



Meijburg & Co
Tax Lawyers

VAT Deduction
Exclusion Decree
("DED")
and
Private Use Cars
2018

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1 Main features and methodology of the DED

The 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 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 a tax 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 provisions within the threshold amount are non-recoverable.

An employer that only performs VAT-exempt services is not entitled to recover the VAT on promotional gifts and staff benefits. If an employer performs both taxable and tax-exempt services, the VAT on promotional gifts and staff benefits is fully recoverable if the Christmas gifts are entirely allocable to the VAT-taxed services. If the promotional gifts and staff provisions are directly allocable to the VAT-exempt services, then there is no entitlement to recover VAT. If the promotional gifts and staff provisions are not specifically allocable to the taxable service or the tax-exempt service, then the VAT can be recovered in accordance with the employer's pro rata recovery.

The DED applies to the offering of private transport, the provision of food and drink, the provision of accommodation, offering staff the opportunity for sport and relaxation and to giving promotional and other gifts to parties that do not have a full input VAT recovery right. Salary in kind (insofar as it does not fall under the above categories) and goods and services that staff use for private purposes (such as Christmas gifts, a company staff party or other company outing and computers / iPads and mobile telephones that are also used for private purposes) fall under the DED.

There is a separate adjustment procedure 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 not including the following costs in the calculation of the threshold amount:

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

2 Staff benefits

The threshold of EUR 227 is twofold: after the end of the (financial) year you must 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 Cafeteria Regulation

Businesses that provide food and beverages to staff and to their visitors are regarded as performing a taxable supply. Businesses must 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, insurers, non-profit organizations, etc. The cafeteria regulation also applies to snacks and beverages dispensed by vending machines.

When preparing the last VAT return for the year, you must determine whether an adjustment needs to be made to the VAT recovered during the course of the year to ensure that staff have not received any benefits, for example, if food and beverages are made available to staff at reduced prices.

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

To decide whether a VAT adjustment actually applies, you must first determine the benefit per staff member, not forgetting to take into account any visitors who may have used the staff cafeteria. If the total benefit (catering services and other benefits) exceeds EUR 227 per person per year, the VAT adjustment will apply to the benefit received from using the staff cafeteria.

- | | | |
|--|------------|----------|
| 1. Purchase costs (excluding VAT) of food and beverages or the raw materials used therein (purchases of tobacco products excluded) | EUR | a |
| 2. Add: Fixed 25% markup of EUR a | <u>EUR</u> | <u>b</u> |
| 3. Theoretical cost price | EUR | c |
| 4. Less: actual turnover | <u>EUR</u> | <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 must be made on the staff cafeteria benefits (the positive difference calculated under (e) above). After this adjustment, the cafeteria benefits are disregarded for the purposes of the EUR 227 threshold. The other benefits must then be checked to determine whether they exceed EUR 227 (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 contracting party is 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 different visitors each day has a turnover of EUR 50,000, taxed at the low 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 price excluding VATEUR	100,000
Add: 25% markup	<u>EUR 25,000</u>
Theoretical turnover	EUR 125,000
Less: actual turnover	<u>EUR 50,000</u>
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 has been exceeded in respect of the employees. The benefit received by the visitors does not need to be adjusted, as each individual visitor will almost never exceed the EUR 227 threshold. The year-end adjustment that will have to be made amounts to EUR 4,320 (6% x EUR 75.000 - EUR 3.000 (5 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/or 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 (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 2018 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, is dependent on the total benefits per employee per annum.

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

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

Whether there is an entitlement to recover input VAT depends on the application of the EUR 227 threshold in respect of the other services 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, can, in principle, 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;
- a bicycle was not made available to the employee or 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 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 can 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 must pay the VAT payable on the employee contribution. If the business contribution amounts to more than EUR 749 (including VAT), then the VAT on the excess is non-recoverable. Businesses that perform exempted 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.

Payroll taxes

The 2019 Tax Plan introduced simplified rules for payroll taxes with regard to the fixed addition for company bicycles. As of January 1, 2020, a fixed addition (to income) of 7% of the recommended retail price (including VAT) will apply to the private use of a company bicycle (lease). If the employee is charged for the private use of the bicycle, this may be deducted from the addition to income.

VAT

For the time being, no new VAT plans have been introduced in respect of the private use of company bicycles. We expect that during the course of 2019 more will become clear about the relationship between the fixed addition for company bicycles for payroll tax purposes and a possible adjustment for private use for VAT purposes. Although you may be aware of the following, we would nevertheless like to point out that for payroll tax purposes commuting is a business expense, while it qualifies as private use for VAT purposes.

Office space

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.).

In October 2018 the Arnhem-Leeuwarden Court of Appeals reconfirmed the above; only if the employer is obliged to pay accommodation costs (for example because the employer cannot recruit any domestic temporary workers and foreign workers will not come to the Netherlands if accommodation is not arranged), is the VAT on accommodation recoverable, because the business interests of the employer carry more weight than the private interests of the temporary workers.

The VAT charged for hotel accommodation provided to employees, whereby the employer bears the costs because a business trip is involved, is in principle 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.

Free transport passes provided by passenger transport companies

Free transport passes that passenger transport companies provide to staff (and their family members) are covered by the DED. Free 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 recoverable.

Parking spaces

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

Travel allowance

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

Sport and relaxation

This category refers to the making available of a sports facility (company football competition, gym, etc.) or staff non-business excursions and outings. 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 making sky boxes or other seats at sport events available to staff or business relations contains a private component, the DED must, in principle, be applied.

In June 2018 the Supreme Court ruled on the VAT recovery on business seats at a football stadium. Insofar as the seats were used by staff, there was no input VAT recovery right under the DED. Insofar as the seats were used by business relations, there was an input VAT recovery right, because the tax inspector failed to provide sufficient evidence that if the VAT had been charged to the business relations, they would not be eligible to recover any or most of this VAT. The case was referred back to the Arnhem-Leeuwarden Court of Appeals.

Telephone, Smartphone

According to the 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 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.

Removal 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 Plan

The setting up a staff pension plan, whether the company manages it itself or by means of the incorporation of a separate legal and tax entity, does not fall under 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 is 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
Less: 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?

1. Purchase costs (excluding VAT) of food and drink or raw materials (excluding purchases of cigarettes and tobacco)	EUR 40,000
2. Add: fixed markup of 25% of EUR 40,000	<u>EUR 10,000</u>
3. Theoretical turnover	EUR 50,000
4. Less: actual turnover	<u>EUR 42,000</u>
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 will have to be adjusted, you must 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 it doesn't, then you don't have to do anything else as nothing has to be adjusted. 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: EUR 8,000 / 60 = EUR 133.33
- cost price other benefits per employee: EUR 23,000 / 60 = EUR 383.33

Follow-up to Step 1: is there a benefit?

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

Step 2:

Now that the staff cafeteria benefits together with the other benefits exceed EUR 277 per employee per annum, a VAT adjustment is, at any rate, 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 to the cafeteria benefits eliminates the difference with the EUR 227 threshold. If the other benefits then exceed EUR 227, the 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 other benefits therefore also exceed the threshold of EUR 227. This means that the input VAT on the other staff benefits (EUR 4,830) must also be corrected in your VAT return.

In conclusion

The total VAT adjustment in this example is EUR 5,310 (EUR 480 + EUR 4,830) and must be reported under 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 and the like 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, the Red Cross, etc.;
- c) gifts to businesses that cannot deduct the VAT or can only deduct less than 50% of it, if they had purchased the goods themselves.

The input tax on the above gifts is recoverable if their value per recipient is less than the EUR227 threshold.

Any business that provides promotional gifts to customers entitled to recover input tax 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 and suchlike. 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

If the company car is also used privately, then this private use is regarded as a service provided to the employee by the employer. The employer must 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 Tax 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 deduction 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 use the car privately, this private use will be taxed. Private use can involve, for example, situations that are clearly private, such as visits to family or friends or using the car to go shopping.

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 must 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 private motor vehicle and motorcycle tax. This only applies in those cases where it is impossible to determine from the accounts the extent to which the car was used for private purposes and/or which costs are to be allocated to this private use.

The fixed percentage must be applied on a pro rata basis in those cases where a business is only entitled to partly recover the input tax 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 a 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 ruled in 2017 that the private use of a company car can also be determined in other ways than by means of the fixed percentage or a comprehensive kilometer registration system. According to the Supreme Court, if the fixed amount is not applied and there is no kilometer registration system, then the scale of private use must be realistically determined taking all the circumstances of the case into consideration. Circumstances that must be taken into account in this assessment are:

- the type of company;
- the business purposes for which the purchased car is used within the business;
- the position the person using the car holds within the company and the activities they perform for the company;
- what is known about the way in which the car may be or is used privately, for example for commuting.

If statistical data is relied on, the above circumstances must be used to convincingly demonstrate that this data is usable in the relevant case.

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. A separate approval has been given for itinerant employees. We suggest that you contact your tax advisor to see if it is possible to reduce the fixed adjustment.

Employees who only commute

If the company car is only used privately for commuting, which is, for example, often the case with a delivery van, tax relief for the administrative burden is available. In such situations, the employer can determine the actual use by multiplying the commuted distance by the number of commutes per year, and deducting this figure from 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 with a full VAT recovery right

An employer with a VAT recovery right makes a company car with a list price of EUR 50,000 (including VAT and BPM) available to an employee as of January 1, 2018. 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) must be remitted annually.

Example 2:

Adjustment for private use of a company car in respect of a business with a partial VAT recovery right

An employer with a partial deduction entitlement makes a company car with a list price of EUR 50,000 (including VAT and BPM) available to an employee as of January 1, 2018. 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.

For the sake of convenience, 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) must be remitted in respect of the private use of the company car.

Example 3: Adjustment for private use that differs from the fixed amount

The list price of a car is EUR 35,000

The annual VAT on car expenses is EUR 2,500

The car is used by a representative who, on average, uses the car once a week to travel directly from his home to the office (approximately 46 times per year).

The representative signed a Statement of No Private Use of Company Car and does not travel privately more than 500 kilometers per year (commuting does not qualify as private use for payroll tax purposes; it does for VAT purposes).

The commute is 30 kilometers per day

The total number of kilometers traveled on an annual basis is 60,000

The total private use is thus $(46 \times 30 + 500) / 60,000 = 3\%$; $3\% \times \text{EUR } 2,500 = \text{EUR } 75$

VAT adjustment paid: $2.7\% \times 35,000 = \text{EUR } 945$

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 must be remitted to the tax authorities. If the employee contribution is less than the standard value of items made available, VAT must 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 must remit VAT on the employee contribution. The fixed amount does not apply.

4.5 Special rules for rental car companies

Employees or the proprietor of a car lease company sometimes use 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 can be worthwhile to file a notice of objection against a reported adjustment, provided this lower adjustment can be substantiated. If a comprehensive kilometer registration is not used, then for the purposes of determining the scale of private use all circumstances of the case should be taken into account, such as the type of company, the business purposes for which the car is used, the activities performed within the company by the person using the car and statistical data.

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.