

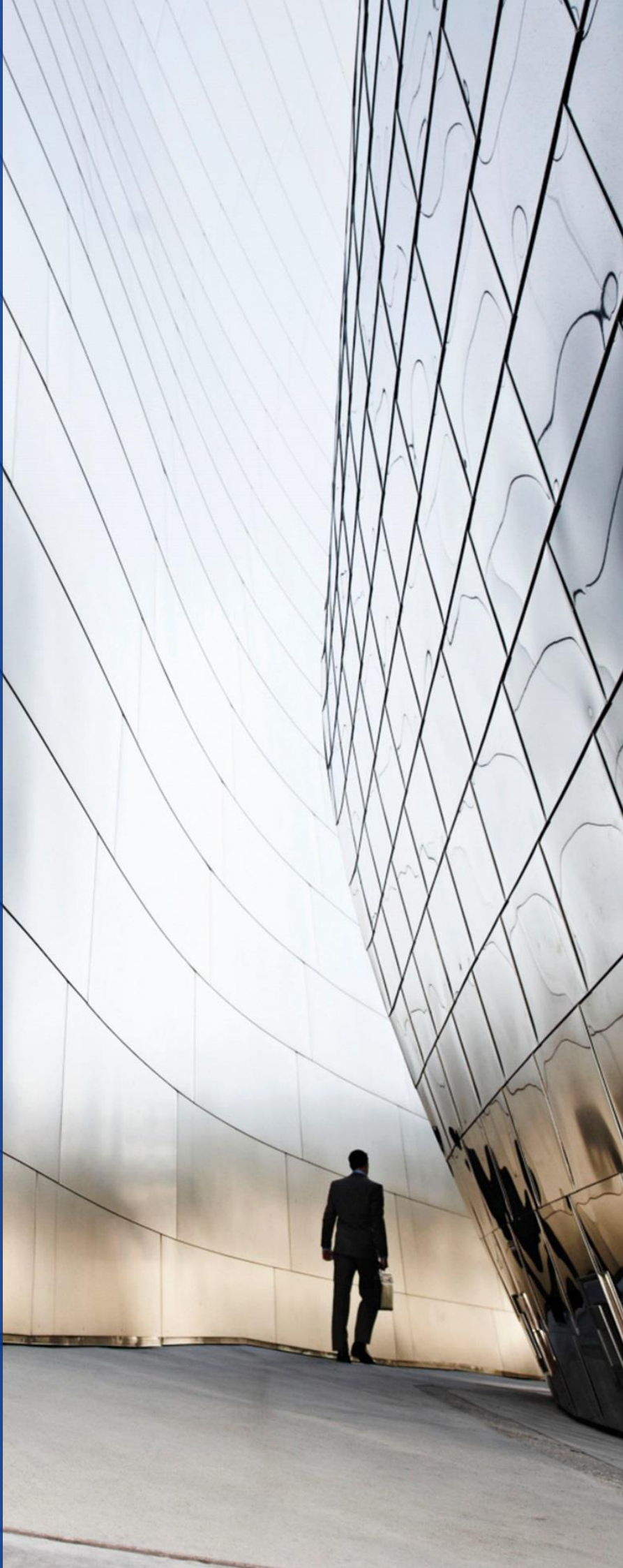


Meijburg & Co  
Tax Lawyers

VAT Deduction  
Exclusion  
Decree ("DED")  
and  
Private use cars  
2017

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# Table of Contents

|          |   |           |
|----------|---|-----------|
| <b>1</b> | <b>Main features and methodology of the DED</b>                   | <b>3</b>  |
| <b>2</b> | <b>Staff benefits</b>   | <b>4</b>  |
| 2.1      | The canteen regulation  | 4         |
| 2.2      | Other benefits  | 6         |
|          | <i>Staff parties / catering establishments</i>                    | 6         |
|          | <i>Gifts for employment anniversaries</i>                         | 7         |
|          | <i>Courses / training costs</i>                                   | 7         |
|          | <i>Company bicycle</i>  | 7         |
|          | <i>Housing</i>  | 7         |
|          | <i>Christmas gifts</i>  | 8         |
|          | <i>Laptop, tablet</i>   | 8         |
|          | <i>Transport passes provided by passenger transport companies</i> | 8         |
|          | <i>Outplacement</i>   | 8         |
|          | <i>Parking spaces</i>   | 8         |
|          | <i>Travel allowance</i>   | 8         |
|          | <i>Sport and relaxation</i>                                       | 8         |
|          | <i>Sky boxes</i>  | 8         |
|          | <i>Telephone, smartphone</i>                                      | 8         |
|          | <i>Relocation expenses</i>  | 9         |
|          | <i>Pension fund contributions</i>                                 | 9         |
| 2.3      | Practical example and step-by-step plan                           | 10        |
| <b>3</b> | <b>Promotional gifts and gifts to third parties</b>               | <b>13</b> |
| <b>4</b> | <b>Private use of company cars by employees</b>                   | <b>14</b> |
| 4.1      | VAT on the private use of cars                                    | 14        |
| 4.2      | Private use of car and commuting                                  | 16        |
|          | <i>Commuting</i>  | 16        |
|          | <i>Itinerant employees</i>  | 16        |
|          | <i>Employees who only commute</i>                                 | 16        |
| 4.3      | Sample calculations   | 16        |
| 4.4      | Employee contribution   | 18        |
| 4.5      | Special rules for rental car companies                            | 18        |
| 4.6      | Objections to the adjustment                                      | 18        |

# 1 Main features and methodology of the DED

The VAT Deduction Exclusion Decree (“DED”) precludes the recovery of VAT (also referred to as input VAT) on promotional gifts and staff benefits if they were provided free of charge or below cost by the business. It is irrelevant whether a business had a commercial reason for providing the gifts and staff benefits, for example, client relationship management, staff commitment, etc. The rationale for not allowing input VAT to be recovered is based on the fact that these costs, while business-related, are consumption-oriented, and VAT is specifically designed to tax consumption. A threshold of EUR 227 per recipient applies. It is not necessary to make a DED adjustment if the total purchase and development costs (the cost price) of the benefits are less than EUR 227 (excluding VAT) per annum per recipient. This is a final threshold: if the threshold is exceeded, the input VAT on the threshold amount is non-recoverable.

An employer that only performs VAT exempt activities is not entitled to recover the VAT on promotional gifts and staff benefits. If an employer performs both taxable and VAT exempt activities, the VAT on the promotional gifts and staff benefits is fully recoverable if the promotional gifts and staff benefits are directly linked to the taxable activities. If the promotional gifts and staff benefits are directly linked to the VAT exempt activities, then there is no entitlement to recover VAT. If the promotional gifts and staff benefits are neither directly linked to the taxable activities nor the VAT exempt activities, then the VAT can be recovered on a pro rata basis.

In the past, the validity of the DED was frequently the subject of litigation. The Court of Justice of the European Union ruled that many aspects of the DED are valid, for example, the provision of private transport, food and beverages, accommodation, giving staff the opportunity to partake of sport and relaxation activities, as well as promotional gifts and other gifts made to parties who are not (fully) entitled to recover input VAT. With regard to salary in kind (insofar as this is not included in one of the categories mentioned above) and goods and services used by staff for other personal purposes, the DED also applies to these other categories. This means that the following payments are also covered by the DED: Christmas gifts, a staff party or other company outings, computers/iPads and telephones (including Smartphones) that are also for private use.

There is a separate adjustment mechanism for company cars and they do not have to be included in the calculation of this threshold. We consider that good arguments can be made for also excluding the following costs in the calculation of the threshold amount:

- (i) expenses for food and beverages imbibed in catering establishments (this VAT is non-recoverable); and
- (ii) costs not subject to VAT such as international airline tickets and accommodation.

## 2 Staff benefits

The threshold of EUR 227 is twofold: after the end of the (financial) year you should check whether:

- the staff cafeteria benefits per recipient exceeded EUR 227 during the year (see 2.1); and
- the other staff benefits exceeded EUR 227 per employee during the year (see 2.2).

### 2.1 The canteen regulation

Businesses that provide food and beverages to staff and to visitors are regarded as performing a taxable supply. Businesses should therefore remit VAT on any income generated by this service. The input VAT on purchases, inventory, maintenance etc. is, in principle, fully recoverable. This also applies to VAT-exempt businesses such as banks, insurance companies, and non-profit organizations. The canteen regulation also applies to snacks and beverages dispensed by vending machines.

When preparing the last VAT return for the year, you should determine whether an adjustment needs to be made to the VAT recovered during the course of the year in relation to staff benefits. Such a staff benefit could occur, for example, if food and beverages are provided to staff at reduced prices.

To determine whether food and beverages have been provided too cheaply, the actual turnover must be compared with the cost price (excluding VAT) of the ingredients and materials used in the food and beverages increased by a fixed 25% markup.

Whether a VAT adjustment should be made, you will first have to determine the benefit that each employee has received from the favorable treatment, also taking into account the visitors who may have used the staff cafeteria. If the total benefit (catering services and other (staff) benefits) exceeds EUR 227 per person per year, the benefit received from using the staff cafeteria will first have to be adjusted.

|  |                |
|--|----------------|
| 1. Purchase costs (excluding VAT)  |                |
| Ingredients and materials for food and beverages<br>(purchases of tobacco products excluded) | EUR a          |
| 2. Add: Fixed 25% markup of EUR a  | EUR <u>b</u> + |
| 3. Hypothetical turnover   | EUR c          |
| 4. Less actual turnover  | EUR <u>d</u> - |
| 5. Difference (positive/negative)  | EUR e          |

### Schematically:

The benefit enjoyed by each full-time employee is calculated as follows:

$$\frac{\text{EUR } e}{[\text{total number of employees}] + [\text{average number of visitors per day}]} = \text{EUR } x$$

If the benefit received from using the staff cafeteria (EUR  $x$ ), together with the other benefits received (2.2), is more than EUR 227 per employee per annum, a 6% adjustment should be made on the staff cafeteria benefits (the positive difference calculated under (e) above). After this adjustment the staff cafeteria benefits are excluded from the EUR 227 threshold. The remaining benefits are checked separately to determine whether they exceed EUR 227 (see 2.2).

### Open book method

In practice, staff cafeterias are often managed by external catering companies. In such cases, an open book method is generally applied. Under this method, the employer is still responsible for the remittance of VAT. This means that the VAT return filed by the business in respect of the staff cafeteria turnover and purchases is based on the information provided by the catering company. The open book method requires the catering company to periodically submit the information necessary for the VAT returns, including a breakdown of the sales and a specification of the costs incurred during that period.

### Example:

A staff cafeteria servicing 120 employees and an average of 5 visitors each day has a turnover of EUR 50,000, taxed at the reduced 6% rate (21% on the sale of alcoholic beverages). The purchase price of the food and beverages amounts to EUR 100,000. The calculation to be made is as follows:

|                                |     |         |
|--------------------------------|-----|---------|
| Purchase costs (excluding VAT) | EUR | 100,000 |
| Add: 25% markup                | EUR | 25,000  |
| Hypothetical turnover          | EUR | 125,000 |
| Minus: Actual turnover         | EUR | 50,000  |
| Positive difference            | EUR | 75,000  |

The benefit per employee amounts to EUR 600 (EUR 75,000 divided by 125), so that the EUR 227 threshold for employees is exceeded. The benefit received by the visitors does not need to be adjusted, since it is unlikely that the EUR 227 threshold is exceeded per individual visitor. The required year-end adjustment amounts to EUR 4,320  $6\% \times (\text{EUR } 75,000 - \text{EUR } 3,000 (5 \text{ visitors}))$ .

## 2.2 Other benefits

### Staff parties / catering establishments

In the Netherlands, the VAT on food and beverages imbibed in catering establishments is non-recoverable, regardless of the reason for its purchase. This also applies if a caterer supplies the food and beverages at the contractor's office or at premises leased from a third party (but not, for example, in the case of take-away sandwiches).

For the purposes of determining whether the VAT charged on receptions and parties organized by a caterer is recoverable, a distinction must be made between the provision of food and beverages and the provision of other services, for example, room hire, entertainment, etc. The partners of employees are not included in the calculation of the EUR 227 threshold. This results in the following calculation:

#### Example:

Each year Company A organizes a party for its employees and clients. The party held in 2017 was attended by 300 employees and their partners, and 200 clients and their partners. A total of 1,000 people attended. The costs for entertainment and room hire amounted to EUR 25,000; the costs for food and beverages amounted to EUR 40,000.

The VAT on food and beverages is non-recoverable. Whether the VAT on the costs for entertainment and room hire (amounting to EUR 25,000) is recoverable, depends on the total benefits per employee per annum.

The partners of employees/clients should not be taken into account when determining the cost per employee/client. Consequently, the cost per person is:

$$\begin{array}{r} \text{EUR 25,000} \\ \text{-----} \\ \text{500} \end{array} = \text{EUR 50}$$

Whether there is an entitlement to recover input VAT depends on the application of the EUR 227 threshold in respect of the other benefits provided. It is unlikely that the EUR 227 threshold will be exceeded as a result of the provisions to clients. As such, this VAT can be recovered, with the exception of the VAT on food and beverages.

### **Gifts for employment anniversaries**

Gifts given to employees celebrating an employment anniversary are covered by the DED. This means that the input VAT on the purchase of the gifts is recoverable, unless the total benefit of the employee in question exceeds EUR 227 per annum.

### **Courses / training costs**

An employer that pays for training courses for its staff, may recover any VAT charged on this training, provided that the training is relevant to the position held, or to be held, by the employee in the business. VAT on, for example, car skid control training, is non-recoverable as this cost is regarded as a private matter for the employee. This may not be the case for a business where driving proficiency is an occupational necessity, for example, a taxi company. Please note that VAT is not charged on a large number of the training courses on offer.

### **Company bicycle**

Employers who provide employees with a bicycle can recover the VAT on the bicycle if they can demonstrate that the bicycle was made available for commuting purposes and insofar as:

- the bicycle's purchase price does not exceed EUR 749 (including VAT), or if the bicycle is leased, the total cost (including VAT) of the lease does not exceed EUR 749;
- the employee was not provided with a bicycle during the calendar year in question and the two preceding calendar years; and
- from the moment the bicycle was made available until the end of the calendar year in question and in each of the two following calendar years, the employee received an allowance or was provided with a means of transport other than a bicycle, which covered 50% or more of the number of days on which the employee commutes.

VAT may be recovered in full if the employee pays a contribution toward the bicycle, so that the maximum amount paid by the employer is, on balance, EUR 749. However, the business should remit VAT over the employee contribution. If the business contributes more than EUR 749 (including VAT), then the VAT on the excess is non-recoverable. Businesses that perform VAT exempt services and do not ask the employee for a contribution, or only require the employee to make a symbolic contribution, are not entitled to recover VAT on purchased bicycles. For practical reasons, the bicycle may also be used by the employee for private purposes other than commuting.

### **Housing**

If an employer provides company accommodation to an employee or rents accommodation and allows the employee to live in it free of charge or at a low rent, then the employer cannot recover the VAT charged on the related costs (for example, a specialized agency that acts as intermediary, maintenance costs for the accommodation, etc).

The VAT charged on hotel accommodation provided to employees in relation to business trips, whereby the employer bears the costs, is not covered by the above rule and is therefore recoverable in the usual manner. The VAT on food and beverages imbibed in a catering establishment is non-recoverable. Different rules may apply if this occurs abroad.

### **Christmas gifts**

The provision of Christmas gifts to employees is regarded as a staff benefit. This means that the input VAT on the purchase of the Christmas gifts is recoverable, unless the total benefit exceeds EUR 227 per employee per annum.

### **Laptop, tablet**

In our view, employers do not have to make a DED adjustment for laptops or tablets made available to employees for work purposes only, i.e. no private use is permitted. If private use of the laptop or tablet is permitted, a value will have to be given to the salary in kind component in order to determine the amount of the DED adjustment. If it is difficult to determine the private use component, we recommend that agreement be reached on this point with the Dutch Tax and Customs Administration.

### **Transport passes provided by passenger transport companies**

Free or subsidized transport tickets that passenger transport companies provide to staff (and their family members) are covered by the DED. Transport passes provided to retired staff (and their family members) are not covered by the DED.

### **Outplacement**

The costs incurred by an employer for outplacement are regarded as having been made entirely for business reasons. The VAT on these costs is generally recoverable.

### **Parking spaces**

The provision of parking spaces is regarded as business-related. As such, no adjustment has to be made.

### **Travel allowance**

Employers often pay a kilometer allowance to employees who use a private car for work. In such cases, it is not possible to recover the input VAT.

### **Sport and relaxation**

This category refers to the provision of sport facilities, or non-business related trips e.g. company football competitions, fitness, etc. The VAT on these costs is also non-recoverable if the total benefit per employee per annum exceeds the EUR 227 threshold.

### **Sky boxes**

As the provision of sky boxes contains a private component, the DED should, in principle, be applied.

### **Telephone, smartphone**

According to the Dutch Ministry of Finance, the VAT on employee landline telephone subscriptions that are taken out in the name of the employer is not recoverable, because the service is not supplied to the employer. We consider this to be debatable and a good case could be made for arguing that the employer should be able to recover the VAT. The private component of the telephone subscription is covered by the DED. If it is difficult to determine the private use component, we recommend that agreement be reached on this point with the Dutch Tax and Customs Administration.



According to Dutch the Ministry of Finance, an employer is entitled to recover the input VAT on mobile phones made available to employees to the extent they are not used for private purposes. In practice, it is often very difficult to determine the private use component. If this is the case and the private use is considerable, it may be possible to reach agreement with the tax inspector on how this should be dealt with.

### **Relocation expenses**

In those situations where the relocation was solely related to the employee's work and the relocation invoice was made out in the name of the employer, the VAT may be recoverable. However, if the relocation was at the employee's initiative, then the DED applies.

### **Pension fund contributions**

Contributions to a pension fund for employees, in-house or established in a separate legal and fiscal entity, are not covered by the DED.

## 2.3 Practical example and step-by-step plan

The practical example set out below and the accompanying step-by-step plan are intended to help you determine whether you need to make a year-end adjustment to the VAT already recovered.

### Introduction

Let's assume that you provide food and beverages to your 60 staff members. The food and beverages are purchased for EUR 40,000 over which EUR 2,400 VAT is charged. The price employees are charged for the food and beverages is based on a total amount of EUR 42,000 (including VAT). You are charged VAT of EUR 1,500 for the purchase of inventory for the staff cafeteria. In addition to the cafeteria benefits provided to staff, you also provided other staff benefits that are covered by the DED. The cost price of the other benefits is EUR 23,000 over which EUR 4,830 VAT was charged.

The overall amount accounted for in your VAT returns during the year is:

|  |           |
|--|-----------|
| VAT due ( $6/106 \times \text{EUR } 42,000$ )        | EUR 2,377 |
| Minus: Input VAT (EUR 2,400 + EUR 1,500 + EUR 4,830) | EUR 8,730 |
| VAT refund   | EUR 6,353 |

The following pages provide a three-step outline for determining whether you need to make a VAT adjustment in respect of the staff benefits described above and, if this is the case, the amount of the adjustment.

## Step 1: Is there a benefit arising from favorable treatment by the company?

|  |     |        |
|--|-----|--------|
| 1. Purchase costs (excluding VAT) of food and beverages or the raw materials used therein (purchases of tobacco products excluded) | EUR | 40,000 |
| 2. Add: Fixed 25% markup of EUR 40,000   | EUR | 10,000 |
| 3. Hypothetical turnover   | EUR | 50,000 |
| 4. Minus: Actual turnover  | EUR | 42,000 |
| 5. Positive difference   | EUR | 8,000  |

Because the hypothetical turnover exceeds the actual turnover there is a positive difference and therefore the staff have received a benefit, which means that the input VAT already recovered may have to be adjusted.

To determine whether the input VAT already recovered needs adjustment, you should check whether the value of your total staff benefits, including the positive difference listed under point 5, exceeds EUR 227 per employee per annum. If not, then you are finished and no adjustment has to be made. If the threshold has been exceeded, please follow the instructions in step 2.

In the example given, the benefit per employee per annum amounts to:

- provision of food and beverages:  $\text{EUR } 8,000 / 60 = \text{EUR } 133.33$
- cost price other benefits per employee:  $\text{EUR } 23,000 / 60 = \text{EUR } 383.33$

The total benefits per employee therefore amounts to EUR 516.66. This means that the threshold of EUR 227 is exceeded and the input VAT on the provision of food and beverages should be corrected (refer to step 2).

## Step 2:

Now that the staff cafeteria benefits together with the other benefits exceed EUR 227 per employee per annum, a VAT adjustment is necessary in respect of the cafeteria benefits. This adjustment is 6% on the difference determined in step 1, point 5.

In our example, the VAT adjustment for cafeteria benefits therefore amounts to EUR 480 (6% of EUR 8,000).

Step 3 will help you determine whether a VAT adjustment needs to be made for the other benefits.

### Step 3:

The adjustment in relation to the cafeteria eliminates this benefit from the EUR 227 threshold. If the remaining benefits exceed EUR 227, the input VAT on them cannot be recovered.

In this example, the cost price of the other staff benefits amounts to EUR 23,000. The benefit per employee amounts to EUR 383.33. The remaining benefits exceed the threshold of EUR 227. This means that the input VAT on the other staff benefits (EUR 4,830) should also be corrected in your VAT return.

### Conclusion

The total VAT adjustment in this example is EUR 5,310 (EUR 480 + EUR 4,830) and should be reported in box 1d of the VAT return.

# 3 Promotional gifts and gifts to third parties

Promotional gifts are gifts other than cash gifts given by businesses to their customers, suppliers etc. for commercial reasons. Gifts are generally defined as benefits given by businesses to foundations etc. that are not entitled to recover input VAT.

In general, input VAT cannot be recovered on the following promotional gifts and gifts to third parties:

- a) gifts to private individuals;
- b) gifts to fully exempt businesses, such as hospitals, or the Red Cross; and
- c) gifts to businesses that cannot recover input VAT or may only recover less than 50% if they purchased the goods themselves.

The input VAT on the above gifts is recoverable if their value per recipient is less than the EUR 227 threshold.

Any business that provides promotional gifts to customers entitled to recover input VAT can, in principle, fully recover the input VAT on these gifts. However, this is not the case if the goods can only be used exclusively for private purposes, for example, household appliances, cosmetics, or non-professional books. In that case, the DED applies.

If you invite a business client to join you for drinks or a meal in a restaurant, the VAT charged cannot be recovered, regardless of whether or not the threshold of EUR 227 is exceeded.

# 4 Private use of company cars by employees

The private use of company cars made available to employees is regarded as a service provided to the employee by the employer. The employer should remit VAT on this service in the final VAT return for the financial year, in most cases this is the December VAT return or the fourth quarter return. Current legislation is discussed below.

## 4.1 VAT on the private use of cars

If a business provides an employee with a company car, it can recover the VAT on the purchase costs, the lease or rental payments, the maintenance and fuel costs, etc. based on the recoverable percentage applicable to the business, provided that the business has been invoiced for these costs and the relevant invoices/receipts can be produced. If employees make private use of the car, for example, for visits to family or friends or for shopping trips this private use should be taxed.

### **Adjustment based on actual use and application of the fixed amount**

The basic assumption with regard to the private use of a company car is that the adjustment should be based on the actual private use of the car. Kilometer registration records can be used to ascertain the degree to which a company car has been used for private purposes. However, keeping such records is an onerous task, and is generally not something employers can demand of their employees. Partly for that reason, approval has been given for the employer to apply a fixed percentage of 2.7% of the list value of the car, including VAT and car registration tax. This only applies in those cases where it is impossible to determine from the administration to which extent the car was used for private purposes and/or which costs are to be allocated to this private use.

The fixed percentage should be applied on a pro rata basis in case a business is only entitled to partly recover the input VAT on car-related expenses. If a car has been purchased without VAT being charged, a fixed percentage of 1.5%, rather than 2.7%, may be applied and the VAT on the other car-related expenses may be recovered. Approval has also been given for a lower fixed percentage of 1.5%, to apply after the purchased car has been used by the business for five years. This means that the lower fixed percentage can be applied after the end of the fourth year following the year in which the business started using the car.

The Supreme Court decided in 2017, that the private use of a company car, besides the fixed percentage and a balanced kilometer registration, can be determined by other means. In that case, according to the Supreme Court, the private use should be determined taking into account all circumstances of the specific case in reasonableness. The following should be considered:

- Nature of the company
- Business purposes for which the company car is used within the company
- Position and activities within the company of the person who uses the car
- What is agreed / known regarding the allowed private use of the car, for example commuting.

In case statistical information is used to determine the private use of the company car, the usefulness of these statistical data needs to be made reasonable based on the above circumstances.

## 4.2 Private use of car and commuting

### Commuting

Commuting also constitutes private use for VAT purposes. Commuting is defined as: travel between the place of residence and the fixed workplace as agreed in the employment contract. If no employment contract has been concluded, commuting is defined as travel between the place of residence and the business' office address.

### Itinerant employees

Employees with no fixed workplace (itinerant employees) are only considered to commute if this involves driving from their home to a fixed (agreed upon) business address belonging to the employer. The fixed adjustment for itinerant employees will, therefore, often be too high. However, no separate approval has been given for itinerant employees to apply a lower fixed correction percentage. We suggest that you contact your tax advisor to see if it is possible to reduce the adjustment.

### Employees who only commute

If the company car is only used privately for commuting, which is often the case with a delivery van, a relief of the administrative burden is available. The employer may determine the actual use by multiplying the commuted distance by the number of commutes per year, and comparing this figure with the total kilometers driven in a year. The annual number of working days can be taken as 214. The 214 working days may be applied on a proportionate basis if the workweek is less than five days or if the employment relationship began or ended during the calendar year.

## 4.3 Sample calculations

### Example 1:

#### Adjustment for private use of a company car in respect of a business that is fully entitled to recover VAT

An employer that is fully entitled to recover VAT makes a company car with a list price of EUR 50,000 (including VAT and car registration tax) available to an employee as of January 1, 2017. No kilometer registration records are kept and no contribution is asked of the employee.

For the sake of convenience, the benefit for VAT purposes has been calculated using 2.7% of the list price on an annual basis. Therefore, VAT amounting to EUR 1,350 (2.7% of EUR 50,000) should be remitted annually.



### **Example 2:**

#### **Adjustment for private use of a company car in respect of a business that is partly entitled to recover VAT**

An employer that can only partly recover VAT makes a company car with a list price of EUR 50,000 (including VAT and car registration tax) available to an employee as of January 1, 2017. No kilometer registration records are kept and no contribution is asked of the employee. The expenses attributable to the car in that year amount to EUR 10,000 excluding VAT. The business is entitled to recover 40% of the input VAT.

The benefit for VAT purposes has been calculated using 2.7% of the list price on an annual basis. In this situation, a partial entitlement to recover VAT applies. 40 % of the input tax on the car-related expenses may be recovered. In addition, VAT amounting to EUR 540 (40% of 2.7% of EUR 50,000) should be remitted in respect of the private use of the company car.

### **Example 3:**

#### **Adjustment for private use of a company car that deviates from fixed percentage**

List price of the company car EUR 35,000

Annual VAT amount on costs of company car EUR 2,500

The company car is used by a salesman who commutes on average once a week (46 times a year)

The salesman has signed a statement of no private use of the company car for wage tax purposes and does not use the company car for more than 500 km for private use

Commuter distance amounts 30 km a day

Annual total amount of km 60,000

Private use of company car  $(46 \times 30 + 500) / 60,000 = 3\%$ ;  $3\% \times \text{EUR } 2,500 = \text{EUR } 75$

Paid amount of VAT:  $2,7\% \times 35,000 = \text{EUR } 945$

Difference: EUR 870

## 4.4 Employee contribution

If the employee is asked to contribute to the private use of the car, the VAT on this contribution should be remitted to the tax authorities. If the employee contribution is less than the standard value of the car, VAT should be charged on this 'standard value'.

The standard value may often be difficult to determine in practice and therefore the fixed rate or lower fixed rate is applied (2.7% or 1.5%). However, if the VAT on the employee contribution is higher than the fixed rate, the business should remit VAT on the employee contribution. In that case, the fixed rate does not apply.

## 4.5 Special rules for rental car companies

Employees or the proprietor of a car lease company sometimes use multiple cars belonging to the business for private purposes. A concession applies for these situations, whereby the non-weighted average list price can be used as the list price for the taxable base.

## 4.6 Objections to the adjustment

It might pay to file a notice of objection against an adjustment, provided that the lower adjustment can be motivated. In case there is no balanced kilometer registration, the private use should be determined taking into account all circumstances of the specific case, such as nature of the company, business purposes for which the company car is used within the company, position and activities within the company of the person who uses the car and what is agreed / known regarding the allowed private use of the car.

*The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.*