanten - van de hun in rekening gebrachte btw niet alleen toelaat de voorbelasting te recupereren maar ook het belastingsaldo financiert dat na de aftrek van die voorbelasting nog overblijft voor de Staat. Vermits er geen opeenstapeling (cascade) van belasting is, veroorzaken de opeenvolgende btw-heffingen geen cumulatief effect. In iedere fase van de commerciële kringloop wordt de btw telkens opnieuw geheven van prijzen die volledig gezuiverd zijn van alle belastingen die in de vorige fasen geheven werden.

Due to the repeated taxation on every delivery of goods and on every provision of services, the payment of VAT, which is due on consumer prices, is spread over all phases of the economic cycle. As a result of the effect of the deduction mechanism, each taxable person pays - in principle - periodically only the difference between the tax payable and the deductible tax, as this difference was calculated in the periodic VAT return.

By transferring only that ultimate result to the State, each taxpayer pays a fraction of the tax levied on the entire package of goods and services provided by all taxpayers together to final consumers. This during the period to which the payment relates.

2. Conditions for the right to deduct

In order to enjoy the right to deduct, it is required that:

- the interested party is a taxable person acting as such
- the interested goods and services are encumbered with VAT
- the VAT charged is legally due
- carries out any interested acts that confer a right to deduct
- the goods or services obtained have a direct and immediate link with the outgoing transactions which give right to deduct.

When these conditions are met and the right to deduct has arisen, the taxpayer can exercise his right to deduct in the periodic return (monthly or quarterly).

3. Burden of proof

According to the case law of the Court of Justice of the European Union,

those wishing to deduct input tax must demonstrate that the conditions for deduction are fulfilled (Court of Justice of the European Union, Renate Enkler , Case C-230/94, 26.09.1996, paragraph 24).

This law is consistent with the principle of the laws of Belgium '*actori incumbit probatio* ', referred to in the articles of the Civil Code 1315 and 870 of the Legal Code, which are applicable in the tax law.

4. Legal basis of the right to deduct: Article 45, § 1 of the VAT Code

Under Article 45, § 1, of the VAT Code, which establishes the principle of the right to deduct, any taxable person may deduct from the tax which he owes the tax levied on the goods and services supplied to him, of the goods imported by him and the intra-Community acquisitions of goods carried out by him , to the extent that he uses those goods and services to perform:

- taxed actions
- transactions exempt from tax under Articles 39 to 42 of the VAT Code
- transactions abroad, for which a right to deduct would arise if they were performed in the Netherlands
- acts as referred to in Article 44, § 3, 4 ° to 10 °, of the VAT Code, whenever the co-contractor is established outside the Community, or the said acts are directly related, under conditions to be determined by or on behalf of the Minister of Finance with goods intended to be exported to a country outside the Community
- services as broker or agent for actions referred to in the previous point.

5. Actions granting a right to deduct

A. Taxed transactions, certain exempt transactions and certain transactions abroad

Pursuant to Article 45, § 1, 1 ° of the VAT Code, the right to deduct is, in principle, reserved exclusively for the taxable person whose outgoing transactions are taxed. This means that they are not exempt under Article 44 of the VAT Code.

However, this article provides that the deduction is not limited to the cases where the taxable person earmarks the goods and services received to carry out transactions which are actually subject to VAT.

Pursuant to Article 45, § 1, 2 ° and 3 ° of the VAT Code, a taxable person retains his right to deduct when he uses the goods and services received to perform:

- transactions exempted under Articles 39 to 42 of the VAT Code (Article 45, § 1, 2 ° of the VAT Code) or
- transactions abroad, for which a right to deduct would arise if they were to take place domestically (Article 45, § 1, 3 ° of the VAT Code).

Examples:

In principle, the VAT charged on their professional expenses can be deducted by, in particular:

- exporters and intra-community providers (Articles 39 and 39 *bis* of the VAT Code)
- the taxpayer who delivers a stored warehouse (Article 40, § 2, 1 ° of the VAT Code)
- the international freight carriers that benefit from the exemption referred to in Article 41 of the VAT Code
- the builders of seagoing and inland vessels that benefit from the exemption referred to in Article 42 of the VAT Code
- the contractor of work in real estate that is established here in the country and erects a building outside Belgium (Article 21, § 3, 1 °, or Article *21a* , § 2, 1 ° of the VAT Code)
- the broker who does not act under the circumstances referred to in Article 13, § 2 of the VAT Code and who intervenes in the purchase or sale of goods located outside the Community, even if they have to be imported into Belgium (Article 21, § 2, and Article 41, § 2, of the VAT Code), or of goods that are located in Belgium and that are exported with tax exemption under Article 39 of the VAT Code (Article 41, § 2 of the VAT Code).

An insurance company, on the other hand, from which the transactions are exempted by Article 44, § 3, 4 ° of the VAT Code, may in principle not deduct because of its economic activity carried on here in the country or abroad (see, however, section B, below).

B. Some insurance and financial operations

In accordance with Article 45, § 1, 4 ° and 5 ° of the VAT Code, the input tax can also be deducted when the transactions (purchase of goods, imports, intra-Community acquisitions and the equivalent transactions, services received) of which they was levied, used to perform:

- transactions as referred to in Article 44, § 3, 4 ° to 10 °, of the VAT Code (insurance and reinsurance transactions, credit transactions, other exempt banking and financial transactions, foreign exchange transactions, transactions other than custody and management, in relation to securities), whenever the contracting partner is established outside the European Community, or that the said transactions are directly related, under conditions to be determined by or on behalf of the Minister of Finance, to goods intended for export to a country outside the Community
- services as broker or agent in actions referred to in the previous point.

Apart from a possible choice for taxing the payment and receipt transactions (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 9: Exemptions intended by Article 44 of the VAT Code'), it concerns transactions that are exempt from VAT pursuant to Article 44, § 3 of the VAT Code.

Although, as a rule, those who carry out these transactions are not liable to VAT, they are still entitled to deduct the VAT charged to them.

The recovery is carried out by means of a deduction in the periodic return (and no longer as a refund), since such taxpayers, like any other taxpayer with a right to deduct, must submit periodic returns (Article 53, § 1 of the VAT. - Code).

6. The destination principle

A. Assessment criterion: the likely destination of the goods and services received

Article 1 of Royal Decree No 3 adds an important clarification for the application of Article 45, § 1 of the VAT Code, by stipulating that the taxpayer deducts the tax that was levied on the goods and services he is destined to perform acts referred to in Article 45, § 1, 1 ° to 5 ° of the VAT Code.

When the deduction is applied by entering the deductible tax in the periodic return, the taxpayer must determine whether or not the goods and services received are, in the normal course of business, intended to carry out transactions which grant right of deduction (see Title 4 above).

If so, may he in principle deduct the tax that encumbered the goods and services received, subject to the exclusions and limitations of the right of deduction provided for in Article 45, §§ 1 ° *bis* , 1 ° *quinquies* , 2, 3, 4 and 5 of the VAT Code. In other words, the taxpayer should not wait until the actual destination of the goods and services received is known.

If not, there is no right to deduct.

The destination principle, which has just been explained, must be distinguished from the term 'use' which will be examined in Section 4, below.

B. Rejection of the deduction or withdrawal

In principle, the taxable person may not deduct the tax that was levied on a good or service if he knows in advance that, in the normal course of business in his enterprise, that good or service for his private purposes , the private purposes of its personnel or, more generally, for purposes other than those of its economic activity are intended or, moreover, that the good or service will be supplied free of charge, unless it is a trade sample or a commercial gift of small value (see Section 12, below).

However, situations may arise in which it is impossible for this taxable person to either provide with certainty that the goods or services will be used for such purposes or to determine the destination for those purposes for each good or service separately, or its size correctly. In those circumstances, deduction of the tax is allowed. But at the time when the good or service is withdrawn for the above-mentioned purposes, this withdrawal is subject to tax in accordance with Article 12, § 1, first paragraph, 1 ° or 2 °, or Article 19, § 1 or § 2. , first paragraph, 1 ° or 2 °, of the VAT Code; if not, a revision of the deduction must be made in accordance with Royal Decree no. 3, artikel 5 (zie Hoofdstuk 12: Correcties op het recht op aftrek (herzieningen, onttrekkingen en ingebruiknemingen)).

Voorbeelden:

- A wine wholesaler buys wine for sale. A keg is intended for private consumption. The VAT charged on the purchase of that keg is not deductible.
  If, on the other hand, the wholesaler does not reserve wine for private consumption at the time of purchase but intends to take it out of stock according to his private needs, he may immediately deduct all VAT paid on the purchase of wine, but he must Pursuant to Article 12, § 1, first paragraph, 1 °, of the VAT Code, at the time of the withdrawal for his private consumption, pay the VAT due on account of that withdrawal. That VAT is of course not deductible.

- A jeweler buys a specific jewel that he will use as a wedding gift for his daughter. The VAT charged on that purchase is not deductible. If, on the other hand, the jeweler buys a batch of jewelery and does not keep the jewel to be used as a wedding gift outside his books, he may fully deduct the tax charged on that purchase. However, in accordance with Article 12, § 1, first paragraph, 2 ° of the VAT Code, he must of course pay the tax on the purchase price (taxable amount determined in Article 33, § 1, 1 ° of the VAT Code.) when extracting that jewel chosen as a gift. That VAT is not deductible.

- A real estate contractor has his workers build his private home. On completion of the work, on the basis of Article 19, § 2, first paragraph, 2 ° of the VAT Code, he must pay VAT on the expenses incurred by him (taxable amount determined in Article 33, § 1). , 2 °, of the VAT Code). That tax is not deductible. However, he has been allowed to deduct the VAT that was originally charged when the materials used were purchased and there is no need to revise that VAT.

7. Existence of a direct and immediate link

A. Principles

a. The notion of the direct and immediate relationship

In order for a taxpayer to be entitled to a deduction, it must:

- the taxpayer performs outgoing transactions that give him the right to deduct, namely transactions listed in Article 45, § 1 of the VAT Code (transposition into Belgian law of Articles 168 and 169 of Council Directive 2006/112 / EC of 28.11.2006 on the common system of value added tax, previously Article 17 of the Sixth Directive 77/388 / EC of 17.05.1977 on the harmonization of the laws of the Member States concerning turnover taxes - Common system of value added tax value: uniform basis)
- and the goods and services acquired by the taxable person are directly and directly related to the outgoing transactions which give him a right to deduct (Court of Justice of the European Union, Judgment BLP Group, Case C-4/94, 06.04.1995, point 19).

In other words, there must be a direct and immediate link between a special transaction at an earlier stage and one or more transactions carried out at a later stage for which there is a right to deduct, in order to grant a taxable person a right to deduct input tax. and determine the extent of that right (Court of Justice of the European Union, Midland Bank plc , Case C-98/98, 08.06.2000, paragraph 24).

The existence of a direct and immediate link originates from the VAT directives. The use of the term 'used for' in paragraph 1 of Article 173 of Directive 2006/112 / EC (previously paragraph 5 of Article 17 of the Sixth Directive) shows that, in order to open the right to deduct, the acquired goods or services must have a direct and immediate link with acts which give rise to the right to deduct. This interpretation is supported by Article 2 of the First Directive, under which only the VAT with which the individual components of the price of a taxed transaction are directly taxed may be deducted (Court of Justice of the European Union, Midland Bank plc, Case C-98/98, 08.06.2000, points 20 and 21).

It follows from that rule that the right to deduct VAT on the goods and services obtained presupposes that the costs incurred in acquiring those goods or services are part of the price of the transactions entitled to deduct grant. Those costs must therefore form part of the price of the subsequent transactions involving the use of those goods and services. Therefore, those elements of the cost price should normally have arisen before the taxable person carries out the taxable transactions to which they relate (Court of Justice of the European Union, Midland Bank plc , Case C-98/98, 08.06.2000, point 30).

There is normally no direct and immediate link between a later act and services that a taxable person has used for and after the performance of that act. Although the costs incurred in obtaining those services were incurred at a later stage because of the transaction, they are not normally included in the cost of the transaction carried out at a later stage. There is therefore no direct and immediate link between those services and the act at a later stage. This would only be different if the taxable person demonstrates, with objective factors, that the costs of the goods or services which he used to perform an act for which a right to deduct exist,Court of Justice of the European Union, Midland Bank plc , Case C-98/98, 08.06.2000, paragraphs 31 and 32).

Regarding the nature of a 'direct and immediate link' which must exist between an earlier act and a later act, the European Court of Justice has ruled that it is not realistic to attempt to formulate consistency more precisely. Taking into account the variety of commercial and professional transactions, it would be impossible to provide a more precise definition in all cases to establish the required link between the transactions at an earlier and at a later stage so that the VAT on the incoming would be deductible (Court of Justice of the European Union, Midland Bank plc , case C-98/98, 08.06.2000, paragraph 25).

b. The theory of general costs

The existence of a direct and immediate link between a particular transaction at a later date and one or more transactions at an earlier stage opening the right to deduct is, in principle, necessary to grant the taxable person a right to deduct VAT. and determine the extent of that right (Court of Justice of the European Union, Midland Bank plc , Case C-98/98 of 08.06.2000, paragraph 24 , Court of Justice of the European Union, Abbey National, Case C -408/98, of 22.02.2001, paragraph 26 , Court of Justice of the European Union, Judgment I / S Fini H, Case C-32/03, 03.03.2005, paragraph 26). Het recht op aftrek van de btw die op deze goederen of diensten drukt, veronderstelt dat de voor verwerving gedane uitgaven van die goederen of diensten zijn opgenomen in de prijs van de belaste handelingen in een later stadium waardoor het recht op aftrek bestaat (Hof van Justitie van de Europese Unie, Arrest Midland Bank plc, zaak C-98/98, van 08.06.2000, punt 30, Hof van Justitie van de Europese Unie, Arrest Abbey National, zaak C-408/98, van 22.02.2001, punt 28, Hof van Justitie van de Europese Unie, Arrest Cibo Participation SA, zaak C-16/00, van 27.09.2001, punt 31).

Het recht op aftrek ten voordele van de belastingplichtige bestaat eveneens, zelfs in de afwezigheid van een rechtstreeks en onmiddellijk verband tussen een specifieke handeling in een later stadium en één of meerdere handelingen in een eerder stadium die recht op aftrek verlenen, in het geval dat de kosten van de betreffende diensten deel uitmaken van de algemene kosten van de belastingplichtige en zijn als zodanig bestanddelen van de prijs van de goederen of diensten die hij levert. Dergelijke kosten hebben een rechtstreeks en onmiddellijk verband met het geheel van de economische activiteit van de belastingplichtige (Hof van Justitie van de Europese Unie, Arrest Midland Bank plc, zaak C-98/98, van 08.06.2000, punten 23 en 31). Deze rechtspraak gaat van het principe uit dat, in deze gevallen, de belastingplichtige optreedt als ‘consument’ van handelingen waarvan hij de kosten draagt. Bij gebrek aan andere criteria dient het recht op aftrek te worden bepaald in functie van het geheel van de economische activiteit van de belastingplichtige.

Indien er echter een rechstreeks verband bestaat met een bepaalde handeling in een later stadium, vormt het in aanmerking nemen van deze latere handeling een meer nauwkeurige methode om het recht op aftrek te bepalen. De nauwkeurigere methode is gebaseerd op een forfaitaire benadering van de totale omzet (Hof van Justitie van de Europese Unie, *Iberdrola Inmobiliaria Real Estate Investments*, zaak C-132/16, conclusie van de advocaat generaal, punt 36).

Met andere woorden, de toepassing van de theorie van de algemene kosten implicieert een redenering die bestaat uit twee stappen:

- Indien het mogelijk is om een bepaalde uitgaande handeling te onderscheiden van andere handelingen die een geheel van de economische activiteit van een belastingplichtige vormen, moet eerst worden onderzocht of er een rechtstreeks en onmiddellijk verband bestaat met die specifieke handeling.
- Het is pas in een tweede fase, wanneer een dergelijk verband ontbreekt, dat moet worden nagegaan of de uitgaven in kwestie, als onderdeel van de prijs van alle transacties, een rechtstreeks en onmiddellijk verband hebben met het geheel van de economische activiteit. Deze uitgaven worden ‘algemene kosten’ genoemd (Hof van Justitie van de Europese Unie, Arrest *C&D Foods Acquisition ApS*, conclusies van de advocaat generaal, punt 42).

In beide gevallen veronderstelt het bestaan van een rechststreeks en onmiddellijk verband dat de kost van de handelingen in een eerder stadium begrepen is in de prijs van de specifieke handelingen in een later stadium of in de prijs van de geleverde goederen of diensten door de belastingplichtige in het kader van zijn economische activiteit (Hof van Justitie van de Europese Unie, Arrest AB SKF, zaak C-29/08, van 29.10.2009, punt 60).

c. Uitsluiting van de theorie van de algemene kosten

De theorie van de algemene kosten is niet van toepassing wanneer het mogelijk is om een bepaalde handeling in een later stadium te onderscheiden van andere handelingen die het geheel van de economische activiteit van de belastingplichtige vormen, en de kost van de handelingen in een eerder stadium begrepen zijn in de prijs van deze specifieke handeling in een later stadium. Het gevolg is dat het bestaan van het recht op aftrek wordt bepaald in functie van de handelingen in een later stadium waardoor de handelingen in een eerder stadium worden beïnvloed (Hof van Justitie van de Europese Unie, Arrest AB SKF, zaak C-29/08, van 29.10.2009, punt 60).

Bijgevolg, kan er geen sprake zijn van de heffing van de belasting in een later stadium noch van aftrek ervan in een eerder stadium in de twee volgende gevallen (Hof van Justitie van de Europese Unie, Arrest AB SKF, zaak C-29/08, van 29.10.2009, punt 59):

- on the one hand, when the primary use focuses on transactions carried out for consideration, but which are exempt from VAT. The transactions at an earlier stage form part of the cost of the VAT-exempt transactions at a later stage and are included in their price (Court of Justice of the European Union, Judgment BLP Group, C-4/94, 06.04.1995, paragraph 19 , Court of Justice of the European Union, AB SKF judgment, Case C-29/08, 29.10.20019, paragraphs 62 and 71 , Court of Justice of the European Union, Judgment X, Case C- 651/11, of 30.05.2013, paragraph 56).
- on the other hand, when the primary use is aimed at a non-economic activity. According to case law, a taxpayer's expenditure cannot give rise to a deduction insofar as it relates to non-economic activities (Court of Justice of the European Union, Securenta , Case C-437/06, 13.03.2008, paragraph 30 ; Court of Justice of the European Union Judgment Association Northern Agricultural and Horticultural Organization, case C-515/07 of 12.02.2009, item 37).

The Court considers that there is a direct and immediate link between an act at an earlier stage and a particular act at a later stage if the expenditure incurred is included in the price of the act at a later stage (Court of Justice of the European Union). European Union, AB SKF, Case C-29/08, 29.10.2009, paragraph 62).

The Court's statement that the expenditure incurred should be included in the price does not mean that an effective price increase is required, for example by increasing the sales price to a certain amount. Therefore, the transactions carried out at an earlier stage should relate to the transactions carried out at a later stage in such a way that they form an economic element of the price of the intended transaction.

d. Mixed and partial taxable persons

When the goods or services acquired by the person liable for taxation are used both for transactions for which a right to deduct exists and for transactions for which there is no right to deduct, the deduction is permitted only for the portion of VAT that is proportional to the amount of the first-mentioned transactions .

The right to deduct should be determined in accordance with the specific provisions on mixed taxable persons (see Section 15: Court of Justice of the European Union, Portugal Telecom, Case C-496/11, 06.09.2012, paragraph 46 , Court Justice of the European Union, Judgment, Volkswagen Financial services (UK) Ltd , Case C-153/17, 18.10.2018, paragraph 48).

When the goods or services acquired by the taxable person are used for both economic and non-economic activities, the right to deduct should be determined in accordance with the specific rules regarding the deduction made by a partial taxable person (see Section 16: Court of Justice of the European Union, Portugal Telecom, Case C-496/11, 06.09.2012, paragraph 47).

e. Resume

In summary, according to the case law of the Court of Justice of the European Union, there is a right to deduct the VAT charged:

- or where there is a direct and immediate link between a certain act at an earlier stage and one or more acts performed at a later stage which give entitlement to deduct. Those costs must therefore form part of the price of the subsequent transactions involving the use of those goods and services.
- either exceptionally and under certain conditions where there is no such direct and immediate link but where the costs incurred form part of the general costs of the taxable person and thus have a direct and immediate link with the economic activity of the taxable person as a whole entitled to deduction (the costs incurred form part of the taxpayer's general costs and, as such, form part of the components of the price of the goods or services he provides).

On the other hand, there is no right to deduct where the costs incurred are not directly and directly related to one or more subsequent transactions giving rise to the right to deduct, or to the whole activity of the taxable person giving the right to deduct.

B. Examples

- A company has committed to realize a Baltic mythological recreational discovery path and to open it to the public free of charge. This company has deducted VAT for the acquisition or manufacture of certain investment goods in connection with the activities for the implementation of the recreational discovery path in question. This recreational discovery path can be seen as a means of attracting visitors in order to deliver them through the sale of souvenirs, food and drink, goods and services.

  The expenses of the company in connection with the construction works of the recreational discovery path are partly included in the price of the goods and services supplied to the visitors. Thus, the free use of the recreational discovery path does not alter the fact that there is a direct and immediate link between the transactions at an earlier stage and those at a later stage for which there is a right to deduct or with all economic activities of the taxable person, so that such use does not affects the existence of a right to deduct VAT (Court of Justice of the European Union, Sveda , Case C-126/14, 22.10.2015).

- A private investor has bought several sites in a holiday village in order to construct buildings with apartments. He has entered into an agreement with the municipality regarding the repair of the pumping station for wastewater by means of construction or renovation work on this station and has called on a third company for this. The repair is necessary because, after completion of the work, the company will build buildings in the holiday village and connect them to the pumping station. Without this repair, the connection proves impossible because the existing pipes are unsuitable.

  Such circumstances may demonstrate the existence of a direct and immediate link between the service consisting of the repair of the waste water pumping station belonging to the municipality and a taxed transaction carried out by a private investor at a later stage, as soon as it appears that the service is carried out to allow the private investor to carry out the real estate project.

If the work on the repair of this pumping station were to go beyond what is necessary for the buildings erected by the private investor, there would be a direct and immediate link between the service in question and the taxable transactions at a later stage, consisting of the construction of those properties, have been partially severed and the private investor should only be granted a right of deduction for the VAT which presses on the part of the cost of repairing the wastewater pumping station that was objectively necessary to enable that investor to perform his taxable acts (Court of Justice of the European Union, Judgment Iberdrola Inmobiliaria Real Estate Investments , Case C-132/16, 14.09.2017).

- The activities of a university are partly financed with gifts and grants, which are placed in a fund and subsequently invested. This fund is managed by a third party. The university has applied for a deduction of VAT on the management fees paid for the fund concerned because the income generated by this fund is used to finance the costs of all its activities.

  The Court finds that the university does not act as a taxpayer when collecting and receiving gifts and grants. After all, in order to be classified as a taxable person, a person must pursue economic activities, that is to say, carry out activities for consideration. Gifts and endowments, which are made essentially for personal and charitable reasons and which are inherently uncertain, do not constitute consideration for any economic activity, so that their collection and receipt is outside the scope of VAT. Consequently, the VAT paid at an earlier stage on any costs incurred in the collection of gifts and additions is not deductible, despite the reason why those gifts and additions were obtained.

  After all, the management costs of gifts and grants invested in the fund concerned are not included in the price of a specific downstream transaction. Furthermore, it appears that the university is a non-profit educational institution and that the costs involved are incurred in order to generate income, which in turn is used to finance the actions taken by the university in its entirety at a later stage. Thanks to this income, the prices of the goods and services supplied by the university can therefore be reduced. The costs involved can therefore in no way be considered to be passed on in these prices and therefore do not form part of the general costs of the university.Court of Justice of the European Union, Judgment The Chancellor , Masters and Scholars of the University of Cambridge, case C-316/18, from 03.07.2019).

- The interference of a holding company in the management of its subsidiaries is an economic activity when it involves transactions subject to tax, such as administrative, financial, commercial and technical services that a holding company provides for its subsidiaries.

  The expenses of a holding company for the various services used by it in the acquisition of a participation in a subsidiary form part of its general expenses and are therefore, in principle, directly and immediately related to the whole of its business activities (Court of Justice of European Union, Cibo Participations SA, Case C-16/00, 27.09.2001).

- The interference of a holding company in the management of its subsidiaries is not an economic activity if the holding company does not provide its subsidiaries with the price of the services it has engaged in the interest of the whole group of companies or in that of certain of them, nor the tax on charged the added value. Consequently, even if it carries on any other taxable economic activity conferring its right to deduct, such a holding company is not entitled to deduct input tax on the services in question, provided that they are not directly and directly related to a taxable economic activity (Court of Justice Justice of the European Union, MMVMZ, Case C-28/16, 12.01.2017).

- Costs related to the acquisition of shareholdings in subsidiaries, incurred by a holding company that participates in the management of those subsidiaries and thus pursues an economic activity, should be considered to be part of its overheads and the tax paid on those costs. the value added must in principle be deducted in full, unless certain economic transactions carried out at a later stage are exempt from value added tax, in which case the right to deduct can be exercised only in accordance with the rules laid down in Article 17 (5) of the Sixth Directive 77/388 / EC, which was transposed into Belgian law in Article 46 of the VAT Code (Court of Justice of the European Union, Judgment Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG, Joined Cases C-108/14 and C-109/14, 16.07.2015).

- Where a holding company has incurred costs for the acquisition of shareholdings in subsidiaries and it only participates in the management of certain of these subsidiaries and does not engage in economic activities in respect of the other subsidiaries, these costs can only be considered part of the costs. from its general costs, so that only the VAT paid on the costs inherent in economic activity can be deducted (Court of Justice of the European Union, Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG, Joined Cases C-108 / 14 and C-109/14, from 16.07.2015).

8. Deductible tax

In principle, the taxpayer can deduct:

- the VAT invoiced to him for the supply of goods (business assets, raw materials, semi- finished products, finished products, auxiliary materials, energy ...) and for the provision of services (contract work, real estate work, equipment rental, transport, advertising, brokerage ...).)
- the VAT he paid on importing goods for his company. This is also the case with regard to VAT due on import paid by an owner-consignee, who is a taxable person, in respect of goods intended for his activity which were imported under a bonded or transit procedure and which have disappeared under that procedure. or stolen (decision no. ET 20.066 of 19.06.1979)
- the VAT he has paid as a result of the intra-Community acquisition of goods or an equivalent transaction
- the VAT he has paid for putting goods into use for the purposes of his economic activity or for work in real estate that he carries out for the same purposes (Article 12, § 1, first paragraph, 3 ° and 4 °, Article 19, § 2, first paragraph, 1 °, of the VAT Code).

Subject to the possible application of Article 45 § 1 *d* , of the VAT Code, the assets is levied VAT eligible for immediate deduction on the same grounds as the VAT levied on other goods and services used by the taxpayer for the exercise of his taxable economic activity. However, attention should be drawn to the fact that this deduction is subject to review for

a period of five years, fifteen years or twenty-five years, in accordance with Article 48, § 2 of the VAT Code (see Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning)).

There is only a right to deduct for tax that is due - that is to say, tax in respect of a transaction subject to VAT - or that is paid to the extent that it was due (Court of Justice of the European Union, Genius Holding BV, case C-342/87, 13.12.1989, point 13).

Therefore, when the transferor has wrongly charged VAT to the transferee when transferring a generality of goods, under the circumstances referred to in Articles 11 and 18, § 3 of the VAT Code, the latter cannot subtract. However, it goes without saying that this non-payable VAT may be subject to a refund under Article 77 of the VAT Code.

On the other hand, a taxable person is entitled to deduct the VAT he has paid on services provided by another taxable person who is not registered for VAT, where the relevant invoices contain all the information required by Directive 2006/112 / EC, in particular those necessary to identify the economic operator who issued those invoices and the nature of the services provided (Court of Justice of the European Union, Boguslaw Juliusz Dankowski , Case C-438/09, 22.12.2010, paragraph 38).

9. Non-deductible VAT

There are a number of cases in which the taxable person is unable to deduct, or only partially deduct, the VAT charged on the goods and services supplied to him, on the goods imported by him and on the intra-Community acquisitions of goods made by him .

The non-deductible VAT can, for example, be divided into the following categories, depending on the reason why the deduction is limited or excluded:

- non-deductible VAT due to the nature of the outgoing transactions
- non-deductible VAT due to the nature of the costs
- non-deductible VAT due to the application of a special scheme.

A. Due to the nature of the outgoing actions

For example, in the following cases, the taxpayer cannot deduct, or only partially deduct, the input tax due to the nature of the outgoing transactions:

- the actions that are performed free of charge
- the acts that are exempted under Article 44 of the VAT Code. However, the transactions referred to in Article 44, § 3, 4 ° to 10 °, of the VAT Code, entitle to a deduction provided that the co-contractor is established outside the Community, or the said transactions, in accordance with or by the Minister of Financial conditions to be determined, directly linked to goods intended to be exported to a country outside the Community.
- the transactions are carried out in the capacity of a non-taxable person (for example, a transaction that is carried out by chance, in a bond of subordination, outside the scope of VAT, under the conditions of non-taxpayer stipulated in Article 6 of the VAT Code...).

B. Due to the nature of the costs

For example, in the following cases, the taxpayer cannot deduct or only partially deduct the input tax due to the nature of the costs:

- as charged regards the taxation of supplies, import and intra-Community acquisitions of goods and services related to an Article 39 *bis* of the VAT Code exempt supply of a new means of transport within the meaning of Article 8 *bis* , § 2 of the VAT - Code , the taxpayers referred to in Article *8a*, § 1, of the VAT Code, or in Article 57 of the VAT Code, as well as taxable persons who only supply goods or services for which they are not entitled to deduct, only deduct the tax levied on the supply, the input or the intra-Community acquisition of said means of transport and that, within the limits or extent of the amount of the load that would be due to this delivery if they would not be released by virtue of Article 39 *bis* (Article 45, § 1 *bis* , of the VAT Code)
- in any case, in respect of the supply, import and intra-Community acquisition of motor vehicles used for the carriage of persons and / or goods by road, and in respect of goods and services related to those vehicles, the deduction may not exceed 50%. of the tax paid (Article 45, § 2, of the VAT Code).

  However, this provision does not apply to certain exhaustively listed motor vehicles
- the tax levied on the supplies and intra-Community acquisitions of manufactured tobacco is not deductible (Article 45, § 3, 1 ° of the VAT Code)
- the tax levied on supplies and intra-Community acquisitions of spirits , including those intended to be resold, to be provided for the performance of a service, or to be offered as a trade sample or as part of a tasting (Article 45, § 3, 2 ° of the VAT Code)
- the tax levied on accommodation, food and drink costs within the meaning of Article 18, § 1, second paragraph, 10 ° and 11 °, of the VAT Code, is not deductible (Article 45, § 3, 3 °, of the VAT Code), not including the costs incurred:
  - for personnel charged with the supply of goods or services outside the company
  - by taxable persons who in turn provide the same services for consideration
- the tax levied on reception costs is not deductible (Article 45, § 3, 4 ° of the VAT Code).

C. Because of the application of a special arrangement

For example, the following special arrangements affect the right to deduct:

- the exemption of tax for small enterprises (Article 56 *bis* of the VAT Code)
- the flat-rate agricultural scheme (Article 57 of the VAT Code)

- the special regulation of taxation on the profit margin (Articles 45, § 5, first paragraph, and 58, § 4 of the VAT Code)
- the special arrangements for investment gold (article 44 *bis* of the VAT Code)
- the scheme for travel agents (Article 45, § 4 of the VAT Code).

10. Examples of deductible and non-deductible taxes

A. Deductible tax

The VAT charged on expert costs incurred by a taxable person is deductible under the normal rules:

- to determine the value of the goods belonging to his company with a view to concluding or modifying an insurance contract
- to evaluate the assets and / or liabilities of his company with a view to a capital increase or a contribution to the company, or in the context of a solvency or profitability analysis
- om, ten opzichte van een verzekeringsmaatschappij, de schade te schatten die hij heeft geleden wegens het geheel of gedeeltelijk verlies door ramp van zijn bedrijfsgoederen of zijn bedrijfswinst (beslissing nr. E.T. 51.825 van 24.09.1985).

B. Niet aftrekbare belasting

a. Kosten voor het verwerven van kunstwerken en bijhorende voorwerpen

The goods, such as original works of art (paintings, sculptures ...), that are bought by a taxable person without the intention to resell them but as an investment, and the value of which does not decrease by the use made by the taxable person, are not assets as intended in Article 6 of Royal Decree No. 3 of 10.12.1969 or, more generally, no goods that are intended to be used for the performance of acts referred to in Article 45, § 1, of the VAT Code. The tax levied on the purchase of those goods is therefore not deductible (decision no. ET 19.499 of 06.12.1974).

The same solution also applies to the purchase of frames, pedestals and other holders or supports intended to protect or display the above works of art.

b. Costs of acquiring and holding shares

A taxable company may not deduct the tax charged on expenses, such as the bank charges of payment, which result in a cash contribution that it makes to another company. After all, these costs relate to the acquisition and holding of shares, which cannot be regarded as an economic activity and are therefore not covered by the VAT Code (decision no. ET 14.089 of 31.01.1973).

However, it should be noted that the costs related to the acquisition and holding of holdings by a holding company in companies for which it provides management services are general expenses of the holding's entire (taxable and / or exempt) economic activity and are therefore deductible to the extent that they relate to taxable transactions (Court of Justice of the European Union, Cibo Participations SA, case C-16/00, 27.09.2001).

c. Agency fees incurred for the sale of a building

The VAT charged on a commission paid to a broker who intervenes in the sale of a building, which is exempt under art. 44, § 3, 1 °, a) of the VAT Code, is not deductible, even if this building is used as a business asset for the performance of an activity as a taxable person (decision no. ET 19.385 of 24.03.1975).

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Section 3 - Only taxable persons are entitled to a deduction

1. Principe

Entitlement to deduct exists only in respect of persons who acquire the status of taxable person through the exercise of an independent economic activity (Article 4 of the VAT Code) or who acquire the status of accidental taxable person through the performance of a specific act (Article 8 and 8 *bis* of the VAT Code).

The purpose of the deduction scheme is indeed to fully relieve the entrepreneur of the VAT owed or paid in the context of all his economic activities. The value added tax system therefore ensures a completely neutral tax tax of
all economic activities, regardless of the object or result of those activities,
provided that those activities are in themselves subject to VAT. (Court of Justice of the European Union, Rompelman , Case C-268/83, 14.02.1985, paragraph 19).

Therefore, the deduction by a taxable person of the so-called input tax can only relate to the VAT payable or paid for goods or services supplied to him or carried out for his benefit in the course of his business (Court of Justice of European Union, Judgment Société Reading Portfolio 'Intimate' CV, Case C-165/86, 08.03.1988, paragraph 11).

The right to deduct arises when the deductible tax becomes chargeable.

Therefore, the existence of a right to deduct depends only on the capacity in which the person concerned is acting at that time. The taxable person acting as such who uses goods for his taxable transactions is entitled to deduct VAT due or paid on those goods (Court of Justice of the European Union, Lennartz v Finanzamt München III, Case C-97/90, 11.07.1991 , point 8).

2. Categories of taxable persons with regard to the right of deduction

A. The full taxpayer

Anyone who, in the exercise of his economic activity, only carries out activities referred to in Article 45, § 1, 1 ° to 3 ° of the VAT Code, is a full taxpayer or a taxpayer with full right of deduction. As a rule, this person can deduct the full amount of the VAT charged on his professional expenses.

In principle, the full taxable person deducts all VAT levied on his professional expenses.

He must only exclude from the deduction:

- the VAT charged on private or non-professional expenses
- the VAT for which an exclusion or limitation of the right to deduct is expressly determined in accordance with Article 45, §§ 2 and 3 of the VAT Code.

B. The exempt taxable person

A taxable person who provides supplies or services that are exempt under Article 44 of the VAT Code cannot exercise any right of deduction.

C. The non-taxable person

The following persons cannot deduct input tax as they do not have the status of taxable person:

- the public sector entities that act under the conditions of non-tax liability as defined in article 6 of the VAT Code
- those who only accidentally perform acts referred to in the VAT Code
- those who work in a bond of subordination (for example, employment contract for white-collar workers or blue-collar workers)
- those who carry out transactions which are outside the scope of VAT (eg passive holding companies, persons who carry out transactions free of charge).

D. Mixed taxpayer and partial taxpayer

a. The mixed taxpayer

The mixed taxable person is a person who:

- on the one hand, carries out transactions that fall within the scope of VAT and grant a right to deduct
- on the other hand, carries out transactions which fall within the scope of VAT and which do not confer a right to deduct.

The mixed taxable person, as well as the full taxable person, must, before making any deductions, exclude the VAT relating to his private or non-professional expenditure, as well as the tax for which an exclusion or limitation of the right to deduct is expressly prescribed.

To determine the partial deduction that he may make, the mixed taxpayer must refer to the provisions of Articles 46 and 48 of the VAT Code and 12 to 21 of Royal Decree No. 3 (Article 1, § 1, second paragraph. , of Royal Decree No. 3 of 10.12.1969 on the deduction scheme for the application of value added tax).

That problem is discussed in more detail in Section 15.

It can already be pointed out that:

- when the mixed taxpayer is subject to the 'general ratio' with regard to the deduction of input tax (Article 46, § 1, of the VAT Code), he applies that ratio to the amount of the tax for which deduction would have been allowed if he was a full taxpayer
- if the mixed taxable person follows the rule of actual use (Article 46, § 2 of the VAT Code), before making the deduction, he must check whether the goods and services received are intended for the economic activity which entitles him to on deduction, and if so, to what extent.

b. The partial taxpayer

The partial taxpayer is a person who:

- on the one hand, carries out transactions that fall within the scope of VAT, which confer on him the status of taxable person: these transactions grant him or not the right to deduct depending on whether or not they are exempt from VAT
- on the other hand, carries out transactions which fall outside the scope of VAT, which do not confer on him the status of taxable person: those transactions do not confer on him any right to deduct.

That problem is discussed in more detail in Section 16.

E. The taxpayer who falls under a special scheme provided by the VAT Code

Certain special schemes affect the right to deduct. This is the case for the following special schemes:

- taxable persons covered by the exemption in favor of small enterprises (Article 56 *bis* of the VAT Code) bring the tax to be levied on the goods and services they use to carry out their in tax exempt transactions not deductible
- to the extent that they are subject to the special agricultural scheme (Article 57 of the VAT Code) , taxable persons cannot deduct in accordance with Articles 45 to 49 of the VAT Code the tax charged on the various components of the price of the actions they perform. The amount of this tax is refunded to them in the form of flat-rate compensation
- taxpayers who use used goods, works of art, collectors' items or antiques for the purpose of their supplies subject to the special scheme of taxation on the profit margin (Article 58, § 4, of the VAT Code) are entitled to tax they owe not deduct: a) the tax owed or paid on works of art, collectors' items or antiques which they themselves have imported; b) the tax owed or paid for works of art delivered or to be delivered to them by the maker or his rightful claimants; (c) the tax payable or paid on works of art supplied or to be delivered to them by a taxable person other than a taxable dealer
- the travel agents within the meaning of Article 1, § 7, paragraph 2, of the VAT Code, the tax may not deduct tax levied of the goods and services that other taxable supply them for the benefits referred to in Article 18, § 2, second paragraph, of the VAT Code, and which directly benefit customers (Article 45, § 4, of the VAT Code).

F. The casual taxpayer

There are two categories of casual taxpayers:

- a person who, by chance, other than in the exercise of an economic activity, alienates a building or part of a building and the associated land, establishes, transfers or re-transfers real rights to such property, becomes a taxable person only at the time to which he performs said action with regard to a building, or a part of a building and the associated terrain and only with regard to the property concerned, insofar as he has previously exercised the option referred to in that regard (Article 8 of the VAT Code). . This taxpayer's right to deduct is limited (see 'Book VI: Specific topics - Chapter 16: Specific topics, Section 1: Real estate - Supplies').
- the person who happens consideration provides a new means of transport under the terms of Article 39 *bis* of the VAT Code, is also regarded as an accidental taxpayer (article 8 *bis* , § 1, of the VAT Code). The right to deduct from this taxable person is limited in accordance with Article 45, § *1a* of the VAT Code (see 'Book VI: Specific topics - Chapter 16: Specific topics, Section 3: Motor vehicles').

G. The taxable person established in a Member State other than the Member State of refund

The modalities of the procedure for the refund of VAT to taxable persons who are not established in the Member State where they carry out purchases of goods and services or taxed imports of goods, but who are established in another Member State, are governed by a specific directive.

This concerns Council Directive 2008/9 / EC of 12.02.2008 laying down detailed rules for the refund of value added tax, laid down in Directive 2006/112 / EC, to taxable persons who are not resident in the Member State of refund but in be established in another Member State .

As of 01.01.2010, the aforementioned Directive 2008/9 / EC has the eighth Council Directive 79/1072 / EEC of 06.12.1979 on the harmonization of the laws of the Member States concerning turnover taxes - tax refund scheme value added to non-domiciled taxable persons, it being understood that the provisions of the latter Directive continue to apply to refund applications made before 01.01.2010.

Pursuant to Article 76, § 2, second paragraph, of the VAT Code, Royal Decree 56 of 09.12.2009 regarding the refund of value added tax to taxable persons established in a Member State other than the Member State of restitution of the provisions of Directive 2008/9 / EC into Belgian law.

A distinction should be made between two situations:

- the taxpayer established in another Member State of the European Union that cumulatively fulfills the following conditions:
  - during the period covered by the refund application, he did not have a seat of his economic activity in Belgium, nor a permanent establishment from which the transactions were carried out, or, in the absence of such a seat or permanent establishment, his residence or his usual residence
  - during the period covered by the refund application, he has not made any deliveries of goods or services for which the place of delivery or the place of supply respectively are deemed to take place in Belgium, with the exception of, on the one hand, transport and related services which are exempt in accordance with Articles 39 to 42 of the VAT Code and, on the other hand, supplies of goods and services for which the customer owes VAT pursuant to Article 51, § 2 of the VAT Code
  - and he had neither a representative of liability nor a direct identification in Belgium during the period covered by the refund application.

This taxpayer must submit his refund request through the portal made available to him in his Member State of establishment. Although this request is submitted to the government of the Member State of establishment, it must meet the conditions and formal requirements that apply in accordance with Belgian regulations.

The refund request must be submitted to the Member State of establishment no later than 30 September of the calendar year following the refund period (see Article 12 of Royal Decree 56). The application for a refund is only deemed to have been submitted if the applicant has provided all the information required by Articles 5, 6 and 8 of Royal Decree 56.

It will be examined and processed by the competent service in Belgium, namely the Foreign Center, in accordance with the provisions of Articles 2 to 22 of the aforementioned Royal Decree 56.

- the taxable person established in Belgium who has been identified for VAT purposes in Belgium in accordance with Article 50 of the VAT Code, to the exclusion of the VAT unit within the meaning of Article 4, § 2, of the said Code, and the members of a VAT unit within the meaning of Article 4, § 2 of this Code (see Article 23 of the Royal Decree No. 56 , aforementioned), which:
  - in the Member State of refund for the period covered by the application for refund has not had a seat of its economic activity, nor a permanent establishment from which the transactions were carried out, or, in the absence of such a seat or permanent establishment, its domicile or its usual residence
  - has not, during the period covered by the refund application, made deliveries of goods or services for which the supply or service respectively takes place in the Member State of refund, with the exception of transport services and related services exempted in accordance with Articles 144, 146, 148 , 149, 151, 153, 159 or 160 of Directive 2006/112 / EC and, on the other hand, supplies of goods and services for which the customer is liable to pay VAT under Articles 194 to 197 and 199 of Directive 2006/112 / EC (see Article 25 of Royal Decree 56 , aforementioned).

Under the provisions of Directive 2008/9 / EC, this taxable person can claim a refund of the VAT charged on him in another Member State.

As the taxpayer established in a Member State other than Belgium who can request a tax refund as a result of transactions carried out in Belgium and referred to in Article 3 of Royal Decree No 56 , the Belgian taxpayer requesting a refund is obliged to submit a compliant application to file a refund via the Belgian portal which will be examined by the Member State where the transactions gave rise to a tax refund.

The refund request must be submitted no later than 30 September of the calendar year following the refund period (Article 27 of Royal Decree 56). The refund request is only deemed to have been filed if the applicant has provided all the information required by Articles 25 and 26 of Royal Decree 56.

It will be examined and handled by the competent authority of the Member State concerned, in accordance with the provisions of Directive 2008/9 / EC, mentioned above.

For more information regarding the taxable persons targeted by these provisions, the scope of the right to a refund of VAT paid and the refund procedure, please refer to Royal Decree 56 , aforementioned, as well as Letter No. 4/1988 from 24.02.1988 and to circular AFZ No. 20/2009 from 22.12.2009 .

3. Special events related to tax liability

A. Acquiring the status of taxable person after acquiring a good or a service

Before making the deduction, the taxable person must also determine the capacity in which he is acting at the time of the purchase of a good or service.

Indeed, the Court of Justice of the European Union has ruled that Article 17 of the Sixth Directive 77/388 / EC (now Article 168 of Directive 2006/112 / EC - Article 45 of the VAT Code and Articles 1 and 2 of Royal Decree No. 3 , aforementioned) determines the time when the right to deduct arises and it follows from this provision that only the capacity in which the person concerned acted at the time of the purchase of the good can determine whether a there is a right to deduct (Court of Justice of the European Union, Judgment of the Zeeuws Vlaanderen Water Board against Secretary of State for Finance, Case C-378/02, 02.06.2005). _

The Court has pointed out that Article 20 of this Directive (now Article 184 and following of Directive 2006/112 / EC - Articles 48, § 2, and 49, 3 ° of the VAT Code and Articles 6 to 11 of the aforementioned Royal Decree No 3 , the aforementioned), on the other hand, does not contain any provision regarding the creation of a right to deduct, but establishes the calculation method for revising the original deduction and thus cannot create a right to deduct nor can convert tax paid by a taxable person in connection with his non-taxable transactions into deductible tax within the meaning of Article 17. _

It is therefore clear from that case-law that where a natural or legal person has bought a good in the capacity of a non-taxable person and subsequently acquires it as a taxable person and uses it as a business asset for his economic activity, he is not permitted to tax deducted in full or in part from the purchase of this good (decision ET 110.412 of 20.12.2005).

B. VAT identification after the time when a good or service is acquired

A distinction must be made between the situation in which a person acquires the status of taxable person after purchasing a good and the situation in which a person, who has not yet been identified for VAT, incurs costs in the context of acts which are unmistakably preparation of an economic activity.

Under such presumption, those persons have the status of VAT taxable persons because of those preparatory transactions and may therefore deduct the tax charged on the goods and services obtained, even if those transactions precede his VAT identification. The person requesting the deduction of VAT must demonstrate that the conditions for the deduction are fulfilled, so that the administration can demand that the living will be supported by objective data (Court of Justice of the European Union, Rompelman , case C-268 / 83, from 14.02.1985).

According to the Court of Justice of the European Union, the identification for VAT is not an act giving rise to the right to deduct - which arises at the time when the deductible tax becomes chargeable - but a formal requirement for control purposes (Court of Justice of the European Union, Judgment Nidera Handelscompagnie BV, case C-385/09, 21.10.2010, paragraph 50).

C. Circumstances outside the control of the taxpayer that prevent the use of the goods or services

If the status of taxable person is acquired unambiguously and without fraudulent or fraudulent intent, this status of taxable person cannot be retroactively removed, nor can the right of deduction exercised be called into question if the economic activity envisaged is due to circumstances. foreign to the will of the taxpayer has not effectively led to taxable transactions (Court of Justice of the European Union, Inzo , Case C-110/94, 29.02.1996, paragraph 20 and Court of Justice of the European Union, Judgment Ghent Coal Terminal, case C-37/95, 15.01.1998, point 20).

While in principle his right to deduct cannot be called into question, the taxpayer who ceases his economic activity may be required to revise the originally deductible (see Chapter 12: Adjustments to the right to deduct (revisions, withdrawals and putting into use).

In addition, in the event of fraud or abuse, for example, where the interested party has pretended to pursue a particular economic activity, but in reality has attempted to include goods for which deductions can be made in his private assets , the tax authorities can retroactively claim reimbursement of the deducted amounts as they were granted on the basis of false statements (Court of Justice of the European Union, Inzo , Case C-110/94, 29.02.1996, paragraph 24 and Court of Justice of the European Union, Ghent Coal Terminal, Case C-37/95, 15.01.1998, paragraph 21).

D. Deduction after cessation of activity

A person who has ceased an economic activity, but who continues to pay the costs related to this activity, because the agreement contains a clause according to which it cannot be terminated, is considered to be a taxable person and is entitled to deduct VAT on the thus amounts paid, where there is a direct and immediate link between payments made and commercial activity (Court of Justice of the European Union, Judgment I / S Fini H, Case C-32/03, 03.03.2005).

However, this taxpayer is not entitled to deduct input tax after the cessation of his activity in the event of fraud or abuse. This would be the case, for example, if the taxable person continued to use such goods and services for purely private purposes (Court of Justice of the European Union, Judgment I / S Fini H, Case C-32/03, 03.03.2005, paragraph 32). .

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Section 4 - The concepts of destination and use

1. Definitions

Dedication occurs when a taxable person acting as such acquires goods or services and not as a private person to use for his economic activities, which may include both taxed and exempt transactions.

The capacity in which a person trades in the acquisition of goods or services and the purposes for which they are acquired determine whether those goods or services belong to the assets of the company and are therefore subject to VAT legislation, or to the private sphere, where the VAT rules do not apply.

The imputation to business assets cannot in itself create a right of deduction. Indeed, in order to determine the taxpayer's right to deduct, it must also be demonstrated to what extent they are used for transactions which give right to deduct.

A clear distinction must therefore be made between the concepts of destination and use.

2. Distinction between legal persons and natural persons

A. Principles

The goods or services that a legal person obtains can only belong to business assets, since a legal person has no private assets (circular AOIF No. 5/2005 (No. ET 108.691) of 31.01.2005, Title 3.7).

On the other hand, it is clear from settled case law of the Court of Justice of the European Union that a taxable natural person has the choice for VAT purposes:

- either to fully incorporate the good or service in business assets
- or keep it fully in its private assets and exclude it entirely from the VAT system: any deduction or revision is excluded
- or even only to include it partly in its business assets: any deduction or revision is excluded to the extent of the part that is not included in the business assets.

For this problem, please refer to the case law of the Court of Justice of the European Union (Court of Justice of the European Union, Ambrecht , Case C-291/92, 04.10.1995, point 20 ; Court of Justice of the European Union, Bakcsi , Case C-415/98, 08.03.2001, paragraph 25 ; Court of Justice of the European Union, Seeling , Case C-269/00, 08.05.2003, paragraph 40 ; Court of Justice of the European Union, Charles et TS Charles-Tijmens, Case C-434/03, 14.07.2005, paragraph 23 ; Court of Justice of the European Union, Wollny , Case C-72/05, 14.09.2006, point 21 ;Court of Justice of the European Union, Sandra Puffer, Case C-460/07, 23.04.2009, paragraph 39).

B. Example 1

A taxpayer has had a building erected (price 300,000 euros, excluding VAT) and has decided to include that building in his business assets up to a rate of 50%.

He is, in a definitive manner, not entitled to any deduction for the part that was not included in the business assets.

a. Variant 1

- Professional use corresponds to the share that was included in the business assets, being 50%.
- Article 45, § *1d* of the VAT Code cannot be applied and the taxpayer can deduct 50% of the VAT levied on the construction of the building (Article 45, § 1 of the VAT Code), being 31,500 euros (300,000 euros x 50% x 21%).
- If it subsequently emerges that the professional use of the share included in the business assets falls to 30%, in favor of the use for private purposes, this private use will be taxable annually up to 20% (being 150,000 euros x 1/15 x 20% = 2,000 euros x 21% = 420 euros) under Article 19, § 1 of the VAT Code.

b. Variant 2

- The professional use of the building is only 30% and therefore does not correspond to the share included in the business assets
- The taxpayer can only deduct 30% of the VAT levied upon the creation of the house (combined application of Article 45, §§ 1 and *1d* of the VAT Code), being EUR 18,900 (EUR 300,000 x 30% x 21%).
- Any subsequent changes in use will be corrected through revisions, bearing in mind that revision is excluded for the share that was not initially recognized in operating assets.

C. Example 2

In 2013, a taxable natural person purchases a new passenger car for 40,000 euros + 8,400 euros VAT.

a. Variant 1

- The car is fully included in the business assets. To determine the professional use of the car, he has opted for the fixed professional flat rate of 35%. In 2016 he sells the car to a third party for 25,000 euros, excluding VAT.
- The taxpayer can deduct 2,940 euros (35% of 8,400 euros) from the purchase VAT.
- When selling, he may apply the administrative tolerance and charge VAT on 25,000 euros x 50% = 12,500 euros. The VAT that he charges to the buyer is therefore 2,625 euros.
- In addition, he is entitled to a VAT revision in his favor which is calculated as follows: 2/5 x (4,200 - 2,940) = 504 euros.

b. Variant 2

- Only 35% of the car is included in company assets.
- The taxpayer can deduct 1,470 euros (8,400 euros x 35% x 50%) from the purchase VAT.
- He must charge VAT on 25,000 euros x 35% x 50% = 4,375 euros. The VAT that he charges to the buyer is therefore 918.75 euros.
- He is not entitled to a VAT revision in his favor.

3. Goods and services for the use and maintenance of an investment good

The destination of an investment good is decisive for the application of the VAT system to that good itself and not for the application of the VAT system to the goods and services for the use and maintenance of that good.

The right to deduct the VAT on those goods and services is another matter. This right depends in particular on the relationship between the said goods and services and the taxable transactions of the taxable person. It follows that the tax regime for the supply of a commercial property and that for the taxable expenditure on its use and maintenance must be viewed separately (Court of Justice of the European Union, Bakcsi , Case C-415/98 , of 08.03.2001, point 33).

4. Elements showing the destination

The taxpayer's intention to include a good or a service in his business assets can only be inferred from the fact that the taxable person uses all or part of the good for his economic activities (Court of Justice of the European Union, Bakcsi , case C -415/98, of 08.03.2001, point 29).

The taxpayer's intention to include a good or service in his business assets must be reflected in the amount included in the grids 81, 82 and 83 of the periodic VAT return, as that amount establishes the final ratio of the recognition in business assets. The part of the transactions that, if applicable, is intended for the private use of the declarant (amounts, including VAT, to be entered in the column 'PRIVATE' of the book for incoming invoices) should not be in the grids 81, 82 or 83 (circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015, point 12 ; Explanatory notes for completing the periodic VAT return of 01.01.2014, number 160).

In the case of partial recognition in the business assets by a taxable natural person, the amount that the taxpayer would have included in one of the grids 81, 82 or 83 determines the definitive ratio of the recognition in the business assets.

In addition, the taxpayer's intention to include an investment good in his business assets means that this good must be included in the business accounts for its total value (i.e. including the part intended for private purposes (circular AOIF No. 5 / 2005 (no. ET 108.691) of 31.01.2005, title 3.2):

- for taxable natural persons who keep simplified accounts (which is usually the case), this means that the asset must be included in its annual inventory of assets and liabilities for its total value
- for taxable natural persons who keep double accounts, this means that the total value of the business asset must be included in the fixed assets of the company and that this value serves as the basis for the annual depreciation or, for the persons who practice a liberal profession , an office or a post, in the revenue and expenditure journal (decision No ET 108.691 / 2 of 01.03.2007).

5. Change of destination after acquisition

The destination may change after the goods and services have been acquired:

- if the goods or services are originally intended for the taxpayer's business assets, they may be transferred to the taxpayer 's private property , subject to an adjustment of the original deduction, thus retaining tax neutrality for the taxpayer
- when the goods or services are initially included in the taxable person 's private property , any deduction of input tax is excluded. Any subsequent transfer to business assets means that the VAT that originally could not be deducted is lost.

6. Effects of the destination on the resale of a good

The destination also has consequences for the subsequent resale of a good:

- when a taxable person sells a good which he has fully absorbed in his business assets, he acts as a taxable person for the sale of this good and the sale is fully subject to VAT. It is of no importance that the taxable person has used the property for both professional and private purposes (Court of Justice of the European Union, Bakcsi , Case C-415/98, 08.03.2001, paragraph 38)
- when a taxable person sells a good that he has partly included in his business assets, only this part is subject to VAT. In principle, the part of the price relating to the private part should not be included in the taxable amount (Court of Justice of the European Union, Ambrecht , Case C-291/92, 04.10.1995, point 24)
- when a taxable person sells a good that he has fully included in his private assets , he does not act as a taxable person for the sale of this good and is not subject to VAT.

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Section 5 - Article 45, § 1quinquies, of the VAT Code

1 Introduction

Pursuant to article 12 of the law of 29.12.2010 (Belgian Official Gazette of 31.12.2010, 4th edition), a new article 45 , § *1d has been* inserted in the VAT Code with effect from 01.01.2011 .

Article 45, § *1d* , of the VAT Code provides that the taxable person levies VAT on the by nature immovable property, other business assets and services provided to the taxpayer under Article 48, § 2, of the VAT Code. cannot be deducted from his review to the extent that they are used for his private purposes, or those of his staff, or more generally, for purposes other than those of his economic activity.

This article is the transposition into Belgian law of Article 168 *bis* of the Directive 2006/112 / EC .

Article 168 *bis* of the Directive 2006/112 / EC is the response of the European legislator in the Seeling case-law of the Court of Justice of the European Union (Court of Justice of the European Union Judgment Seeling , Case C-269/00 , from 08.05.2003) under which Article 168 (a) of Directive 2006/112 / EC was to be interpreted as meaning that if a taxable person chooses to treat an asset used for both business and private purposes as an asset , the input tax due for the acquisition of that good is in principle fully and immediately deductible. In those circumstances, their use for private purposes of the taxable person or of his staff or for purposes other than business was assimilated to a service provided for consideration.

With regard to the business assets that a taxpayer has purchased and which he has included in whole or in part in his patrimony, the right to deduct VAT pursuant to Article 45, § *1d* of the VAT Code must be determined in accordance with the destination principle . In that case, Article 19 , § 1 of the VAT Code no longer applies.

Attention is drawn to the fact that with regard to goods and services that are not business assets, the right to deduct VAT must also be determined in accordance with the destination principle contained in Article 45, § 1 of the VAT Code and in Article 1 of the Royal Decree No 3 , aforementioned.

Simultaneously with the insertion in the VAT Code of the aforementioned Article 45, § *1d* , in accordance with Article 6 of the aforementioned Law of 29.12.2010, Article 19, § 1 of the VAT Code was amended, in the sense that from 01.01.2011 the real estate by its nature falls within the scope of this provision.

Article 45, § *1d* , of the VAT Code is explained in detail in the circular AAFisc No. 36/2015 (No. ET 119.650) of 23.11.2015 .

2. Scope of Article 45, paragraph 1 *d* , of the VAT Code

The new provision aims to:

- the real estate by its nature, the other business assets and the services that are subject to the review pursuant to Article 48 , § 2 of the VAT Code
- which belong to the assets of the taxable person's business
- and which are used from the outset both for the purposes of its economic activity and for its private purposes or for the private purposes of its personnel or, more generally, for purposes other than those of its economic activity.

The making available of a good to a user for consideration is considered an economic activity. Consequently, Article 45, § *1d* of the VAT Code does not apply.

A. Intended goods and services

The deduction limitation of Article 45, § *1d* of the VAT Code only applies to the goods and services intended by Articles 6 (1) and 7 (1) of Royal Decree No 3 , referred to above, concerning the revision of the deduction of VAT levied on company assets .

For a definition of the term business assets, reference is made to 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning)', as well as point 53 of circular AFZ no. 3/2007 from 15.02.2007 .

Niet alleen lichamelijke goederen maar ook diensten kunnen aangemerkt worden als een bedrijfsmiddel. Het gaat dan bijvoorbeeld om de omvormings- of verbeteringswerken aan een gebouw (het leggen van een nieuw dak, het plaatsen van nieuwe ramen …). Ook bepaalde diensten zoals software op maat, licenties … worden beschouwd als een bedrijfsmiddel als ze worden afgeschreven over een periode van minimum 5 jaar.

De aandacht wordt erop gevestigd dat vanaf 01.01.2014 het bedrag dat dient te worden bereikt door de prijs, of bij ontstentenis van de prijs, door de normale waarde, per gebruikelijke handelseenheid, opdat klein materieel, klein gereedschap en kantoorbehoeften als bedrijfsmiddelen worden beschouwd, werd opgetrokken tot 1.000 euro, exclusief btw (beslissing nr. E.T. 125.162 van 16.01.2014).

B. Goederen en diensten die niet worden beoogd

Er dient te worden benadrukt dat de gehuurde goederen (leasing) niet worden beoogd door artikel 45, § 1*quinquies*, van het Btw-Wetboek aangezien ze in hoofde van de huurder niet als bedrijfsmiddelen worden aangemerkt.

De belasting geheven van leveringen van goederen en diensten (herstelling, onderhoud, brandstof ...) met betrekking tot bedrijfsmiddelen wordt evenmin beoogd.

De aftrek van voorbelasting gebeurt dan krachtens artikel 45, § 1, van het Btw-Wetboek en, in voorkomend geval, krachtens artikel 45, § 2, van het Btw-Wetboek.

As explained below, however, the method of determining the original right to deduct will be the same regardless of whether the right to deduct is determined on the basis of Article 45, § *1d* of the VAT Code or on the basis of Article 45, § 1 of the VAT Code.

C. Inclusion in the operating assets of the equipment

In order for Article 45, § *1d* , of the VAT Code to apply, it is necessary that the asset is part of the assets of the taxpayer's company.

Reference is made in this regard to Section 4 above.

D. Intended Use

Article 45 (*1d*) of the VAT Code provides that the taxable person may not deduct the tax charged on the intended goods and services to the extent that they are used for his private purposes or that of his staff, or more generally , for purposes other than those of its economic activity.

It is recalled that the private use of a means of transport also includes commuting of the taxable person or of his staff. The concept of commuting is explained in Section 8, below.

The use of the business asset belonging to the business assets must be mixed from the start , i.e. it must be used from the beginning for both professional and other purposes (private use by the taxpayer, so as not to make the staff available for their private needs...). A change in retrospective use must be corrected through the system of revisions or through article 12 of the VAT Code in the event of a full and definitive use of the business for purposes other than those of the economic activity (withdrawal) or the own a business asset when he ceases to exercise his economic activity.

Conversely, if the part of the business asset belonging to the business assets is used from the start only for professional purposes, Article 45, § *1d* of the VAT Code does not apply. In that case, the deduction must be made in accordance with other applicable rules (Article 45, § 1, of the VAT Code and, where applicable, Article 45, § 2 of the VAT Code).

In the event of a later change in use, the regularization must be carried out on the basis of Article 19, § 1 of the VAT Code or via Article 12 of the VAT Code in the case of a complete and definitive use of the business asset for purposes other than that of the economic activity (withdrawal) or the possession of a business asset when he ceases to carry on his economic activity.

Only the agreements under which the business assets are made available to users free of charge are intended.

When the user is obliged to pay a rent, it is a provision for consideration. The deduction of input tax is then made pursuant to Article 45, § 1 of the VAT Code and, where applicable, pursuant to Article 45, § 2 of the VAT Code.

Reference is made to Section 6 for the distinction between a "free" act and a "for consideration" act as regards the making available of goods and services by a taxable person of his staff.

E. Vehicles intended by Article 45, § 2, first paragraph, of the VAT Code

It is clarified that if the professional use of a vehicle, intended by Article 45, § 2, first paragraph, of the VAT Code, does not exceed 50%, the deduction limitation of the aforementioned Article does not apply. Initially, the right to deduct will be limited in accordance with Article 45, § *1d* , of the VAT Code to the extent of professional use.

This is the case, for example, when a taxable person, who buys a passenger car in 2015 and fully incorporates it into his business assets, only uses this car for 40% for the purposes of his economic activity. The right to deduct VAT charged on the purchase of the passenger car will be limited to 40% under Article 45, § *1d* of the VAT Code.

However, if the professional use exceeds 50%, the deduction restrictions provided for in Articles 45, § *1d* and 45, § 2, first paragraph, of the VAT Code must be combined.

This is the case when the taxpayer in the example above uses 60% of the passenger car for the purposes of his economic activity. The right to deduct VAT charged on the purchase of the passenger car, which in the first instance would only be limited to 60% in accordance with Article 45, § *1d* of the VAT Code, is, under the general limitation referred to in Article 45, § 2, first paragraph, of the VAT Code further limited to 50%.

In both assumptions, Article 19, § 1 of the VAT Code may no longer apply (see 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning)) . Where appropriate, the taxpayer must rectify an altered use of the passenger car (professional-private use ratio) through the system of revisions.

The rules applicable to such vehicles are set out in more detail under Section 7.

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Section 6 - Provision of a business asset or other good by a manager, director or staff member

1. Distinguish action for consideration and action for free

An act is performed for consideration if there is a direct link between the act performed and the consideration received. The taxable amount is formed by the consideration actually received for this, which must also be expressed in monetary terms.

In the context of the provision of a business asset or other property of a manager, director or staff member, this act is generally carried out for consideration if the consideration consists of:

- the payment of a sum of money
- the reduction of the remuneration of the manager, director or staff member by the value of the posting
- debiting the current account of the manager, director... to the amount of the agreed fee.

The fact that the private use of a property intended for the business is subject to income tax as a quantifiable benefit of all kind is, in itself, irrelevant (compare Court of Justice of the European Union, Joined Cases Medicom SPRL, C -210/11, and Maison Patrice Alard SPRL, C-211/11, 18.07.2013, paragraphs 28 and 29).

Note

It often happens that a taxpayer in principle makes a company car available free of charge to a manager, driver or staff member, but the latter is given the opportunity to choose additional options, an accessory or a more expensive model (hereinafter: additional options) on provided that the employee bears the additional cost for this.

Whether those underwriting the consideration of the provision of the company or rather a contribution to the additional options is a question of fact. The actual intention of the parties is important, as evidenced by the ' car policy' laid down by the company or the agreement concluded between the employer and employee.

If the following conditions are simultaneously fulfilled, it is in any case assumed that the company car is made available free of charge (and the contribution paid therefore relates to the additional options):

- a one-off fee is requested, which is paid at the start of the provision of the company car
- the option to obtain the additional options is optional.

It goes without saying that charging the additional options by the taxpayer to his employees is the consideration of a taxable transaction. In that case, however, Article 45, § 2, first paragraph, of the VAT Code should not be applied in respect of the taxpayer who makes the property available with regard to the input tax levied on the additional options, insofar as the cost of these additional options are fully charged.

2. Consequences

The provision for consideration of a business asset or other property is a taxable lease within the meaning of Article 18 , § 1, second paragraph, 4 °, of the VAT Code, except when it concerns exempt real estate rental (transaction exempt under Article 44 , § 3, 2 °, of the VAT Code). Incidentally, the taxable amount here is in certain cases the normal value (Article 33, § 2, of the VAT Code, see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount).

Article 45, § *1d* of the VAT Code does not apply in the case of a posting for consideration; where appropriate, the right to deduct is limited if the other provisions of Article 45 of the VAT Code are applied.

The rules applicable to the vehicles referred to in Article 45, § 2, first paragraph, of the VAT Code are set out in a detailed explanation in Section 7.

With regard to real estate, the position contained in point 3.7 of circular AOIF No 5/2005 (no. ET 108.691) of 31.01.2005 is no longer retained. Accordingly, as regards immovable property, the chargeable event of which occurs after 31.12.2010:

- the deduction limitation of Article 45, § *1d* of the VAT Code to be applied (whereby Article 19, § 1 of the VAT Code may no longer apply later) when the taxable person (natural or legal person) properly makes available to a manager, a director or a staff member, without the recipient being obliged to pay rent
- the deduction limitation of Article 45, § *1d* of the VAT Code not to be applied when the taxpayer (natural or legal person) makes the real estate available to a manager, a director or a staff member against payment of rent and the real estate good thus originally used entirely for the purposes of the economic activity of the taxable person. When it concerns an exempted posting (Article 44, § 3, 2 ° of the VAT Code), there is no deduction of input tax under Article 45, § 1 of the VAT Code.

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Section 7 - Special case: Provision of a vehicle as intended by Article 45, § 2, first paragraph, of the VAT Code of a manager, driver or member of staff

1. Generalities

As for other business assets, Article 45, § *1d*, of the VAT Code does not intend the provision for consideration (against payment of a rental fee) of a vehicle intended under Article 45, § 2, first paragraph, of the VAT Code which limits the right to deduct input tax.

If it concerns the making available for consideration of a vehicle intended by Article 45, § 2, first paragraph, of the VAT Code of a manager, driver or staff member, VAT is due on the rent received. In certain cases, the taxable amount may not be lower than the normal value (Article 33, § 2 of the VAT Code). For the determination of the normal value, reference is made to 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount'. On the other hand, the right to deduct VAT from the purchase or rental of those vehicles, as well as from the supplies of goods and services related to those vehicles (fuel, maintenance, repair...) is limited to a maximum of 50%.

When a taxpayer but a vehicle to not make available to its staff or the manager or director, a distinction must be made between the taxpayer buys or leases the vehicle.

Only if the vehicle is purchased and to the extent that it has been included in the taxpayer's business assets, Article 45, § *1d*, of the VAT Code may apply (Article 19, § 1, of the VAT Code does not apply).

Taking into account the principles of fiscal neutrality, for the vehicles referred to in Article 45, § 2, first paragraph, of the VAT Code, which have not been subject to a deduction limitation of Article 45, § *1d*, of the VAT Code (for example because the use was originally not mixed or because they were purchased before 01.01.2013 and the taxable person has linked the maximum VAT deduction of 50% to taxing the benefit of all kinds), Article 19, § 1 of the VAT. Incidentally, the Code should only be applied if the use for purposes other than economic activity exceeds 50% and only to the extent of that exceedance.

If, on the other hand, it concerns a vehicle that is rented by the taxable person, the right to deduct is determined in accordance with Articles 45, § 1 and 45, § 2, first paragraph, of the VAT Code. In that case, Article 19, § 1 of the VAT Code does not apply.

With regard to the combined application of Articles 45, § *1d* and 45, § 2, first paragraph, of the VAT Code, reference is made to Section 5, Title 2, Section E.

2. The vehicle is purchased by the taxable person

A. There is mixed use when purchasing the asset

The taxable person purchasing the vehicle will have to consider from the outset the use for purposes other than those of his economic activity (the making available free of charge of a vehicle of a manager, driver or staff member or the use of a vehicle by the taxable person for purposes other than those of its economic activity).

For example, in the case of a mixed use of a vehicle, he will have to limit the VAT charged on the purchase of that vehicle under Article 45, § *1d* of the VAT Code and, where applicable, under Article 45, § 2, first paragraph, of the VAT Code.

In principle, the relationship between private and professional use is determined on the basis of an estimate of the kilometers to be traveled. This estimate is made under the supervision of the administration and must be supported by evidence. The taxpayer must revise the original deduction by no later than 20 April of the year following the year of purchase of the business asset in the periodic VAT return (Article 8, 1 °, of the Royal Decree No 3 , aforementioned). .

However, the administration provides for a number of practical modalities for determining professional use with regard to certain means of transport (see Section 8).

a. Example 1

In the course of 2014, a company will purchase a passenger car that will be made available to the HR manager free of charge. Purchase price car: 50,000 euros + 10,500 euros VAT. At the end of 2014, a detailed record of trip administration shows that 30,000 km were traveled during that year, of which 8,000 km were trips in the context of his position as HR manager.

In this hypothesis, the car is used for 27% (= 8,000 / 30,000) for the professional purposes of the HR manager. Pursuant to Article 45, § *1d* of the VAT Code, the right to deduct VAT charged on the purchase of the vehicle will therefore be limited to EUR 10,500 x 27% = EUR 2,835.

At the time of purchase, if the company has estimated the number of professional kilometers at 50% and therefore deducted 50% of the purchase VAT, a revision must be made in the periodic VAT return by 20.04.2015 at the latest. is calculated as follows (Article 8, 1 °, of the Royal Decree No. 3 , aforementioned):

(10,500 x 50%) - (10,500 x 27%) = 2,415 euros to the disadvantage of the taxpayer.

Article 19, § 1 of the VAT Code does not apply to private use.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol, etc.) is also limited to 27% under Article 45, § 1, of the VAT Code. Accordingly, a revision should also be made in the periodic VAT return to be submitted by 20.04.2015.

If it is established for 2015 that the size of private use deviates from the ratio established with respect to 2014 (for example, there is now 40% professional use), a revision must be carried out pursuant to Article 10, § 1, first paragraph, 1 °, of Royal Decree No 3 , aforementioned. The revision is done year by year (Article 11, § 1, first paragraph, of the Royal Decree).

This revision is calculated for 2015 as follows:

((10,500 x 40%) - (10,500 x 27%)) / 5 = 273 euros for the benefit of the taxable person and to be included in the periodic VAT return to be submitted no later than 20.04.2016.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol…) is also limited to 40% under Article 45, § 1 of the VAT Code. Accordingly, a revision should also be made in the periodic VAT return to be submitted by 20.04.2016.

b. Example 2

In the course of 2014, a company will purchase a passenger car that will be made available to a technical employee free of charge. Purchase price car: 20,000 euros + 4,200 euros VAT. The professional use of the car, using method 2 (see Section 8, Title 4, Section D, subsection b), is definitively set at 56%. Pursuant to a combined application of Article 45, § *1d,* and § 2 of the VAT Code, the right to deduct VAT charged upon purchase of the vehicle will therefore be limited to 4,200 x 50% = 2,100 euros.

At the time of purchase, if the company has estimated the number of professional kilometers at 50% and therefore deducts 50% of the purchase VAT, no revision is required for 2014.

Article 19, § 1 of the VAT Code does not apply to private use.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol, etc.) is also limited to 50% under Article 45, § 2, first paragraph, of the VAT Code.

If it is established for 2015 that the size of private use deviates from the ratio established with respect to 2014 (for example, there is now 45% professional use), a revision must be carried out pursuant to Article 10, § 1, first paragraph, 1 °, of Royal Decree No 3 , aforementioned. The revision takes place year by year (Article 11, § 1, first paragraph, of Royal Decree No. 3 , aforementioned).

This revision is calculated for 2015 as follows:

((4,200 x 50%) - (4,200 x 45%)) / 5 = 42 euros to the detriment of the taxable person and to be included in the periodic VAT return to be submitted no later than 20.04.2016.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol, etc.) is also limited to 45% under Article 45, § 1, of the VAT Code. Accordingly, a revision should also be made in the periodic VAT return to be submitted by 20.04.2016.

B. There is no mixed use when purchasing the asset

The taxpayer exercises his right of deduction in accordance with Article 45, § 1 of the VAT Code and, where applicable, under Article 45, § 2 of the VAT Code.

In the event of application of Article 19, § 1, of the VAT Code (see Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning), the taxable amount must be determined in accordance with Article 33, § 1, 2 ° of the VAT Code, which is the expenditure incurred by the taxpayer In order to treat the taxpayers who rent a vehicle as much as possible in the same way as the taxpayers who buy and include a vehicle in their business assets, the administration has decided that the optional method of calculation to determine the taxable amount if a benefit of any kind is retained in respect of income taxes may no longer be applied (see Note No 4/1996 of 09.05.1996 , Chapter VI).

From now on, the taxable amount should only be determined taking into account the amount of the expenditure incurred by the taxpayer (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount').

a. Example 1

In the course of 2014, a company buys a passenger car and makes it available to the HR manager for consideration. For private use, the HR manager pays 2,000 euros + VAT per year (in accordance with normal value). Purchase price car: 50,000 euros + 10,500 euros VAT.

The company provides a rental service as referred to in Article 18 of the VAT Code. The VAT charged on the purchase of the car is deductible up to 5,250 euros, regardless of the number of private kilometers driven by the HR manager (application of Article 45, § 2, first paragraph, of the VAT Code - see Section 5, title 2, section E).

From 01.01. 2015 the employment contract with the HR manager changes in such a way that he no longer has to pay a personal contribution.

Since Article 45, § *1d* of the VAT Code was not applicable at the start, the use of the vehicle must be taxed if applicable when Article 19, § 1 of the VAT Code is applied.

The professional use of the car, when applying method 3 (see Section 8, Title 4, section D), is set at 35%. Since private use exceeds 50%, Article 19, § 1 of the VAT Code must actually be applied.

The taxable amount must be calculated as follows: (50,000 x (50% - 35%)) / 5 = 1,500 euros.

The VAT due in this case is therefore 1,500 x 21% = 315 euros.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol…) is, moreover, limited to 35% pursuant to Article 45, § 1, of the VAT Code.

b. Example 2

In the course of 2014, a company buys a passenger car and makes it available to the technical employee for consideration. For private use, the staff member pays 400 euros + VAT per year (in accordance with normal value). Purchase price car: 10,000 euros + 2,100 euros VAT.

The company provides a rental service as referred to in Article 18 of the VAT Code. The VAT charged on the purchase of the car is deductible up to 1,050 euros, regardless of the number of private kilometers driven by the employee (application of Article 45, § 2, first paragraph, of the VAT Code - see Section 5, Title 2, section E).

From 01.01. 2015 changes the employment contract with the technical employee in such a way that he no longer has to pay a personal contribution.

Since Article 45, § *1d* of the VAT Code was not applicable at the start, the use of the vehicle free of charge may, if applicable, be taxed when Article 19, § 1 of the VAT Code is applied.

When using method 2 (Section 8, Title 4, Section D, subsection b), the private use of the car is set at 44%. Consequently, professional use is 56%.

Since private use does not exceed 50%, Article 19, § 1 of the VAT Code should not be applied.

The right to deduct VAT charged on services and supplies of goods relating to the vehicle (maintenance costs, petrol, etc.) is also limited to 50% under Article 45, § 2, first paragraph, of the VAT Code.

3. The vehicle is rented by the taxable person

In case the taxpayer rents a vehicle, it cannot be classified as an operating asset on his behalf (see 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning').

He receives a service and must exercise his right to deduct in accordance with Article 45, §§ 1 and 2 of the VAT Code. Article 19, § 1 of the VAT Code may not apply (see 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning').

The taxable person hiring the vehicle will have to consider from the outset its use for purposes other than those of its economic activity.

For example, in the event that he makes the vehicle available to a member of staff who will use it for both professional and private purposes free of charge, he will have to limit the VAT charged on the rental of that vehicle pursuant to Article 45, § 1, of the VAT Code and, where applicable, pursuant to Article 45, § 2, first paragraph, of the VAT Code.

In principle, the relationship between private and professional use is determined on the basis of an estimate of the kilometers to be traveled. This estimate is made under the supervision of the administration and must be supported by evidence. The taxpayer must revise the original deduction by no later than 20 April of the year following the year in which the vehicle is rented in the periodic VAT return (Article 5, § 1, 1 °, of the Royal Decree No 3 , aforementioned).

However, the administration provides for a number of practical modalities for determining professional use with regard to certain means of transport (see Section 8).

If the vehicle is made available for consideration to a manager, driver or staff member, VAT is due on the compensation received. This taxable amount may not be less than the normal value (Article 33, § 2 of the VAT Code).

For the determination of the normal value, reference is made to 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount'. On the other hand, the right to deduct VAT from the rental of those vehicles is limited to the maximum of 50% (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount').

A. Example 1

In the course of 2014, a company rents a vehicle that will be made available to the HR manager free of charge. Annual car rental price: 15,000 euros + 3,150 euros VAT. The professional use of the car is definitively set at 41% in accordance with method 2 (see Section 8, Title 4, Section D, subsection b).

In this hypothesis, the car is used for 59% for the private purposes of the HR manager. Pursuant to Article 45, § 1, of the VAT Code, the annual rent (including fuel costs) will only be deductible up to the amount of 3,150 x 41% = 1,291.50 euros.

If the company has recovered 50% of the VAT on the rental price (including fuel costs) during the year, a revision must be made no later than 20.04.2015, which is calculated as follows (Article 5, § 1, 1 °, of the Royal Decree No. 3 , aforementioned):

(3,150 x 50%) - (3,150 x 41%) = 283.50 euros to the disadvantage of the taxpayer.

Article 19, § 1 of the VAT Code does not apply since the vehicle is not a business asset for the taxpayer.

B. Example 2

In the course of 2014, a company will rent a passenger car that will be made available to the technical employee for free. Annual car rental price: 10,000 euros + 2,100 euros VAT. At the end of 2014, a detailed record of trip administration shows that 50,000 km were traveled during that year, of which 28,000 km were trips in the context of his position as a technical employee.

In this hypothesis, the car is used for 56% (= 28,000 / 50,000) for the professional purposes of the technical employee. Pursuant to a combined application of Article 45, § 1 and § 2 of the VAT Code, the right to deduct will therefore be limited to 2,100 x 50% = 1,050 euros.

If the company has recovered 50% of the VAT on the rental price (including fuel costs) during the year, no revision is required for 2014.

Article 19, § 1 of the VAT Code does not apply since the vehicle is not a business asset for the taxpayer.

[Inhoudstafe l of this chapter] - [Contents of the VAT Comments]

Section 8 - Determining the private and professional use of a good or service

1 Introduction

In view of the way in which the original right to deduct input tax is to be determined, as well as the way in which this right to deduct should be regularized, it is necessary to determine the professional use made of company assets and other goods and services.

The taxpayer can of course only estimate the use of the property at the beginning of a calendar year. On the basis of that estimate, he exercises his right to deduct. It follows that, on expiry of the calendar year, the taxable person will have to revise the original right of deduction. At the latest in the periodic VAT return to be submitted no later than April 20 of the year following the year of the purchase or rental of the good, the taxpayer must revise the deduction originally made (Article 5, § 1, 1 °, and 8, first paragraph 1 ° of Royal Decree No. 3 , aforementioned). As regards VAT charged on business assets, an annual review should also be carried out for the remaining years of the review period (Article 10, § 1, first paragraph, 1 °, of the Royal Decree No. 3 , aforementioned). For practical examples in connection with motor vehicles intended by Article 45, § 2, first paragraph, of the VAT Code, reference is made to Section 7, Title 2.

Determining professional use is not only necessary for determining the right to deduct, but also for:

- determining the normal value in the circumstances intended by Article 33, § 2 of the VAT Code (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount')
- determining the expenses incurred in the circumstances in which Article 19, § 1 of the VAT Code applies (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount').

Because in certain cases practical difficulties may arise to determine the professional use of a good or service, the administration has developed a number of application modalities in the case of a free delivery.

Optional methods of calculation are also proposed to calculate normal value in the event of a provision for consideration, as well as to determine the expenditure incurred when Article 19, § 1 of the VAT Code applies.

2. Special case: the VAT unit

The VAT unit referred to in Article 4 , § 2 of the VAT Code must be regarded as a single taxable person who replaces its members in order to jointly exercise their VAT rights and obligations.

When the term 'taxable person' is used in Sections 5 to 9, this naturally also includes the VAT unit within the meaning of Article 4, § 2 of the VAT Code and not a member of a VAT unit.

If, for example, the VAT unit decides to set an overall average deduction rate (as referred to in Section 9) for all means of transport of the same nature available to the VAT unit (purchase and / or leasing), it will not be accepted that this deduction percentage is determined at the level of the individual member.

After all, the VAT unit is regarded as a single taxable person for the purposes of VAT. Consequently, the global average deduction rate should be set at the level of the VAT unit.

The members of the VAT unit must exchange the necessary information for this purpose.

With regard to motor vehicles other than fiscal light trucks, the VAT unit may combine method 1 with method 2. This means that the VAT unit for each individual vehicle has the choice of either keeping a complete journey administration (method 1) or use a semi-standard formula (method 2). The choice applies to the calendar year. The VAT unit can of course also use a global average deduction percentage.

The VAT unit can also opt to determine professional use by means of the general flat rate (method 3).

In addition, the VAT unit will be able to apply the separate scheme (including a method 4) for fiscal light trucks.

It is emphasized that the application of method 3 in respect of one or more members of the VAT unit cannot in principle be combined with the application of methods 1 and / or 2 in respect of one or more other members, subject to what is said under Section 8, Title 4, Section D, subsection c).

In the same vein, the separate scheme for fiscal light trucks should be applied in respect of the VAT unit (and not considered individually for each member).

Finally, it is recalled that the VAT unit exercises the right to deduct the VAT charged on the goods and services provided to its members during its existence.

Articles 45 to 49 of the VAT Code therefore apply to the VAT unit.

3. Fate of agreements concluded on professional use

If the professional / private use relationship that a taxable person makes of a good or a service has been the subject of an individual formal agreement concluded between the administration and the taxable person, the taxable person can continue to invoke this and the following rules apply to professional use. therefore not applicable, unless it is clear from the actual factual circumstances that the professional / private use ratio does not correspond to the agreement concluded .

In principle, the individual agreement only applies to goods and services that the taxable person already had at the time the agreement was concluded and which he himself uses for both professional and private purposes, unless the agreement has a broader scope over time .

The foregoing applies to the individual agreements concluded no later than the date of publication of Circular AOIF No. 36/2015 (No. ET 119.650) of 23.11.2015 .

Example:

- A taxpayer has a passenger car and a light truck (purchase or rental). Pursuant to an individual agreement with the administration concluded in 2010, professional use for passenger cars is set at 40% and for light trucks at 75%.

  To the extent that the professional use of the vehicles in 2015 complies with the concluded agreement, the taxable person may continue to rely on it and must not determine the professional use of a vehicle in accordance with one of the methods provided for in this circular.

  If the taxpayer wishes to claim the general flat rate of 85% (see method 4-85%, title 4, section E, subsection b), the individual agreement with regard to the light truck will lapse.

- A taxpayer has a motorcycle (purchase or rental). Pursuant to an individual agreement with the administration concluded in 2010, the professional use of the motorcycle is set at 80%. The taxpayer buys a new motorcycle on 19.09.2015.

  As far as the new motorcycle is concerned, professional use should in principle be determined in accordance with the method laid down in Title 4, unless the individual agreement concluded in 2010 also applies to future purchased business assets and does not change the professional use.

4. Determining the use of a means of transport

At the time when the means of transport is purchased or hired by a taxable person, the ratio of private use and professional use is in principle determined on the basis of an estimate of the kilometers to be traveled. This estimate of actual use is made under the supervision of the administration.

The definitive determination of the use of a means of transport must be supported by evidence. The administration puts forward two methods according to which the professional use can be determined taking into account the actual use of each individual vehicle (see method 1 and method 2, below).

Two other methods, on the other hand, are a general flat rate (see Method 3 and Method 4 below).

A. Intended means of transport

The methods of determining professional use can only be applied to means of transport equipped with an engine with a cylinder capacity of more than 48 cc or with a power of more than 7.2 kilowatts intended for the transport of persons and / or goods by the way .

It is irrelevant whether the taxpayer buys these vehicles (as a business asset) or rents them.

Are not intended by any of the four methods: a helicopter, a pleasure craft, a bicycle, a trailer.

However, some motorized means of transport for road transport are excluded from the scope of these methods. This concerns in particular the car vehicles intended by Article 45, § 2, second paragraph, a) to e) of the VAT Code :

- vehicles with a maximum permitted mass of more than 3,500 kg
- passenger vehicles with more than 8 seats, not including the driver
- vehicles specially equipped for the transport of sick, injured and prisoners and for the transport of corpses
- vehicles that, due to their technical characteristics, cannot be registered in the register of the Vehicle Registration Service
- the vehicles specially equipped for camping.

The professional use of these means of transport is determined on the basis of the actual circumstances under the supervision of the administration.

However, the use of a properly kept trip administration cannot be denied to a taxable person who expressly requests it, since this method is the application of the principle of actual use contained in Articles 45, § 1 and § *1d* of the VAT. - Code.

B. Intended use

The methods of determining professional use do not apply to means of transport used exclusively for professional purposes by the taxable person or the person to whom the vehicle is made available.

Insignificant use (occasional or casual use) for purposes other than economic activity will not be taken into account in this context.

This is a factual matter which the administration will assess on a case by case basis. In order to ascertain the administration's position regarding the use of a particular vehicle, the taxpayer may conclude a prior agreement with the administration (for example, an agreement of the Center's management department under which the taxpayer falls).

The following are considered as professional use of a vehicle only (not exhaustive):

- the employee comes with his own vehicle to the registered office of the company (with or without the intervention of the employer in the costs) and uses a commercial vehicle only in the context of the economic activity of the taxpayer
- the nature of the vehicle and taking into account the economic activity of the taxable person and more generally the circumstances in which that vehicle is used by the taxable person shows that professional use only is highly probable (for example a tax pick-up light truck). loaded with materials and tools, certain agricultural vehicles, vehicles used exclusively on the taxpayer's premises, vehicles used only for site visits, a van whose loading space is specifically designed to store materials and tools).

Note: Commissioning of operating assets

The commissioning by a taxable person, as a business asset, of a good in the circumstances envisaged by Article 12 , § 1, 3 °, of the VAT Code is equated with a supply for consideration. The VAT charged on this commissioning is only deductible to the extent that the good is used to perform taxable transactions. Consequently, professional use should be determined by one of the methods from the time of commissioning as a business asset.

Of course, the foregoing also applies to the special arrangements for the commissioning carried out by manufacturers and dealers in passenger cars and dual-use wagons (see Note 9/1985 of 30.07.1985, changed later). When the vehicles put into service under this scheme are used for both economic and other purposes (for example, as a demo car for potential customers as well as as a private vehicle of the manager), the professional use must be determined according to one of the methods. Taking into account that this special scheme does not provide for a commissioning to be taxed or for a regularization of the deductible input tax, if the vehicle is delivered within three months after it was first put into circulation, professional use should not to be determined with regard to the aforementioned period.

From the first day after the three-month period following the vehicle's first entry into service, the taxable person shall establish professional use in accordance with one of the methods.

C. Concept of commuting

It is recalled that the private use of a means of transport includes the commuting of the taxable person or any other user.

In terms of VAT, commuting must be defined as the journey that the user of a means of transport travels between his place of residence and his place of employment (for example an employee) or the place where or from where he carries out his economic activity (for example a taxable natural person).

If the movement to and from the place of employment takes place from a place other than the place of residence, that place of residence must be taken as a reference point for determining commuter traffic.

Example:

A company based in Liège makes a car available to a staff member who lives in Antwerp with his family. In order to limit daily trips to and from work (distance Antwerp-Liège is 130 km), the staff member rents a studio in Tienen where he stays from Monday to Friday (distance Tienen-Liège is 60 km).

In determining commuter traffic, method 1 naturally takes into account the actual travel from Antwerp on Monday morning and to Antwerp on Friday evening.

As far as method 2 is concerned, the parameter ' WoonWerk Distance ' must be estimated as follows: Distance WoonWerk = (130 km x 2/10) + (60 km x 8/10) = 74 km.

Moreover, as regards the application of VAT, the place of employment or the place from or where the economic activity is pursued are exclusively the registered office or an establishment of the taxable person.

The term ' registered office ' is intended to be the seat of the business, this is the place where the central management tasks of the company are performed.

The term ' establishment ' means:

- a business unit registered with the Crossroads Bank for Enterprises (KBO)
- as far as not referred to in the previous point, a place of an establishment characterized by a sufficient degree of durability and, in terms of personnel and technical resources, an appropriate structure to provide or receive services and supplies of goods.

It is on the basis of a set of factual and legal circumstances (employment contract, contractual provisions, job description or job description of the employee...) that the place of employment or the place where or from which the economic activity is carried on must be determined.

In usual commercial relationships between independent persons, the establishment of a customer, of another supplier or service provider... for the purposes of this scheme is not considered to be a place of employment or a place from or where the economic activity is pursued. The '40 day rule' for determining the permanent place of employment for direct taxation (see circular Ci.RH.241 / 573.243 (AOIF no. 46/2007) of 06.12.2007) does not apply to VAT .

Example:

A staff member of an ICT company based in Liège works for three months with a customer of the company in Brussels to update the security programs on the spot. The establishment of the customer is not regarded as a place of employment within the meaning of this section.

It sometimes happens, however, that a taxpayer is so closely linked organisationally and / or economically to another person that there is no longer any question of a commercial relationship between two independent persons.

In those circumstances, where, in addition, the taxable person pursues his economic activity on a permanent basis in the place where the person with whom he is so connected has an establishment, that location may be considered as a place from or from which the taxable person carries on his economic activity or in which a servant of the taxpayer is employed, being an establishment as described above.

The bottom line is that in those cases it must be determined on the basis of the actual circumstances which place 'sustainable' must be designated as the place of employment or where or from which an economic activity is carried out.

However, a construction site is never regarded as an establishment of the taxable person (contractor for works).

Application cases and administrative tolerances:

- construction workers

  If workers in the construction sector go from their place of residence to a meeting place that may or may not be located at the taxpayer's registered office (or an establishment), after which they drive together to a specific yard, the entire process will become an administrative tolerance. classified as a professional travel.

  This tolerance also applies to movements between the taxpayer's place of residence and the registered office (or an establishment) taken to collect materials and tools before driving to a specific yard.
- use pool car by the employees

  If an employee goes to a assembly point from his place of residence before driving to his place of work with his colleagues (pool car) in his car (pool car) (the registered office or an establishment of the taxpayer), the entire path taken by that employee will be regarded as residence. -work traffic.
- the director or manager and the company

  For the directors or managers of a company that do not have the status of taxpayer, the route from their place of residence to the registered office of the company is regarded as commuting.

  It sometimes happens that the registered office of a taxable legal person and the domicile of the director or manager of that company coincide. In that case, the place of residence and the place of employment naturally coincide and there is no commuting.

  In contrast, directors or business managers who are taxable persons are regarded as suppliers or service providers in their relationship with the company. Consequently, the route from the place of residence of these persons to the registered office of the company is not considered commuting.

  Example:

  Mr. Francken is a director of the company Francken bvba, identified for VAT purposes for the activity of director of companies. Mr. Francken's residence in Deinze coincides with the registered office of his company. Francken bvba is a director of Dupont nv in Liège (an operating company).

Mr. Francken is regarded as an employee of the company Francken bvba. Since the residence of Mr. Francken coincides with the registered office of his company, there is no commuter traffic on the basis of the former.

On the other hand, the company Francken bvba, in its capacity as director, is generally a service provider with regard to the employer. When Mr Francken participates on behalf of his company in a meeting of the board of directors of Dupont nv in Liège, the distance traveled Deinze-Liège is also not regarded as commuting. After all, Dupont nv is not regarded as an establishment of Francken bvba.

- the lawyer intern or lawyer employee

  The displacement of the trainee lawyer or attorney-employee, who is a taxable person, between his place of residence and the law firm for which he is permanently employed is considered to be a home-work trip.

  After all, the trainee or employee is generally associated with the law firm in an organizational and / or economic manner that it is difficult to speak of a usual commercial relationship between the service provider and the co-contractor. The trainee or employee actually carries out his taxpayer activity sustainably in an establishment of the law firm. Consequently, the place where the law firm is located is considered to be an establishment of the lawyer trainee or lawyer employee.

D. Methods for determining the professional use of some means of transport, with the exclusion, however, of light trucks as intended by Article 45, § 2, second paragraph, f) of the VAT Code

a. Methode 1

The taxpayer keeps daily records of trip administration via manual input (for example, trip booklet, software program) or in an automated manner (for example, adapted GPS system).

A complete trip administration assumes the maintenance of the following data regarding daily journeys for professional purposes : date of the trip, start address, end address, kilometers traveled per trip, total kilometers traveled per day.

In addition, the mileage must be registered at the beginning and end of the period (in principle per calendar year).

The daily updated trip administration must be submitted at every request of the administration.

The taxpayer must determine usage based on this method per company vehicle . The properly maintained trip administration serves as the basis for establishing the right to deduct. The result of the calculation may be rounded to the higher unit.

The professional use determined in accordance with this method with regard to year X is generally used as an estimate for the professional use in year X + 1.

The taxpayer may combine method 1 with method 2 at his own discretion. This means that each year he has the choice per individual vehicle to maintain a complete journey administration (method 1) or to use a semi-standard formula (method 2).). The choice applies to a calendar year.

Administrative tolerance

When a taxable person makes a car available to an employee with whom he has a trade representation contract and recourse to method 1 is accepted, it is accepted that there is at least a 50% professional use, without having to be substantiated by by means of a trip administration. This administrative tolerance only applies to one vehicle per user.

b. Method 2

However, in order to simplify the taxable person who does not wish to keep a trip administration, to determine professional use in a way that is related to the actual use of each individual vehicle, the administration accepts, for simplification, the application of the following formula:

% Private = ((Distance from Home Work x 2 x 200 + 6,000) / Total Distance) x 100

% Occupation = 100% -% Private

With as parameters:

'% Private ' = the ratio of private use

'% Occupation ' = the ratio of professional use (the result of the calculation may be rounded to the higher unit)

' Distance WoonWerk ' = the distance from the place of residence to the workplace in kilometers (see section C above)

' Total Distance ' = the real distance traveled in a calendar year in kilometers (vehicle odometer)

' 200 ' = fixed number of working days performed per calendar year in which the vehicle is deemed to have been used for commuting, round trip

' 6,000 km ' = fixed fixed other private use per calendar year

The semi-standard method applies in principle to a car that is made available by a taxable person to an employee, driver or manager who uses that vehicle for professional and private trips (including commuting). However, this formula can also be applied by the taxable person who uses a car himself. There must be a number of conditions met in order to apply this method (see *below*).

The fixed number of working days performed per calendar year (200) remains unchanged. This factor already takes into account holidays, sick days, days telework, part-time work ...

Example:

An employee has a passenger car that she uses for both professional and private purposes. In 2015 she will take unpaid leave in August.

The factor 200 is not reduced. Moreover, the exclusive private use of the means of transport in August also does not affect the fixed other private use per calendar year (6,000 km).

The number of times that the user actually travels the home-workplace route with the vehicle is therefore not important. It is even possible to apply this method if the residence-workplace route is never taken (example: the employee works from his residence, the employee never goes directly to the office), provided that the other conditions relating to this method are fulfilled (see *infra*).

Example:

An employee who lives in Aalst usually drives directly to customers from his place of residence. Usually, however, he works 2 days a week (92 days in the course of 2015) in his office at the head office in Wavre (distance Aalst-Waver is 64 km).
The Wavre office is regarded as the employee's workplace.

The taxpayer (employer) who opts to apply method 2 must take into account a 'Distance Living Work ' = 64 km when determining the professional use of the vehicle by the employee .

The fact that the trajectory will be completed in 92 days in 2015 does not mean that the parameter 200 of the fixed amount may be reduced.

If the place of residence (or residence) coincides with the place of employment or the place where or from where the economic activity is carried on, the parameter 'Distance Living Work ' has a value of '0'.

Example:

An independent accountant lives in Durbuy. He has established the seat of his economic activity at the same address from which he carries out all professional trips.

Since the place of residence coincides with the place from which he performs his economic activity, the parameter 'Distance Work ' has a value of '0'.

However, the formula must be adjusted if a change occurs in the use of the car vehicle during a calendar year.

This is the case when the vehicle is put into service by a taxable person during a calendar year: parameters '200' and '6,000 km' must be reduced accordingly pro rata temporis .

Example:

On 01.08.2015, a company makes a car available to a staff member. The parameter 'Distance WoonWerk ' is 16 km and the total distance traveled from August 1 to December 31 (153 days) is 9,150 km (according to odometer).

The formula should be adapted as follows:

% Private = ((16 km x 2 x 200 + 6,000 km) / 9,150 km) x 100 x 153/365 = 56.81%

% Occupation = 100% - 56.81% = 43.19% (rounded to the higher unit: 44%)

The formula must also be adjusted if the distance from the place of residence to the place of employment or the place from or from which the economic activity is carried out changes during the calendar year: the factor 'Distance between Work ' must in that case be pro rata temporis being calculated; the factors '2 x 200' and '6,000' remain unchanged.

Three cumulative application conditions related to method 2:

- there is one regular user (the manager, driver, employee including their family) of the car vehicle

  Example:

  A company has a commercial vehicle (pool car) that the employees can use alternately for both service and private trips depending on the availability of the vehicle. Since there is no regular user for that vehicle, the application of method 2 is not possible.
- there is one vehicle per user

  If the regular user of a car vehicle is also the regular user of one or more other car vehicles, method 2 can only be applied to one of these vehicles.

  Example:

  An independent window cleaner in Liège has a station wagon (break) and a passenger car (sedan). Both vehicles are used by him and his family both professionally and privately. The taxable natural person can only apply the semi-flat rate method to one of the two passenger cars.
- the vehicle must actually be used as a working tool or operating means in the context of economic activity. Vehicles that are not used, or are used only insignificantly (occasionally or accidentally) for the taxpayer's economic purposes, are expressly excluded from the application of method 2.

  It is an insignificant professional use if the vehicle is used for less than 10% for professional purposes .

This is a factual matter which the administration will assess on a case by case basis. In order to ascertain the administration's position regarding the use of a particular vehicle, the taxpayer may conclude a prior agreement with the administration (example: agreement of the Center's management department under which the taxpayer falls).

When a taxpayer makes a vehicle available to an employee under the pay policy, the administration assumes for the purposes of method 2 that the vehicle is actually used as a work tool or as an operating means.

The taxpayer must determine the usage based on this method by motor vehicle . This calculation serves as the basis for determining the right to deduct. The result of the calculation may be rounded to the higher unit.

The professional use determined in accordance with this method with regard to year X is generally used as an estimate for the professional use in year X + 1.

The taxpayer may combine method 1 with method 2 at his own discretion. This means that each year he has the choice per individual vehicle to maintain a complete journey administration (method 1) or to use a semi-flat rate formula (method 2). . The choice applies to a calendar year.

c. Method 3

For some taxpayers, applying method 1 and even method 2 may result in a significant administrative burden.

The administration therefore accepts that the taxpayer determines professional use by means of a general flat rate of: % Profession = 35%.

Three cumulative application conditions related to method 3:

- Method 3 should in principle be applied to all motorized means of transport intended for the transport of persons and / or goods by road (purchased or rented) that are used both for economic activity and otherwise to the extent of course not explicitly excluded from this method (see Title 4, Section A, above).

  Subject to what is said below (second point), the taxpayer may in principle not combine method 3 with method 1 and / or method 2 to determine professional use.
- The flat rate only applies to one vehicle per user .

  If the taxpayer natural person or his family has more than 1 passenger car or if the taxpayer makes more than 1 passenger car available to a manager or staff member (or their family), the flat rate may only be applied for one mixed-use vehicle of his choice. For the other passenger car (s) that are used in combination, the professional character must be demonstrated by means of a journey administration.

  The taxpayer determines at the purchase or at the start of the rental of a vehicle for which vehicle he applies the general flat rate of 35%. As for the other vehicles available to him (or his family), he applies method 1.
- The vehicle must actually be used as a working tool or as an operating means in the context of economic activity. Vehicles that are not used, or are used only insignificantly (occasionally or accidentally) for the taxpayer's economic purposes, are expressly excluded from the application of method 3.

  It is an insignificant professional use if the vehicle is used for less than 10% for professional purposes .

  This is a factual matter which the administration will assess on a case by case basis. In order to ascertain the administration's position regarding the use of a particular vehicle, the taxpayer may conclude a prior agreement with the administration (example: agreement of the Center's management department under which the taxpayer falls).

  When a taxpayer makes a vehicle available to an employee under the pay policy, the administration assumes for the purposes of method 3 that the vehicle is actually used as a work tool or as an operating means.

The taxpayer who opts for this must apply the general flat rate for at least 4 calendar years from the year in which this method is first applied.

Example:

A taxable person (natural person) has three passenger cars that he uses both in the context of his economic activity and otherwise. He (or his family) uses two vehicles himself and makes the third available to an employee. The taxpayer opts for the application of method 3. Both for the vehicle that he makes available to an employee and for one of the passenger cars that he uses himself, he must apply method 3 (the flat rate of 35%) for the other vehicle that he he himself must use method 1 (trip administration).

E. Separate scheme to determine the professional use of light trucks intended by Article 45, § 2, second paragraph, f) of the VAT Code (including a method 4)

This separate scheme applies to 'light truck' motor vehicles belonging to one of the following categories:

- each car consisting of a single or double cabin, fully enclosed from the cargo space and limited to a maximum of two or six places respectively, excluding the driver, and an open body
- each car simultaneously consisting of a passenger compartment which may contain a maximum of two places, not including the driver, and a cargo compartment enclosed by it, the distance of which , measured between each point of the partition behind the seats and the inside of the rear of the cargo compartment, is measured in the longitudinal direction of the vehicle, at a height of 20 cm above the floor, must always be at least 50% of the length of the wheelbase. In addition, this loading space must consist of its entire surface of a horizontal load floor that is part of the body, fixed or permanently attached, without anchoring points for additional benches, seats or safety belts.
- each vehicle simultaneously consisting of a passenger compartment which may contain a maximum of six spaces, excluding the driver's compartment, and one of which is a fully enclosed cargo compartment, the distance of which, between each point on the partition behind the last row of seats, and the interior of the rear of the rear load space, measured in the longitudinal direction of the vehicle, at a height of 20 cm above the floor, must always be at least

50% of the length of the wheelbase. In addition, this loading space must consist of its entire surface of a horizontal load floor that is part of the body, fixed or permanently attached, without anchoring points for additional benches, seats or safety belts.

With regard to the aforementioned fiscal light trucks, the following distinction must be made:

- vehicles that are (almost) exclusively used for professional purposes and for which none of the methods for determining the professional use must be applied (see section B above)

  It should be noted that the movements of workers in the construction sector from their place of residence to a meeting place which may or may not be located at the registered office (or an establishment of the taxpayer), after which they drive together to a specific yard, are fully regarded as professional displacements.

  This also applies to trips between the place of residence and the registered office (or an establishment of the taxpayer) that are taken to collect materials and tools before driving to a specific yard (see section C above).
- as regards vehicles used for both economic activity and otherwise, the taxable person, for taxable light trucks not covered by the first point, has the choice of:
  - or, for all fiscal light trucks (not referred to in the first point), apply method 1 (trip administration)
  - or, to apply a method 4 (flat rate) for all fiscal light trucks (not referred to in the first point).

Note

The taxpayer must combine the methods mentioned in this section under title 4, section D. with the separate regulation that applies to the light trucks envisaged by Article 45, § 2, second paragraph, f) of the VAT Code.

In other words, the rules that apply to taxable light trucks must be applied separately from the rules that apply to other means of transport.

Example:

A taxpayer has 2 vehicles, 1 of which is a passenger car and 1 fiscal light truck, which are both used in a mixed way. In order to determine the professional use of these means of transport, the taxpayer has the choice:

- for the passenger car, method 1, method 2 or method 3
- as regards the fiscal light truck: method 1 or method 4 (see comment below).

a. Methode 1

The taxpayer keeps daily records of trip administration via manual input (for example, trip booklet, software program) or in an automated manner (for example, adapted GPS system).

A complete trip administration assumes the maintenance of the following data regarding daily journeys for professional purposes : date of the trip, start address, end address, kilometers traveled per trip, total kilometers traveled per day.

In addition, the mileage must be registered at the beginning and end of the period (in principle per calendar year).

The daily updated trip administration must be submitted at every request of the administration.

The taxpayer must determine usage based on this method per company vehicle. The properly maintained trip administration serves as the basis for establishing the right to deduct. The result of the calculation may be rounded to the higher unit.

The professional use determined in accordance with this method with regard to year X is generally used as an estimate for the professional use in year X + 1.

b. Method 4

This method provides for two general fixed rates to determine professional use. Both lump s are explained below.

The administration accepts that the taxpayer determines the professional use of a taxable light truck in principle by means of a general fixed amount (method 4-85%) on: % Occupation = 85%.

Taking into account the intention of the legislator and in order to prevent abuses, the application of the general flat rate of 85% is limited to taxable light trucks which are mainly used by the taxpayer as a work tool or operating means in the course of his economic activity. This additional condition is therefore stricter than the condition of use, as provided for in this section under section B above.

This is a matter of fact, taking into account the fact that the aim of the legislator was to subject certain vehicles designed and built for the transport of goods and whose permissible mass does not exceed 3,500 kg to a more favorable tax regime (both on direct taxation as well as on VAT).

These categories of vehicles are clearly defined.

This assessment should take into account the general factual circumstances in which the taxable person's economic activity is carried on, in particular taking into account:

- the nature of the economic activity of the taxable person whose transport of goods (raw materials, materials, goods for resale) is a characteristic feature
- the type of light goods vehicle (open body, closed cargo space, number of seats) where the use by the taxable person is linked to the nature of the economic activity
- the identity of the person to whom the means of transport is made available by the taxable person (the user), in particular with his function and duties, even if the transport of goods is a characteristic element of economic activity and even if the type of light truck that is used in connection with the nature of that economic activity.

Consequently, taxable light trucks that are not mainly used for professional purposes cannot apply the general flat rate of 85%. The same applies to fiscal light trucks that no longer meet that condition during the useful life.

With regard to mixed-use fiscal light trucks whose use does not or no longer meets the circumstances described above, professional use can be determined on the basis of a general fixed amount (method 4-35%) of: % Occupation = 35% if the following conditions have been met .

Two cumulative application conditions related to method 4-35%:

- The flat rate only applies to one vehicle per user .

  The professional flat rate of 35% when applying method 4-35% only applies to one vehicle per user. If the taxable person (or his family) has more than 1 light truck that is used in a mixed but not predominantly professional manner, or if the taxable person makes more than 1 such vehicle available to a manager or employee (or their family), the flat rate may only one mixed-use vehicle of your choice can be used. For the other vehicle (s) that are used in combination, the professional character must be demonstrated by means of a journey administration.

  The taxpayer determines at the purchase or at the start of the rental of a vehicle for which vehicle he applies the general flat rate of 35%. As for the other vehicles available to him (or his family), he applies method 1.
- The vehicle must actually be used as a working tool or as an operating means in the context of economic activity. Vehicles that are not used, or only insignificantly (occasionally or accidentally) for the taxpayer's economic purposes, are expressly excluded from the application of method 4-35%.

  It is an insignificant professional use if the vehicle is used for less than 10% for professional purposes.

  This is a factual matter which the administration will assess on a case by case basis. In order to ascertain the administration's position regarding the use of a particular vehicle, the taxpayer may conclude a prior agreement with the administration (example: agreement of the Center's management department under which the taxpayer falls).

  When a taxable person places a vehicle at the disposal of an employee under the pay policy, the administration assumes for the application of method 4-35% that the vehicle is actually used as a work tool or as an operating means.

The taxpayer is not obliged to apply method 4. However, if he chooses to apply the fixed rate, it is in principle mandatory to apply to all mixed-use fiscal light trucks (method 4-85% and / or method 4-35%) without distinction.

The taxpayer who opts for it must apply the general flat rate for at least 4 calendar years, starting from the year in which this method was first applied.

5. The use of movable property other than means of transport

A. Algemeen fixed price

With regard to movable property other than means of transport used for both economic activity and otherwise, the relationship between private and professional use must be determined.

The administration accepts that the taxpayer determines the professional use of the aforementioned goods (with the exception of the goods that are expressly excluded below) by means of a general flat rate of: % Profession = 75%.

This generally flat rate is, in principle, applicable to movable goods other than vehicles, irrespective of their value, which is mixed (professional and privématig) are used (however, see section B, below.). It therefore applies both to the assets referred to in Article 48, § 2 of the VAT Code and to other movable property (for example, movable property with a value of less than 1,000 euros, excluding VAT, rented movable property).

The general flat rate applies not only to the purchase or rental of a good, but also to the related costs (telephone subscription, call costs, internet subscription, repair costs ...).

The taxpayer opting for the application of this overall package is there in this package relieved to apply to the movable property used exclusively for business purposes .

Insignificant use (occasional or casual use) for purposes other than economic activity (for example, a fixed office PC occasionally used privately) will not be taken into account in this context. This is a factual matter that the administration assesses on a case-by-case basis.

If the taxpayer opts for the application of this general flat rate, it applies to all movable property other than means of transport that are mainly used as a work tool or exploitation means in the context of economic activity. The taxpayer will therefore have to be able to demonstrate the predominant use of a movable asset as a working tool or exploitation means for the purposes of his economic activity if he wishes to rely on the general flat rate.

However, goods used only occasionally or additionally for the taxpayer's economic purposes are expressly excluded from the application of this general flat rate. With regard to these goods, professional use must be determined under the supervision of the administration.

The choice for the application of this general fixed amount is made per calendar year.

B. Exclusions

The general flat rate does not apply to deliveries of goods such as electricity, natural gas, water, oil ... With regard to these goods, professional use must be determined under the supervision of the administration, taking into account the actual circumstances (see, however, the administrative tolerance included in Section 9, Title 1, below).

Nor does it apply to goods intended to be sold or rented by the taxable person.

If only a fuel card (without car vehicle) is made available to an employee, manager or driver, the 75% flat rate cannot be applied.

Nor can the professional use of the fuel card be determined on the basis of one of the methods. In that case, professional use is in principle determined on the basis of the actual circumstances under the supervision of the administration.

The use of a properly kept trip administration can nevertheless not be refused to a taxpayer who expressly requests it, since that method is the application of the principle of actual use contained in Article 45, § 1 of the VAT Code.

The 50% deduction limitation of Article 45, § 2 of the VAT Code must also be taken into account for the consumption of fuel by vehicles intended by Article 45, § 2, first paragraph, of the VAT Code.

Finally, the general flat rate does not apply to movable property:

- which are delivered and immediately affixed to a property in such a way that it becomes immovable property by its nature
- referred to in Article 20, § 2, second paragraph, 1 ° and 2 °, of the Royal Decree No 1 of 29.12.1992 with regard to the scheme for the payment of value added tax , referred to above, which are supplied and attached to a real estate although they do not acquire the nature of real estate by its nature.

Reference is made to Title 6, below.

6. Determining the use of real estate by its nature

With regard to real estate by its nature, the relationship between professional and private use must be determined by the taxpayer under the supervision of the administration on the basis of the factual circumstances.

The same applies with regard to the movable property referred to in Article 20, § 2, second paragraph, 1 ° and 2 °, of the Royal Decree No. 1, aforementioned, which are delivered and attached to a real estate, even if they do not character of real estate by its nature.

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Section 9 - Determination of the right to deduct

1. General

Professional use determined in accordance with the rules set out in Section 8 serves as the basis for determining the taxpayer's right to deduct.

Indeed, the right to deduct VAT charged on goods and services which are made available free of charge to a manager, director or employee or, more generally, are used by the taxable person for purposes other than those of his economic activity is limited in accordance with the destination principle contained in Articles 45, § 1 and § *1d* of the VAT Code and Article 1 of Royal Decree No 3 , aforementioned.

It is no longer necessary to take into account the benefit of any kind established in respect of income taxes.

This principle applies not only to business assets, but also to other goods and services that the taxable person uses or consumes in the course of his economic activity.

Administrative tolerance

For the free provision of heating and of electricity used for purposes other than heating the manager, driver or a member of staff who may also use the goods for private purposes, the taxable legal person may, in case of normal consumption, deduct the VAT in full (i.e. also on private use), provided that the VAT on the flat-rate benefit of any kind regarding direct taxation charged is passed on to the Treasury.

Since this benefit of all kind is in principle determined including VAT, the VAT due is obtained by multiplying the amount of this benefit by the fraction 21/121, to be included in the periodic VAT return to be submitted by 20 April at the latest. of the year following consumption.

2. Special case: means of transport

A. General

The percentage of professional use, which is determined according to method 1 or method 2, serves as the basis for determining the right to deduct, which must be applied, among other things, to the VAT levied on:

- the purchase and rental of a vehicle
- the purchase of fuel
- expenditure on repairs and maintenance
- the purchase of accessories.

In principle, this deduction is determined individually for each means of transport, whereby the possible application of Article 45, § 2, first paragraph, of the VAT Code (maximum 50% deduction) must not be overlooked (see, however, section B, below, for a simplification measure when determining the right to deduct).

In principle, the standard percentage of professional use determined in accordance with method 3 or method 4 is equal to the deduction percentage.

However, an additional restriction may have to be applied to the mixed taxpayer (see Section 15).

B. Simplification measure in determining the right to deduct VAT charged on costs related to means of transport

By way of derogation from what is said in section A above, the administration accepts, for the sake of simplification, that the taxable person who has determined the use of the means of transport on the basis of method 1 and / or method 2 calculates an overall average deduction percentage for each of the following categories separately:

- motor vehicles that are subject to the deduction limitation intended by Article 45, § 2, first paragraph, of the VAT Code
- light trucks intended by Article 45, § 2, second paragraph, f), of the VAT Code (only method 1 possible)
- motor vehicles intended for paid passenger transport as intended by Article 45, § 2, second paragraph, j) of the VAT Code
- mopeds and motorcycles intended by Article 45, § 2, second paragraph, g) of the VAT Code.

Determining a global average deduction percentage with regard to means of transport must be done in the following way:

- per individual vehicle, the taxpayer determines the percentage of professional use (% Occupation) in accordance with method 1 or 2. This percentage is in principle the deduction percentage, except in the case when, when applying Article 45, § 2, or Article 46 of the VAT Code, the deduction percentage must be limited.
- the sum is then added up of the deductible percentages calculated in accordance with the previous point and that total is divided by the number of means of transport involved.

The final result of this calculation is the global average deduction percentage (Average% Deduction) for the means of transport of the category concerned. The result may be rounded to the higher unit.

The taxpayer likewise calculates a new global average deduction percentage year after year.

The global average deduction percentage must be applied to VAT charged on the purchase or rent as well as to all usage costs (fuel costs, maintenance costs, repair costs) relating to the means of transport whose professional use was determined by method 1 and / or method 2.

The taxpayer is of course not obliged to apply this method of calculating the right to deduct. However, the taxable person who chooses to apply this method of calculation for at least 4 calendar years from the year in which this method of calculation was first applied (unless, during that period, he chooses to establish professional use in accordance with Method 3 or method 4).

[Inhoudstafe l of this chapter] - [Contents of the VAT Comments]

Section 10 - Restrictions on the right to deduct VAT charged on certain professional expenses

1. Special case with regard to new means of transport that are supplied intra-Community (Article 45, § *1a* of the VAT Code)

Article 45, § *1a* of the VAT Code introduces a restriction on the right to deduct VAT charged on supplies, imports and intra-Community acquisitions of goods and services in respect of a new means of transport within the meaning of Article *8a* , § 2 of the VAT Code, the supply of which is exempt under Article 39 *bis* of the VAT Code.

The taxable persons referred to by this restriction of the right to deduct are:

- the casual taxpayers referred to in Article *8a* , § 1 of the VAT Code

- taxpayers who only carry out transactions referred to in Article 44 of the VAT Code and who are not entitled to any deduction under Article 45, § 1, 4 ° or 5 ° of the VAT Code
- taxable subjected to the exemption provided for in Article 56 *bis* , § 1, of the VAT Code
- taxpayers subject to the standard agricultural scheme provided for in Article 57 of the VAT Code
- taxable persons benefiting from a special scheme and who thus waive their right to deduct.

This provision entails a double restriction on the right of deduction of that taxable person:

- On the one hand, as regards the nature of the deductible tax, it concerns only the tax levied on the purchase, intra-Community acquisition or importation of the new means of transport. Consequently, the tax levied on goods and services related to the sale of the means of transport by the accidental taxable person, such as costs relating to advertising, brokers or transport, cannot in any way be deducted.
- secondly, in terms of the amount of tax deductible: the amount is calculated on the taxable amount by Article 39 *bis* of the VAT Code, exempt supply rate to apply that applies to this provision (see 'Book VI: Specific topics - Chapter 16: Specific topics, Section 3: Motor vehicles').

2. Special case with regard to motor vehicles intended for the transport of persons and / or goods by road. Deduction ceiling of 50% (Article 45, § 2 of the VAT Code, see Note 73/1972 of 11.07.1972)

Pursuant to Article 45, § 2 of the VAT Code, with regard to the supply, import and intra-Community acquisition of motor vehicles intended for the transport of persons and / or goods by road, and with regard to supplies and services relating to to those vehicles, the deduction will in no case exceed 50% of the tax paid, except in 11 exceptional cases (see Title B, below).

Even if a vehicle referred to in Article 45, § 2 of the VAT Code is fully used for an activity that grants a full right to deduct, the deduction remains limited to 50%, despite the fact that with regard to direct taxes the full amount of the expenses related to the vehicle as operating expenses would be accepted.

A. History of Article 45, § 2 of the VAT Code

Before 01.01.2006, Article 45, § 2, first paragraph, of the VAT Code stipulated that with regard to the delivery, import and intra-Community acquisition of motor vehicles for passenger transport, including vehicles that can serve both for passenger transport and for freight transport , the deduction may in no case exceed 50% of the tax paid.

Paragraph 2 of that provision provided for three cases where the restriction of the right to deduct did not apply, namely for vehicles intended to be sold or hired out by certain automotive professionals, for vehicles intended for exclusive use for paid passenger transport and finally for the new vehicles which are the subject of an exempt intra-Community supply.

However, no provision in the VAT Code or in the decisions taken in implementation thereof contained well-defined criteria that allowed to determine which vehicles were or were not intended by the restriction referred to in the aforementioned Article 45, § 2, first paragraph.

Until then, the distinction between the vehicles was only determined by administrative registrations (criteria included in registrations n ° 10/1987 of 11.09.1987 and n ° 25/1990 of 11.12.1990). While no difficulty arose in particular for trucks used for the transport of goods (without limitation of the right to deduct), on the other hand, the distinction was made between passenger cars, dual-use cars (meant by the restriction) and light trucks (not meant by the limitation) to be much more delicate.

In order to avoid any dispute, a specific, precise and strict legal provision was required.

That is the purpose of the new Article 45, § 2 of the VAT Code and more specifically of the second paragraph thereof, amended on 01.01.2006 by Article 107 of the Program Law of 27.12.2005 (see circular AFZ no. 12/2006 of 06.06.2006).

Article 45, § 2, new, which retains the previously applied exclusions, is drafted differently. Subsection 1 now introduces a general limitation on the right to deduct that applies to all types of motor vehicles, including trucks, light trucks, buses and motorcycles. The second paragraph contains a restrictive list of exceptions to the limitation of the right to deduct.

In addition to the already existing exclusions, the new paragraph 2 lists the motor vehicles to which the derogation to the limitation of the right to deduct applies.

Article 45, § 2, second paragraph, f), of the VAT Code specifically aims at light trucks.

Between 01.01.2006 and 16.07.2016, Article 45, § 2, second paragraph, f) of the VAT Code intended the 'light trucks' by reference to the definition contained in Article 4, § 2, of the Code of taxes assimilated to income taxes.

Article 45, § 2 of the VAT Code was amended on 17.07.2016 by the law of 27.06.2016 in the sense that from now on no reference is made to the Code of taxes assimilated to income taxes and that a definition of the term 'light truck' has been inserted in Article 45, § 2, third paragraph, of the VAT Code. The definition retained is that included in Article 4, § 2, of the Code of taxes assimilated to income taxes. This adjustment is therefore purely technical.

B. Vehicles to which the limitation provided for in Article 45, § 2, first paragraph, of the VAT Code applies

Article 45, § 2, first paragraph, of the VAT Code, aims at car vehicles, without any distinction having to be made depending on whether these vehicles serve exclusively for passenger transport, for freight transport only, or for both passenger and freight transport.

Basically, the category under which said vehicle in terms of the legislation on car registration is registered with the Office for Registration of Vehicles in itself does not determine whether or not application of the restriction in Article 45, § 2, first paragraph , of the VAT Code (see, however, Article 45, § 2, second paragraph, d) of the VAT Code).

As a rule, equipment used on construction sites such as cranes, bulldozers, excavators or equipment for moving exceptional loads is not considered to be a means of transport. This also applies to cranes mounted on barges or ships (written parliamentary question No. 248 by Mr People's Representative Jean-Pierre De Clippele of 06.10.1992).

C. Exceptions stated in Article 45, § 2, second paragraph, of the VAT Code

The limitation contained in Article 45, § 2, first paragraph, of the VAT Code does not apply to:

- vehicles with a maximum authorized mass of more than 3,500 kg (Article 45, § 2, second paragraph, a) of the VAT Code)

- passenger vehicles with more than eight seats, not including the driver (Article 45, § 2, second paragraph, b) of the VAT Code)

- vehicles specially equipped for the transport of sick, injured and prisoners and for the transport of corpses (Article 45, § 2, second paragraph, c) of the VAT Code)

- vehicles that, due to their technical characteristics, cannot be registered in the register of the Vehicle Registration Service (Article 45, § 2, second paragraph, d) of the VAT Code)

  On the other hand, the restriction of the right to deduct applies to vehicles that are not registered with the Vehicle Registration Service due to the fact that they are only used in the company or abroad.

- vehicles specially equipped for camping (Article 45, § 2, second paragraph, e) of the VAT Code)

- the cars conceived and built for the transport of goods of which the maximum permitted mass does not exceed 3,500 kg, called 'light trucks' (Article 45, § 2, second paragraph, f) of the VAT Code)

  According to Article 45, § 2, third paragraph, of the VAT Code, 'light truck', as referred to in the second paragraph, f), means:

  - each car consisting of a single or double cabin, fully enclosed from the cargo space and limited to a maximum of two or six places respectively, excluding the driver, and an open body
  - each car simultaneously consisting of a passenger compartment which may contain a maximum of two places, not including the driver, and a cargo compartment enclosed by it, the distance of which, measured between each point of the partition behind the seats and the inside of the rear of the cargo compartment, is measured in the longitudinal direction of the vehicle, at a height of 20 cm above the floor, must always be at least 50% of the length of the wheelbase. In addition, this loading space must consist of its entire surface of a horizontal load floor that is part of the body, fixed or permanently attached, without anchorages for additional benches, seats or seat belts.
  - each vehicle simultaneously consisting of a passenger compartment which may contain a maximum of six spaces, excluding the driver's compartment, and one of which is a fully enclosed cargo compartment, the distance of which, between each point on the partition behind the last row of seats, and the interior of the rear of the rear load space, measured in the longitudinal direction of the vehicle, at a height of 20 cm above the floor, must always be at least 50% of the length of the wheelbase. In addition, this loading space must consist of its entire surface of a horizontal load floor that is part of the body, fixed or permanently attached, without anchoring points for additional benches, seats or safety belts.

- mopeds and motorcycles (Article 45, § 2, second paragraph, g), of the VAT Code)

- vehicles intended to be sold by a taxable person who carries out an economic activity consisting of the sale of motor vehicles (Article 45, § 2, second paragraph, h) of the VAT Code)

- the vehicles intended to be rented out by a taxable person who carries out an economic activity that consists in the rental of car vehicles to anyone (Article 45, § 2, second paragraph, i) of the VAT Code).

  Two cassation judgments of 19.01.2007 relate to the scope of Article 45, § 2, second paragraph, i) of the VAT Code (decision no. ET 113.611 of 07.11.2007).

  In accordance with those judgments, a (specific) economic activity consisting of the rental of motor vehicles means:

  - one directed at the public
  - and accidental activity of car rental.

  This does not require:

  - that that activity would be the sole or most important activity
  - nor that the offer would be made to an unlimited customer base.

  For the application of Article 45, § 2, second paragraph, i) of the VAT Code, the rental activity does not therefore have to be a main activity (for example, it may also be a secondary activity that is automatically generated by another activity of the taxpayer). and the company targeting a particular target audience should not be

distinguished from a taxpayer who rents car vehicles to everyone.

In view of the foregoing, the deduction limitation in Article 45, § 2 of the VAT Code no longer applies when a taxable person:

- makes replacement vehicles available to its customers pending repair or maintenance of the vehicle by the latter
- makes replacement vehicles available to its customers pending the delivery of a new vehicle
- makes replacement vehicles available to its customers as part of a breakdown assistance service
- makes vehicles available to affiliated companies.

Since Article 45, § 2, second paragraph, i) of the VAT Code only aims at companies that carry out an economic activity that consists in the rental of car vehicles as clarified above (including leasing), this exception to the deduction limitation may, under more, not be invoked:

- by taxpayers who only occasionally rent out motor vehicles
- by taxpayers who limit themselves to the rental of a car vehicle, for example to shareholders, drivers or employees
- for motor vehicles used in circumstances as referred to in Article 19, § 1 of the VAT Code.

For companies as referred to in Article 45, § 2, second paragraph, i) of the VAT Code, the exception to the deduction limitation only applies to cars that are intended to be rented and that actually get that destination. Vehicles that are partly used for other purposes (for example, use for one's own professional needs or use in circumstances as referred to in Article 19, § 1 of the VAT Code) are in principle excluded from the exception (see, however, specification no. 9/1985 of 30.07.1985).

- vehicles intended to be used exclusively for paid passenger transport (Article 45, § 2, second paragraph, j) of the VAT Code)

  This exception to the deduction restriction mainly, but not exclusively, means the operators of taxi companies. Insofar as a company of passenger transport by limousine uses the vehicles exclusively for carrying out paid passenger transport, the VAT is charged on the costs related to those vehicles (purchase, maintenance ...) and is deductible in accordance with the normal rules and the restriction referred to in Article 45, § 2, first paragraph, of the VAT Code does not apply (written parliamentary question No. 57 by Mr Senator Alain Destexhe of 20.02.1996).

  In principle, this exception to the deduction limitation requires an exclusive use for paid passenger transport. When an operator of a taxi company uses his vehicle very incidentally for private purposes, or incidentally for the paid transport of small objects (parcels, documents...), it is assumed that the restriction intended by Article 45, § 2, first paragraph, of the VAT Nor does the Code apply. In that case, input tax may be deducted in proportion to use for the purposes of the economic activity without the 50% restriction having to be applied (decision no. ET 56.717 of 03.02.1987).

  The transportation of small items may be considered incidental to the activity performed by taxi operators to the extent that the turnover realized thereby does not exceed 15% of the total turnover related to the taxi service itself and the paid transportation of small items.

  Since driving school operators are not covered by any of the exceptions listed above, the restriction imposed by Article 45, § 2, of the VAT Code applies to passenger cars used by them for the provision of their services. as well as with regard to the supply of goods and services in respect of those vehicles.

  According to the Court of Arbitration (from 07.05.2007 the Constitutional Court), the legislator could reasonably have assumed that the risk of fraud was less among taxpayers who use their vehicle exclusively for paid passenger transport. Therefore, without infringing the principle of equality and non-discrimination, he was able to decide not to apply that restriction to that category of taxable persons, without granting the same advantage to the driving schools, the activity of which does not fall under that definition (Judgment of the Arbitration Court No 36/2002 of 13.02.2002, point B.4.2).

- the new vehicles, within the meaning of Article 8 *bis* , § 2, 2 °, first indent, of the VAT Code, other than those referred to above, which are the subject of a by virtue of Article 39 *bis* of the VAT Code exempt delivery. In this case, the deduction exercised only within the limits or extent of the amount of tax that would be payable on the delivery if they would not be exempt under that article 39 *bis* (see "Boekwerk VI: Specific topics - Chapter 16: Specific topics, Section 3: Motor vehicles').

D. Taxation of which the right to deduct is limited

a. General

First, the restriction of the right to deduct applies to the tax levied on the acquisition, the intra-Community acquisition and the equivalent transactions (Article *25c* of the VAT Code) and the import of motor vehicles, including the supply to oneself is taxable under Article 12, § 1, first paragraph, 3 °, of the VAT Code.

Moreover, the restriction of the right to deduct also applies to the tax levied on supplies and services in respect of the vehicles in question.

In addition to the tax paid in respect of the rental of those vehicles, including the rental according to a so-called ' renting formula ' (written parliamentary question no. 648 by Mr People's Representative Francis Van den Eynde of 11.04.2001), this generally concerns the tax charged on the cost of use, in particular:

- supplies of fuels, lubricating oils and other products intended for consumption by those vehicles
- cleaning, maintaining, repairing, improving, arranging and converting those vehicles, including the supply of parts and accessories used for the provision of those services
- supplies of parts, accessories and appliances related to those vehicles.

b. Handvrije kits

The VAT charged on, as the case may be, the pure and simple supply or the supply with placement or installation of a 'hand-free' kit intended to allow the use of a mobile phone in a car, is subject to the deduction limit referred to in Article 45, § 2 of the VAT Code (decision no. ET 101.400 of 30.11.2001).

E. Taxes not covered by the limitation on the right to deduct

a. Parkingkosten

The VAT charged on the costs of setting up and maintaining a garage for the storage of a vehicle used for a taxable economic activity is not subject to the limitation of the right to deduct provided by Article 45, § 2 of the VAT Code.

The same applies to the deduction of VAT charged on the rental or use of car parks and garages (decision no. ET 108.474 of 09.12.2004).

b. Toll fees

The granting of the right of access to traffic routes and the right to use them is a service intended in Article 18, § 1, second paragraph, 15 °, of the VAT Code. However, this service should not be classified as ' *a service relating to a vehicle* ' as referred to in the aforementioned Article 45, § 2. The deduction limitation of the aforementioned Article 45, § 2 therefore does not apply to the VAT charged on tolls (decision No. ET 103,391 of 27.10.2005).

c. Cost of transport by taxi

The costs of transport by taxi incurred by a taxpayer in the course of his professional activities are not the reimbursement of services referred to in Article 45, § 2 of the VAT Code (decision no. ET 13.098 of 08.11.1972).

d. Cost of publicity on a car vehicle

The affixing of publicity (paint of a particular color, the name or business name of a company or advertising texts) to a motor vehicle should not be regarded as a service related to such a vehicle but as a publicity service.

Consequently, the VAT charged on these publicity publications is not intended by limiting the right to deduct to 50% provided for in Article 45, § 2, first paragraph, of the VAT Code (decision no. ET 129.852 of 15.06.2016).

Nevertheless, such advertising lettering on the vehicle in question used for the purposes of an economic activity does not in any way affect the right to deduct VAT charged on the goods and services relating to that vehicle (fuel and maintenance costs, anti - rust treatment ...) and this in such a way that this deduction is made taking into account professional use and the fundamental limitation to 50% (Article 45, §§ 1 and 2, first paragraph, of the VAT Code; Article 1 of the Royal Decree No. 3 , aforementioned and circular AAFisc No. 36/2015 (No. ET 119.650 of 23.11.2015).

e. Costs of lawyers involved in a dispute regarding the use of a vehicle

Article 45, § 2, first paragraph, of the VAT Code only applies to costs that relate directly and exclusively to the car itself.

If the owner or user of a passenger car uses the services of a lawyer, his intervention does not directly concern the car, but the defense of the taxpayer's interests in a dispute. One is thinking of the provision
of liability in a road accident, the defense before the police court
in case of a serious traffic offense or obtaining compensation for
physical damage.

Since the legal assistance and the costs of the lawyer do not directly relate to the car itself, the administration is of the opinion that the VAT on these costs does not fall under the application of the 50% deduction limitation (circular AAFisc No. 47/2013 (no. ET 124.411) of 20.11.2013, marginal numbers 198 to 200).

F. Consistency between Articles 45, § 1, § 1quinquies and 46, § 1 of the VAT Code

Regarding the connection between Articles 45, § 1, § *1d* and 46, § 1 of the VAT Code, reference is made to Section 15, Title 3, Section D.

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Section 11 - Exclusion of the right to deduct VAT charged on certain professional expenses

1. General

Article 45, §§ 3, 4 and 5 of the VAT Code excludes the right to deduct VAT charged on certain supplies of goods and certain services, even when they are used by a taxable person for the purposes of his economic activity and for carrying out taxable transactions.

2. Manufactured tobacco (Article 45, § 3, 1 ° of the VAT Code)

Any right to deduct is excluded for manufactured tobacco as they fall under the application of a special system in which the normal deduction does not apply (Article 58, § 1, of the VAT Code; Royal Decree No. 13 of 29.12.1992 relating to to the regulation of manufactured tobacco , see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount').

3. Spirit drinks (Article 45, § 3, 2 ° of the VAT Code)

The tax on the purchase, import or intra-Community acquisition of spirits is not deductible, except if they are:

- to be resold (manufacture or trade in spirit drinks), or
- to be provided for the performance of a service (consumption on the spot, as such or after being incorporated in food or drink, in hotels, restaurants, private clubs ...) or
- to be presented as a trade sample or as part of a tasting.

The exclusion concerns so-called spirits, such as cognac, whiskey, gin and liqueurs, which are consumed within the company. The exclusion does not apply to wine, champagne, aperitif based on wine and champagne.

It applies even when these drinks are presented as a gift of little value (see Section 12, Title 3).

In this regard, it was stipulated that when the operator of a restaurant, cafe or similar establishment offers a spirit or other drink to a customer on the occasion of the provision of a meal or consumption for consideration, it may in principle be assumed that the the price charged for the meal or drinks also includes the drink offered. This 'free offer' therefore does not result in a revision of the deduction or any taxable withdrawal. However, it should not be forgotten that, to suspect Article 64, § 1, of the VAT Code (under which the administration has the right to claim VAT on the 'tariff price' of the drink offered), the taxpayer must prove that the drink was offered in the context of providing a meal or a consumption for consideration (decision no. ET 93.887 of 31.08.2000).

4. Accommodation costs and costs of food and drinks to be consumed on the spot (Article 45, § 3, 3 ° of the VAT Code)

A. Concept of 'accommodation costs and costs of food and drink to be consumed on the spot'

Costs of accommodation, food and drinks, arising from a housing or restoration contract, are expenditure in which it is difficult to distinguish between private and professional use. Therefore, the VAT paid in respect of those costs (hotel, restaurant bills...) should as a rule not be deducted (Article 45, § 3, 3 ° of the VAT Code).

However, the exclusion intended by Article 45, § 3, 3 ° of the VAT Code contains the following two exceptions that must be interpreted restrictively:

- costs incurred for personnel outside the company who are responsible for the supply of goods or the provision of services (heading B, below)
- costs incurred by taxable persons who, in turn, provide the same services for consideration (heading C, below).

However, a distinction must be made between the costs of accommodation, food and drink and publicity costs described above. In a judgment of 11.03.2010, the Court of Cassation ruled that the VAT charged on costs related to an activity the primary and direct purpose of which is to inform potential buyers about the existence and qualities of a product or service with the in order to promote its sale, it must be regarded as VAT charged on publicity costs. These costs are not covered by the deduction. The Court of Cassation confirmed this view in a judgment of 15.06.2012 (Judgment of the Court of Cassation No. F. 11.0095.F of 15.06.2012).

In such circumstances, the costs referred to are not regarded as accommodation, food and beverage costs within the meaning of Article 45, § 3, 3 ° of the VAT Code, nor as costs of reception within the meaning of Article 45, § 3, 4 °, of the VAT Code, but as advertising costs of a professional nature (decision no. ET 124.247 of 13.03.2015).

It goes without saying that, subject to Article 45, § 1 of the VAT Code, the taxpayer will have to demonstrate, on a case-by-case basis, that the costs are actually incurred in the context of an activity for the benefit of his existing or potential customers. , which has primarily and directly an advertising purpose with the aim of promoting the sale of its products or services.

B. Hotel- en restauratiekosten die voor het personeel worden gemaakt

De belastingplichtige mag de btw aftrekken ter zake van de kosten van logies, spijzen en dranken, die worden gedaan '*voor het personeel dat buiten de onderneming belast is met een levering van goederen of met een dienstverrichting*' (artikel 45, § 3, 3°, a), van het Btw-Wetboek).

Deze afwijkende bepaling is enerzijds slechts van toepassing op de kosten gemaakt voor de leden van het personeel en bedoelt dus geenszins dezelfde kosten die voor de beheersorganen (bestuurders, zaakvoerders, de belastingplichtige zelf indien het gaat om een natuurlijke persoon) worden gemaakt. Anderzijds moet het gaan om kosten die, buiten de onderneming, ter gelegenheid van verplaatsingen worden gemaakt in verband met een welbepaalde opdracht: het leveren van goederen of het verstrekken van diensten in de zin van het Btw-Wetboek.

Inzonderheid zijn hieronder begrepen:

- de hotel- en restauratiekosten die door vrachtwagenbestuurders en begeleiders worden gedaan ter gelegenheid van de levering van goederen, zonder onderscheid naargelang die goederen vooraf besteld waren of dadelijk bij de bestelling worden geleverd
- de hotel- en restauratiekosten die gedaan worden door arbeiders die, op een andere plaats dan in de onderneming, belast zijn met het monteren van een machine of met het oprichten van een gebouw voor rekening van klanten
- de door een productiemaatschappij gemaakte kosten ten behoeve van haar personeelsleden belast met de productie van een film wanneer de filmproductie wordt uitgevoerd ten behoeve van een derde, ter uitvoering van een contract onder bezwarende titel. De overdracht van de rechten waarover de productiemaatschappij op het als zodanig gecreëerde werk beschikt, dient het voorwerp te hebben uitgemaakt van een overeenkomst met de overnemer voorafgaand aan de opname (beslissing nr. E.T. 118.072 van 24.02.2011).

Aftrek van voorbelasting is integendeel uitgesloten voor:

- de kosten gemaakt door de handelsvertegenwoordigers, bedienden van de firma, ter gelegenheid van de prospectie van het cliënteel, zonder dat daarbij een onmiddellijke levering van goederen plaatsvindt
- de kosten die door een weddetrekkend boekhouder van een firma met filialen worden gedaan ter gelegenheid van verplaatsingen die hij doet voor de controle van de in die filialen gehouden boekhouding
- de kosten voor maaltijden die door een belastingplichtige worden gemaakt, naar aanleiding van een receptie die hij voor zijn personeelsleden in een restaurant of een hotelinrichting organiseert, bijvoorbeeld, ter gelegenheid van een patroonfeest (beslissing nr. E.T. 14.661 van 28.05.1973)
- de kosten van een 'rondje' dat een leverancier, ter gelegenheid van een levering van dranken, bij een caféhouder aanbiedt aan de klanten die zich in de inrichting bevinden.

De ondernemingen die grote moeilijkheden ondervinden om, geval per geval, uit te maken of de aftrek al dan niet toegestaan is, kunnen, in akkoord met de afdeling beheer van het Centrum waaronder zij ressorteren, forfaitaire aftrekbedragen vaststellen die dan globaal genomen, moeten overeenstemmen met de werkelijke aanwending van de gemaakte kosten.

Hoe dan ook, het is duidelijk dat de belastingplichtige de aftrek enkel kan toepassen voor kosten die werkelijk werden gedaan en die bewezen worden door facturen of rekeningen die op zijn naam of op de firmanaam werden opgesteld, door de hotel-, restaurant- of caféhouder. Bijgevolg kan geen aftrek worden verricht:

- wanneer de belastingplichtige aan zijn personeel een forfaitaire reisvergoeding toekent, zonder van de personeelsleden de verantwoording van de werkelijke kosten te eisen
- wanneer de overeenkomst tussen de leverancier of dienstverrichter en zijn klant bepaalt dat de klant moet voorzien in de huisvesting en de maaltijden van het personeel van de leverancier of dienstverrichter, zodat de hotelier en/of de restaurateur uiteindelijk de kosten van logies, spijs en dranken rechtstreeks aan de klant factureert, is er geen btw-aftrek mogelijk voor die kosten in hoofde van de klant overeenkomstig artikel 45, § 3, 3°, van het Btw-Wetboek.

The exception to the rejection of the right to deduct, provided under point a) of this provision with regard to costs incurred for the members of his staff who are charged with a supply or service provision outside the company, only applies in respect of the supplier or the service provider (Written Parliamentary Question No 1.866 by Ms Senator Clotilde Nyssens of 04.02.2002).

C. Hotel and restoration costs incurred by taxpayers who in turn provide the same services

Pursuant to Article 45, § 3, 3 °, b) of the VAT Code, the VAT charged on hotel and catering costs incurred by taxable persons who in turn provide these services for consideration may be deducted by the latter.

The deduction is therefore permitted for hotel or restaurant owners who subcontract to a colleague, as well as for the company canteens that have meals provided by caterers or specialized restoration companies.

This is also the case with the organization of conferences, seminars, congresses ... the organizers such charges were laid their dependents, as such and for a single price by invoice (in their name) to the participants of the events in question (written Parliamentary Question No 1.411 by Mr Paul Breyne, Member of Parliament of 02.02.1995).

5. Reception costs (Article 45, § 3, 4 °, of the VAT Code)

A. Concept of 'reception costs'

Pursuant to Article 45, § 3, 4 ° of the VAT Code, the taxable person may not deduct the VAT charged on reception costs.

Reception costs, the right of deduction of which is excluded under Article 45, § 3, 4 ° of the VAT Code, are the costs that taxpayers incur in the context of public relations, reception and entertainment of persons foreign to the company . The exclusion of this right of deduction fulfills the purposes of Article 176 of Directive 2006/112 / EC (formerly Article 17, §

6, of the Sixth Directive 77/388 / EC), namely the exclusion of the right to deduct for ' *expenses that do not have a strict professional character, such as luxury expenses, entertainment or entertainment expenses* '.

Persons foreign to the company are those who do not work in the company as a management board (including the administrative council) or a staff member. The term foreign persons to the company therefore does not only mean the suppliers and customers, but also the shareholders or partners of a company and the members of an association.

Any deduction is therefore excluded both for expenditure incurred in order to create and develop a favorable environment for the promotion of the business outside the ordinary professional contracts, and for expenditure incurred by a company or an association for the reception or reception. of the shareholders, partners or members at a general meeting.

These expenses, which are mainly incurred in connection with events or special events (banquet, reception, inauguration, party, travel, all kinds of entertainment ...) can consist of hotel costs, restaurant or catering costs, as well as the purchase of drinks and food, the purchase of flowers, the rental of equipment ...

However, a distinction must be made between the aforementioned reception costs and the publicity costs. In its judgment of 08.04.2005, the Court of Cassation ruled on the classification of entertainment and entertainment costs incurred in the context of a festive gathering the main and direct aim of which is to inform purchasers of the existence and capacity of a product or service, with the intention of promoting its sale (Judgment of the Court of Cassation No. C.02.0419.N of 08.04.2005).

The administration has decided not to classify such costs, which are made for the purpose of publicity for specific products and therefore publicity and publications of a strictly professional nature, as reception costs within the meaning of Article 45, § 3, 4 ° of the VAT Code (decision no. ET 124.247 of 13.03.2015).

It is up to the taxpayer to demonstrate, on a case-by-case basis, that the costs incurred are aimed at direct sales or are incurred for the purpose of publicity for specified products, or that they have pursued a purpose other than creating an overall favorable atmosphere in front of the company.

Examples:

The VAT charged on the following costs incurred by the company cannot be deducted as it concerns reception costs:

- costs of the purchase of flowers, when those purchases are made for the purpose of organizing a reception, for the reception and to the satisfaction of visitors alien to the company. The deduction must therefore be rejected, inter alia, in respect of purchases of flowers intended to decorate tables for banquets. On the other hand, the deduction must be accepted for flowers intended for the decoration of business premises if those flowers were not specially purchased for a reception (decision no. ET 13.210 of 19.01.1973).
- the costs incurred by a company on the occasion of its annual general meeting for offering refreshments to the partners (decision no. ET 12.463 of 06.02.1973)
- de aankoop van een plezierboot die de koper zal gebruiken om zijn zakenrelaties te bevorderen door het organiseren van tochten op zee voor zijn klanten en leveranciers (beslissing nr. E.T. 19.216 van 27.02.1976)
- de kosten voor het inrichten en uitrusten van een appartement, dat kosteloos ter beschikking wordt gesteld van sommige klanten (beslissing nr. E.T. 26.232 van 03.02.1978)
- de uitgaven met betrekking tot de organisatie van een reis met inbegrip eventueel van eetmaal, bezoek aan bezienswaardigheden ... voor potentiële kopers (beslissing nr. E.T. 26.968 van 06.01.1978)
- the cost of drinks offered free of charge at the opening of a restaurant, café or similar establishment or during a customer and / or supplier reception of such an establishment (decision no. ET 93.887 of 30.08.2000).

B. Costs that are not of the nature of reception costs

On the other hand, the provision referred to in Article 45, § 3, 4 ° of the VAT Code does not apply to costs that are of a strictly professional nature.

Examples:

Are no costs of reception, the costs incurred for:

- the arrangement of a hall, a waiting room, meeting room and other professional premises, and the purchase of goods to equip those places (seats, tables, coat racks, ashtrays ...) and decorations (plants, flowers, wall decorations, and others) in the normal context of the operation, the work environment of the personnel, and the normal circumstances of trade contacts (decision no. ET 96.653 of 06.03.2000), excluding goods that would have been purchased for a reception. With regard to wall decorations and the like, the exclusion of the right to deduct on the basis of Article 45, § 1, do not lose sight of the VAT Code, for original works of art purchased by the taxable person, without the intention to sell them, but as an investment and the value of which does not decrease through use (see Section 2, title 9 , section D, subsection a, above)
- the decoration of premises of a hotel or a restaurant (decoration and flowers in the hall and the rooms, chandeliers in the lounge, bar and dining room...), the expenditure of which aims to ensure a pleasant stay for their customers and where the price paid corresponds with the comfort provided (decision no. ET 96.653 of 06.03.2000). On the other hand, the deduction is excluded on the basis of Article 45, § 1 of the VAT Code when it concerns original works of art whose value does not decrease through use and which have been purchased by the hotelier or restaurant owner as an investment (see Section 2, Title 9, section D, subsection a, above).
- making parking available to the company for the benefit of customers and suppliers, without paying for it, under the trade contracts stricto sensu , and this without distinction whether the company has set up its own parking facilities or whether it pays the parking fees itself for parking spaces made available

- the 'free' transport of potential customers, from a specific place to the company and back, with the clear aim, outside of any party or reception, to give them the opportunity to make a technical visit to the establishment and thus to sell the stimulate products (decision no. ET 20.646 of 20.05.1975). In this context, no distinction should be made according to whether the taxable person enters into a contract with a transport company or whether he uses his own means of transport.
- the costs related to the provision of a 'hostess' at a trade fair (decision no. ET 23.318 of 14.01.1977).

On the other hand, reception costs should not be confused with demonstration costs, which may include handing out trade samples, or the costs associated with the consumption of goods produced or sold by the company (for example, beer or wine offered by a brewery or by a wine merchant products offered by demonstrators at trade fairs or food parlors for tasting). The tax paid for the distributed samples (see Section 12, Title 1) and for the goods presented for testing is deductible and no deduction must be taxed.

C. Special case in the context of sport and culture

With regard to the provision, for a fee, by football clubs, of business seats and lodges of companies where food and drinks are also provided to the guests of the latter on the occasion of football matches, the question arises whether the VAT charged on those costs is deductible by the aforementioned. companies.

In view of the clear provision of Article 45, § 3, 3 ° and 4 ° of the VAT Code, VAT has been charged on the costs of food and drinks provided under the above circumstances, as well as VAT on costs of receptions made on the same occasion, in respect of such enterprises, are excluded from any right of deduction.

On the other hand, the costs incurred by companies relating to the use of business seats and lodges to the extent that the companies referred to by means of those business activities are not regarded as reception costs as referred to in Article 45, § 3, 4 °, but as advertising costs. advertise seats and lodges in one form or another (decision no. ET 63.540 of 07 and 10.07.1989).

The rules elaborated in this respect apply mutatis mutandis to other sports events (tennis, volleyball ...) and cultural events (theater, cinema, concerts ...), the organization of which is subject to VAT.

6. Costs incurred by travel agencies for the services referred to in Article 18, § 2, second paragraph, of the VAT Code (Article 45, § 4, of the VAT Code)

The services provided to travelers through travel agents are subject to a special arrangement. One of the specific features of this scheme, which amounts to a one-off flat-rate VAT levy on the gross profit margin, is an exclusion of the right to deduct the tax levied on the goods and services that other taxable persons provide to them for the services referred to in Article 18, § 2, second paragraph, of the VAT Code and which directly benefit the customers. It concerns the actions that form part of or belong to a trip as intended in Article 1, § 7, first paragraph, 1 °, of the VAT Code and which travel agencies provide to travelers, being the entirety of related services of transport, accommodation, food and drink to be consumed on the spot, relaxation or the like, stay at a fixed sum, which in particular include accommodation, touristic tours, as well as the performance of one or more services that are part of those units or that are in the same line.

The regulations with regard to the deduction with regard to travel agents are explained in circular 2020 / C / 44 of 23.03.2020 on the special travel agency scheme and the VAT scheme for travel transactions to which the special travel agency scheme does not apply .

7. Delivery of goods subject to the special scheme of taxation of the profit margin by a taxable reseller (Article 45, § 5 of the VAT Code)

Taxable persons may not deduct the tax due or paid on goods supplied or to be supplied to them by a taxable dealer from the tax which they owe, insofar as the supply of those goods by the taxable dealer is subject to the special scheme of taxation of the profit margin (Article 45, § 5, first paragraph, and 58, § 4, 5 ° of the VAT Code).

Insofar as the goods are used for the purpose of his supplies that are subject to the special arrangement for taxation of the profit margin, the taxable dealer cannot deduct from the tax he owes (Article 45, § 5, second paragraph, and 58, § 4, 6 °, of the VAT Code):

- the tax owed or paid on works of art, collectors' items or antiques that he himself imported
- the tax owed or paid for works of art delivered or to be delivered to him by the maker or his entitled parties
- the tax that is owed or paid for works of art delivered or to be delivered to him by a taxable person other than a taxable dealer.

For a detailed explanation, reference is made to 'Book work V: Special arrangements - Chapter 15: Special arrangements'.

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Section 12 - Exclusion from the right of deduction for transactions performed free of charge and exceptions to this exclusion

In principle, the taxable person may not deduct the tax that was levied on a good or service if he knows in advance that, in the normal course of business, the good or service will be provided free of charge.

Where it is impossible for this taxable person to either provide with certainty that the goods or services will be used for such purpose, or to determine the intended purpose for each good or service separately, or to determine its size correctly tax deduction is allowed. However, at the time when the good or service is withdrawn, this withdrawal is subject to tax (Article 12, § 1, first paragraph, 1 °, or 2 °, of the VAT Code) or a taxable commissioning serves as a correction. (Article 19, § 1, or § 2, first paragraph, 1 °, or 2 °, of the VAT Code) or another revision of the deduction in accordance with Article 5 of Royal Decree No 3 to be made (see 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning')).

Under certain conditions, there is a deviation from the just described rules regarding:

- commercial samples (see Title 1, below)
- premiums in kind (see Title 2, below)
- small value commercial gifts (see Title 3, below)
- promotional items (see Title 4, below)
- occasional gifts for staff or their children (see Title 5 below)
- goods donated to disaster victims (see Title 6, below)
- gifting foodstuffs for charity (see Title 7 below)
- providing vital non-food items for charity (see Title 8 below)

These cases, with the exception of the in-kind premiums, are explained in circular 2017 / C / 32 of 29.05.2017 on commercial gifts and samples, promotional items and other goods provided free of charge , in circular 2019 / C / 3 of 25.01. .2019 regarding the adjustments of the VAT Code by the law of 30.07.2018 as well as in the circular 2019 / C / 48 of 13.06.2019 concerning the provision of vital non-food products for charity purposes .

1. Free distribution of samples

When a taxpayer distributes samples free of charge, for a publicity purpose and to get to know and appreciate the goods that the company manufactures or sells, the tax levied on the manufacture or purchase of those samples is deductible if the costs as operating expenses are accepted for income tax purposes. There is then no revision of the deduction, nor of a withdrawal, since Article 12, § 1, first paragraph, 2 °, a) of the VAT Code explicitly excludes the trade samples from the application of that provision.

The sample must be of the same nature as the goods manufactured or sold by the company. However, it is not required that they were conditioned in a special way or offered in a separate form, nor that they bear the express mention 'monster'.

Taking into account the nature of the product and the commercial context in which the samples are presented, multiple samples can also be offered to the same customer (Court of Justice of the European Union, Judgment EMI Group Ltd , Case C-581/08, 30.09.2010).

The taxpayer who makes such distribution must of course ensure that, before the administration, he can demonstrate in some way that the goods distributed for that purpose were not delivered in circumstances that make the tax payable (Article 64 , § 1 of the VAT Code). This proof can be provided, among other things, by submitting a receipt signed by the customer. However, the taxpayer can also provide other evidence.

Pursuant to Article 45, § 3, 2 ° of the VAT Code, the tax is also deductible on supplies and intra-Community acquisitions of spirits such as cognac, whiskey, gin and liqueurs (wine, champagne, wine-based aperitif and champagne not included) when intended to be presented as a trade sample or as part of a tasting.

2. Premiums in kind given on the occasion of a promotional sale when purchasing goods

The circumstance referred to in the previous title is not to be confused with the case where, on the occasion of the sale of goods, a taxable person awards a premium, or in the form of a merchandise of the same nature (for example, the sale of three products for the price of two), or of another type of merchandise (for example, handing over an item when buying food).

In such case, the transaction is deemed to relate to the sale, at a single price, of a set of goods. As a result, if goods are taxable at the same rate, the tax is simply calculated, at that rate, on the price paid. If the premium object is taxable at a rate different from that of the goods sold, the price must in principle be split between those different rates, so that all elements of the whole are taxed at their own rate.

For the sake of completeness, reference is also made to the nos . 85/1972 of 31.07.1972 and 22/1975 of 29.09.1975 (see 'Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount').

3. Small value commercial gifts

This refers to objects that are given in professional relationships and the cost of which is recorded by the companies as general expenses (such as end-of-year gifts, gifts in kind). These items differ from the trade samples intended above in that they are not of the same nature as the goods the company typically sells. They are therefore not distributed with the intention of getting to know or appreciate them.

A good is considered a commercial gift of low value if it meets the following conditions:

- the gift is given in professional relationships
- the gift is not a good meant in Article 45, § 3, 1 ° or 2 ° of the VAT Code
- the purchase price, or in the absence thereof, the normal value, for the gift that is given to a professional relationship is less than 50 euros, excluding VAT
- the gift is not a promotional item (see Title 4 below).

If those conditions are fulfilled, the administration accepts that the deduction of the tax levied on those objects, or on the elements of which they are made up, may be made without any revision of the deduction or deduction being made in their distribution. this is the case (Article 12, § 1, first paragraph, 2 °, a) of the VAT Code).

A single-use voucher may also qualify as a small value commercial gift if the voucher meets these conditions. Under *'voucher for single use* ' means a voucher which entitles a supply of goods to its owner (eg a book of your choice) or a service (eg access to a wellness) enjoy, the place of delivery and the applicable VAT rate is known at the time of issue of the receipt.

However, only one small business gift per calendar year is eligible for VAT deduction per professional relationship . If several gifts with a value of less than 50 euros, excluding VAT, are given to a professional relationship in a calendar year, the deduction can only be applied to one of those commercial gifts.

If the value of such objects reaches or exceeds the indicated limit, no deduction should be made in any case. If the tax has already been deducted when these goods are acquired, the deduction must not be revised when it is distributed, but the withdrawal for the purpose of being issued as a gift is itself an operation which is treated as a taxable supply (Article 12 , § 1, first paragraph, 2 °, a) of the VAT Code).

Finally, no deduction is allowed from the tax that the taxpayer pays on the purchase of goods and services for the provision of services free of charge, even if the value of this service does not reach EUR 50 excluding VAT. However, a single-use voucher related to a service is eligible as a trade gift if its value is less than 50 euros, excluding VAT (for example, a voucher worth 40 euros, good for air baptism).

4. Promotional items

By analogy with the direct tax regime, the tax levied on the purchase of promotional items is deductible if it concerns items that cumulatively fulfill the following three conditions:

- are intended for very wide distribution and are not limited to a limited category of customers or business associates
- are of little value to those who receive them
- prominently and permanently bear the name of the donating company.

These include: ball point pens, agendas, calendars, key rings ...

Business gifts in the form of consumables (for example wine, champagne, chocolate ...) do not meet the criterion of *'conspicuously and permanently bearing the name of the donating company'* . These are therefore small value commercial gifts, the VAT deduction of which is subject to other conditions (see Title 3 above).

5. Occasional gifts for staff or their children

As a rule, when a taxpayer presents gifts to certain servants or to the children of servants on a particular occasion, these are social benefits which are privative in nature.

The tax levied on the goods used to provide these privative benefits is not deductible if their destination is known in advance. However, in cases where it is impossible to predict with certainty the destination or to determine it individually for each object, or to determine its exact size, the deduction of the tax is permitted but the subsequent withdrawal is subject to VAT, as determined in Article 12, § 1, first paragraph, 1 ° and 2 °, of the VAT Code.

The Administration accepts that certain gifts distributed to employees or their children are classified under the collective benefits, the provision of which does not give rise to a revision of the deduction or to a withdrawal under the following conditions:

- the gift is distributed to all children of the staff meeting a pre-imposed age condition or, in the case of gifts to staff, these gifts are distributed to all staff
- the purchase price, or in the absence thereof, the normal value, of the gift given to a staff member or to a child of a staff member is less than 50 euros, excluding VAT
- the gifts given are not goods as referred to in Article 45, § 3, 1 ° and 2 ° of the VAT Code.

However, only one occasional gift per calendar year per beneficiary (staff member, child of a staff member) is eligible for VAT deduction regardless of the time or reason. If in a calendar year a staff member or a child of a staff member is given several gifts with a value of less than 50 euros, excluding VAT, the deduction can only be applied for one of those gifts.

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A single-use voucher may also qualify as an employee gift when the voucher meets these conditions. Under *'voucher for single use'* means a voucher which entitled its owner grants a supply of goods (eg a pen) or a service (for example, a ticket for a movie) to enjoy where the place of delivery or service and the applicable VAT rate is known at the time of issue of the receipt.

6. Goods donated to disaster victims

When, in exceptional circumstances, a taxable person donates goods normally intended for sale to victims of a disaster, the donation does not give rise to a revision of the deduction or to a withdrawal as referred to in Article 12, § 1, 2 °, of the VAT Code, regardless of the value of the goods.

7. Donate food surpluses

When a taxable person provides food for human consumption free of charge for charity purposes, the tax levied on the purchase or production of those foods is deductible. These are foodstuffs whose intrinsic characteristics no longer allow them to be sold in any link of the regular economic circuit at the original commercialization conditions. There is then no revision of the deduction, nor of withdrawal, since Article 12, § 1, first paragraph, 2 °, b) of the VAT Code expressly provides free of charge for charity purposes foodstuffs intended for human consumption of excludes the application of that provision. Spirit drinks are excluded from this regulation.

Reference is made to Royal Decree 59 with regard to the withdrawal of low-value commercial gifts and the charitable withdrawal of food and non-food necessities other than goods that can be used in a sustainable way, with regard to value added tax concerns .

8. Providing vital non-food items for charity

Providing free of charge for charity purposes certain vital non-food items is no longer assimilated to a supply for consideration, subject to certain conditions. Reference is also made to Circular AAFisc No 2019 / C / 48 of 13.06.2019 on the provision of vital non-food products for charity purposes .

Reference is made to Royal Decree 59 with regard to the withdrawal of low-value commercial gifts and the charitable withdrawal of food and non-food necessities other than goods that can be used in a sustainable way, with regard to value added tax concerns .

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Section 13 - Costs incurred for employees

1. Social benefits of a collective nature

When, in the sole interest of all employees, a company provides certain social benefits of a collective nature that are not considered to be benefits of every kind for the purposes of the Income Tax Code, but where the deduction is deducted for the purposes of that Code accepted from the goods and services used to realize that benefit, the VAT charged on the goods and services is deductible under normal rules.

This is the case, for example, with goods and services used for collective purposes, for a reception or a party given following an appointment, the handing over of a decoration, Sinterklaas and other such parties. This with the exception of the costs incurred, which are excluded under Article 45, § 3, 1 ° to 3 °, of the VAT Code (written parliamentary question No. 202 by Ms de Volks Representative Trees Pieters of 20.01.2000).

This solution will continue to apply if the employer requests from its employees a certain participation in the costs incurred by him on the condition that, at least, if he had not asked for that contribution at all, the benefit which was then provided would not be a benefit of any kind. be classified.

The social benefits envisaged below include:

- setting up and maintaining a club house, sanitary facilities, a childcare facility, a medical or pharmaceutical service intended for providing medical assistance in the event of accidents at work, a sports field
- the purchase and maintenance of sports equipment, musical instruments, materials and supplies which are used by the staff for the practice of sports or for making music, and which do not become their property
- free distribution of soup or drinks (coffee, tea, milk, beer ... but with the exception of so-called "spirits") to members of staff
- the free distribution of fruit as a snack for immediate consumption during working hours (decision no. ET 124.506 of 03.09.2013)
- free transport of workers by coach from their place of residence or from a nearby place to the company and vice versa
- the goods and services intended for collective purposes at a reception or a party on the occasion of an appointment, the award of the laureates, a Saint Nicholas party... (flowers for decoration of the room where the party or reception takes place, food and drink - other than the so-called spirits - which are consumed during the party or reception in the company ...). The VAT charged on restaurant or other costs referred to in Article 45, § 3, 3 ° of the VAT Code is, of course, not deductible.

Title: VAT Comment - Chapter 11. Right to deduct (Update on 01.06.2020)

Summary: VAT Comment - Right to deduct

Keywords: business asset , mixed taxpayer , partial taxable , restaurant , costs commercial vehicle , general ratio , actual use , intra-Community acquisition , abuse of law , casual taxable person , exempt taxable person, cessation of professional activity , non-taxpayer , cost , - , sharing association , declaration for consumption , subsidy , import , right to deduct VAT , delivery to self , gift to staff , means of transport , food surplus , trade sample, act for consideration , gift of low value , mixed use , bankrupt , self-employed group , food and drink , private use , professional purposes , reception , costs accommodation , costs , accommodation , costs , staff, social benefit , company canteen

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2. Company canteens - Certain restaurant outside the company - Meal vouchers issued by specialist companies

A. Company canteens

Some companies have their own canteen where meals are provided to staff, often at reduced prices. In that case, the administration assumes that these companies act as restaurant owners.

The provision of meals and drinks takes place under a contract for consideration between employer and staff, either because the staff pay a price for it or because they thus derive an additional benefit from their employment or employee contract. This service is therefore subject to VAT.

This solution also applies to goods sold to staff (for example, drinks or food sold through vending machines operated by the employer) and to all merchandise distributions, free of charge or at prices below the actual price, whenever, In terms of income tax, a benefit of all kinds has been determined (for example, bottles of beer given to brewery staff, coal given to miners, meals enjoyed by restaurant staff...).

The employer may, of course, deduct the tax levied on the expenses he had to incur to provide those benefits to his staff. This is the case even when those income tax benefits are not classified as benefits of any kind. In this respect, it is generally irrelevant whether the preparation and serving of the meals is carried out by the employees of the companies or whether they are, for all or part of the supplies or services necessary for such an activity. , call on a specialist company to invoice the company for the cost of these actions.

The situation is completely different when the company bears the cost of the business meals in which some of its management bodies or some of its staff participate. In this case, in accordance with Article 45, § 3, 3 ° and 4 ° of the VAT Code, the VAT charged to the company by the restaurateur who provided these meals is not deductible. In such a case, however, the Administration will not tax the benefit in kind which, in accordance with income tax legislation, could result from it for the management bodies or the members of staff who participated in these meals.

B. Certain restaurant outside the company

It happens that a company does not have its own company canteen, but enters into an agreement with a certain restaurant owner, whose employees can use their meals. Usually, this restaurateur hands over the company to exchange vouchers or tickets of a certain or determinable value for a meal. The company pays a price corresponding to this value and in turn provides the tickets to its employees, usually at a lower price.

In that case, and insofar as the conditions set out in the following paragraph are met, the administration believes that, as in the case of Section A above, the company carries out a restoration activity subject to VAT, the implementation of which it in subcontracting have carried through the restaurant which they act.

It may therefore deduct the VAT included in the value of the vouchers and tickets that it actually issues to its employees.

This solution applies only if the following conditions are met:

- the number of vouchers issued to each member of staff must be regarded as normal in view of the number of working days
- the value of the vouchers must not exceed the normal price charged to members of staff for an ordinary meal taken in a company canteen
- the coupon must, at least to the extent of its value, actually be used for a meal taken during the rest period allocated for this purpose in accordance with the company's work regulations
- the restaurateur and the company that has entered into the above agreement must be able to demonstrate to the administration that the above conditions have been met.

C. Meal vouchers issued by specialized companies

Specialized companies issue, sometimes directly, sometimes through banks, meal vouchers of varying nominal value, which are acquired by the companies for their value plus commission, and which include the possibility of eating meals in many cataloged restaurants. The companies that have obtained and paid for these checks hand them over to their employees, often for an amount below their nominal value.

The restaurants which own the checks used for the meals offer these to the issuing companies for payment so that they are not tied to the companies which therefore cannot monitor the actual use of the checks distributed.

Under those circumstances, the companies applying this method cannot be expected to provide their employees with meals which they have carried out by a restaurant. In fact, their intervention consists in the granting of a monetary bonus, which gives salaried workers the opportunity to eat a meal directly at the restaurant of their choice on more advantageous terms.

It follows from this:

- whereas these companies may not exercise any right to deduct expenditure corresponding to the value of the meal vouchers
- nor should they, in their relationship with the members of staff, charge the tax on the sum that is charged to the latter when the meal vouchers are handed over or, where appropriate, on the benefit in kind that would be eligible in this case taken.

Furthermore, the companies that issue meal vouchers provide a set of services (issuing the vouchers, collection from the companies, payment to the restaurants, prospecting for the latter, advertising...), as referred to in Article 18, § 1, second paragraph, 1 °, of the VAT Code. The commission they charge for this performance above the value of the checks when they are sold is subject to VAT at the rate of 21%. In addition, these companies are non-exempt taxable persons and may, in accordance with normal rules, deduct the tax charged on their professional expenses; the issue of the checks cannot give rise to a partial tax liability in the present case, since their equivalent is not an element of the turnover of these companies.

Companies that have obtained the checks, in so far as they are non-exempt taxable persons, may in turn deduct, in accordance with normal rules, the tax levied on the commission charged to them, since they carry out this expenditure for the needs of their economic activity.

When, between the issuing company and the enterprise, a banking institution mediates for the issue and collection of checks, and invoices this service in its own name, it is deemed, in application of Articles 13 and 20 of the VAT Code, to provide the service it has received itself (all services). The tax is therefore payable by the banking institution on the total amount of the commission that it charges to the company, while under the issuing company the tax is payable on the part of the commission that the bank transfers to it. In accordance with normal rules, the bank may then deduct the tax charged to it by the issuing company.

Finally, it is clear that, in the relationship of the company's servants to the restaurants, VAT is due in accordance with normal rules on the total price charged by the latter for the meals. In order to determine the time of chargeability of the tax, when the rule of collection of the price as defined in Article *22a* , second paragraph of the VAT Code applies, one must also take into account that the issue of the meal vouchers to the restaurateur can be regarded as a valid payment to the latter. In addition, following the repayment of the value of the meal vouchers by the issuing company, the restaurant owner may not issue these invoices on which the VAT is charged withwith regard to meals provided against delivery of the meal vouchers (decision no. ET 28.192 of 23.07.1981).

3. Travel and accommodation costs

It is common for staff members to incur costs on the occasion of professional travel (hotel and restaurant costs...). They also often incur costs for professional travel themselves (transport costs).

In order to obtain repayment thereof, they hand over a global account to their employer.

For the employer, the tax levied on those costs is only deductible provided that the following conditions are met together:

- it must be the actual costs that appear on an invoice issued by the supplier or service provider in the employer's name
- there may not be an exclusion from the right to deduct under Article 45, § 3 of the VAT Code.

Any deduction is therefore, in particular, excluded:

- when a flat-rate travel allowance is granted to the staff member without accounting for expenditure incurred
- when the staff member has made the expenditure in his own name and that expenditure is therefore not the subject of an invoice drawn up in the name of the employer
- when, for the professional journeys he makes with his own car, the staff member receives a fixed kilometer allowance.

The accounts for costs incurred that are handed over to the employer must show the detail of the expenses and must be supported by the invoices that justify them. The amounts of those invoices and of the deductible tax that appears on them may be entered globally and periodically in the incoming invoice book, provided, however, that reference is made to the entry of those expense reports in the financial journal.

4. Cost of transport by rail, tram and bus

Afwijkend van wat in titel 3, hiervoor, werd gezegd mag de werkgever de belasting in aftrek brengen die geheven werd van de werkelijke reiskosten die hij draagt voor zijn personeel, mits het gaat om de gemeenschappelijke vervoermiddelen (spoorweg, tram, autobus), in de mate waarin de werkgever verplicht is daarin bij te dragen op grond van de sociale wetgeving of overeenkomstig de paritaire overeenkomsten die ter uitvoering van die wetgeving werden getroffen. Die oplossing blijft gelden wanneer de bediende of de arbeider die vervoerkosten in eigen naam heeft gedaan en zelfs zo, gelet op de aard van dergelijk vervoer, door de vervoerder geen enkele factuur wordt uitgereikt en de reiziger evenmin in het bezit kan blijven van zijn vervoerbewijs.

Wat de vervoerkosten betreft die door de werkgever zelf worden gedragen voor zijn persoonlijke verplaatsingen, wordt er verwezen naar Afdeling 14, titel 2, rubriek C, subrubriek b.

5. Automobielen die door de onderneming ter beschikking worden gesteld van een zaakvoerder, bestuurder of personeelslid voor hun verplaatsingen

Er wordt verwezen naar Afdeling 7.

6. Terbeschikkingstelling van woongelegenheid aan een zaakvoerder, bestuurder of personeelslid

Er wordt verwezen naar Afdeling 6.

7. Gelegenheidsgeschenken

Er wordt verwezen naar Afdeling 12, titel 5.

8. Kosten van outplacement

Werkgevers doen vaak tegen betaling beroep op een gespecialiseerd bureau van leidingsadvies, met als doel een werknemer toe te laten om zelf en zo snel mogelijk werk te vinden bij een nieuwe werkgever of een beroepsactiviteit als zelfstandige uit te bouwen.

Op het vlak van inkomstenbelasting worden de kosten van outplacement gelijkgesteld met de eigen uitgaven van de werkgever die deze laatste als kosten kan in aftrek brengen. Voor de toepassing van de btw, dient men bijgevolg de kosten van outplacement te beschouwen als inherent aan de economische activiteit van de werkgever. Indien laatstgenoemde een btw-belastingplichtige met recht op aftrek is, is de btw geheven op deze kosten volgens de normale regels aftrekbaar (parlementaire vraag nr. 1.477 van de heer Volksvertegenwoordiger Richard Fournaux van 08.09.1998).

9. Kosten gedragen door de werkgever tot ontlasting van de buitenlandse kaderleden

De door de werkgever gedragen kosten tot ontlasting van zijn naar België overgeplaatste buitenlandse kaderleden zijn voor de toepassing van de belasting over de toegevoegde waarde, uitgaven die verband houden met de privé-behoeften van die kaderleden, hoewel ze door de bepalingen van de nrs. 235/6 tot 235/10 van de administratieve commentaar op het Wetboek van de inkomstenbelastingen 1992 worden beschouwd als terugbetalingen van eigen kosten van de werkgever (Hof van Justitie van de Europese Unie, Arrest Julius Fillibeck Söhne GmbH & Co. KG, zaak C-258/95, van 16.10.1997).

Bijgevolg kan de werkgever de van die kosten geheven belasting in de regel niet in aftrek brengen.

However, in the past, an employer was allowed to deduct the VAT charged on the relocation costs borne by him to relieve his foreign executives transferred to Belgium in accordance with normal rules (Parliamentary Question No 1.327 by Mr Volks Representative L. Michel van 20.04.1998).

This deviation is a strict interpretation. The deduction of VAT is therefore excluded for all other costs mentioned in the aforementioned nos . of the administrative commentary on the WIB 1992 (the involvement of a real estate agency in finding housing, furnishing a home, purchasing furniture, traveling for the manager and his family members to the country of origin...).

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Section 14 - Exercise of the right of deduction

For a taxpayer to deduct the tax charged on the goods and services it receives:

- the right to deduct that tax must have arisen (Article 2 of Royal Decree No 3 , aforementioned; see Title 1, below)
- the conditions for the exercise of that right must have been complied with (Article 3 of Royal Decree No 3 , aforementioned and Article 7 of Royal Decree No 31 of 02.04.2002 with regard to the methods of application of value added tax in respect of with regard to transactions performed by taxable persons not established in Belgium , see Title 2, below).

When those two conditions are met, the deduction for a given period is made globally in the monthly or quarterly declaration (Article 4 of Royal Decree No 3 , aforementioned; see Title 3, below).

1. Origin of the right to deduct input tax

A. Immediate deduction

The deduction is made immediately in the sense that the right to deduct arises at the time when the tax becomes due.

B. Supply of goods and provision of services

Taxes on goods and services supplied to the taxable person are subject to the right to deduct on the date on which the tax becomes due under Articles 16, § 1, 17, 22, § 1 and *22a* of the VAT Code (Article 2, 1 °, of the Royal Decree No. 3 , aforementioned).

Examples:

- Sale to a taxable person of goods to be transported. An advance was paid with the order on 15.12.2017. On 29.01.2018 the goods leave the seller's warehouse and on 02.02.2018 they are delivered to the buyer who pays the balance of the price on the same day . An invoice will be issued for the full amount on 02.02.2018. The right to deduct arises on:
  - 15.12.2017, with regard to the VAT that is due and payable on this advance on this date (Article 17, § 1, third paragraph, of the VAT Code)
  - 02.02.2018, with regard to the VAT that becomes due on this date on the balance of the price (Article 17, § 1, first paragraph, of the VAT Code).

- Material work on movable property, performed for a private person by a taxable person who usually provides services for private individuals. An advance must be paid with the order, which is on 29.01.2018 and the balance is due on completion of the work, which is on 10.03.2018. The client pays the advance on 05.02.2018 and the balance of the price on 04.04.2018.

  The right to deduct the tax charged on the advance arises on 05.02.2018, date on which the advance was received (Article *22a* , § 3, of the VAT Code), while the right to deduct the tax charged on the balance arises on 10.03.2018, date on which the work is completed (Article 22, § 1 of the VAT Code).

C. Deliveries to themselves

Taxed on the transactions that a taxable person performs for the needs of his business and that are equated with a supply of goods by Article 12, § 1, first paragraph, 3 ° and 4 °, of the VAT Code, or that the provision of a service is assimilated by Article 19, § 2, first paragraph, 1 ° or § 3, of the VAT Code, the right to deduct arises on the date on which the tax becomes due under Article 16, § 1 , 17, 22, § 1 and 22 *bis* of the VAT Code (Article 2, 2 °, of the Royal Decree No. 3 , aforementioned).

The delivery to itself (withdrawal or putting into use) is technically equated with the delivery of a good or with the provision of a service, also with regard to the moment of the claim being due and payable. Consequently, the right to deduct arises at the same time. That moment is therefore determined in accordance with Articles 16, § 1, 17, 22, § 1 and 22 *bis* of the VAT Code.

Examples:

- A manufacturer of laptops normally intended for sale withdraws a laptop from its inventory for the needs of its offices. The withdrawal will take place on 05.03.2018, the date on which the manufacturer takes possession of the laptop to use it in his offices as a business asset.

  De belasting is, wegens die ingebruikneming, op 05.03.2018 opeisbaar, ingevolge de artikelen 12, § 1, eerste lid, 3° en 16, § 1, eerste lid, van het Btw-Wetboek. De belasting is volgens de normale regels aftrekbaar aangezien de ingebruikneming voor de behoeften van het bedrijf is gebeurd. Het recht op aftrek ontstaat op 05.03.2018.

- Het tot stand brengen met het oog op de verhuur, van een binnenhuistelefooninstallatie, waarvan de verschillende bestanddelen normaal voor verkoop bestemd zijn, door de vennootschap die eigenares ervan is, heeft de toepassing tot gevolg van artikel 12, § 1, eerste lid, 3°, van het Btw-Wetboek, in hoofde van deze vennootschap.

  De belasting is opeisbaar over de overeenkomstig artikel 33, § 1, 1°, van het Btw-Wetboek te bepalen kostprijs van die installatie op het tijdstip dat die installatie is voltooid (zie artikel 16, § 1, eerste en derde lid, *in fine*, van het Btw-Wetboek). Op datzelfde tijdstip ontstaat ook het recht op aftrek.

  Daar het gaat om een ingebruikneming voor een belastbare roerende verhuur, mag de aldus berekende belasting door de vennootschap in aftrek worden gebracht (beslissing nr. E.T. 15.522 van 07.01.1974).

- Een aannemer van werk in onroerende staat laat door zijn arbeiders en met materialen die hij aan zijn voorraad onttrekt, een loods bouwen om er zijn bedrijfsmaterieel in op te bergen. De bouw is voltooid op 10.11.2018.

  De belasting berekend over de normale waarde van de dienst (artikel 33, § 1, 3°, van het Btw-Wetboek) met betrekking tot de oprichting van dat gebouw is, ingevolge artikel 19, § 2, eerste lid, 1°, van het Btw-Wetboek, opeisbaar op het tijdstip waarop het gebouw is voltooid, hetzij op 10.11.2018 (artikel 22, § 1, van het Btw-Wetboek). Aangezien de onttrekking voor de behoeften van het bedrijf is gebeurd, is de belasting op dezelfde datum aftrekbaar.

D. Invoer

Voor de belasting geheven bij invoer ontstaat het recht op aftrek op de datum waarop die belasting opeisbaar is krachtens artikel 24 van het Btw-Wetboek (artikel 2, 3°, van het koninklijk besluit nr. 3, voornoemd). De commentaar op die bepaling is opgenomen in 'Boekwerk I: Belastingplicht en belastbare handelingen – Hoofdstuk 4: Invoer'.

Voorbeeld:

Aan invoerrechten onderworpen goederen worden op 09.01.2018 rechtstreeks vanuit Brazilië in België ingevoerd. Ze worden op 12.01.2018 in België voor het verbruik aangegeven met een aangifte die dezelfde dag door de Belgische douane wordt aanvaard. Het recht op aftrek ontstaat op 12.01.2018, datum waarop de douaneschuld ontstaat (aanvaarding van de aangifte voor het verbruik) en de btw wegens invoer opeisbaar is.

E. Intracommunautaire verwervingen en daarmee gelijkgestelde handelingen

Voor de btw geheven van intracommunautaire verwervingen en van handelingen die hiermee worden gelijkgesteld door artikel 25*quater* van het Btw-Wetboek, ontstaat het recht op aftrek op de datum waarop die btw opeisbaar wordt krachtens artikel 25*sexies* van het Btw-Wetboek (artikel 2, 4° en 5°, van het koninklijk besluit nr. 3, voornoemd), dat wil zeggen in de regel bij de uitreiking van de factuur overeenkomstig artikel 17, § 2, eerste lid, van het Btw-Wetboek.

De btw wordt echter opeisbaar op de vijftiende dag van de maand volgend op die waarin het belastbare feit heeft plaatsgevonden, indien geen factuur werd uitgereikt vóór deze datum (artikel 25*sexies*, § 2, van het Btw-Wetboek).

Voorbeeld:

A, een Belgische belastingplichtige met volledig recht op aftrek verricht een intracommunautaire verwerving van goederen die hij bij B, een in Italië gevestigde belastingplichtige, gekocht heeft. Op 10.03.2018 worden de goederen door vervoerder C, die handelt in opdracht van B, bij A afgeleverd. De factuur met betrekking tot die levering wordt uitgereikt op 20.04.2018.

De belasting wordt terzake opeisbaar op 15.04.2018, tijdstip waarop ook het recht op aftrek ontstaat.

Indien de factuur zou zijn uitgereikt op 18.03.2018, zou de belasting opeisbaar zijn geworden en het recht op aftrek zijn ontstaan op 18.03.2018.

2. Voorwaarden om het recht op aftrek uit te oefenen

A. Algemeenheden

Net zoals de voor een handeling opeisbare belasting niet aan de Staat dient te worden betaald op het tijdstip waarop ze opeisbaar is, kan de aftrek van de belasting die van een handeling geheven werd ook niet worden toegepast op het ogenblik waarop het recht op aftrek is ontstaan. Het is immers zo dat de belasting die een belastingplichtige uiteindelijk aan de Staat stort voortspruit uit een globale afrekening die in een aangifte wordt gemaakt. Daarin wordt, voor een bepaalde periode, de wegens de inputs af te trekken btw toegerekend op de wegens de outputs opeisbare btw.

Wanneer men derhalve voor de inputs vaststelt op welk ogenblik het recht op aftrek ontstaat, dan duidt men meteen de periode aan waarop de aangifte zal betrekking hebben waarin de aftrek kan worden toegepast. Voor de uitoefening van het recht op aftrek is bovendien vereist dat bepaalde voorwaarden, die in artikel 3 van het koninklijk besluit nr. 3 zijn vastgesteld, worden nageleefd. Die voorwaarden worden hierna aangeduid voor de onderscheiden inputs.

B. Leveren van goederen en verlenen van diensten (artikel 3, § 1, 1°, van het koninklijk besluit nr. 3 en artikel 7 van het koninklijk besluit nr. 31)

a. Algemeenheden

Article 53, § 2 of the VAT Code provides that the taxable person who makes supplies of goods or services other than those exempted under Article 44 of the VAT Code and other than those referred to in Article 135 (1), points (a) to (g) of Directive 2006/112 / EC, should issue an invoice to his contracting partner and draw up a copy thereof or ensure it in his name and on his behalf, by his contracting partner or a third party an invoice is issued and a copy is drawn up:

- when he has supplied goods or services for a taxable or non-taxable legal person
- when he has made a supply of goods, as referred to in Article 15, §§ 1 and 2, of the VAT Code for every non-taxable person
- when an intra-Community supply of new means of transport within the meaning of Article 8 *bis* , § 2 of the VAT Code, as defined in Article 39 *bis* conducted, paragraph 2, of the VAT Code for each non-taxable person
- when the tax becomes due on all or part of the price of the transaction, in application of Articles 17, § 1, third paragraph and § 4 and *22a* , § 1, third paragraph, § 2, second paragraph and § 4 of the VAT Code before a supply of a good or service as referred to in the first two points is made.

The invoice must be issued no later than the fifteenth day of the month after the taxable event in accordance with Articles 16 and 22 of the VAT Code (see Article 4, § 1, first paragraph, of the Royal Decree no. 1 , aforementioned).

Notwithstanding the foregoing, the invoice will be issued no later than the fifteenth day of the month after the month in which the tax in accordance with Articles 17, § 1, third paragraph and § 4, and *22a* , § 1, third paragraph and § 4, of the VAT Code becomes due and payable on all or part of the price (see Article 4, § 1, second paragraph, of the Royal Decree No. 1 , aforementioned).

In order to exercise his right of deduction, the taxable person must, in respect of the tax levied on the goods supplied and services rendered to him, hold an invoice issued in accordance with Articles 53, § 2 and *53i* , § 2 of the VAT Code containing the statements referred to in Article 5, § 1, of the Royal Decree No. 1, aforementioned (see Article 3, § 1, 1 °, of the Royal Decree No. 3 , aforementioned).

This provision transposes Article 178 (a) of Directive 2006/112 / EC, which provides that, in order to exercise his right of deduction under Article 168 (a) of that Directive, as regards the supply of goods and services, the taxable person must be in possession of an invoice issued in accordance with the provisions of Title XI, Chapter 3, Sections 3 to 6.

b. European justice: content above form

The case-law of the Court of Justice of the European Union on the origin and scope of the right to deduct and on the exercise of the right to deduct has expanded over the years.

In several recent judgments, the Court has emphasized that the fundamental principle of VAT neutrality requires the deduction of input tax to be granted if the substantive conditions are fulfilled, even if a taxable person does not fulfill certain formal conditions (Court of Justice of the European Union , Senatex GmbH, Case C-518/14, 15.09.2016, paragraph 38 ; Court of Justice of the European Union, Barlis , Case C-516/14, 15.09.2016, paragraph 42 ; Court of Justice of the European Union, Trawertyn , Case C-280/10, 01.03.2012, paragraph 41).

This case law confirms the '*substance over form*' principle in the exercise of the right to deduct (see circular 2017 / C / 64 of 12.10.2017 regarding the invoice, condition for exercising the right to deduct with regard to VAT).

Consequently, if the tax authorities have the information necessary to establish that the substantive conditions are fulfilled, they may not impose further conditions on the taxable person's right to deduct that tax, which may result in the exercise of that right. is prevented (Court of Justice of the European Union, Barlis , Case C-516/14, 15.09.2016, paragraph 42).

The importance of the evidential value of a regular invoice is therefore qualified by the Court.

Indeed, there may be circumstances in which the data can be validly determined by means other than an invoice (Court of Justice of the European Union, Trawertyn , Case C-280/10, 01.03.2012, paragraph 48).

Thus, the administration should not limit itself to examining the invoice itself, but it should also take into account additional information provided by the taxable person. The Court finds support for this finding in Article 219 of Directive 2006/112 / EC, which equates any document or message which changes and specifically and unambiguously refers to the original invoice with an invoice (Court of Justice of the European Union, judgment Barlis , case C-516/14, of 09/15/2016, paragraph 44).

Thus, with regard to the right to deduct VAT charged by the taxable person on supplies and / or services purchased by him, the Court ruled in the following cases that:

- the tax authorities cannot refuse the taxpayer his right to deduct, if the substantive conditions for deduction are met, and the tax authorities concerned have received from the taxpayer a corrected invoice with the correct date of completion of the service before making its decision. even if there is no consecutive numbering of this invoice and the credit note that withdrew the original invoice (Court of Justice of the European Union, Pannon , Case C-368/09, 15.07.2010, paragraph 45 ; see here context also Judgment Petroma Transports , case C-271/12, of 08/05/2013, points 14, 35 and 36)
- the tax authorities should not limit themselves to examining the invoices themselves, but should also take into account the additional documents submitted by the taxpayer, if the description of the services on the invoices is insufficiently described and the invoices do not allow to be determined on the period covered by the statements in question (Court of Justice of the European Union, Barlis , Case C-516/14, 15.09.2016)
- the correction of a mandatory indication, which was initially missing on the invoice (in this case the addressee's VAT identification number), has retroactive effect (Court of Justice of the European Union, Senatex , Case C-518/14, 15.09.2016)
- de belastingdienst de aftrek op een aankoop in hoofde van een vennootschap niet mag weigeren wanneer blijkt dat de materiële voorwaarden zijn voldaan, maar de facturen waren opgemaakt op naam van de vennoten omdat de vennootschap op dat moment nog niet bestond (Hof van Justitie van de Europese Unie, Arrest Trawertyn, zaak C-280/10, van 01.03.2012).

c. Gevolgen voor de Belgische praktijk

Wanneer de factuur niet regelmatig is of onvolledig ten aanzien van de bepalingen van het koninklijk besluit nr. 1, voornoemd, weigerde de administratie in principe de aftrek van btw. Die bepalingen werden doorgaans evenwel reeds met een zekere soepelheid toegepast, waarbij de bevoegde administratie geval per geval beslist rekening houdend met alle feitelijke en wettelijke elementen (zie ook schriftelijke parlementaire vraag nr. 941 van de heer Volksvertegenwoordiger Richard Fournaux van 16.06.1997).

De rechtspraak van het Hof erkent evenwel dat in bepaalde omstandigheden het recht op aftrek dat werd uitgeoefend op grond van een onregelmatige factuur niet noodzakelijkerwijze aanleiding mag geven tot een verwerping van het recht op aftrek van de belastingplichtige door de administratie.

Wanneer de door de belastingplichtige voorgelegde factuur niet regelmatig is en/of onvolledig ten aanzien van de bepalingen van het voornoemde koninklijk besluit nr. 1, zal de administratie in het concrete geval het recht op aftrek beoordelen:

- op basis van een gecorrigeerde factuur (artikel 53, § 2, derde lid, van het Btw-Wetboek en artikel 12 van koninklijk besluit nr. 1, voornoemd) en/of
- in combinatie met aanvullende bewijskrachtige stukken (zoals bijvoorbeeld contracten, bestelbonnen, offertes, correspondentie ...) die ondubbelzinnig betrekking hebben op de factuur en

die door de belastingplichtige worden voorgelegd, voor zover natuurlijk:

- het bewijs wordt geleverd dat de materiële voorwaarden van het recht op aftrek van artikel 45 van het Btw-Wetboek zijn voldaan
- de belastingplichtige zich niet heeft schuldig gemaakt aan fraude, misbruik of wist of had moeten weten dat de handeling waarvoor aanspraak op het recht op aftrek wordt gemaakt onderdeel was van fraude of misbruik.

De hiervoor genoemde gecorrigeerde facturen en/of aanvullende bewijskrachtige stukken moeten evenwel tijdig aan de administratie worden voorgelegd, dit wil zeggen vóór de beëindiging van de belastingcontrole.

De aftrek moet echter worden herzien indien daarna wordt vastgesteld dat de leverancier niet het volledige bedrag dat hij zijn klant als belasting in rekening heeft gebracht aan de Staat heeft voldaan (zie artikel 51, § 1, 3°, van het Btw-Wetboek,) of dat hij een teruggaaf heeft bekomen tegen uitreiking aan zijn klant van een verbeterend stuk overeenkomstig artikel 77, § 1, 1°, en artikel 79, § 1, van het Btw-Wetboek.

d. Origineel, duplicaat en dubbel

In principle, only the original copy of an invoice may serve as proof of the right to deduct. When multiple copies of an invoice are issued, the supplier must clearly indicate on the additional copies issued to the customer the statement 'duplicate' or any other indication showing that another copy of the invoice is the original copy that may only be used for the deduction of the tax.

However, if the original copy has been lost or destroyed by accident, the tax may, subject to certain conditions (see notice no. 10/1974 of 09.08.1974), be deducted on sight of a double.

C. Special cases due to the nature of the goods and services

a. Costs of publication of deeds or extracts of deeds and of the annual accounts of companies

With regard to VAT payable on the costs of publication of deeds or extracts of deeds and on the annual accounts of companies, the right of deduction can be exercised by the company provided that it is in possession of an extract from the appendices to the Belgian Official Gazette in which the publication appears.

The document, which may be issued by the registrar, either upon payment of the commission or after the final statement of accounts, therefore does not confer entitlement to deduct (see note 34/1978 of 13.11.1978).

As regards the deduction of VAT charged on the supply of goods and services relating to a passenger car used for the business of a partnership, a distinction must be made according to whether this passenger car is purchased by and invoiced to one of the the partners of that partnership or are purchased by and billed to the partnership itself (Written Parliamentary Question No. 65 by Mr Senator Alfons Verbist of 22.02.1977).

b. Common passenger transport (rail, tram, bus)

In view of the special circumstances in which public transport companies issue tickets to passengers, these companies are exempt from issuing an invoice when tickets (tickets, tickets, subscriptions) are purchased for professional needs.

Although the taxable person, because of the exemption granted to public transport companies, is not in possession of a regular invoice, he is allowed to deduct the VAT charged on public transport of which he bears the costs to the extent that he demonstrates to the administration, in particular by presenting a ticket, that he has actually used public transport for the needs of the company.

Moreover, no distinction needs to be made according to whether the transport for professional travel was used by the taxable person himself or by the management bodies, if the taxable person is a legal person or by members of his staff.

If the ticket entitles to several journeys (card or subscription, even issued in the name of a management body of the company or of a staff member), the VAT included in the price of the ticket may of course only be deducted to the extent that ticket was actually used for the needs of the company. The amount of the deductible VAT must be determined by the taxable person in accordance with the rules adopted on income tax for determining the portion of the ticket price that can be recognized as general expenses (see decision no. ET 16.172 of 31.07.1975).

D. Special cases due to the quality or situation of the supplier

a. The contracting partner of the non-resident taxpayer

The contracting partner of the non-resident taxpayer may only deduct the tax levied on the goods and services supplied to him by that taxable person if he is in possession of the invoice issued in accordance with Article 4 or 5 of Royal Decree no. 31 , aforementioned, or if, in the case referred to in Article 5 of the same Decree, he has paid the tax due in accordance with that Article and he has an invoice which establishes the transaction.

b. Public sale of the assets of a bankrupt

In the event that the movable property of a bankrupt taxpayer is sold publicly, the trustee in bankruptcy must, as a rule, issue an invoice in all cases in which the distribution would be obligatory in the event of voluntary sales (see 'Book IV: Satisfaction of the tax - Chapter 13: Scheme for the payment of the tax ').

However, this invoice may be replaced, under the following conditions, by a document drawn up by the instrumenting civil-law notary or bailiff on the basis of the official report of assignment and issued to the purchaser:

- For each assigned lot, the report and document contain the normal entries of an invoice, including the buyer's VAT identification number, except for the serial number in the outgoing invoice book. In the official report these entries may be replaced by a reference number assigned to each document.
- a duplicate of the document is handed over to the curator (Article 6 of Royal Decree No. 1 , aforementioned).

The purchaser, if he is a non-exempt taxable person, may, in accordance with the normal rules, deduct VAT on the basis of this extract from the record of assignment.

E. Special cases because of the status or situation of the recipient

a. Indivisibility

In a simple case of undivided VAT taxable persons and not of taxable persons united in an unincorporated association, the invoices establishing the goods and services rendered for the benefit of this undivided capital must in principle be issued in the name of all the partners of the indivisibility. The suppliers of the goods or the service providers must therefore indicate on the invoices issued the name of each participant of the indivisibility, his address and his VAT identification number, as well as the indication of the share of each of them if the partners do not contribute evenly to the cost of the indivisibility.

Such an obligation can prove quite compelling when it comes to a large number of partners. However, it is necessary for each of them to exercise, where appropriate, their right to deduct the tax charged on this invoice, in accordance with Article 3, § 1, 1 °, of the Royal Decree No 3 , referred to above. .

However, in the case where, for example, only one of the partners would contract with the supplier / service provider (case where the indivisibility has mandated one of its partners to perform certain tasks for the indivisibility), the invoice must only be in the name of this one associate must be drawn up, who must recover from each of the other associates the expenses he has incurred in this way for the benefit of the undivided interest (written parliamentary question no. 3-2.676 by Ms Senator Clotilde Nyssens of 12.05.2005).

b. Assets obtained by the spouse

As a general rule, a taxable person who uses a business asset for his economic activity subject to VAT may only deduct the VAT charged on its acquisition if the property has been acquired by him and invoiced in his name.

However, where an asset has been acquired and invoiced in the name of one of the spouses, but is intended for the other spouse who uses it for his economic activity subject to VAT, the VAT charged on the acquisition of this asset may be deducted as if the asset was billed by and to the spouse who uses the property for his taxable economic activity.

This rule applies regardless of the spouses' matrimonial system and whoever is the spouse who obtained the property.

It also applies when both spouses each carry on an economic activity as a taxable person for which they are subject to the normal VAT scheme. In this case, the deduction of the VAT levied on the acquisition of the property should be made taking into account actual use for the purposes of the economic activity of each of the spouses. This also applies when a spouse carries out an economic activity as a taxable person and the other spouse has an activity for which he is not a taxable person (decision No ET 17.998 of 14.04.1976 (compare Section 15, Title 4, Section C, subsection a)).

Deze regel geldt wat ook het huwelijksvermogensstelsel is van de echtgenoten en welke echtgenoot de goederen heeft verworven. In dat verband worden wettelijk samenwonende partners gelijkgesteld met gehuwden met uitzondering van de feitelijk samenwonenden.

c. Zelfstandige groepering van personen – kostendelende vereniging

Wanneer een zelfstandige groepering van personen in de zin van artikel 44, § 2*bis*, van het Btw-Wetboek zowel belaste als vrijgestelde diensten verstrekt, heeft ze de hoedanigheid van een gemengde btw-belastingplichtige met gedeeltelijk recht op aftrek.

Opdat een dergelijke groepering die goederen en diensten heeft ontvangen, rechtmatig haar recht op aftrek van de btw die hierover werd geheven, zou kunnen uitoefenen, dient zij in het bezit te zijn van facturen opgemaakt overeenkomstig artikel 5 van het koninklijk besluit nr. 1, voornoemd (zie artikel 3, § 1, 1°, van het koninklijk besluit nr. 3, voornoemd). Inzonderheid dient de factuur met betrekking tot handelingen die door derden worden verricht voor een zelfstandige groepering te worden uitgereikt op naam en op het adres van die groepering, opdat de zelfstandige groepering op haar beurt zelf handelingen zou kunnen verstrekken aan haar leden (of aan derden).

Het is evenwel toegestaan dat een leverancier/dienstverrichter factureert aan een lid (bijvoorbeeld voor schaalvoordelen) en laatstgenoemde de dienst of levering van goederen aanrekent aan de zelfstandige groepering. Op die aanrekening zijn evenwel de gewone btw-regels van toepassing.

Er wordt verder verwezen naar de circulaire AAFisc nr. 31/2016 (nr. E.T. 127.540) van 12.12.2016.

d. De vereniging van de medeëigenaars

De door derden gedane leveringen en diensten die zowel betrekking hebben op periodieke uitgaven (bijvoorbeeld verwarmings- en verlichtingskosten) als op niet-periodieke uitgaven (bijvoorbeeld uitgaven voor de vernieuwing van het verwarmingssysteem, herstelling of vernieuwing van een lift of het leggen van een nieuwe dakbedekking) moeten gefactureerd worden aan de vereniging van de medeëigenaars met aanduiding van de ligging van het gebouw of van de groep van gebouwen. Die factuur moet verstuurd worden naar het adres aangeduid door de syndicus.

The co-owner who is a taxable person with a right to deduct may deduct the VAT levied on the supply of goods and services to the association of co-owners under Article 45, § 1, of the VAT Code up to the amount of his share provided he is in possession of a detailed statement issued by the syndic on behalf of the co-owners' association .

This statement, which must be drawn up at least once a year, must state the correct price to be paid to the suppliers or service providers, the amount of the tax and, per co-owner, his share of the common expenses and the tax.

On the other hand, because of his capacity as agent or representative of the association of co-owners , the syndic may not issue to the association of co-owners an invoice, debit note or other equivalent document in his name , unless then, where appropriate, the demand fees (Note 13/1995 of 20/09/1995).

e. Public contracts executed on behalf of several contracting authorities

How should the problem of the exercise of the right of deduction under certain VAT taxable contracting authorities be solved if, in implementation of the provisions on public contracts and some contracts for works, supplies and services, only the intervention is provided by one government, which will act in their joint name in the award and execution of the contract, but which is not itself a taxable person. In that case, only the relevant non-taxable government receives invoices from the contractor.

Pursuant to Article 3, § 1, 1 °, of the Royal Decree no. 3 , the taxpayer, in order to exercise his right of deduction, must in principle, with regard to the tax levied on the goods and services supplied to him, , be in possession of a regular invoice issued by his supplier, in which he has been charged this tax separately.

In any event, it is permitted for contracting authorities that are liable to VAT to exercise their right to deduct on the basis of a detailed statement drawn up by the said government, on which, on the one hand, the total price to be paid by the government to the contractor, and the amount of state the VAT due (invoice (s) attached) and state, on the other hand, the share, exclusive of tax, of each contracting authority in the common expenses and the VAT due thereon (Written Parliamentary Question No. 819 by Mr Volks Representative François Bellot from 29.10.2001).

F. Supplies and services to themselves for the needs of the company (Article 3, § 1, 2 °, of the Royal Decree No. 3)

In order to exercise his right of deduction, the taxpayer must, with regard to tax, be charged an act he performs for the needs of his economic activity and which is assimilated to a supply by Article 12, § 1, first paragraph, 3 ° and 4 ° of the VAT Code, or with a service provided by Article 19, § 2, first paragraph, 1 °, or § 3, of the VAT Code, the referred to in Article 3 of Royal Decree No. 1, aforementioned prepare the document and include the tax owed in the tax return with regard to the period in which it becomes due (see Article 3, § 1, 2 °, of the Royal Decree No. 3 , aforementioned).

The taxpayer must draw up a document establishing the transactions to himself referred to in Article 3 of Royal Decree No 1 , referred to above, no later than the fifteenth day of the month after the month in which the chargeable event of the tax took place in accordance with Articles 16 and 22 of the VAT Code (see Article 4, § 1, of the Royal Decree No. 1 , aforementioned).

G. Import with payment of the tax at the time of the declaration for consumption (Article 3, § 1, 3 °, of the Royal Decree No. 3)

In order to be able to deduct the tax charged on an import, which is not effected under the transfer of taxation procedure in the territory of the country, the taxable person must be in possession of a paper or electronic declaration of consumption on which he is entered as the consignee and that the payment of VAT to the customs authorities concerned (see Article 3, § 1, 3 °, of the Royal Decree No. 3, aforementioned) (see 'Book I: Tax liability and taxable transactions - Chapter 4: Import').

H. Imports under the system for the reverse charge levy (Article 3, § 1, 4 °, of Royal Decree No 3)

Taxable persons who have an individual VAT identification number in Belgium and who submit periodic returns can be granted a license to, under the conditions laid down by that license (see circular AOIF No 1/2008 (no. ET 675.10) of 02.01.2008 , update of letter no 3/1973 of 11.01.1973), not to pay the VAT due on import at the time of the declaration for consumption, but to include it as tax due in schedule 57 of the declaration regarding the period during which the import takes place (see Article 3, § 1, 4 ° of the Royal Decree No 3 , aforementioned, and,Article 7, § 2, of the Royal Decree No 7 of 29.11.1992 regarding the import of goods for the purposes of value added tax).

In order to attest to the entry in Schedule 57, the taxable person must be in possession of a paper or electronic consumption statement on which he is listed as the consignee and on which he relies on the reverse charge of the tax referred to in the Circular for the payment of VAT. AOIF No. 1/2008 (No. ET 675.10) of 02.01.2008 , aforementioned (see 'Book I: Tax Duty and Taxable Transactions - Chapter 4: Import').

This registration allows the taxpayer to exercise his right to deduct in Schedule 59 of the same return.

I. Intra-Community acquisition of goods (Article 3, § 1, 5 °, of the Royal Decree No. 3)

In order to deduct input tax levied on intra-Community acquisitions of goods, the acquirer liable to pay tax must hold an invoice issued by the supplier in accordance with the legal provisions in force in the Member State from which those goods are dispatched or transported and include the tax owed in the tax return with regard to the period in which it becomes due (see Article 3, § 1, 5 °, of the Royal Decree No 3, voornoemd). Deze factuur dient minimaal een aantal vermeldingen te bevatten, namelijk de naam, het adres en het btw-identificatienummer van de bij de handeling betrokken partijen, de aard en de hoeveelheid van de verworven goederen, de prijs en het toebehoren ervan, en moet door de verwerver worden aangevuld met de overige vermeldingen die overeenkomstig artikel 5, § 1, van voornoemd koninklijk besluit nr. 1 op de factuur moeten voorkomen.

Bij gebreke van een dergelijke factuur moet de belastingplichtige verwerver in het bezit zijn van het stuk bedoeld in artikel 9, § 1, van het koninklijk besluit nr. 1, voornoemd, en de verschuldigde belasting opnemen in de aangifte met betrekking tot het tijdvak waarin ze opeisbaar wordt (zie artikel 3, § 1, 5°, van het koninklijk besluit nr. 3, voornoemd).

Wat het stuk bedoeld in artikel 9, § 1, van het koninklijk besluit nr. 1, voornoemd, betreft wordt voorzien dat, behalve in het geval de factuur moet worden uitgereikt door de medecontractant in naam en voor rekening van de belastingplichtige die de goederen levert of de diensten verstrekt, de belastingplichtige en de niet-belastingplichtige rechtspersoon, die overeenkomstig artikel 51, § 1, 2° en § 2, eerste lid, van het Btw-Wetboek, of de artikelen 20, 20*bis* of 20*ter*, schuldenaar zijn van de belasting, uiterlijk de vijftiende dag van de maand na die waarin overeenkomstig de artikelen 16, § 1, 17, § 1, derde lid, 22, § 1, 22*bis*, § 1, derde lid of 25*sexies*, § 2, tweede lid, van het Btw-Wetboek de belasting opeisbaar wordt, een stuk moeten opstellen wanneer zij nog niet in het bezit zijn van de factuur met betrekking tot de handeling.

Ten aanzien van de intracommunautaire verwerving van een nieuw vervoermiddel dient de belastingplichtige, in de gevallen bedoeld in de artikelen 1 en 2 van het koninklijk besluit nr. 46 van 29.12.1992, tot regeling van de aangifte van de intracommunautaire verwerving van vervoermiddelen en van de betaling van de ter zake verschuldigde btw, om zijn recht op aftrek te kunnen uitoefenen in het bezit te zijn van de bijzondere btw-aangifte bedoeld in artikel 1 van voornoemd besluit (aangifte nr. 446, zie artikel 3, § 1, 5°, in fine, van het koninklijk besluit nr. 3, voornoemd).

J. Met een intracommunautaire verwerving van goederen gelijkgestelde handeling (artikel 3, § 1, 6°, van het koninklijk besluit nr. 3)

Om zijn recht op aftrek te kunnen uitoefenen ten aanzien van een handeling die de belastingplichtige verricht voor de behoeften van zijn economische activiteit en die met een intracommunautaire verwerving wordt gelijkgesteld door artikel 25*quater* van het Btw-Wetboek, moet de belastingplichtige in het bezit zijn van het transferdocument opgesteld overeenkomstig de wettelijke bepalingen die van kracht zijn in de lidstaat van waaruit deze goederen zijn verzonden of vervoerd, of bij gebreke van dat stuk, in het bezit zijn van een door hemzelf opgemaakt stuk (zie artikel 9, § 3, van het koninklijk besluit nr. 1, voornoemd) en de verschuldigde belasting opnemen in de aangifte met betrekking tot het tijdvak waarin ze opeisbaar wordt (zie artikel 3, § 1, 6°, van het koninklijk besluit nr. 3, voornoemd).

K. Belasting voldaan door de medecontractant (artikel 3, § 1, 7°, van het koninklijk besluit nr. 3)

Om zijn recht op aftrek te kunnen uitoefenen moet de belastingplichtige ten aanzien van de belasting geheven van de handelingen waarvoor hij, bij toepassing van artikel 51, § 2, eerste lid, 1°, 2°, 5° en 6° of § 4, of van artikel 55, § 6, van het Btw-Wetboek, ertoe gehouden is zelf de opeisbare belasting te voldoen, in het bezit zijn van een factuur uitgereikt overeenkomstig de artikelen 53, § 2 en 53*decies*, § 2, van het Btw-Wetboek of, bij gebreke van een dergelijke factuur, van het bedoelde stuk in artikel 9, § 1, van het koninklijk besluit nr. 1, voornoemd, of in artikel 5, § 2, van het koninklijk besluit nr. 31 van 02.04.2002 met betrekking tot de toepassingsmodaliteiten van de belasting over de toegevoegde waarde ten aanzien van de handelingen verricht door niet in België gevestigde belastingplichtigen, en de verschuldigde belasting opnemen in de aangifte met betrekking tot het tijdvak waarin ze opeisbaar wordt (zie artikel 3, § 1, 7°, van het koninklijk besluit nr. 3, voornoemd).

Wat inzonderheid het stuk bedoeld in artikel 9, § 1, van het koninklijk besluit nr. 1, voornoemd, betreft, is er bepaald dat, behalve in het geval de factuur moet worden uitgereikt door de medecontractant in naam en voor rekening van de belastingplichtige die de goederen levert of de diensten verstrekt, de belastingplichtige en de niet-belastingplichtige rechtspersoon, die overeenkomstig artikel 51, § 1, 2°, en § 2, eerste lid, van het Btw-Wetboek, of de artikelen 20, 20*bis* of 20*ter*, schuldenaar zijn van de belasting, uiterlijk de vijftiende dag van de maand na die waarin de belasting overeenkomstig de artikelen 16, § 1, 17, § 1, derde lid, 22, § 1, 22*bis*, § 1, derde lid of 25*sexies*, § 2, tweede lid, van het Btw-Wetboek opeisbaar wordt, een stuk dienen op te maken wanneer zij nog niet in het bezit zijn van de factuur met betrekking tot de handeling.

3. Uitoefening van het recht op aftrek van voorbelasting

A. De aftrek geschiedt onmiddellijk en globaal

De aftrek geschiedt, in principe, onmiddellijk en globaal in die zin dat de belastingplichtige dat recht uitoefent door op het totale bedrag van de voor een aangiftetijdvak verschuldigde belasting, het totaal van de belasting waarvoor het recht op aftrek tijdens datzelfde tijdvak is ontstaan toe te rekenen, voor zover de voorwaarden voor de uitoefening van dat recht worden nagekomen.

No other conditions for the exercise of the right to deduct are set in Article 4, first paragraph, of the Royal Decree No 3 , which contains that principle.

It follows in particular:

- that the deduction may be made immediately, without waiting for the goods to actually be resold (so a stock may be formed without being burdened by the tax levied on its components)
- that the deduction can be made by a taxable person without having paid to his supplier the tax charged by that supplier
- that the deduction may be applied and remain valid even if the tax to be deducted for a good exceeds that applicable on resale (goods sold at a loss).

B. Examples

- A taxpayer who has to file a monthly return has received a regular invoice issued on 05.02.2018 for a delivery that took place on 15.01.2018. The price was fully paid on 20.01.2018. The taxpayer may deduct the tax indicated on that invoice in the declaration relating to the transactions of January 2018, which he must submit by 20.02.2018 at the latest.

  If, on the other hand, the invoice was issued on 05.02.2018 for a delivery that took place on 15.01.2018 for which the price has not yet been paid, the right to deduct only arises on 05.02.2018 and the taxable person may only exercise his right to deduct in the return with regard to the acts of February 2018, which he must submit on 20.03.2018 at the latest.

- A taxable person who is required to submit monthly returns imports an import duty from Japan entering the territory of the Community on 20.01.2018 through the port of Antwerp. This good is declared in Belgium in its name for consumption on 23.01.2018 with payment of the tax. The relevant consumption declaration shall be accepted by the customs administrations concerned on the same day. He deducts the tax in the declaration relating to the January transactions, since the right to deduct arose on 23.01.2018, date on which the customs debt was incurred as a result of the acceptance of the declaration for consumption and therefore also the VAT due imports have become due and payable. He is, moreover, in possession of the import document at the time of the declaration no later than 20.02.

- A taxpayer who is required to file monthly returns imports a business subject to import duty directly from the United States into Belgium under the system of deferral of taxation. The declaration for the consumption of that asset is accepted by the Belgian customs on 20.01.2018.

  In the declaration relating to the January transactions, he includes the tax payable on those imports in the amount of the tax due (grid 57); in the same declaration, he includes this tax in the amount of the deductible tax (grid 59).

- A taxpayer, wholesaler in storage cabinets takes from his stock a cabinet that he uses for the equipment of his offices. The commissioning will take place on 20.01.2018. For this purpose, the taxpayer prepares the document required by Article 3 of Royal Decree No. 1 within the stipulated period.

  In the declaration regarding the transactions of January, the taxpayer includes the tax due and payable for that commissioning in the amount of the tax due (grid 54) (Article 12, § 1, first paragraph, 3 °, of the VAT Code). ; in the same declaration, he includes that tax in the amount of the deductible tax (grid 59).

C. Late exercise of the right to deduct

Where the taxable person has not exercised his right of deduction, either in the return for the period in which the right arose or in the return in which the formalities for the exercise of that right were completed, he may still exercise that right by including the amount of the deductible tax in a declaration for a subsequent period, submitted before the end of the third calendar year following that in which the tax to be deducted has become due and payable (Article 4, second paragraph of Royal Decree No. 3 , aforementioned).

In that case, the deductible VAT is included in schedule 62 of the periodic return.

Article 4, second paragraph, of the Royal Decree no. 3 , aforementioned, may also apply if a person has lost the status of taxable person, for example by ceasing his economic activity. The latter may then, within the aforementioned period, request that he may still exercise the right to deduct that he did not exercise during the period in which he was a taxable person; in that case, the right to deduct must then be exercised as a refund. The application for a refund must then contain the information stated in number 6 of letter no. 29/1975 of 25.11.1975 .

D. Delay in fulfilling the conditions for exercising the right to deduct input tax

In principle, the right to deduct is exercised during the same period in which it arose, when the tax became due.

However, it may happen that the formalities on which the exercise of the right to deduct depends, are completed late. This is the case in particular when the invoice for a delivery of goods or a service (Article 3, § 1, 1 °, of the Royal Decree No. 3 , aforementioned) is issued after the fifteenth day of the month after the month in which the good was provided or the service was provided (Article 4, § 1, of the Royal Decree No. 1 , aforementioned).

In that case, the right to deduct shall be exercised in the declaration relating to the period in which the formalities are completed, submitted before the end of the third calendar year following that in which the tax to be deducted has become due and payable (Article 4, second paragraph, of Royal Decree No. 3 , aforementioned).

The taxpayer records the amount of the deductible tax in schedule 62 of the periodic return.

Example:

Een belastingplichtige die maandaangiften moet indienen, heeft een factuur ontvangen die op 18.02.2018 werd uitgereikt voor een levering die plaatsvond op 15.01.2018 en waarvan de prijs werd betaald op 20.01.2018. Hoewel hij die factuur in zijn bezit heeft op het tijdstip dat hij zijn maandaangifte voor de handelingen van januari 2018 opstelt, mag hij de aftrek van de te laat gefactureerde belasting slechts doen in de aangifte met betrekking tot de handelingen van februari 2018, die hij ten laatste op 20.03.2018 moet indienen. De belastingplichtige dient in ieder geval zijn recht op aftrek uit te oefenen in een aangifte in te dienen voor het eind van het jaar 2021.

Het verstrijken van de bovengenoemde verjaringstermijn heeft tot gevolg dat de onvoldoende voortvarende belastingplichtige, die heeft nagelaten aanspraak te maken op zijn recht op aftrek van de btw, bestraft wordt met het verval van dat recht op aftrek. De mogelijkheid om het recht op aftrek uit te oefenen zonder tijdsbeperking staat echter

haaks op het rechtszekerheidsbeginsel, dat verlangt dat de fiscale situatie van een belastingplichtige, met name zijn rechten en plichten jegens de belastingadministratie, niet gedurende onbepaalde tijd in het ongewisse blijft (Europees Hof van Justitie, Arrest Giuseppe Astone, zaak C-332/15, van 28.07.2016, punt 33).

De situatie is verschillend indien het voor de belastingplichtige objectief onmogelijk was om zijn recht op aftrek uit te oefenen omdat hij niet beschikte over de facturen of de rechtzettingen van de oorspronkelijk foutieve facturen en evenmin wist dat btw moest worden betaald op een wijze dat geen blijk wordt gegeven van onzorgvoldig gedrag. In dit geval, in de afwezigheid van misbruik of frauduleuze samenspanning, gaat de vervaltermijn in op het tijdstip waarop de materiële en formele voorwaarden die het recht op aftrek toestaan worden voldaan. Dit is de datum vanaf dewelke de belastingplichtige effectief zijn recht op aftrek kan uitoefenen. Bijgevolg kan hem het recht op aftrek van de btw niet worden geweigerd op grond van het feit dat de verjaringstermijn zou gestart zijn vanaf de datum van de handeling en zou aflopen voor de uitoefeningvan zijn recht op aftrek (Hof van Justitie van de Europese Unie, Arrest Volkswagen, zaak C-533/16, van 21.03.2018, Hof van Justitie van de Europese Unie, Arrest Biosafe, zaak C-8/17, van 12.04.2018).

E. Verval van het recht op aftrek

Wanneer de aftrek niet werd uitgeoefend binnen de gestelde termijnen en volgens de in de voorgaande rubrieken bepaalde modaliteiten, kan de belastingplichtige zijn recht op aftrek niet meer uitoefenen.

F. Rechtsmisbruik

Ingeval van misbruik dient degene die de belasting op de betreffende handelingen in aftrek heeft gebracht, de aldus als btw afgetrokken bedragen aan de Staat terug te storten.

De persoon die de belasting geheven van de goederen en de diensten die hem worden geleverd, van de goederen die hij heeft ingevoerd en van de intracommunautaire verwervingen die hij heeft verricht, in aftrek heeft gebracht, is er toe gehouden de aldus afgetrokken bedragen aan de Staat terug te storten als hij, op het tijdstip waarop hij deze handeling heeft verricht, wist of moest weten dat de verschuldigde belasting, in de ketting van de handelingen, niet werd of zal worden gestort aan de Staat met de bedoeling de belasting te ontduiken (artikel 79, § 2, van het Btw-Wetboek).

[Inhoudstafel van dit hoofdstuk] - [Inhoudstafel van de Btw-Commentaar]

Afdeling 15 - Bijzondere bepalingen met betrekking tot de aftrek door een gemengde belastingplichtige

1. Definitie van de gemengde belastingplichtige

De gemengde belastingplichtige is een belastingplichtige die:

- enerzijds handelingen verricht die vallen binnen de werkingssfeer van de btw en recht op aftrek verlenen
- anderzijds handelingen verricht die vallen binnen de werkingssfeer van de btw en geen recht op aftrek verlenen.

Gemengde belastingplichtigen zijn onder meer:

- de banken, die aan de belasting onderworpen handelingen verrichten (bewaring van effecten, verhuur van brandkasten ...) en ook handelingen stellen die ingevolge artikel 44, § 3, 5° tot 10°, van het Btw-Wetboek van de btw zijn vrijgesteld (krediet-, disconto- en beursverrichtingen, overdracht van waarden en van geld ...) (zie aanschrijving nr. 10/1995 van 26.07.1995)
- de accountant die zowel aan de belasting onderworpen handelingen verricht (boekhoudwerk, adviezen verstrekken ...) als handelingen vrijgesteld op grond van artikel 44 van het Btw-Wetboek (bijvoorbeeld privé-lessen inzake boekhouding; zie artikel 44, § 2, 4°, van het Btw-Wetboek)
- de autorijscholen die geen winstoogmerk hebben en die zowel diensten verstrekken die aan de btw zijn onderworpen (leren rijden met personenwagens) als diensten die vrijgesteld zijn krachtens artikel 44, § 2, 4°, a), van het Btw-Wetboek (leren rijden met een vrachtwagen, een autobus of landbouwvoertuigen; zie circulaire AAFisc. nr. 50/2013 (nr. E.T. 124.537) van 29.11.2013, randnummer 30)
- de exploitant van een tandheelkundige praktijk die kunsttanden levert of herstelt, nu eens met het verstrekken van bijhorende zorgen (handeling vrijgesteld krachtens artikel 44, § 1, 1°, van het Btw-Wetboek), dan weer zonder verzorging (handeling onderworpen aan de btw) (zie aanschrijving nr. 57/1972 van 02.06.1972)
- degenen die geregeld de dubbele werkzaamheid uitoefenen die erin bestaat in artikel 44, § 3, 1°, a), van het Btw-Wetboek bedoelde gebouwen over te dragen of op te richten voor rekening van derden en gronden of onverdeelde aandelen in gronden te verkopen, zoals de zogenaamde projectontwikkelaars (bouwpromotors), verkavelaarspromotors en sommige aannemers van openbare of particuliere werken (zie aanschrijving nr. 17/1975 van 29.07.1975).

2. Wettelijke bepalingen van toepassing ten aanzien van gemengde belastingplichtigen

De gemengde belastingplichtige mag de van zijn beroepsuitgaven geheven belasting niet volledig in aftrek brengen. De aftrek wordt slechts gedeeltelijk toegestaan.

Wettelijke bepalingen van toepassing voor het bepalen van het recht op aftrek van de gemengde belastingplichtigen zijn:

- in Europees recht: de artikelen 173 tot 175 van de richtlijn 2006/112/EG (de artikelen 17 en 19 van de Zesde richtlijn 77/388/EG)
- in Belgisch recht: artikel 46 van het Btw-Wetboek, alsook de artikelen 12 tot 21 van het koninklijk besluit nr. 3.

A. In Europees recht

a. Algemene regel

For a mixed taxable person, Article 173 (1) of Directive 2006/112 / EC (Article 17 (5) (1) of the Sixth Directive 77/388 / EC) lays down the principle that for goods and services supplied by a taxable person is used both for transactions for which there is a right to deduct, and for transactions for which there is no right to deduct, the deduction is only allowed for the part of VAT that is proportional to the amount of the transactions for which a deduction exists.

The deductible part is determined in accordance with Articles 174 and 175 of Directive 2006/112 / EC (Article 19 of Sixth Directive 77/388 / EC) for the total number of transactions carried out by the taxable person.

Article 174 of Directive 2006/112 / EC states that the deductible part is the result of a break, of which:

- the numerator consists of the total amount of the turnover calculated per year, not including VAT, in respect of transactions for which there is a right to deduct
- the denominator consists of the total amount of the turnover calculated per year, not including VAT, in respect of the transactions included in the numerator and the transactions for which there is no right to deduct.

This general rule is based on the ratio between the amount of turnover related to transactions for which there is a right to deduct and the amount of turnover related to transactions for which there is no deduction. Accounting data is used to which all taxpayers have easy access, and it is in principle possible to calculate the final deductible amount fairly and fairly accurately.

b. Different rules

Article 173 (2) of Directive 2006/112 / EC (Article 17 (5) (3) of the Sixth Directive 77/388 / EC) allows Member States to derogate from paragraph 1 of that Article. It provides a number of different and diverse options for Member States. These options can be summarized as follows:

- Member States may allow or require that a separate calculation is made for each 'sector of the business' (points (a) and (b))
- Member States may require that the application of the main pro-rata rule be mandatory or optional for all goods and services used (point d)
- Member States may allow or require the deduction to be calculated on the basis of actual use of the goods and services or part thereof (point (c))
- Member States may provide that if the VAT, which cannot be deducted by the taxable person, is negligible, it shall not be taken into account (point e).

B. Right in Belgian

Article 46 of the VAT Code provides two methods of deduction for the mixed taxpayer:

- In principle, the mixed taxpayer applies the rule of the 'general ratio', determined in Article 46, § 1 of the VAT Code: the tax on the goods and services used for its economic activity is deducted proportionally of the fraction formed by the amount of transactions for which deduction is allowed (numerator of the fraction) and the total amount of transactions of its economic activity (denominator of the fraction).

  This provision transposes into Belgian law Article 173 (2) (d) of Directive 2006/112 / EC (Article 17 (5) (3) (d) of Sixth Directive 77/388 / EC).
- By way of derogation from that rule, the administration may, at its request, authorize the taxable person to exercise the right of deduction, taking into account the actual use of the goods and services received or part thereof. It can oblige it to act in this way if the deduction in proportion to the break leads to inequality in the levying of the tax (Article 46, § 2 of the VAT Code).

  This provision transposes into Belgian law Article 173 (2) (c) of Directive 2006/112 / EC (Article 17 (5) (3) (c) of Sixth Directive 77/388 / EC) .

The articles 12 to 18 of the Royal Decree no. 3 , the provisions of which with respect to the subtractor in accordance with the general ratio (see Section 3 below), while the articles 19 to 21 of that decision, such as in the arrangements for the revision of the deduction according to actual use (see Title 4, below).

3. General ratio

A. Determining the general ratio

The general ratio is, according to Article 12, first paragraph, of the Royal Decree No. 3 , aforementioned, a fraction:

- with as counter, the total amount, determined per calendar year, of the transactions for which entitlement to deduction exists. It concerns acts referred to in Article 45, § 1, 1 ° to 5 °, of the VAT Code, namely:
  - taxed actions
  - transactions exempt from tax under Articles 39 to 42 of the VAT Code
  - transactions abroad, for which a right to deduct would arise if they were performed in the Netherlands

  - acts as referred to in Article 44, § 3, 4 ° to 10 °, of the VAT Code, whenever the co-contractor is established outside the Community, or the said acts are directly related, under conditions to be determined by or on behalf of the Minister of Finance with goods intended to be exported to a country outside the Community
  - services as broker or agent in actions referred to in the previous point
  - acts equated with deliveries of goods or services by Articles 12, § 1, 1 °, 2 ° and 5 ° and 19, § 1 and § 2, 2 ° of the VAT Code
- with the denominator, the total amount, determined per calendar year, both of the transactions included in the numerator and of the transactions for which there is no entitlement to deduction.

The amount of the transactions is in principle understood to mean the price or, in the absence of a price, the normal value of the supplies of goods and of the services, taking into account, where appropriate, the reductions authorized during the year. or discounts. The tax levied on the transactions is not counted (Article 12, first paragraph, 2 °, of the Royal Decree no. 3 , aforementioned).

The transactions to be taken into account are those for which VAT has become due during the calendar year (Court of Justice of the European Union, Antonio Jorge, Case C-536/03, 26.05.2005).

B. Calculation and rounding modalities of the general ratio number

De bedragen uitgedrukt in euro, zowel in teller als in noemer, worden afgerond tot het hoger tiental.

Na deze afronding wordt het algemeen verhoudingsgetal uitgedrukt in percenten door volgende verhouding te maken: het bedrag van de teller staat tot het bedrag van de noemer, zoals het resultaat staat tot honderd.

Is het resultaat geen geheel getal, dan wordt het afgerond naar de hogere eenheid.
Voorbeeld:

58.327 (T)/ 180.473 (N)

Afronding teller en noemer tot het hoger tiental:

58.330 / 180.480 = 32,32 /100

Het resultaat (32,32%) wordt afgerond naar de hogere eenheid, zijnde 33%.

C. Uitsluiting van sommige factoren voor de berekening van het algemeen verhoudingsgetal

a. Algemeen

Article 13 of Royal Decree No 3 , aforementioned, excludes from the numerator and denominator of the general ratio some factors, in order to avoid that they would falsify the meaning of the ratio to the extent that these factors do not belong to the professional activity of the taxpayer.

This is the case for the sale of company assets and the real or financial transactions that are carried out on an ancillary basis, ie they have only an incidental significance with regard to the total turnover of the company. Moreover, these transactions are only excluded if they do not form part of the taxable person's normal professional activity.

This is also the case for acts performed outside Belgium by resident exploïtatiezetel when the expenses related to these transactions are not directly supported by the Belgium-based exploïtatiezetel .

b. The proceeds from the disposal of company assets

Article 13, 1 °, of the Royal Decree no. 3 , aforementioned, excludes the proceeds from the disposal of company assets (industrial or commercial buildings, machines...) used by the taxpayer in his company for the calculation of the general ratio. .

This provision is the transposition into Belgian law of Article 174 (2) (a) of Directive 2006/112 / EC (Article 19 (2), first sentence, of the Sixth Directive 77/388 / EC).

The definition of the business assets intended here does not necessarily coincide with the definition given to this term in Article 6 (1) of Royal Decree No 3 , aforementioned, for the application of Articles 12, § 1, 19, § 2 and 48, § 2 of the VAT Code (Court of Justice of the European Union, Nordania , Case C-98/07, 20.03.2008).

It concerns two different concepts.

These two concepts are aimed at goods which, used for business purposes, are distinguished by their durable nature and value, and the acquisition costs of which are normally not recognized as current expenses, but are amortized over several years.

The term provided for in Article 13, 1 °, of the Royal Decree No. 3 , referred to above, only covers business assets the sale of which does not form the normal activity of the taxpayer.

Consequently, only these assets are excluded for the calculation of the general ratio.

On the other hand, if the sale of assets is part of the taxable person's normal and taxable activity, the relevant turnover figure must be included for the calculation of the general ratio.

For example, when a taxable person purchases vehicles to lease them and sell them after the lease expires, the sale of those vehicles is an ordinary activity that the taxable person organizes professionally and systematically. Consequently, these vehicles are not operating assets as referred to in Article 13, 1 °, of the Royal Decree No. 3 , aforementioned, and the turnover figure related to the sale must be included for the calculation of the general ratio.

c. Income and income from real estate and financial transactions

Article 13, 2 °, of the Royal Decree No. 3 , prescribes for the calculation of the general ratio the exclusion of the income from and income from real estate transactions (sale of land, real estate rental ...) or from financial transactions (stock exchange - and credit transactions...), unless these transactions form part of a specific economic activity of this nature (real estate agency, bank, credit institution).

The purpose of this last exclusion is to prevent companies from being subject to the rule of proportion for additional transactions of a real or financial nature that they have to perform for the management of their own funds and that are exempted under Article 44 of the VAT Code. (for example, real estate rental, sale of land or old buildings or stock exchange transactions related to their own portfolio). Those companies are treated as taxable persons with a full right of deduction provided they are not allowed to deduct the tax levied on the goods and services used to carry out those transactions (for example, portfolio safekeeping, restoration and maintaining premises rented,

However, where taxable persons engage in financial transactions that are a direct, lasting and necessary extension of their taxable activity, these transactions cannot be considered ancillary and these taxable persons have only partial right to deduct. They are then subject to the general ratio rule. This will be the case, inter alia, with a legal person appointed as syndic and with a company specialized in the issue of meal vouchers (decision no. ET 88.549 of 18.11.1996).

d. Amount of certain acts performed abroad

Article 13, 3 °, of the Royal Decree no. 3 , aforementioned, excludes the amount of transactions carried out abroad by the registered office there, if such expenditure is not borne directly by the registered office in Belgium.

D. Relationship between the general ratio and Articles 45, § 1, § 1quinquies and § 2, of the VAT Code

a. Principles

In case of application of the general ratio, the taxpayer must determine his right to deduct where appropriate by combining the application of Article 46, § 1 of the VAT Code with Article 45, § 1, § *1d* and § 2 , first paragraph, of the VAT Code.

Het Hof van Cassatie heeft bepaald dat het algemeen verhoudingsgetal bedoeld in artikel 46, § 1, van het Btw-Wetboek moet berekend worden rekening houdend met de beperking voorzien in artikel 45, § 2, van het Btw-Wetboek (Arrest van het Hof van Cassatie nr. C.01.0422.N van 02.10.2003). Hieruit volgt, in voorkomend geval, een dubbele beperking van het recht op aftrek van de belastingplichtige.

Rekening houdend met deze rechtspraak, moet de belastingplichtige zijn recht op aftrek als volgt bepalen:

- de belastingplichtige bepaalt eerst de hoedanigheid waaronder hij handelt wanneer hij goederen of diensten verwerft en met welk doel deze werden verkregen. Alzo bepaalt de belastingplichtige of deze goederen of diensten worden opgenomen in zijn bedrijfsvermogen, en bijgevolg onderworpen zijn aan de regels inzake btw, dan wel in zijn privé-vermogen, waar de btw-regels niet van toepassing zijn
- vervolgens moet de belastingplichtige zijn recht op aftrek beperken overeenkomstig de artikelen 45, § 1, § 1*quinquies* en § 2, eerste lid, van het Btw-Wetboek:
  - eerst beperkt de belastingplichtige, indien nodig, zijn recht op aftrek tot beloop van zijn beroepsmatig gebruik overeenkomstig artikel 45, § 1, van het Btw-Wetboek of, in voorkomend geval, overeenkomstig artikel 45, § 1*quinquies*, van het Btw-Wetboek
  - vervolgens past de belastingplichtige, indien nodig, artikel 45, § 2, eerste lid, van het Btw-Wetboek toe, volgens hetwelk ten aanzien van de levering, de invoer en de intracommunautaire verwerving van autovoertuigen bestemd voor het vervoer van personen en/of goederen over de weg, en ten aanzien van goederen en diensten met betrekking tot die voertuigen, de aftrek in geen geval hoger mag zijn dan 50% van de betaalde belasting.

    Wanneer het beroepsmatig gebruik van een voertuig beoogd door artikel 45, § 2, eerste lid, van het Btw-Wetboek, 50% niet overschrijdt, is de aftrekbeperking van voornoemd artikel niet van toepassing. Initieel zal het recht op aftrek beperkt worden tot beloop van het beroepsmatig gebruik, overeenkomstig artikel 45, § 1, of § 1*quinquies*, van het Btw-Wetboek.

    Indien het beroepsmatig gebruik echter hoger is dan 50% moeten de aftrekbeperkingen voorzien in de artikelen 45, § 1, of § 1*quinquies*, en 45, § 2, eerste lid, van het Btw-Wetboek worden gecombineerd.
- tenslotte past de belastingplichtige op het bekomen resultaat zijn algemeen verhoudingsgetal toe bepaald overeenkomstig artikel 46, § 1, van het Btw-Wetboek.

Deze principes kunnen met de volgende formule samengevat worden:

Aftrekbare btw = (betaalde btw) x (verhouding beroepsmatig gebruik bepaald overeenkomstig artikel 45, § 1, en § 1*quinquies* van het Btw-Wetboek, en in voorkomend geval beperkt overeenkomstig artikel 45, § 2, van het Btw-Wetboek) x (algemeen verhoudingsgetal bepaald overeenkomstig artikel 46, § 1, van het Btw-Wetboek).

Deze problematiek wordt toegelicht in de circulaire AAFisc nr. 36/2015 (nr. E.T. 119.650) van 23.11.2015.

b. Voorbeeld 1: huur van een personenwagen door een belastingplichtige

Een belastingplichtige verricht zowel handelingen waarvoor hij recht op aftrek heeft als handelingen waarvoor hij geen recht op aftrek heeft volgens artikel 44 van het Btw-Wetboek. Voor het uitoefenen van zijn recht op aftrek past hij het stelsel van het algemeen verhoudingsgetal (AVG) toe (artikel 46, § 1, van het Btw-Wetboek).

Wat het AVG betreft worden twee hypotheses vooropgesteld, naargelang het voertuig om niet ter beschikking wordt gesteld (AVG = 60%) of onder bezwarende titel (AVG = 62%).

De belastingplichtige huurt een personenwagen met een maandelijkse kost (inclusief brandstof en onderhoud) van 907,50 euro (750 + 157,50 btw). Deze wagen wordt door de zaakvoerder gebruikt voor zowel beroepsdoeleinden als voor andere doeleinden.

- Hypothesis A: availability for free : professional use is set at 55% (method 1).
  The deductible VAT is calculated as follows (annual basis):
  (157.50 x 12) x 50% (method 1 and Article 45, § 2, first paragraph, of the VAT Code) x 60% (GDPR) = 567 euros.
- Hypothesis B: posting for consideration : in this case the professional use of the taxpayer is complete. For the manager, it is set at 55% (method 1).
  The deductible VAT is calculated as follows (annual basis):
  (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Act) x 62% (AVG) = 585.90 euros.
  The taxable person must pay VAT on the requested compensation. However, since professional use is at least 50%, no normal value should be calculated.

c. Example 2: rental of a passenger car by a taxable person

A taxpayer performs both transactions for which he is entitled to deduct and transactions for which he is not entitled to deduct according to Article 44 of the VAT Code. To exercise his right to deduct, he applies the system of the general ratio number (GDPR) (Article 46, § 1 of the VAT Code).

With regard to the GDPR, two hypotheses are put forward, depending on whether the vehicle is made available for free (GDPR = 60%) or for consideration (GDPR = 62%).

The taxpayer rents a passenger car with a monthly cost (including fuel and maintenance) of 907.50 euros (750 + 157.50 VAT). This car is used by the business manager for both professional and other purposes.

- Hypothesis A: availability for free : professional use is set at 35% (method 3).
  The deductible VAT is calculated as follows (annual basis):
  (157,50 x 12) x 35% (methode 3) x 60% (AVG) = 396,90 euro.
  No VAT is due.
- Hypothesis B: posting for consideration : in this case the professional use of the taxpayer is complete. For the manager, it is set at 35% (method 3).
  The deductible VAT is calculated as follows (annual basis):
  (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Act) x 62% (AVG) = 585.90 euros.
  The taxable person must pay VAT on the requested compensation.
  The normal value can be calculated as follows:
  (750 x 12) x (50% – 35%) x 62% (AVG) = 837 euro.
  The VAT due calculated on the normal value is 175.77 euros.

d. Example 3: purchase of a passenger car by a taxable person

A taxpayer performs both transactions for which he is entitled to deduct and transactions for which he is not entitled to deduct according to Article 44 of the VAT Code. To exercise his right to deduct, he applies the system of the general ratio number (GDPR) (Article 46, § 1 of the VAT Code).

With regard to the GDPR, two hypotheses are put forward, depending on whether the vehicle is made available for free (GDPR = 40%) or for consideration (GDPR = 41%).

In 2013, the taxpayer buys a passenger car for 24,200 euros (20,000 + 4,200 VAT).

This car is used by the business manager for both professional and other purposes. The operating costs amount to 3,025 euros (2,500 + 525 VAT).

- Hypothesis A: availability for free : professional use is set at 35% (method 3).
  The deductible VAT is calculated as follows (annual basis):
  - with regard to the purchase: 4,200 x 35% (method 3) x 40% (AVG) = 588 euros
  - with regard to costs: 525 x 35% (method 3) x 40% (AVG) = 73.50 euros.

  No VAT is due.
- Hypothesis B: posting for consideration : in this case the professional use of the taxpayer is complete. For the manager, it is set at 35% (method 3).
  The deductible VAT is calculated as follows (annual basis):
  - with regard to the purchase: 4,200 x 50% (Article 45, § 2, first paragraph, of the VAT Code) x 41% (GDPR) = 861 euros
  - with regard to costs: 525 x 50% (Article 45, § 2, first paragraph, of the VAT Code) x 41% (GDPR) = 107.63 euros.

  The taxable person must pay VAT on the requested compensation.
  The normal value can be calculated as follows: ((20,000 / 5) + 2,500) x (50% - 35%) x 41% (AVG) = 399.75 euros.
  The VAT due calculated on the normal value is EUR 83.95.

e. Example 4: purchase of a passenger car by a taxable person

Een belastingplichtige verricht zowel handelingen waarvoor hij recht op aftrek heeft als handelingen waarvoor hij geen recht op aftrek heeft (artikel 44 van het Btw-Wetboek). Voor het uitoefenen van zijn recht op aftrek past hij het stelsel van het algemeen verhoudingsgetal (AVG) toe (artikel 46, § 1, van het Btw-Wetboek).

De belastingplichtige koopt in 2013 een personenwagen voor 24.200 euro (20.000 + 4.200 btw).

Deze wagen wordt door de zaakvoerder gebruikt voor zowel beroepsdoeleinden als voor andere doeleinden. De gebruikskosten belopen 3.025 euro (2.500 + 525 btw). Het beroepsgebruik wordt vastgesteld op 35% (methode 3).

In 2013 betaalt de zaakvoerder een vergoeding (zie voorbeeld 3, hypothese B) maar in 2014 wordt de wagen om niet ter beschikking gesteld van de zaakvoerder.

The GDPR for 2013 is 41% and for 2014 40%.

With regard to the VAT consequences for the year 2013, reference is made to example 3, hypothesis B.

Since Article 45, § *1d* , of the VAT Code was not applicable in this hypothesis, private use must be taxed when Article 19, § 1 of the VAT Code is applied.

The taxable person must pay VAT on the expenditure incurred.

The expenses incurred can be calculated as follows:

(20.000 / 5) x (50% – 35%) x 40% (AVG) = 240 euro.

The VAT due calculated on the expenditure incurred is EUR 50.40.

The VAT charged on the costs is deductible up to an amount of 525 x 35% x 40%, or 73.50 euros.

f. Example 5: Purchase of a laptop by a taxpayer

A taxpayer performs both transactions for which he is entitled to deduct and transactions for which he is not entitled to deduct according to Article 44 of the VAT Code. To exercise his right to deduct, he applies the system of the general ratio number (GDPR) (Article 46, § 1 of the VAT Code). The GDPR for 2013 is 60%.

The taxpayer buys a laptop of 968 euros (800 + 168 VAT) that he will not use exclusively for professional purposes. The taxpayer sets the professional use at a flat rate of 75%.

The deductible VAT is calculated as follows (annual basis): 168 x 75% (general fixed amount with regard to movable goods, other than means of transport) x 60% (GDPR) = 75.60 euros.

No VAT is due.

E. Provisional ratio and final ratio

a. Preliminary ratio

For each calendar year, the taxpayer makes the deduction provisionally according to a ratio determined on the basis of the amount of the transactions that were carried out during the previous year (Article 15, first paragraph, of the Royal Decree No 3 , aforementioned).

However, it is possible that such a reference is missing (new company) or not relevant (a company that is considering a major change in the nature of its economic activity).

The provisional ratio is then estimated by the taxable person according to his exploitation prospects (Article 15 (1), second sentence, of Royal Decree No 3 , aforementioned).

b. Definitive ratio

The final ratio is determined on the basis of the actual amount of the transactions performed during the past year. It must be adopted no later than April 20 of the following year (Article 15 aforementioned, second paragraph).

In principle, the definitive ratio for a certain year becomes the provisional ratio for the following year.

Example:

The final ratio for 2017, established in 2018, is the provisional ratio for 2018.

c. Special case

The taxpayer who is obliged to submit monthly returns is not always able to know the final ratio of the previous year, which serves as the provisional ratio for the current year, at the time when he has to submit the returns in respect of the first two months of the year.

In that case he may continue to use the provisional ratio of the previous year, but he must revise the deduction thus made in the declaration concerning the transactions of March to be submitted in April. He then takes into account the final ratio that must then have been determined.

d. Obligations

Ieder verhoudingsgetal moet worden verantwoord in een berekeningsblad waarin alle elementen bedoeld in de artikelen 12 en 13 van het koninklijk besluit nr. 3, voornoemd, in aanmerking genomen voor het bepalen van dat getal, worden opgenomen (zie rubrieken A en C, hiervoor; artikel 15, vierde lid, van het koninklijk besluit nr. 3, voornoemd).

De belastingplichtige dient dat berekeningsblad in bij de daartoe aangewezen dienst, uiterlijk op de datum van het indienen van de aangifte bedoeld in artikel 18, §§ 1 en 2, van het koninklijk besluit nr. 1, voornoemd, waarin dat verhoudingsgetal voor het eerst wordt aangewend. Het berekeningsblad dient te verwijzen naar die aangifte.

F. Herziening van de belasting afgetrokken volgens het algemeen verhoudingsgetal

De aftrek geschiedt in principe onmiddellijk. De gemengde belastingplichtige die het algemeen verhoudingsgetal toepast moet echter in principe elk jaar de afgetrokken btw herzien in functie van de schommelingen van het verhoudingsgetal.

Dit wordt uitvoerig toegelicht in Hoofdstuk 12: Correcties op het recht op aftrek (herzieningen, onttrekkingen en ingebruiknemingen).

4. De aftrek met inachtneming van het werkelijk gebruik van de goederen en diensten

A. Algemeen

De regel van het algemeen verhoudingsgetal kan, door de forfaitaire aard ervan, leiden tot ongelijkheden in de heffing van de belasting, nu eens in het nadeel van de belastingplichtige die ingevolge het verhoudingsgetal de aftrek niet kan verrichten waarop hij recht had indien men rekening houdt met het werkelijk gebruik van de goederen en diensten, dan weer in het voordeel van de belastingplichtige die wegens het algemeen verhoudingsgetal meer kan aftrekken dan het bedrag waarop hij in werkelijkheid recht had gelet op het gebruik van de goederen en diensten.

Daarom kan de administratie aan de belastingplichtige, op zijn verzoek, vergunning verlenen om het recht op aftrek uit te oefenen met inachtneming van het werkelijk gebruik van alle of van een gedeelte van de ontvangen goederen en diensten. Zo de toepassing van het algemeen verhoudingsgetal leidt tot ongelijkheden, kan ze hem overigens verplichten op die wijze te handelen (artikel 46, § 2, van het Btw-Wetboek).

Het is in vele gevallen aangewezen de regel van het werkelijk gebruik toe te passen en het algemeen verhoudingsgetal prijs te geven. Tijdens de parlementaire werkzaamheden die aan de goedkeuring van het Btw-Wetboek zijn voorafgegaan, heeft de Minister van Financiën trouwens verklaard dat de administratie, zo vaak als mogelijk is, gebruik zou moeten maken van de machten die daartoe in artikel 46, § 2, van het Btw-Wetboek zijn ingeschreven (Verslag van de Verenigde Commissies voor Economische Zaken en voor Financiën van de Senaat, Parl. besch., Senaat, zitting 1968-1969, nr. 455, pagina 163).

B. Werkingssfeer van de aftrek met inachtneming van het werkelijk gebruik van de goederen en diensten

a. Aanvraag om toepassing

Iedere belastingplichtige kan voor de toepassing van het stelsel van aftrek volgens het werkelijk gebruik opteren. Hij oefent die optie uit in een stuk dat hij moet indienen bij de afdeling beheer van het Centrum waaronder hij ressorteert.

Voor de belasting geheven van goederen en diensten die uitsluitend voor de sector met recht op aftrek bestemd zijn, oefent hij zijn recht op aftrek uit volgens de regels die gelden voor de volledige belastingplichtige.

Voor de belasting geheven van goederen en diensten die uitsluitend voor de sector zonder recht op aftrek worden bestemd, is alle aftrek uitgesloten.

Voor de belasting die geheven werd van goederen en diensten die hij voor de twee sectoren zal gebruiken, moet hij, in de mate van het mogelijke, bijzondere verhoudingsgetallen vaststellen met betrekking tot dat gebruik (zo zal, bijvoorbeeld, wanneer een onroerend goed voor beide sectoren wordt gebruikt, hij een criterium kunnen aanwenden dat gebaseerd is op de respectievelijk door de sectoren ingenomen oppervlakte). Eventueel kan een bijzonder verhoudingsgetal worden gebruikt dat op dezelfde wijze wordt vastgesteld als het algemeen verhoudingsgetal, dit voor zover de administratie zich daar niet uitdrukkelijk tegen verzet (zie subrubriek b).

b. Verplichte toepassing

The Center to which the taxpayer falls may impose an obligation on him to make the deduction according to the rule of actual use, whenever it is established that the use of the general ratio leads to inequality in the levying of the tax (Article 46, § 2, of the VAT Code). This happens by means of a motivated decision that is notified to the person concerned. The notification states the date from which it takes effect.

This notification will, in principle, always be made when it is established that the deduction according to the general ratio leads to a deduction that is appreciably greater than that which would result from the use of the actual usage rule. In this way, the mixed taxable person would be treated better for his taxable economic activity than a full taxable person who has the same economic activity.

When determining the necessity to make the deduction compulsory according to actual usage, the administration will take into account certain factual circumstances that preclude the preservation, in whole or in part, of the rule of the general ratio.

This is especially the case when:

- the economic activity includes a sector with a right to deduct and a sector clearly distinguishable from it without a right to deduct, and in particular when separate accounts are kept for each sector
- the mixed taxable person, when receiving the goods or providing the services, can easily determine the sector for which those goods and services are intended exclusively, either for the sector with a right of deduction or the sector without a right of deduction
- the general ratio rule cannot be applied as it is difficult or impossible to determine the denominator of the ratio (case of insurance companies carrying out taxable transactions independently of their insurance transactions).

It is therefore appropriate that the taxable persons in such circumstances spontaneously use the system of deduction according to actual use (see subsection b).

In this way, they will avoid the difficulties that an amendment to their deductions would entail if the administration obliged them to do so by notification.

For the public institutions that are subject to value added tax under Article 6 of the VAT Code, the application of the rule of actual use will in any case be imposed officially. In doing so, account is taken of the statements made to that effect in the United Nations Economic Affairs and Finance Committees on the occasion of the preparatory works of the Act of 03.07.1969 introducing the VAT Code (see also circular AAFisc No. 42/2015 (No. ET 125.567) of 10.12.2015).

c. Notification regarding special ratios

The taxpayer applying specific ratios which are backed by actual use have their administration inform . He does this in a document that he must submit to the Center under which he reports. In that document he indicates the criteria that he used in the calculation. That document may be the same as that referred to in subsection a, in which he requests the application of the deduction according to actual use.

C. Relationship between actual use and Article 45, § 1, § 1quinquies and § 2, of the VAT Code

a. General principle

In the event of actual use being applied, the taxpayer must, where applicable, determine his right to deduct by combining the application of Article 46, § 2 of the VAT Code with Article 45, § 1, § *1d* and § 2 , first paragraph, of the VAT Code.

This issue was explained in the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015 .

Specifically, the taxpayer must determine his right to deduct as follows:

- the taxpayer first determines the quality under which he acts when he acquires goods or services and for what purpose they were obtained. In this way, the taxable person determines whether these goods or services are included in his business assets and are therefore subject to the VAT rules or to his private assets , where the VAT rules do not apply.
- the taxpayer must then limit his right to deduct in accordance with Article 45, § 1, § *1d* and § 2, first paragraph, of the VAT Code:
  - first, if necessary, the taxpayer limits his right to deduct to the extent of his professional use in accordance with Article 45, § 1, of the VAT Code or, where applicable, in accordance with Article 45, § *1d* , of the VAT Code
  - the taxpayer then applies, if necessary, Article 45, § 2, first paragraph, of the VAT Code, according to which the delivery, import and intra-Community acquisition of motor vehicles intended for the transport of persons and / or goods by road, and in respect of goods and services related to those vehicles, the deduction may in no case exceed 50% of the tax paid.

    If the professional use of a vehicle intended by Article 45, § 2, first paragraph, of the VAT Code does not exceed 50%, the deduction limitation of the aforementioned Article does not apply. Initially, the right to deduct will be limited to the course of professional use, in accordance with Article 45, § 1, or § *1d* , of the VAT Code.

    However, if professional use exceeds 50%, the deduction restrictions provided for in Article 45, § 1, or § *1d* , and 45, § 2, first paragraph, of the VAT Code must be combined.
- finally, the taxpayer applies the following rules to the result obtained:
  - if the goods and services are used only for the sector which gives a right to deduct, he must not limit his right to deduct

- indien de goederen en diensten uitsluitend worden gebruikt voor de sector die geen recht op aftrek verleent, heeft de belastingplichtige geen enkel recht op aftrek
- indien de goederen en diensten worden gebruikt voor de twee sectoren, moet de belastingplichtige zijn recht op aftrek beperken. De belastingplichtige moet, in de mate van het mogelijke, bijzondere verhoudingsgetallen vaststellen met betrekking tot dat gebruik (zo zal, bijvoorbeeld, wanneer een onroerend goed voor beide sectoren wordt gebruikt, hij een criterium kunnen aanwenden dat gebaseerd is op de respectievelijk door de sectoren ingenomen oppervlakte). Eventueel kan een bijzonder verhoudingsgetal worden gebruikt dat op dezelfde wijze wordt vastgesteld als het algemeen verhoudingsgetal, dit voor zover de administratie zich daar niet uitdrukkelijk tegen verzet.

b. Bijzonder geval: terbeschikkingstelling van een goed onder bezwarende titel

In geval van toepassing van het werkelijk gebruik en de terbeschikkingstelling van een goed onder bezwarende titel, moet de belastingplichtige zijn recht op aftrek als volgt bepalen:

- de belastingplichtige bepaalt eerst de hoedanigheid waaronder hij handelt wanneer hij goederen of diensten verwerft en met welk doel deze werden verkregen. Alzo bepaalt de belastingplichtige of deze goederen of diensten worden opgenomen in zijn bedrijfsvermogen, en bijgevolg onderworpen zijn aan de regels inzake btw, dan wel in zijn privé-vermogen, waar de btw-regels niet van toepassing zijn.
- vervolgens past de belastingplichtige, indien nodig, artikel 45, § 2, eerste lid, van het Btw-Wetboek toe, volgens hetwelk ten aanzien van de levering, de invoer en de intracommunautaire verwerving van autovoertuigen bestemd voor het vervoer van personen en/of goederen over de weg, en ten aanzien van goederen en diensten met betrekking tot die voertuigen, de aftrek in geen geval hoger mag zijn dan 50% van de betaalde belasting.
- tenslotte past de belastingplichtige op het bekomen resultaat de volgende regels toe:
  - het goed wordt uitsluitend gebruikt voor de sector waarvoor recht op aftrek bestaat (zowel voor de terbeschikkingstelling onder bezwarende titel als voor andere handelingen): de belastingplichtige moet zijn recht op aftrek niet beperken
  - anders dan wat de terbeschikkingstelling onder bezwarende titel betreft, het goed wordt uitsluitend gebruikt voor de sector waarvoor geen recht op aftrek bestaat: het bijzonder verhoudingsgetal (BVG) komt in dit geval overeen met het privégebruik van het goed dat onder bezwarende titel wordt ter beschikking gesteld.

    De administratie laat toe dat de gemengde belastingplichtige die zijn recht op aftrek uitoefent volgens de regel van het werkelijk gebruik en die een voertuig uitsluitend gebruikt in de sector zonder recht op aftrek, bij de terbeschikkingstelling van dat voertuig onder bezwarende titel aan een zaakvoerder, bestuurder of een lid van zijn personeel ervoor opteert deze handeling niet aan de belasting te onderwerpen. Dienovereenkomstig verzaakt de belastingplichtige in dat geval aan elk recht op aftrek van btw geheven met betrekking tot dat voertuig. Deze keuze geldt ten aanzien van alle voertuigen die de belastingplichtige in die omstandigheden ter beschikking stelt (circulaire AAFisc nr. 36/2015 (nr. E.T. 119.650) van 23.11.2015, randnummer 189).
  - het goed wordt voor beide sectoren gebruikt: de belastingplichtige past een bijzonder verhoudingsgetal (BVG) toe voor de kosten die in beide sectoren worden gemaakt, bepaald op basis van een raming van het gebruik.

    Het bijzonder verhoudingsgetal wordt als volgt bepaald: % gebruik betreffende de terbeschikkingstelling onder bezwarende titel +((% beroepsmatig gebruik) x (% dat overeenstemt met het gebruik in de belaste sector)).

c. Voorbeeld 1: vervoermiddel waarvoor de aftrekbeperking van artikel 45, § 2, eerste lid, van het Btw-Wetboek van toepassing is

Een belastingplichtige verricht zowel handelingen waarvoor hij recht op aftrek heeft als handelingen waarvoor hij geen recht op aftrek heeft volgens artikel 44 van het Btw-Wetboek. Voor het uitoefenen van zijn recht op aftrek past hij het stelsel van het werkelijk gebruik toe (artikel 46, § 2, van het Btw-Wetboek).

De belastingplichtige huurt een personenwagen met een maandelijkse kost (inclusief brandstof en onderhoud) van 907,50 euro (750 + 157,50 btw). Deze wagen wordt door de zaakvoerder gebruikt voor zowel beroepsdoeleinden als voor andere doeleinden. Het beroepsgebruik wordt vastgesteld op 35% (methode 3).

- Hypothese A: terbeschikkingstelling om niet

  De aftrekbare btw wordt als volgt berekend (jaarbasis) naargelang het voertuig wordt gebruikt hetzij:
  - uitsluitend voor de sector met recht op aftrek: (157,50 x 12) x 35% (methode 3) = 661,50 euro, of
  - uitsluitend voor de sector zonder recht op aftrek: 0 euro, of
  - voor beide sectoren (de belastingplichtige past een bijzonder verhoudingsgetal (BVG) toe van 70% voor de autokosten die in beide sectoren worden gebruikt, bepaald op basis van een raming van het gebruik): (157,50 x 12) x 35% (methode 3) x 70% (BVG) = 463,05 euro

  Er is geen btw verschuldigd.

- Hypothese B: terbeschikkingstelling onder bezwarende titel

  De terbeschikkingstelling onder bezwarende titel van een voertuig is een handeling die wordt ondergebracht in de sector die recht op aftrek verleent. De aftrekbare btw wordt als volgt berekend (jaarbasis) naargelang het voertuig hetzij:
  - is fully used for carrying out taxable transactions (both with regard to the posting and otherwise): (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Code) = 945 euros, or
  - other than with regard to the provision for consideration, is only used for performing non-taxed transactions (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015) . The special ratio (BVG) in this case corresponds to the private use of the vehicle, being 65%: (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Code) x 65 % (BVG) = 614.25 euros, or
  - is used for both sectors (the taxable person applies a special ratio (BVG) of 89.50% (1) for the car costs used in both sectors, determined on the basis of an estimate of the use): (157.50 x 12) x 50% (Article 45, § 2, first paragraph, VAT Code) x 89.50% (BVG) = 845.78 euros

(1) The special ratio is determined as follows: 65% (taxed rental) + 35% (other professional use determined in accordance with method 3) multiplied by the percentage corresponding to use in the taxed sector. In this hypothesis, the professional use of 35% is divided as follows: up to 70% use in the taxed sector with deduction and up to 30% use in the exempt sector without deduction (hypothesis based on parameters determined by the taxpayer). In that case, the BVG is therefore 65% + (35% x 70%) = 89.50%.

The taxable person must pay VAT on the requested compensation.

The normal value can be calculated as follows:

- when the vehicle is used only for taxed operations: (750 x 12) x (50% - 35%) = 1,350 euros
  The VAT due calculated on the normal value is EUR 283.50.
- when the vehicle is used exclusively for the sector without entitlement to deduction, other than as regards making it available for consideration (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11 .2015): the application of the formula referred to in point 3.4.2. of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015 for calculating the normal value in this hypothesis, in connection with the deduction restriction, leads to an unbalanced situation. Consequently, a questionable formula cannot be applied in this hypothesis.
  The taxable person must nonetheless establish normal value.
- when the vehicle is not used exclusively for taxed operations: (750 x 12) x (50% - 35%) x 89.50% (BVG) = 1,208.25 euros
  The VAT due calculated on the normal value is EUR 253.73.

d. Example 2: a means of transport for which the deduction limitation of Article 45, § 2, first paragraph, of the VAT Code applies

A taxpayer performs both transactions for which he is entitled to deduct and transactions for which he is not entitled to deduct (Article 44 of the VAT Code). To exercise his right to deduct, he applies the system of actual use (Article 46, § 2 of the VAT Code).

The taxpayer rents a passenger car with a monthly cost (including fuel and maintenance) of 907.50 euros (750 + 157.50 VAT). This car is used by the business manager for both professional and other purposes. Professional use is set at 55% (method 2).

- Hypothesis A: making available free of charge

  The deductible VAT is calculated as follows (annually) depending on whether the vehicle is used either:
  - only for the sector with a right to deduct: (157.50 x 12) x 50% (method 2 and Article 45, § 2, first paragraph, of the VAT Code) = 945 euros
  - or exclusively for the sector without a right to deduct: 0 euros, or
  - for both sectors (the taxable person applies a special ratio (BVG) of 40% for the car costs used in both sectors, determined on the basis of an estimate of the use): (157.50 x 12) x 50% (method 2 and Article 45, § 2, first paragraph, of the VAT Code) x 40% (BVG) = 378 euros.

  No VAT is due.

- Hypothesis B: making available for consideration

  The making available for consideration of a vehicle is an act which is classified in the sector which grants a right to deduct. The deductible VAT is calculated as follows (annually) depending on the vehicle either:
  - is fully used for carrying out taxable transactions (both with regard to the posting and otherwise): (157.50 x 12) x 50% (Article 45, § 2, first paragraph, VAT Code) = 945 euros, or
  - other than with regard to the provision for consideration, is only used for performing non-taxed transactions (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015) . The special ratio (BVG) in this case corresponds to the private use of the vehicle, being 45%: (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Code) x 45 % (BVG) = 425.25 euros, or
  - is used for both sectors (the taxable person applies a special ratio (BVG) of 67% (2) for the car costs used in both sectors, determined on the basis of an estimate of the use): (157.50 x 12) x 50% (Article 45, § 2, first paragraph, of the VAT Code) x 67% (BVG) = 633.15 euros

(2) The special ratio is determined as follows: 45% (taxed rental) + 55% (other professional use determined in accordance with method 2) multiplied by the percentage corresponding to use in the taxed sector. In this hypothesis, the 55% professional use is divided as follows: up to 40% use in the taxed sector with deduction and up to 60% use in the exempt sector without deduction (hypothesis based on parameters determined by the taxpayer). In that case, the BVG is therefore 45% + (55% x 40%) = 67%.

The taxable person must pay VAT on the requested compensation.

The normal value can be calculated as follows:

- when the vehicle is used only for loaded operations:
  since the professional use is at least 50%, no normal value should be calculated
- when the vehicle is used exclusively for the sector without entitlement to deduction, other than as regards making it available for consideration (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11 .2015): the application of the formula referred to in point 3.4.2. of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015 , for calculating the normal value in this hypothesis, in connection with the deduction restriction , leads to an unbalanced situation. Consequently, a questionable formula cannot be applied in this hypothesis.
  The taxable person must nonetheless establish normal value.

- when the vehicle is not used exclusively for taxed operations:
  since professional use is at least 50%, no normal value should be calculated.

e. Example 3: means of transport for which the deduction limitation of Article 45, § 2, first paragraph, of the VAT Code does not apply

A taxpayer performs both transactions for which he is entitled to deduct and transactions for which he is not entitled to deduct according to Article 44 of the VAT Code. In order to exercise his right of deduction, he applies the system of actual use (Article 46, § 2 of the VAT Code).

The taxpayer buys a fiscal light truck for 54,450 euros (45,000 + 9,450 VAT). This car is used by the business manager for both professional and other purposes. The operating costs amount to 3,025 euros (2,500 + 525 VAT). Professional use is set at 85% (method 4-85%).

- Hypothesis A: making available free of charge

  The deductible VAT is calculated as follows (annually) depending on whether the vehicle is used either:
  - only for the sector with a right to deduct:

    with regard to the purchase: 9,450 x 85% (method 4-85%) = 8,032.50 euros
    with regard to costs: 525 x 85% (method 4-85%) = 446.25 euros, or
  - only for the sector without a right to deduct: 0 euros, or
  - for both sectors (the taxable person applies a special ratio (BVG) of 70% for the car costs used in both sectors, determined on the basis of an estimate of the use):
    with regard to the purchase: 9,450 x 85% (method 4-85%) x 70% (BVG) = 5,622.75 euros
    with regard to the costs: 525 x 85% (method 4-85%) x 70% (BVG) = 312.38 euros

  No VAT is due.

- Hypothesis B: the manager pays a monthly contribution for the provision

  The making available for consideration of a vehicle is an act which is classified in the sector which grants a right to deduct. The deductible VAT is calculated as follows (annually) depending on the vehicle either:
  - is fully used for carrying out taxable transactions (both as regards posting and otherwise):
    with regard to the purchase: 9,450 x 100% (Article 45, § 2, second paragraph, of the VAT Code) = 9,450 euros
    with regard to the costs: 525 x 100% (Article 45, § 2, second paragraph, of the VAT Code) = 525 euros, or
  - other than with regard to the provision for consideration, is only used for performing non-taxed transactions (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11.2015) . The special ratio (BVG) in this case corresponds to the private use of the vehicle, being 15%:
    with regard to the purchase: 9,450 x 100% (Article 45, § 2, second paragraph, of the VAT Code) x 15% (BVG) = 1,417.50 euros
    with regard to costs: 525 x 100% (Article 45, § 2, second paragraph, of the VAT Code) x 15% (BVG) = 78.75 euros, or
  - is used for both sectors (the taxable person applies a special ratio (BVG) of 74.50% (3) for the car costs used in both sectors, determined on the basis of an estimate of the use):
    with respect to the purchase: 9450 x 100% (Article 45 § 2, second paragraph, of the VAT Code) x 74.50% (BVG) = 7040.25 eur
    regarding the cost: 525 x 100% (article 45, § 2, second paragraph, of the VAT Code) x 74.50% (BVG) = 391.13 euros

  (3) The special ratio is determined as follows: 15% (taxed rental) + 85% (other professional use determined in accordance with method 3) multiplied by the percentage corresponding to use in the taxed sector. In this hypothesis, the 85% professional use is divided as follows: up to 70% use in the taxed sector with deduction and up to 30% use in the exempt sector without deduction (hypothesis based on parameters determined by the taxpayer). In that case, the BVG is therefore 15% + (85% x 70%) = 74.50%.

  The taxable person must pay VAT on the requested compensation.
  The normal value can be calculated as follows:
  - when the vehicle is used only for taxed operations:
    (9,000 + 2,500) x (100% - 85%) = 1,725 euros
    The VAT due calculated on the normal value is EUR 362.25.
  - when the vehicle is used exclusively for the sector without entitlement to deduction, other than as regards making it available for consideration (see, however, the comment under marginal 189, of the circular AAFisc no. 36/2015 (no. ET 119.650) of 23.11 .2015): (9,000 + 2,500) x (100% - 85%) = 1,725 euros
    The VAT due calculated on the normal value is EUR 362.25.
  - when the vehicle is not used exclusively for taxed operations:
    (9,000 + 2,500) x (100% - 85%) x 74.50% (BVG) = 1,285.13 euros

    The VAT due calculated on the normal value is EUR 269.88.

D. Revision of the deduction made taking into account actual use

In principle, the deduction is made immediately. However, the mixed taxable person applying the actual use must, in certain cases, revise the deducted VAT.

This is explained in detail in Chapter 12: Corrections to the right to deduct (revisions, withdrawals and commissioning).

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Section 16 - Special rules regarding deduction made by a partial taxable person

1. Definition of a partial taxpayer

A partial taxable person is a taxable person who:

- on the one hand, carries out transactions that fall within the scope of VAT, which confer on him the status of taxable person: these transactions grant a right to deduct insofar as they are not exempt from VAT
- on the other hand, carries out transactions which fall outside the scope of VAT, which do not confer on him the status of taxable person: these transactions do not confer a right to deduct.

2. Absence of a specific legal provision applicable to partial taxable persons

According to the Court of Justice of the European Union, the VAT Directive does not regulate the methods or criteria that Member States must apply when determining provisions for the distribution of input tax paid by a partial taxable person according to whether the corresponding costs relate to economic or non-economic activities (Court of Justice of the European Union, Securenta , Case C-437/06, 13.03.2008, paragraph 33).

Indeed, the rules on the general ratio and actual use provided for in Article 46 of the VAT Code, which transposes Article 173 of Directive 2006/112 / EC, only apply to input tax that reduces costs that related exclusively to economic activities. Those rules do not apply to input tax on costs which are related to economic activities as well as activities other than economic activities (Court of Justice of the European Union, Portugal Telecom, Case C-496/11, 06.09.2012, para. 47).

In other words, the rules on the general ratio and actual use provided for in Article 46 of the VAT Code do not de facto apply to the partial taxable person.

3. Rules applicable to partial taxable persons

The right to deduct partial taxpayers has its legal basis in Article 45, § 1, of the VAT Code, and Article 1 of Royal Decree No. 3 , aforementioned.

Under those provisions, any taxable person may deduct from the tax which he owes the tax levied on the goods supplied and services supplied to him, on the goods imported by him and the intra-Community acquisitions of goods carried out by him , to the extent that he who uses goods and services to perform acts referred to in Article 45, § 1, 1 ° to 5 °, of the VAT Code. It follows that the tax levied on the goods and services supplied to the taxable person concerned can be deducted only to the extent that he uses those goods and services to carry out transactions subject to VAT.

It also follows that for a partial taxable person who carries out both economic and non-economic activities, the value added tax linked to his activities is deductible only to the extent that those costs can be attributed to the economic activity of the taxable person (Judgment of Court of Cassation No. F.12.0082.N of 19.06.2014).

Consequently, to the extent that a partial taxable person carries out transactions which fall within the scope of VAT and other transactions outside the scope of VAT, he must exclude from the deduction the tax charged on the goods and services which relate directly and exclusively to transactions that fall outside the scope of VAT. For the concept of direct and immediate reference is made to Section 2, Title 7.

If it is not possible to designate the goods and services that directly and exclusively relate to transactions outside the scope of VAT, the goods and services are therefore used without distinction and simultaneously for transactions within the scope of VAT and transactions outside the scope of VAT. scope, a special ratio should be determined that takes into account the specific situation of the taxpayer.

In the absence of a relevant way of determining the actual destination of the goods and services, the special ratio can be determined, which is determined in the same way as the general ratio referred to in Article 46, § 1 of the VAT Code.

The method of calculation consists of determining the part of the taxes that relates to transactions outside the scope, by applying a fraction with the numerator as the amount of transactions outside the scope and as denominator the total amount of transactions of the taxpayer. Other special ratios that ensure a more correct application of the deduction can also be accepted by the administration.

According to the case-law of the Court of Justice, it is for the Member States to establish methods and criteria for partial taxable persons to make the necessary calculations, while respecting the principles underlying the common VAT system.

Member States should therefore exercise their discretion to ensure that deduction is possible only for that part of VAT which is proportional to the amount of transactions for which a right to deduct exists. They should therefore ensure that the calculation of the pro rata of economic and non-economic activities reflects objectively what proportion of the costs incurred previously is attributable to each of these two activities.

Member States, in exercising this competence, have the right to use, where appropriate:

- or a distribution key according to the type of investment
- or an allocation key according to the type of action
- or any other appropriate allocation key.

Member States need not limit themselves to one of these methods (Court of Justice of the European Union, Securenta , Case C-437/06, 13.03.2008, paragraphs 32 to 39).

4. Rules applicable to taxable persons who are both partial and mixed taxable persons

Article 46 of the VAT Code only applies when the taxable person carries out transactions which give the right to deduct under Article 45 of the VAT Code in the exercise of his economic activity, as well as other transactions. Thus, this provision does not apply to the breakdown of input tax paid by a partial taxable person according to whether the corresponding amounts relate to economic activities or activities other than economic activities (see Title 3 above).

The partial taxable person who, in the course of his economic activity, carries out both transactions subject to VAT and exempt transactions, and therefore also has the status of mixed taxable person, is therefore required to apply the deduction rules beforehand, in particular those provided for in Articles 46, § 1, of the VAT Code (general ratio) or 46, § 2, of the same Code (actual use of the goods and services), to separate taxes which have a direct and have an exclusive link to acts outside the scope.

Where the taxes in question have no direct and exclusive link with acts outside the scope, but without distinction and at the same time relate to acts outside the scope as well as subject, exempt and within the scope of the scope, the method of calculation may be applied by analogy with the statutory regulation established by Article 46, § 1 of the VAT Code, insofar as the administration does not explicitly oppose this. The method of calculation consists in determining the part of the taxes that relates to transactions within the scope by applying a fraction, the numerator of which is the amount of transactions falling within the scope of VAT and the denominator is the total amount of transactions of the taxpayer.

Op het deel van de belastingen die een rechtstreekse en uitsluitende band hebben met de handelingen binnen de werkingssfeer, onderworpen en vrijgesteld, alsook op het deel van de belastingen met betrekking tot de handelingen binnen de werkingssfeer, onderworpen en vrijgesteld, bepaald overeenkomstig voorgaand lid, moet de gemengde belastingplichtige de regels inzake aftrek voorzien in artikel 46, § 1, van het Btw-Wetboek (algemeen verhoudingsgetal) of 46, § 2, van het Btw-Wetboek (werkelijk gebruik van goederen en diensten) toepassen. Voor de toepassing van artikel 46, § 1, van het Btw-Wetboek, mag het algemeen verhoudingsgetal geen bedrag bevatten dat betrekking heeft op handelingen buiten de werkingssfeer, noch in de teller, noch in de noemer.

[Inhoudstafel van dit hoofdstuk] - [Inhoudstafel van de Btw-Commentaar]

Afdeling 17 - De invloed van subsidies op het recht op aftrek

Het begrip subsidie kan worden omschreven als een door de Staat of door een rechtstreeks of onrechtstreeks door de Staat gesteunde openbare of private rechtspersoon verleende geldelijke hulp aan een fysieke persoon of een rechtspersoon, onder het beding dat de aanwending van de ontvangen gelden moet worden verantwoord en dat een toezicht op het gebruik ervan moet uitgeoefend kunnen worden. De subsidie is dus een door de Staat of door een door de Staat gesteunde rechtspersoon verleende geldelijke tussenkomst aan een persoon, voor het financieren van werkzaamheden waarvan geoordeeld wordt dat ze nuttig zijn voor het algemeen welzijn (schriftelijke parlementaire vraag nr. 300 van de heer Volksvertegenwoordiger Richard Fournaux van 23.02.1996).

1. Indeling van subsidies

Ofschoon een indeling van subsidies nergens, noch in het Btw-Wetboek, noch in de btw-richtlijn, wordt teruggevonden, wordt algemeen aangenomen dat er drie categorieën bestaan:

- subsidies die rechtstreeks met de prijs verband houden
- werkingstoelagen
- schijnsubsidies.

A. Subsidies die rechtstreeks verband houden met de prijs

De ‘subsidies die rechtstreeks verband houden met de prijs’ behoren tot de maatstaf van heffing van de handelingen waarop ze betrekking hebben.

Overeenkomstig artikel 26, eerste lid, van het Btw-Wetboek wordt voor de leveringen van goederen en de diensten de belasting berekend over alles wat de leverancier of de dienstverrichter als tegenprestatie verkrijgt of moet verkrijgen van degene aan wie het goed wordt geleverd of de dienst wordt verstrekt, of van een derde, met inbegrip van de subsidies die rechtstreeks met de prijs van die handelingen verband houden.

Deze bepaling is de omzetting in Belgisch recht van artikel 73 van de richtlijn 2006/112/EG en, vóór 01.01.2007, van artikel 11, A, lid 1, punt a), van de Zesde richtlijn 77/388/EG.

Bij de 'subsidies die rechtstreeks verband houden met de prijs' bestaat er een driehoeksrelatie tussen (Hof van Justitie van de Europese Unie, Arrest Keeping Newcastle Warm, zaak C-353/00, van 13.06.2002; Hof van Justitie van de Europese Unie, Arrest Rayon d'Or, zaak C-151/13, van 27.03.2014) :

- de overheid die de subsidie toekent
- degene die de subsidie geniet
- de ontvanger van het goed of de dienst, respectievelijk geleverd of verstrekt door degene die de subsidie geniet

De beoogde handelingen zijn niet deze die worden verricht ten behoeve van de overheid die de subsidie verleent.

Het enkele feit dat een subsidie invloed zou kunnen hebben op de prijs van door het gesubsidieerde orgaan geleverde goederen of verrichte diensten volstaat niet om deze subsidie belastbaar te maken.

Opdat de subsidie behoort tot de belastbare basis, moet zij rechtstreeks verband houden met de prijs. Het Hof van Justitie van de Europese Unie heeft de kenmerken geformuleerd van de subsidies die rechtstreeks verband houden met de prijs in de zaak 'Office des Produits Wallons' (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001). Volgens het Hof moet deze rechtstreekse band tussen de subsidie en de prijs duidelijk blijken uit een onderzoek van de concrete omstandigheden die aan de basis van de betaling van deze tegenprestatie liggen.

In dit verband heeft het Hof volgende punten aangehaald:

- het enkele feit dat een subsidie invloed kan hebben op de prijs van door het gesubsidieerde orgaan geleverde goederen of verrichte diensten volstaat niet. De subsidie moet specifiek aan het gesubsidieerde orgaan worden betaald om een welbepaald goed te leveren of een welbepaalde dienst te verrichten (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 12). Om na te gaan of de subsidie een dergelijke tegenprestatie vormt:
  - dient de grondslag van de prijs van het goed of de dienst uiterlijk op het ogenblik dat het belastbaar feit plaatsvindt, te worden bepaald
  - tevens moet worden vastgesteld dat de verbintenis tot betaling van de subsidie, die is aangegaan door degene die ze toekent, meebrengt dat de begunstigde recht heeft op betaling ervan zodra hij een belastbare handeling heeft gesteld (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 13)
- de kopers van het goed of de ontvangers van de dienst halen voordeel uit de aan het gesubsidieerde orgaan toegekende subsidie. Het is immers noodzakelijk, dat de door de koper of de ontvanger te betalen prijs aldus is vastgesteld, dat hij daalt naargelang van de aan de verkoper van het goed of de dienstverrichter toegekende subsidie. In dit verband zal moeten onderzocht worden, of het feit dat de verkoper of de dienstverrichter een subsidie ontvangt, hem objectief gezien in staat stelt het goed te leveren of de dienst te verrichten tegen een lagere prijs dan hij zonder de subsidie zou dienen te vragen (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 14).
- er moet nagegaan worden of voor elke actie een specifieke en identificeerbare betaling gebeurt, dan wel of de subsidie globaal wordt gestort ter dekking van het geheel van de werkingskosten. In ieder geval zal enkel het gedeelte van de subsidie dat als tegenprestatie van een belastbare handeling kan worden geïdentificeerd, in voorkomend geval aan de btw kunnen worden onderworpen (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 15). Om na te gaan of de door de subsidie vertegenwoordigde tegenprestatie bepaalbaar is, kan de verkoopprijs van de betrokken goederen vergeleken worden met hun normale kostprijs, dan wel kan onderzocht worden of het subsidiebedrag verlaagd is wegens het uitblijven van de productie van de goederen (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 17).

Indien het resultaat van het onderzoek significant is, zal de conclusie moeten luiden dat het voor de productie en de verkoop van het goed bestemde deel van de subsidie een „*rechtstreeks met de prijs verband houdende subsidie*' is. Daarvoor is niet nodig dat het subsidiebedrag precies overeenstemt met de prijsvermindering van het geleverde goed, het volstaat dat het verband tussen de prijsvermindering en de genoemde subsidie, die forfaitair kan zijn, significant is (Hof van Justitie van de Europese Unie, Arrest Office des produits wallons ASBL, zaak C-184/00, van 22.11.2001, punt 17).

Voorbeeld:

Een gespecialiseerde onderneming, die door de overheid wordt belast met het maken van een studie die de burgers kan interesseren en die derhalve met dit doel in de vorm van een brochure moet worden gepubliceerd, ontvangt van de overheid 1,06 euro per brochure die zij verkoopt (hetzij 1 euro + 0.06 euro btw). Wanneer de aan de kopers gevraagde prijs 1,50 euro exclusief btw per brochure bedraagt, zal de btw verschuldigd zijn over: 1,50 euro + 1 euro (uitgezonderd indien anders vermeld, vormt de subsidie een bedrag btw inclusief) = 2,50 euro.

B. Werkingstoelagen

De werkingstoelagen dekken een gedeelte van de exploitatiekosten van de belastingplichtige, zoals investeringstoelagen en -bijdragen in de algemene onkosten of lopende uitgaven (personeelskosten ...). Zij worden gestort zonder enige verbintenis van degene die de toelage ontvangt, een bepaalde handeling te verrichten (levering van goederen of verstrekken van diensten).

Bij gebrek aan een werkelijke tegenprestatie voor een handeling, vormen deze toelagen geen rechtstreekse band met een bepaalde of bepaalbare handeling en behoren derhalve niet tot de maatstaf van heffing van de btw. Deze toelagen kunnen niet afzonderlijk worden aangemerkt als de prijs van een handeling en komen dus slechts onrechtstreeks de

verbruiker ten goede (schriftelijke parlementaire vraag nr. 300 van de heer Volksvertegenwoordiger Richard Fournaux van 23.02.1996).

Since operating allowances cover part of the operating costs, they almost always have an impact on the cost of the goods and services supplied by the subsidized body. This body will normally be able to do this at a price that it would not be able to charge if it had to both pass on its costs and make a profit (Court of Justice of the European Union, Office des produits wallons ASBL, Case C -184/00, of 22.11.2001, point 11).

It is noted, however, that the mere fact that a subsidy may affect the price of goods or services supplied by the subsidized body is not sufficient to make the subsidy taxable (Court of Justice of the European Union, Office des produits judgment wallons ASBL, Case C-184/00, 22.11.2001, point 12).

C. Illegal subsidies

The term 'apparent subsidies ' is used in practice to denote the sums paid by a public-law entity as compensation for the supply of goods or a service for the public-law entity itself.

While the 'subsidies directly related to the price' have a triangular relationship, the apparent subsidies only relate to:

- the supplier of the good or the service provider
- the government that obtains the good or service.

In that case, there is a direct link between the amount deposited and the interest of the good or service provided, so that the amount constitutes the 'price' of an act subject to tax. This therefore forms part of the taxable amount within the meaning of Article 26 (1) of the VAT Code. It is therefore inappropriate to use the word 'subsidy' in this context.

The Court of Justice of the European Union shares this view.

2. Extent of the right to deduct the subsidized taxable person

The influence of the subsidies on the subsidized taxpayer's right to deduct depends on the tax status of the latter. In this context, a first distinction should be made according to the taxpayer:

- an ordinary taxable person: according to the case law of the Court of Justice, the receipt of a subsidy by a taxable person with full right of deduction does not affect the right to deduct such a taxable person. This is so even if a different interpretation would better safeguard the balance of competition and therefore the principle of neutrality of VAT (Court of Justice of the European Union, Commission v Spain, Case C-204 / 03, 06.10.2005, paragraphs 25 and 28 ; Court of Justice of the European Union, Commission judgment against France, case C-243/03, 06.10.2005, paragraph 36).
- is a mixed or partial taxable person: the subsidies may affect the right to deduct the mixed or partial taxable person depending on the nature of the subsidy.

It should also be noted that the receipt of subsidies in itself cannot lead to a mixed or partial tax liability. Indeed, the receipt of subsidies does not change the nature of the transactions carried out by the taxable person (taxable transactions, exempt transactions or transactions outside the scope of VAT).

A. Grants directly related to the price

Grants directly related to the price affect the right to deduct in the same way as any price paid in return for transactions performed.

a. The subsidized taxpayer is a regular taxpayer

The receipt of a subsidy by a taxable person with a full right to deduct does not affect that taxable person's right to deduct (Court of Justice of the European Union, Commission judgment against Spain, Case C-204/03, 06.10.2005, paragraphs 25 and 28 ; Court of Justice of the European Union, Commission judgment against France, case C-243/03, 06.10.2005, paragraph 36).

These taxpayers therefore retain a full right of deduction.

b. The subsidized taxpayer is an exempt taxpayer

Receiving a subsidy from an exempt taxpayer does not affect the taxpayer's right to deduct.

Consequently, this taxable person is not entitled to deduction.

c. The subsidized taxpayer is a mixed taxpayer

Article 46 of the VAT Code provides the mixed taxpayer with two ways to exercise his right to deduct:

- in principle, the mixed taxpayer applies the rule of the general ratio provided for in Article 46, § 1, of the VAT Code: the tax levied on the goods and services used for its economic activity is deductible in proportion to the breakage formed by the amount of transactions for which a deduction exists (numerator) and the total amount of transactions performed by the person concerned (denominator)

  The application of the general ratio means that:

- wanneer de subsidie rechtstreeks verband houdt met de prijs van een aan de btw onderworpen handeling waarvoor aanspraak op aftrek bestaat, de subsidie moet opgenomen worden in de teller en de noemer van het algemeen verhoudingsgetal. Het algemeen verhoudingsgetal wordt bijgevolg groter.
- wanneer de subsidie rechtstreeks verband houdt met de prijs van een van de btw vrijgestelde handeling waarvoor geen recht op aftrek bestaat, de subsidie alleen moet opgenomen worden in de noemer van het algemeen verhoudingsgetal. Het algemeen verhoudingsgetal wordt bijgevolg kleiner.

- in afwijking van de regel van het algemeen verhoudingsgetal kan door de administratie aan de belastingplichtige, op zijn verzoek, vergunning worden verleend om het recht op aftrek uit te oefenen met inachtneming van het werkelijk gebruik van de goederen en diensten of een deel daarvan. De belastingplichtige kan door de administratie worden verplicht op die wijze te handelen, wanneer de aftrek volgens de regel van het algemeen verhoudingsgetal leidt tot ongelijkheid in de heffing van de belasting (artikel 46, § 2, van et Btw-Wetboek).

  De toepassing van het werkelijk gebruik heeft tot gevolg dat:
  - wanneer de subsidie rechtstreeks verband houdt met de prijs van een handeling die uitsluitend behoort tot de belastbare sector waarvoor recht op aftrek bestaat, of uitsluitend tot de vrijgestelde sector waarvoor geen recht op aftrek bestaat, de subsidie geen invloed heeft op het recht op aftrek van de belastingplichtige
  - wanneer dankzij die subsidie goederen en diensten worden verkregen bestemd om te worden gebruikt voor beide sectoren, moet de belastingplichtige in de mate van het mogelijke een bijzonder verhoudingsgetal bepalen in functie van de bestemming. Hij zal eventueel een bijzonder verhoudingsgetal vaststellen, bepaald zoals het algemeen verhoudingsgetal, behoudens uitdrukkelijk verzet van de administratie. Terzake wordt verwezen naar hetgeen uiteengezet werd betreffende het algemeen verhoudingsgetal.

B. Werkingstoelagen

a. De gesubsidieerde belastingplichtige is een gewone belastingplichtige

Het ontvangen van een werkingstoelage door een belastingplichtige met volledig recht op aftrek heeft geen invloed op het recht op aftrek van deze belastingplichtige (Hof van Justitie van de Europese Unie, Arrest Commissie tegen Spanje, zaak C-204/03, van 06.10.2005, punten 25 en 28; Hof van Justitie van de Europese Unie, Arrest Commissie tegen Frankrijk, zaak C-243/03, van 06.10.2005, punt 36).

Deze belastingplichtigen behouden bijgevolg een volledig recht op aftrek.

b. De gesubsidieerde belastingplichtige is een vrijgestelde belastingplichtige

Het ontvangen van een werkingstoelage door een vrijgestelde belastingplichtige heeft geen invloed op het recht op aftrek van deze belastingplichtige.

Deze belastingplichtige heeft bijgevolg geen recht op aftrek.

c. De gesubsidieerde belastingplichtige is een gemengde belastingplichtige

Het ontvangen van een werkingstoelage door een gemengde belastingplichtige heeft geen invloed op het recht op aftrek van deze belastingplichtige.

Artikel 46 van het Btw-Wetboek voorziet voor de gemengde belastingplichtige twee manieren om zijn recht op aftrek uit te oefenen:

- in principe past de gemengde belastingplichtige de regel van het algemeen verhoudingsgetal voorzien in artikel 46, § 1, van het Btw-Wetboek toe

  The operating allowances should not be included in the general ratio. Indeed, Belgium has until now had the option offered to Member States by Article 174 (1) of Directive 2006/112 / EC to adjust the amount of subsidies other than those directly linked to the price of goods or services related, envisaged in Article 73 of the said Directive, to be included in the heading of the ratio, not transposed into its legislation (Written Parliamentary Question No 314 by Mrs Senator Clotilde Nyssens of 22.12.1999).

  Consequently, receiving operating allowances does not affect the taxpayer's right to deduct.
- By way of derogation from the general ratio rule, the administration may, at its request, authorize the taxable person to exercise the right of deduction taking into account the actual use of the goods and services or part thereof. The taxpayer can be obliged by the administration to act in this way, if the deduction according to the rule of the general ratio leads to inequality in the levying of the tax (Article 46, § 2 of the VAT Code).

  The application of actual use means that:
  - for the taxation of the goods and services intended exclusively for the sector for which a deduction exists, the subsidy does not affect the taxpayer's right to deduct
  - for the taxation of the goods and services intended exclusively for the sector for which there is no right to deduct, the subsidy has no influence whatsoever on the taxpayer's right to deduct
  - for the taxation of the goods and services intended for both sectors, the taxpayer must, as far as possible, determine a special ratio according to the destination (for example, when a property is used for both sectors, he can use a criterion based on the area occupied by the sectors respectively). Optionally, a special ratio can be used that is determined in the same way as the general ratio, insofar as the administration does not explicitly oppose this. In this respect reference is made to what has been explained above regarding the application of the general ratio.

d. The subsidized taxpayer is a partial taxpayer

The rules on deduction provided for in Article 46 of the VAT Code (general ratio and actual use) do not apply to partial taxable persons (Court of Justice of the European Union, Portugal Telecom, Case C-496/11, of 06.09.2012, point 47).

The rules on deduction for partial taxpayers are only contained in Article 45, § 1 of the VAT Code and Article 1 of Royal Decree No 3, aforementioned. Under these provisions, a partial taxable person may deduct VAT on his transactions only to the extent that it is charged on costs attributable to his economic activity. A partial taxable person is therefore bound to exclude any right of deduction from the tax levied on the goods and services which directly and exclusively relate to transactions falling outside the scope of VAT. Where it is possible to identify the goods and services directly and exclusively relating to transactions outside the scope of VAT and to exclude any right to deduct VAT charged on those goods and services, no account should be taken of the operating allowances.

If, on the other hand, it is not possible to designate the goods and services which directly and exclusively relate to transactions outside the scope of VAT and the goods and services are thus used without distinction and simultaneously for transactions within the scope and transactions outside the scope, a special ratio should be determined that takes into account the specific situation of the taxpayer.

According to the Securenta judgment of the Court of Justice, Member States must exercise their discretion in ensuring that deduction is possible only for the part of VAT which is proportional to the amount of transactions for which a right to deduct exists. They should therefore ensure that the calculation of the pro rata of economic and non-economic activities reflects objectively what proportion of the costs incurred previously is attributable to each of these two activities.

Member States, in exercising this competence, have the right to use, where appropriate:

- or a distribution key according to the type of investment
- or an allocation key according to the type of action
- or another suitable distribution key.

Member States need not limit themselves to one of these methods (Court of Justice of the European Union, Securenta , Case C-437/06, 13.03.2008, paragraphs 32 to 39).

In the absence of a relevant way of determining the actual destination of the goods and services, a special ratio can be determined that is determined in the same way as the general ratio referred to in Article 46, § 1 of the VAT Code.

According to the Minister of Finance, in certain special cases, the principle of proportionality between taxable transactions and the related deductible input tax, as required by the VAT Directive, means that the subsidies must be included in the denominator of the special ratio.

This is particularly the case when operating allowances, which cannot be considered as the consideration of the supply of goods or services, are awarded to an activity that does not produce output.

By way of example, the case is taken where a taxable person, on the one hand, carries out taxable transactions and, on the other hand, carries out studies of general interest for which he receives operating grants from the government (for example, studies of general interest whose results will not be commercialized, which are published by the government and can be used by anyone for no consideration).

In such studies of general interest, conducted in the aforementioned circumstances, which do not exist in an economic activity within the meaning of the VAT Code, the tax deducted on the goods and services used for these activities must be: be excluded.

It is therefore necessary to take into account the importance of non-taxable transactions, which do not allow a right to deduct, to include the amount of subsidies granted in the denominator of the special ratio (Parliamentary Written Question No 314 of Ms Senator Clotilde Nyssens of 22.12.1999).

Het Hof van Cassatie heeft zich aangesloten bij dit standpunt. Het Hof heeft beslist dat de aftrek van de voorbelasting door een gedeeltelijke belastingplichtige die subsidies ontvangt voor activiteiten die niet belastbaar zijn op grond van het Btw-Wetboek en die volledig bekostigd worden door de subsidies, overeenkomstig artikel 45, § 1, van het Btw-Wetboek en artikel 1 van het koninklijk besluit nr. 3, voornoemd, kan worden bepaald aan de hand van een verdeelsleutel waarbij in de teller de totale ontvangsten zijn opgenomen die aan de btw onderworpen zijn en waarbij in de noemer de totale omzet is opgenomen, inclusief de subsidies (Arrest van het Hof van Cassatie nr. F.12.0082.N van 19.06.2014).

C. Schijnsubsidies

Er wordt verwezen naar de regels uiteengezet in rubriek A, hiervoor, die *mutatis mutandis* van toepassing zijn.

3. Invloed van subsidies op het recht op aftrek van belastingplichtigen bedoeld in artikel 6 van het Btw-Wetboek

De door publiekrechtelijke lichamen verrichte handelingen kunnen als volgt worden onderverdeeld:

- handelingen die buiten de toepassingssfeer van het Btw-Wetboek vallen (zowel de handelingen verricht als overheid als deze die gratis worden verricht) waarvoor het betrokken publiekrechtelijk lichaam niet de hoedanigheid van btw-belastingplichtige heeft
- handelingen die het publiekrechtelijk lichaam de hoedanigheid van belastingplichtige toekennen maar die evenwel van de belasting zijn vrijgesteld overeenkomstig de bepalingen van artikel 44 van het Btw-Wetboek
- belaste handelingen (handelingen 'verricht als overheid' die hetzij leiden tot concurrentieverstoring van enige betekenis, hetzij handelingen beoogd door artikel 6, derde lid, van het Btw-Wetboek in de mate dat zij niet van onbeduidende omvang zijn).

Overeenkomstig de bepalingen van artikel 45, § 1, van het Wetboek mag een publiekrechtelijk lichaam de belasting geheven van de aan hem geleverde goederen en verleende diensten, van de door hem ingevoerde goederen en de door hem verrichte intracommunautaire verwervingen van goederen in aftrek brengen, in de mate dat hij die goederen en diensten gebruikt voor het verrichten van handelingen die onderworpen zijn aan de belasting over de toegevoegde waarde.

Derhalve verlenen enkel de belaste handelingen recht op aftrek van de voorbelasting.

Het voorgaande in acht genomen kan de regel van het algemeen verhoudingsgetal, door de forfaitaire aard ervan, leiden tot ongelijkheden in de heffing van de belasting, nu eens in het nadeel van het publiekrechtelijk lichaam dat ingevolge het algemeen verhoudingsgetal de aftrek niet kan verrichten waarop hij recht had indien men rekening houdt met het werkelijk gebruik van de goederen en diensten, dan weer in het voordeel van het publiekrechtelijk lichaam dat wegens het algemeen verhoudingsgetal meer kan aftrekken dan het bedrag waarop hij in werkelijkheid recht had gelet op het gebruik van de goederen en diensten.

Rekening houdend met de specifieke omstandigheden waarin publiekrechtelijke lichamen handelen dienen zij het recht op aftrek uit te oefenen met inachtneming van het werkelijk gebruik (zie artikel 46, § 2, van het Btw-Wetboek), in voorkomend geval, in combinatie met een bijzonder verhoudingsgetal voor de niet specifiek toewijsbare kosten (hierna algemene kosten genoemd).

Therefore, the relevant public-law entity can exercise its right to deduct in accordance with the provisions of Article 45, § 1, of the VAT Code only in proportion to the transactions for which a right to deduct exists. As regards general costs which, without distinction, relate both to transactions which confer a right to deduct and to those which do not confer a right to deduct, a special ratio should be established on the basis of which the deduction of VAT in respect of these mixed costs is as far as possible is exercised in accordance with the destination principle of the goods and services used and in accordance with the neutrality principle of VAT.

This special ratio may be calculated, in the absence of a more appropriate method, by analogy with the general ratio, where it may be necessary to take into account the subsidies received which are directly related to the price of the transactions as envisaged by the provisions of Article 26 of the VAT Code.

In any event and in order to take into account that the activities carried out free of charge by the public sector body do not confer a right to deduct and, moreover, do not generate a turnover figure that can be included in the denominator of this ratio, it is appropriate to set the amount of the operating allowances. specifically intended for those actions to be included in this denominator.

Examples:

Below are two examples to clarify how the special ratio can be calculated. For didactic reasons, the number of activities performed by a municipality will be limited to the number strictly necessary to assist in the elaboration of the example:

- A municipality has two activities: on the one hand issuing official documents (identity cards, travel passes, driving licenses ...) for which it is designated as a non-taxable person in accordance with Article 6 (1) of the VAT Code and for which it collects a fee by collecting fees. turnover 'of 20,000 euros. On the other hand, this municipality carries out taxed passenger transport as referred to in Article 6, third paragraph, of the VAT Code for a total amount of 30,000 euros for which it is thus regarded as a taxable person. Finally, this municipality has office costs that relate to both activities. The special ratio in this example is calculated by analogy with the general ratio.
  - no right to deduct input tax from costs incurred for the issue of official documents (Article 45, § 1, of the VAT Code; reason: the municipality is not taxable for this activity)
  - right to deduct input tax of costs incurred for the provision of passenger transport services (Article 45, § 1, of the VAT Code; reason: the municipality is subject to tax for this activity)
  - office costs are deductible for 60% (by analogy with Article 46, § 2 of the VAT Code; special ratio = ((30,000 / (20,000 + 30,000)) x 100% = 60%).
- Same situation as example 1, but the municipality in question also organizes a cultural festival that is free of charge for visitors and receives a working allowance of 50,000 euros from the higher government competent for culture (*in this case* the Communities). The office costs mentioned in example 1 now relate to all three activities. The special ratio in this example is calculated by analogy with the general ratio.
  - no right to deduct input tax of costs incurred for the organization of the festival which is accessible free of charge (Article 2 of the VAT Code; no activity subject to VAT)
  - no right to deduct input tax from costs incurred for the issue of official documents (Article 45, § 1, of the VAT Code; reason: the municipality is not taxable for this activity)
  - right to deduct input tax of costs incurred for the provision of passenger transport services (Article 45, § 1, of the VAT Code; reason: the municipality is subject to tax for this activity)
  - office costs are deductible for 30% (by analogy with Article 46, § 2 of the VAT Code; special ratio = ((30,000 / (20,000 + 30,000 + 50,000)) x 100% = 30%).

However, it should be noted that it will not be necessary to take these operating allowances into account when determining the relevant special ratio, when determining the special ratio taking into account objective criteria specific to the goods and services concerned, depending on their effective use (for example for a car vehicle, a ratio determined according to the useful life, for a building, a ratio determined according to the area spent on the respective activities). The amount of operating bonuses received is therefore without influence.

However, these are factual matters that must be assessed by the administration on a case-by-case basis.

See also circular AAFisc No. 42/2015 (no. ET125.567) dated. 10.12.2015 .

4. Influence of subsidies on the right to deduct autonomous municipal companies

The fact that an institution receives operating subsidies does not in itself affect the application of the exemptions referred to in Article 44, § 2, 3 °, 4 °, a), 6 °, 7 ° and 9 ° of the VAT Code.

The granting of operating grants may prove that the institution or establishment itself does not have sufficient resources to cover its expenditure, in other words that its revenue itself is not sufficient to cover its operating costs. It follows that the granting of operating subsidies may indicate that there is no profit motive (Written Parliamentary Question No 1.320 by Mr People's Representative Stef Goris of 12.06.2006).

The then Minister in charge of the Modernization of Finance and the Fight against Tax Fraud added to the Minister of Finance has clarified the scope of this ministerial answer. It emerges from that answer that, according to normal rules, the tax liability with a right to deduct input tax cannot be disputed for autonomous municipal companies that have not taken the form of an nv or an bvba and that have an establishment intended by Article 44, § 2, 3 °. , of the VAT Code (*mutatis mutandis* article 44, § 2, 4 °, a), 6 °, 7 ° and 9 °, of the VAT Code) , which according to the articles of association show that they are for profit and that they aim to distribute profit (oral parliamentary question No. 519 by Mr Representative Jan Peeters of 11 December 2007).

In an answer to a parliamentary question, the Minister of Finance has further clarified that autonomous municipal companies that have not taken the form of an NV or an SPRL and that are developing activities whose exemption depends on the lack of profit motive, outside the scope of the relevant exemption if their statutes provide that any profits will be distributed to members and that this actually happens (written parliamentary question No. 842 by Ms deputy representative Valérie Warzée-Caverenne , 02.04.2014).

See also decision no. ET129.288 of 19.01.2016 .

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