



Optional VAT on immovable letting

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17 April 2018

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What happened before

Comparison between the current and new regulation

Details of the new regulation

To conclude: looking forward to 1 October 2018

Previous dealings

Optional VAT on B2B immovable letting

Previous dealings

- Government 'summer agreement' 2017: extension scope of warehouse letting (e-commerce), subsequently extended to *general* option to apply VAT to immovable letting (according to 'Dutch model')
- October 2017: optional application of VAT only for 'new' buildings (budget neutrality of the regulation)
- Proposal not maintained due to negative impact on budget
 - Press release 25/10/2017: "*The government has decided to limit at this stage the planned reform of the optional application of VAT to immovable letting.*"
 - Letting of warehouse maintained (through change of the current administrative position)
- December 2017: proposal re-emerges, but is eventually delayed once more
- **Council of Ministers 30 March 2018: approval in 'first reading'**

Optional VAT on B2B immovable letting

Next steps

- Advice Council of State
- 'Second reading' in the Council of Ministers
- Start of the parliamentary procedure
- Entry into force 1 October 2018

Current and new regulation compared

Optional VAT on B2B immovable letting

Comparison

Current regulation – exceptions

- Letting of parkings
- Letting of warehouses
- In framework of operation of (air)ports
- Immovable equipment
- VAT finance lease

- Business centres
- Commercial centres
- Ad hoc regulations ('active letting')

New regulation – exceptions *

- Letting of parkings
- Letting of warehouses (B2C)
- In framework of operation of (air)ports
- Immovable infrastructure
- VAT finance lease
- Short term rent
- Option B2B immovable letting

- Business centres (?)
- Commercial centres (?)
- Ad hoc regulations ('active letting') (?)

* The comments in this presentation are based on the current pre-draft of law; it is not excluded that changes are to this proposal are made. This presentation therefore is not to be considered to comment on the definitive regulation. Please contact your regular contact within Deloitte or Laga to discuss the impact of the new rules for your business.

Closer look to the new regulation

Optional VAT on B2B immovable letting

Legal framework

Art. 44, § 3, 2° VAT Code (new version - free translation):

"The following transactions shall be exempt,

1° (...)

2° the letting of immovable goods by nature, with the exception of:

(...)

*d) The letting of a **building** or a part of a building which is **exclusively** utilised by the tenant for the purposes of his **economic activity** that grants to him the capacity of **taxable person**, provided the landlord and the tenant jointly **opt** to subject the letting to VAT".*

(...)

Conditions

Letting of buildings

- Letting of a **building** or part of a building
 - Cf. large definition of a 'building'
 - Part of a building: relevant in the case of mixed use of a property (see below)
- Letting of a **land plot**: remains VAT exempt
 - Unless land on which the let building stands and let at the same time

Conditions

Capacity of the tenant

- Tenant must be a **taxable person** who uses the building in the framework of his **economic activity**
- Double condition
- **Taxable person**
 - Including mixed and exempt taxable persons (e.g. letting of an elderly home to an operator)
 - Partial taxable person: see *infra*
 - Excluded:
 - Private persons
 - Public bodies
 - (Passive holdings)

Conditions

Capacity of the tenant

- Destined for **economic activity**
 - Hence, not covered: letting of a dwelling (e.g. to an independent person)
 - Partial taxable person (e.g. public body)
 - Option only possible for separated part of the property that is used for the economic activity
 - Independent use of this part is required

Formalities

Joint option

- Formalities to be determined by executing Royal Decree
- Probably:
 - Option to be expressed in the letting agreement
 - Per separate agreement – mixed use of building seems possible
 - Notification to VAT office?
- Option is definitive and irrevokable for the agreement
 - Quid in the case agreement is prolonged?
 - If conditions are not longer met?

Consequences

Existing agreements

- Agreements subject to VAT by force of law
 - No consequences (however, see below, warehouses)
- Agreements including an implicit or explicit right to use an immovable good
 - In essence no 'letting' agreement
 - So not affected
 - E.g. grating of the right to exercise a professional activity; business centre
- Warehouse
 - Due to the current strict scope of application,
 - the application of VAT by option will become the 'general' rule,
 - entailing scope limitation of mandatory application of VAT to B2C,
 - But with less strict conditions

Consequences

Existing agreements

- Concrete scope of application
 - Logistic letting (warehouses)
 - Retail and commercial centres (shopping; retail park)
 - Office letting
 - Social care sector
 - Public sector (municipalities; public companies, ...)

Application in time

Only for new buildings erected as per 1 October 2018

- Option to apply VAT is only possible for new buildings for which the “first tax point” for “directly allocated expenditure” occurs as per 1 October 2018
- **New buildings**
 - Newly constructed
 - But also in the case severe renovation works
 - Cf. current criteria for ‘renewed’ buildings (structure – 60%-rule)

Application in time

Only for new buildings erected as per 1 October 2018

- Option to apply VAT is only possible for new buildings for which the “first tax point” for “directly allocated expenditure” occurs as per 1 October 2018
- **First tax point**
 - Invoice date (provided timely issued)
 - Credit note followed by new invoice?

Application in time

Only for new buildings erected as per 1 October 2018

- Option to apply VAT is only possible for new buildings for which the “first tax point” for “directly allocated expenditure” occurs as per 1 October 2018
- **Directly allocated expenditure**
 - Not limited to construction costs, also soft costs are meant
 - Question of facts
 - *Cf.* consultation from law office
 - Remark: letting agreement can be concluded prior to 1 October 2018 (no construction cost)

Application in time

Only for new buildings erected as per 1 October 2018

- This condition does **not** apply to **warehouses**
 - New regulation applies immediately to new agreements
 - Also for existing buildings
 - Quid existing agreements?

Other measures

Normal value

- New rule introduces 'normal value' concept for letting fees
- Based to temper impact of direct full input VAT recovery in the hands of the landlord with spread payment of VAT on letting fees
- Conditions
 - Letting fee lower than normal value
 - Tenant cannot fully deduct VAT
 - Link between the landlord and the tenant (e.g. director – share holder – control)
 - Caution in the case intra-group letting of property

Other measures

VAT recapture period of 25 years

- Today: 15-years (new building) or 5 years (works of improvement) calculated on an per annum basis
- For building let with VAT due to joint option:
 - **25** years (5 jaar)
 - Computed on **monthly** basis
 - Remark: quid art. 187, al. 1 VAT Directive: adjustment period may be extended to 20 years?
- Computation on monthly basis, except in the case of:
 - Rent free period
 - Vacancy outside the control of the landlord (e.g. period between 2 agreements; due to works etc.)

Other measures

Reduced VAT rates

- Social housing, elderly homes, certain institutions (care sector), schools, ...
 - 6% - 12%
 - Sale – rights in rem – VAT financial lease
- **All regulations will be extended to immovable letting subject to VAT by option**
 - Cf. supra: investor who lets to operator of elderly home = option possible. Operator is (exempt) taxable person

Other measures

Impact on real estate transfer taxes?

- Immovable letting: RETT of 0,2%
- Currently no general exemption of proportional RETT (cf. art. 159, 10° RETT Code)
- But general administrative practice that letting agreements subject to VAT are exempt for the proportional RETT (cf. warehouses)
- Change of RETT Code needed?

Short term letting

Mandatory application of VAT

- *“The provision of immovable goods by nature that are not used for dwelling of for transactions referred to in par. 1 and 2 [of this art. 44], for a period that shall not exceed six months”* (free translation)
- Scope of application: hotels, conference centres, expo hall
 - ‘Immovable goods’ (so larger scope than ‘building’ – cf. optional VAT)
 - No concurrence with ad hoc-regulations? (cf. business centres)
- Exceptions:
 - Letting of a dwelling
 - Letting in social-cultural sector
 - E.g. letting of a hall by cultural centre

To conclude

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