

## Partial VAT deduction according to the real use method: important changes from 1 January 2023

### ***Existing files: notification required by 30 June 2023 at the latest!***

Following the law of 27 December 2021, a new procedure for exercising the VAT deduction based on the real use method will apply to mixed and partially taxable persons as from 1 January 2023. A new Royal Decree of 26 October 2022 has determined in detail the measures for implementing this new procedure.

This new regulation will have a significant impact on all sectors in which there are mixed and partially taxable persons, such as real estate, financial services, public authorities, education, medical services, holding companies, etc.

### ***What will change?***

The application of the real use method by mixed or partially VAT taxable persons entails that the VAT deduction is determined primarily by the allocation of costs between the different activities (as opposed to a general pro rata in which the VAT deduction is determined based on turnover and which applies to all costs).

The current rules provide that a taxable person wishing to exercise his/her right to deduct input VAT under the real use method must submit a written application to the competent VAT office. Based on the existing case law, this application can also be made retroactively. The Act of 27 December 2021 amends this arrangement: from 1 January 2023, **prior notification** is mandatory.

The Royal Decree of 26 October 2022 has determined in detail how these new rules are to be applied. We summarise the main elements below:

- **The prior notification must be submitted electronically (using form E604A or E604B)** before the end of the first reporting period of the current year or the first reporting period following the commencement of, or change in, the economic activity. The notification takes effect from 1 January of the current calendar year or from the first day of the reporting period following the commencement of, or change in, the economic activity.
- The taxable person must also communicate **detailed information** on how the right to deduct input VAT has been determined when submitting the VAT return for the first quarter or for one of the first three months of the current calendar year (such as: information on the previous general pro rata, the percentages of costs allocated to the various company departments, special pro rata) via Intervat.
- **Important:** if the prior notification and/or communication of the requested information does not happen in time, then the real use method can be exercised at the earliest from 1 January of the following calendar year. **Retroactive application is thus *de facto* excluded.**



- Taxable persons may revert to a general pro rata, but not before 31 December of the third year following the effective date of the previous notification. This (total or partial) termination requires a notification that only takes effect on 1 January of the year following this notification.
- The VAT administration only sends an **acknowledgement of receipt, i.e. not an approval**, of the prior notification for the application or termination of the real use method. However, the VAT administration has the right to refuse, with retroactive effect, the proposed method of exercising VAT deduction until 31 December of the year following the year in which the initial notification took effect. In addition, the administration reserves the right to review the input VAT deduction within the general statute of limitation.
- The administration may itself **impose the application of the real use method by means of a reasoned written decision**, sent by registered letter, which takes effect on the first day of the VAT reporting period concerned. However, this decision may have retroactive effect if the administration considers that the information included in the form relating to either the commencement or change of economic activity, or the application for a VAT group is incorrect. By a circular letter, a business sector or a group of taxable persons could be obliged to apply the real use method.
- As already clarified in the law: taxable persons who already apply the real use method by 31 December 2022 must submit the prior notification and communication of the requested information confirming the real use method's application before 1 July 2023. We note that the deadline in the Royal Decree differs from the deadline in the law (which is by 30 June 2023).

### ***Consequences and points of attention***

These new provisions will have a significant impact in practice. As noted above, retroactive application of the real use method will no longer be possible under the new rules, which will considerably limit a taxable person's options. For example, if a tax audit reveals that a business is a disguised mixed VAT taxable person that cannot exercise a 100% right of input VAT deduction, then the VAT administration will in principle impose a general pro rata and the real use method may no longer be applied for the past to mitigate the impact on the taxable person's right of input VAT deduction.

The new rules also make the procedure much more formal. For example, in the event of a change of activity, form E604B must be completed correctly and filed in due time to avoid that the real use method could only be applied in the following calendar year. The question also arises as to what the exact procedure is when a taxable person starts or changes their economic activities in the course of a calendar year, e.g. on 30/06 (after prior notification, the detailed information should only be communicated in the following calendar year).

Moreover, the new rules do not provide greater legal certainty as the administration has a long period of time to either refuse or accept the notification (until 31 December of the following year). Moreover, as the Report to the King states, a refusal decision can also be taken in the form of a correction notice or a process-verbal within the general statutes of limitation. *De facto*, in our view, this means that the administration can always retroactively reject the application of the real use method, or the calculations applied in this respect, if it considers that it does not correspond to reality. The Council of State's commentary in the light of the principle of legitimate expectations does not seem relevant here.

In principle, the VAT authorities themselves cannot impose the retroactive application of the real use method, unless the information in form 604A (commencement of activity), form 604B (change of activity) or form 606A (VAT group) is incorrect. We do foresee discussions on this point (including: what do the VAT authorities consider as "incorrect"?). It is not entirely clear how this will relate to the VAT authorities' powers in the context of an ordinary VAT audit. This also raises the question of the possible penalty: can a penalty be imposed if the authorities do not agree with the method used (i.e. the law itself has not been violated?).

So there are still many questions left unanswered. As always, we are still waiting for a detailed circular letter on this subject that will explain the new rules' practical application. Given the new rules' imminent entry into force, we hope that this circular letter will still be issued this year.

Finally, taxable persons who currently apply the real use method will have to notify and communicate the detailed information by 30 June 2023. The intention here is clearly for the VAT authorities to review the actual working method applied and possibly to impose adjustments or, in the worst case, refuse to apply the real use method. A late notification will result in the temporary inability to apply the real use method. Therefore, a proactive check of the current VAT status and a proper preparation of the notification and detailed information are, in our opinion, recommended to avoid any unpleasant surprises.

The Tiberghien VAT team can assist you in reviewing your VAT status and about how to exercise the right to deduct input VAT given these new, stricter rules.

*Source: Law of 27 December 2021 on various provisions regarding value-added tax (BS 31 December 2021); Royal Decree of 26 October 2022 amending Royal Decrees No. 1, 2, 3, 4, 10, 19, 22 and 59 regarding value-added tax (BS 10 November 2022).*