

Supreme Court: conversion of former wool factory into shopping mall results in 'essentially a new building' for VAT purposes

On November 11, 2022 the Supreme Court delivered a judgment in a case involving the question of whether the conversion of a building resulted in the creation of 'essentially a new building' for VAT purposes. The taxpayer in this matter acquired a former wool factory turned shopping mall in 2016; in the acquisition process, the taxpayer invoked the real estate transfer tax concurrence exemption. For this exemption to be applicable, the transfer of a building by the seller/property developer to the taxpayer must be subject to VAT by operation of law. For its part, the taxpayer was expected to argue that the conversion of the former wool factory into a shopping mall resulted in the creation of 'essentially a new building' for VAT purposes. The Supreme Court ruled that the building works to the property involved such extensive alterations to its structural construction that the only possible conclusion was that the works resulted in the creation of 'essentially a new building', i.e. a newly constructed building for VAT purposes.

The case

The following facts, which are outlined in the judgment, were decisive in the Supreme Court's opinion. The case concerns a former factory complex that was closed in 1997 and had fallen in serious disrepair since then. The complex had a boiler room, a smokestack and a production shop with a 330-meter-long production line. The designated use of the factory complex was changed from 'industry' to 'industry and retail' in 2009. The property developer had the following building works done:

- At least a third of the original 330-meter-long production line was demolished at both ends, so that 140 meters remained. This part of the production line was divided into ten 14-meter-wide sections. Ten-meter-wide passages were created in each section to form the entrances to the shops.
- All interior walls were removed to create an idea of space and to make the area feel light and airy. These interior walls were load-bearing.
- The roof was replaced, in which process its characteristic features were retained (saw-tooth roof).
- The cast-iron pillars were repaired or replaced by new ones if they had eroded beyond repair.
- New steel constructions were installed to increase the required load-bearing capacity of the new roof.
- Most of the floor was replaced. The floor load capacity was increased from 400 kilograms to 1,000 kilograms per square meter. To be able to carry this load, the foundation was strengthened and replaced.
- The boiler room was given a completely new roof and a new floor and new interior load-bearing structures were installed.

Relevance of essentially a new building

If a property is designated as essentially a new building, it will qualify as new for VAT purposes. The transfer of a new property is subject to VAT. The acquiring party can

invoke the real estate transfer tax concurrence exemption in respect of the acquisition in principle, as a result of which no real estate transfer tax will be due.

Grounds for Supreme Court judgment

Based on the facts listed above, i.e. the building works, the Supreme Court ruled that the only possible conclusion was that the conversion of the former factory complex resulted in the creation of a new building.

The Supreme Court refuted the decision by the Den Bosch Court of Appeals that this case did *not* involve the creation of 'essentially a new building'. The Supreme Court opined that the Court of Appeals used an incorrect benchmark by making allowance for the facts that:

- the extensive building works were aimed at retaining or reintroducing the characteristic heritage features of the factory complex;
- the identity of the former factory was retained and the building is still referred to as the old factory in popular parlance;
- it could allegedly not be deduced from the Supreme Court judgment that structural construction alterations are to be considered decisive.

The Supreme Court ruled that the criteria applied by the Court of Appeals were not normative, however. According to the Supreme Court, the question of whether or not 'essentially a new building' has been created should be answered based precisely and only on the structural construction works a building has undergone. In the Supreme Court's opinion, the only alterations that would justify a refurbishment being so extensive that essentially a new building has been created are structural construction changes, such as replacements of all or some of the existing structural construction. This should be reviewed on a case-by-case basis, in the Supreme Court's view. In short, the Supreme Court decided that, in this case, essentially a new building had been created.

Relevance for real estate practice

In its judgment, the Supreme Court reconfirmed that, in answering the question of whether a previously non-existent property is created, it is decisive whether or not the building has undergone *structural construction alterations*. In addition to alterations to the existing structural construction, the Supreme Court has also named the following factors that may point to the creation of 'essentially a new building':

- Changes to the property's structural identity/outward appearance;
- Changes to the functionality of the property in terms of its uses;
- The level of investments in the building; and
- The added value achieved by the refurbishment.

These as well as other factors may point to a refurbishment being so extensive structurally that essentially a new building has been created. In the Supreme Court's opinion, these factors individually or jointly are not decisive or required, however. With

this judgment, the Supreme Court expressly repeated its judgment of November 4, 2022 (see [our coverage](#) on this case).

Since, in its judgment of November 4, 2022, the Supreme Court ruled that ‘essentially a new building’ is not typically likely to be created, this case effectively concerns an exception to the rule. That said, it does offer a certain level of guidance for similar cases.

The question of whether a refurbishment results in the creation of a new building is of major practical relevance and always requires a case-by-case review, as the Supreme Court said. The advisors of KPMG Meijburg & Co’s Real Estate Indirect Tax Group can help you review whether or not ‘essentially a new building’ has been created. Please feel free to contact one of them or your regular advisor.

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