



VAT alert Belgium

Autonomous
Municipal
Companies and
the “for-profit”
notion: new
administrative
clarification

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In an administrative decision (nr. E.T.129.288 of 19 January 2016, to be published), the VAT administration provided additional clarification regarding the assessment of the notion “for-profit” with respect to autonomous municipal companies (AMC’s) whose activities are eligible for an exemption as per article 44 of the VAT Code. This additional clarification has been issued after a new investigation by the VAT authorities and has to provide legal certainty to AMC’s in relation to potential audits, amongst others. Below is an overview of the most important topics and clarifications included in the administrative decision.

Starting point: an AMC is a VAT taxable person with a right to deduct

The starting point is and remains that AMC’s must be considered as normal VAT taxable persons and are consequently not subject to the rules applicable to public bodies as referred to in article 6 of the VAT Code. With respect to the rules applicable on public bodies, reference is made to the [VAT alert of 20 January 2016](#). Consequently, AMC’s have to charge VAT on the price they receive for goods and services supplied and have a right to deduct the VAT incurred on costs with respect to these taxable transactions.

VAT-exemptions applicable on institutions with non-profit aim

The abovementioned starting point does not apply to the supply of goods and services that are exempt from VAT on the basis of article 44 of the VAT Code. In that situation, the AMC cannot charge VAT nor deduct VAT on costs incurred with respect to these transactions. In the context of AMC’s, the VAT exemptions mentioned in article 44, §2, 3°, 6° and 7° of the VAT Code are relevant. These exemptions concern the exploitation of sport infrastructure, libraries and museums, among others. The application of these exemptions on AMC’s is nevertheless subject to two cumulative conditions. On the one hand, the AMC must qualify as an “institution with non-profit aim” and on the other, the AMC “must use the revenues of the exempt activity exclusively to cover the costs of this activity”.

Current points of view regarding profit making aim

The decision repeats that an AMC has no profit-making aim when, taking into account all of its activities, it does not aim to make profit in view of distributing this profit.

A first indication can be found in the bylaws of the AMC. Initially it was accepted that an AMC had a profit-making aim when this was mentioned as such in the bylaws and when the bylaws also mentioned that potential profits would be distributed to the municipality.

In 2014, in an answer to a parliamentary question (Parl. Question number 842 WARZEE-CAVERENNE of 02/04/2014, Vr. en Ant. Kamer, 2013-2014, number 53/161, 95) it was clarified that, besides the abovementioned statutory clauses, an actual distribution of profit by the AMC to the municipality is necessary for an AMC to have a profit making aim. Consequently, the VAT administration can investigate whether the clauses in the bylaws are not merely theoretical, in which case the VAT exemption can still apply.

At the end of last year, in a answer to a parliamentary question (Parl. Question number 481 DISPA of 16/07/2015, Vr. en Ant. Kamer, 2015-2016, number 52, 284)

it was stated that this will be the case when systematic deficits occur at AMC level because the prices charged to the customers are not sufficient to cover the AMC's exploitation costs. The operational result of the AMC's global activity must thereby be taken into account. The response to the parliamentary question stated in this respect that:

- Taking into account the close connection between the AMC and the municipality, general operating subsidies which the municipality puts at the disposal of the AMC cannot be seen as revenues of the AMC. Therefore, these general operating subsidies cannot be deducted from the costs in order to determine the accounting result;
- The subsidies granted by the municipality to the AMC which have a direct connection with the price (price subsidies) and which are part of the taxable base for VAT can be added to other revenues from a certain activity in order to determine whether or not the clauses in the bylaws regarding the profit-making aim and the profit distribution are of a theoretical nature.

Legal certainty for the past

The decision has the merit that it clarifies that decisions by the Ruling commission which were granted in the past and which allowed general operating subsidies to be taken into account for the determination of the profit-making aim remain valid. The AMC's who have obtained such a decision retain legal certainty regarding the position taken "under the terms of the individual decision and in case the circumstances correspond to those of the application but only, if applicable, for the validity period of the individual decision." Although not stated explicitly, this principle is also applicable to decisions issued by local VAT offices and the central VAT administration.

Guidelines for the future

According to the decision, in order to determine whether or not the profit-making aim is of a theoretical nature, going forward, an AMC will have to start from the accounting result (write-offs, provisions,... included) of the AMC's global activity, whereby price subsidies can be taken into account for the determination of revenues. According to the decision, these price subsidies can be determined or amended during the financial year but only for the future (not for the past). Subsequently, the accounting result of the AMC must be corrected in order to exclude received general operating subsidies, exceptional revenues (e.g. the income of immovable and financial transactions) and exceptional costs.

If, based on the aforementioned exercise, it is clear that there are no systematic deficits for the AMC and it is possible to distribute profit, the AMC should be considered as an institution with a profit-making aim and consequently has a right to deduct the input VAT.

To do's

It is recommended that AMC's whose activities qualify for the VAT-exemptions as per article 44, §2, 3°, 6° and 7° of the VAT Code:

- Check whether the decisions obtained in the past, and which allow general operating grants, are implemented according to the agreements in order to maintain their validity;
- For the future and based on the guidelines mentioned in the decision, check whether or not the profit-making aim is of a theoretical nature, and if necessary take the required actions (startup of new profitable activities by the AMC, implementation of price subsidies,...) and adjust the measures taken when needed. This way, the right to deduct applied in the past can also be secured for the future.

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