The Federal Court rules against the FTA's 25/75% practice

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Impact on non-profit organisations

In an explicit manner, the Swiss Federal Court has ruled against the Federal Tax Administration's (FTA) so-called 25/75% practice regarding VAT liability and the right to register for VAT purposes in Switzerland.

The case related to a foundation operating a museum which covered less than 25 % of its costs by revenues generated from supplies of goods and services, respectively more than 75% of its costs were financed by non-considerations, such as donations, subsidies, capital contributions, etc. In accordance with the 25/75% practice, the FTA claimed that the foundation cannot be considered taxable person and cancelled the VAT registration of the foundation retroactively from 1 January 2010.

In its judgement 2C_781/2014, dated 19 April 2015, the Swiss Federal Court has decided that this practice is inconsistent with the VAT Law. Even if, as in the case at hand, the foundation's costs are covered far below 25% by considerations for supplies of goods or services, the VAT registration cannot be denied.

The Federal Court dismissed the argument of the FTA in relation to the 25% threshold stating in its judgement that: "within a business activity there cannot be a non-business area. A non-business activity, which is not entitled to input VAT deduction, cannot be simply presumed, but must be clearly and unequivocally independent to the business activity". As a result, the foundation will be reinstated in the VAT Register with retroactive effect as of 1 January 2010 and will likely be reimbursed a significant (six figure) VAT amount from the FTA.

For non-profit organisations this judgement has significant consequences:

If a non-profit organisation performs business activities, it is liable for the VAT and must register, when its turnover from such business activities exceeds the threshold of CHF 150,000 (for cultural, sport or other organizations pursuing goals in the public interest) or CHF 100,000 (for organisations not falling under the previous category). In case the organisation's turnover is below the threshold, the possibility for opting for voluntary VAT registration should be investigated.

Where the organisation does not perform non-business activities which are clearly and unequivocally independent from its business activities, it should be entitled to full input VAT deduction, unless the organisation carries out supplies of goods and services exempt from tax without credit or receives subsidies.

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If an organisation has been de-registered for VAT purposes due to the discussed practice of the FTA as of 1 January 2010, it is worth analysing the possibility of the organisation to claim retroactive VAT registration and the related input tax.

If the organisation has, besides its business activity, a clearly independent non-business area of activity, the allocation and therefore the input VAT deduction right should be examined.

In any event the FTA will have to revise its current practice and take a decision which is already overdue. Taking into account the Swiss Federal Court's clear judgement it is worthwhile to act proactively and take the opportunity to analyse the VAT position of your organisation and submit your proposed solution to the FTA.

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