



December 2018

VAT taxation on transactions regarding commercial real estate

On 11 December 2018 the Minister of Finance issued tax explanations ("explanations") setting out the circumstances in which a given transaction of a commercial real estate sale should be classified as a sale of an enterprise or an organized part of an enterprise ("OPE"), i.e. as an activity not subject to the VAT Act of 11 March 2004 ("the VAT Act").

The purpose of the official explanations

Explanations issued are intended to increase legal certainty for taxpayers by reducing the risk of the tax authorities challenging the correctness of VAT classification and taxation of commercial real estate supply and drawing the attention of VAT taxpayers conducting supplies of such real estate to factors determining the correct transactions taxation.

Criteria for classification of commercial real estate disposal as an enterprise or an OPE for VAT purposes

According to the Minister of Finance, the following factors should be taken into account when assessing whether the sale of assets constituting commercial real estate should be classified as a sale of an enterprise or an OPE:

- the intention to continue the seller's business activities with the set of assets within the transaction limits, and

- the actual ability to continue the business activity with the components being the subject of the transaction.

Simultaneously, the assessment of whether assets should be considered as an enterprise or an OPE should be performed at the time of the transaction.

Appropriate VAT treatment of the supply of rented commercial property

According to the explanations, the transfer of commercial real estate may be treated as a sale of an enterprise/OPE outside the VAT scope, if all of the following conditions are met:

- the assets which are the subject of the transaction allow the purchaser to continue the business activities of the seller and it is possible to continue these activities solely on the basis of the assets acquired, and
- the purchaser intends to continue the business activities of the seller with the assets acquired in the course of the transaction.

Thus, if for the purpose of continuing the seller's business activity the purchaser needs to engage assets that were not subject to the transaction or to undertake additional factual or legal actions (e.g. concluding agreements), it is not possible to conclude that in a given case the set of assets constitutes an enterprise or an OPE.

In order to determine whether the set of components transferred to the purchaser allows for the continuation of the seller's business, it is necessary to determine whether, in addition to the transfer to the purchaser of standard elements typical for VAT transactions in immovable property (such as movable property, technical infrastructure and rental rights and obligations), elements such as the following are transferred to the purchaser:

- rights and obligations emerging by the virtue of the agreements under which debt financing was granted to the seller for the purpose of execution, acquisition, modernization, adaptation or reconstruction of the transferred real estate,
- property management agreements,
- asset management agreements,
- claims of a pecuniary nature related to the transferred property.

However, in order to assess whether a group of assets constitutes an enterprise or an OPE, it is not necessary to transfer all of the above mentioned elements, but the minimum necessary to allow for the continuation of the seller's business activity.

For the purpose of assessing whether the purchaser of commercial real estate intends to continue the seller's business, it is necessary to take into account

all the circumstances surrounding the transaction under assessment at the time of the conclusion of the transaction, and in particular the fact that the purchaser has taken action confirming its intention to continue the seller's previous business.

Factors not affecting the assessment as to whether the sale of a commercial property constitutes a supply of goods subject to VAT

The explanations also include a catalogue of elements which, while forming an integral part of a commercial property sale, should not be taken into account when assessing whether a sale of a property constitutes a supply of goods subject to VAT or a sale of a business or an OPE outside of the VAT scope. These elements include:

- movable property used in the building,
- rights from securities for proper performance of obligations resulting from lease agreements established by tenants (e.g. rights from bank guarantees, deposits,

declarations of voluntary enforcement submission),

- rights from the guarantee of proper performance by contractors of works connected with construction/repair works carried out in the building,
- rights and obligations resulting from maintenance contracts, including, among others, contracts concerning the provision of security services, cleaning, real estate services (the so-called facility management agreement).

Protection of taxpayers applying for explanations

Compliance by a taxpayer with explanations of tax law issued by the Minister of Finance on the basis of the Act of 29 August 1997, the Tax Ordinance ("Tax Ordinance") will cover the taxpayer with the protection provided for individual tax law interpretations, which means that the taxpayer should not bear the risk of being charged with tax liability in the event of a change the interpretation of regulations.

How can we help you?

If you are interested in obtaining more information on the explanations or discuss its impact on the classification of real estate transactions under the VAT Act, both already completed and future, please contact us. In particular, we would be pleased to assist you in the following matters:

- correct classification of real estate transactions for VAT purposes in order to secure tax settlements of both parties to the transaction,
- preparation of a request for an individual tax law interpretation for the purpose of securing a real estate transactions,
- analysis of real estate transactions already carried out in terms of the risk of reclassification of these transactions in the context of the explanations.

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