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Tax & Legal

Transfer of (short-term) leased building by a developer not a transfer of a going concern for VAT purposes

On April 4, 2018 the Arnhem-Leeuwarden Court of Appeals ruled that the transfer of a (short-term) leased office building by a project developer does not qualify as the transfer of a going concern for VAT purposes. In its judgment of May 15, 2020, the Supreme Court upheld the decision by the Court of Appeals.

The building in question was leased on a VAT-exempt basis. As a result of this judgment, parties will be confronted with a higher amount of non-recoverable VAT.

1. Background and points of law

The taxpayer (a project developer) developed business premises and office buildings for its own account and risk. After the project developer had developed a building and had leased most of it, it was sold.

In the case at hand, the project developer had developed a building. In 2007 it found a tenant that, as of the beginning of October 2010, leases the building on a VAT-exempt basis. In September 2010 (prior to the building being occupied) the project developer sold the building to an investor. The building was transferred on October 15, 2010. The investor continued the leasing of the building.

In dispute is the answer to whether the transfer of the leased office building qualifies for VAT purposes as a transfer of a going concern.

2. Decision by the Court of Appeals and judgment by the Supreme Court

Although the transfer of a leased building may qualify as the transfer of a going concern, the Court of Appeals inferred from the case documents that the building was not used to carry on the business of the property developer. According to the Court of Appeals, this concerned the sale of a good from the inventory of buildings developed by the property developer. The property developer did not want to permanently operate the building itself and from the beginning of the development had intended to sell the building to an investor. The sale took place before the first occupation of the building. An office building is, after all, worth more in a leased state than if it is (partly) vacant.

Based on the above, the Court of Appeals ruled that the transfer did not qualify as a transfer of a going concern. The Supreme Court upheld the decision by the Court of Appeals and did not assess the case because the question is not important for the uniformity or the development of law. The decision by the Court of Appeals is thus final.

3. Practical consequences

Because the transfer does not qualify as a transfer of a going concern, VAT is payable on the full purchase price of the building. If the transfer would have qualified as a transfer of a going concern, then no VAT would have been due on the purchase price and

consequently the non-recoverable VAT (in connection with the VAT-exempt leasing) would have been limited to the VAT due on the development costs of the project developer. In that case, for example, (non-recoverable) VAT would not have been due on the development profit.

In these proceedings there was a sale before the first occupation and a transfer shortly after the first occupation (two weeks). It is questionable whether the proceedings would have led to the same outcome if the building had been listed for sale several months after the first occupation. Although, in our view, this does not necessarily have to be the case, but based on this judgment the transfer of a leased building by a project developer is less likely to qualify as a transfer of a going concern.

When a new building is sold, it will always have to be assessed whether the transfer is should qualify as a transfer of a going concern.

The tax advisors of Meijburg & Co's Real Estate Indirect Tax Group would be pleased to help you identify the potential tax implications of this judgment. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
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