Sale and leaseback transactions are outside VAT scope if no actual supply is made - CJEU

On 27 March 2019, the Court of Justice of the European Union (CJEU) issued its judgment in a Belgian case regarding a VAT exempt sale and leaseback of a building belonging to a taxpayer. In this case, where it concerned a purely financial transaction and where the taxpayer continued to use the buildings for his economic activity, the CJEU finds that both the sale and the leaseback do not qualify as supplies from a VAT point of view. As a result, no VAT revision or adjustment is required by the taxpayer.

Background

Mydibel, a Belgian company active in the production and sale of potato based products, deducted all VAT on purchase invoices for work on its buildings. For liquidity reasons, Mydibel entered into sale and leaseback agreements for these buildings. First, a long lease (right in rem) was established in favour of financial institutions. At the same time, a financial lease agreement (including a purchase option at the end of the contract) was concluded, whereby Mydibel leased the buildings from the financial institutions. The buildings were used by Mydibel in an uninterrupted and permanent manner for its VAT taxable activity.

Since the establishment of the long lease right by Mydibel was exempt from VAT, the authorities claim that an adjustment or revision of input VAT deducted on the buildings is required.
CJEU ruling

According to the CJEU, the initial VAT deduction by Mydibel must not be adjusted, nor should there be a VAT revision for investment goods; this is based on the two following grounds:

- Mydibel continued to use the buildings for its (VAT taxable) activities. The sole establishment of a long lease right without VAT is not breaking the direct link between works performed on the buildings and Mydibel’s VAT taxable activity.

- To the extent that the sale and leaseback operation does not constitute a VAT exempt supply of the buildings by Mydibel, there is no change in the buildings’ use that affects the deduction entitlement in the years following acquisition. If there would be an actual VAT exempt supply, through which the acquirer can act as owner, the conclusion would be different.

Although the CJEU refers to national Courts to assess all situations and facts, it indicates that in the case at hand the establishment of the long lease would not constitute a supply of goods, as the long lease is inseparable from the lease. The transactions cannot be regarded as a supply of goods since the financial institutions are never empowered to dispose of the buildings as if they were owners.

If the sale and leaseback operation would constitute a supply of goods for VAT purposes, then this would give rise to an adjustment or revision, even if the buildings’ actual use for the VAT taxable activity is never interrupted. The CJEU finds that such adjustment or revision is not against the principles of neutrality and equal treatment.

Impact

Currently, sale and leaseback transactions under Belgian VAT law are typically treated as separate transactions for VAT.

With a VAT taxable sale followed by a leaseback (also with VAT), parties must pre-finance the VAT on the sale. With a VAT exempt sale, the original owner might be facing an adjustment /revision of deducted input VAT.

Although the CJEU refers to national Courts for a final assessment of facts, the CJEU clearly puts forward a number of arguments to state that both the sale and (immediate) leaseback must be disregarded from a VAT point of view.

This case definitely creates a more uncertain position for future sale and leaseback transactions, bringing opportunities to eliminate the above mentioned negative effects. For companies who (voluntarily or after a VAT audit) repaid (part of) the initially deducted VAT, due to a past VAT exempt sale (followed by a leaseback), the case also offers arguments to revisit the transaction in order to reclaim this VAT.
If you want to discuss the content of this alert of the next steps more in detail please contact your usual tax consultant at our Deloitte office in Belgium or:

- Johan Van der Paal, jvanderpaal@deloitte.com, +32 2 600 66 39
- Ivan Massin, immassin@deloitte.com, +32 2 600 66 52
- Danny Stas (Laga), dstas@laga.be, +32 2 800 70 11

For general inquiries, please contact:
bedeloittetax@deloitte.com, + 32 2 600 60 00

Be sure to visit us at our website: http://www.deloitte.com/be/tax | http://www.laga.be

---

**Deloitte Academy**

**Tax Tools and Publications**

---

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte provides audit, tax and legal, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte has in the region of 225,000 professionals, all committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

Laga CVBA in Belgium

Laga CVBA is part of a privileged multidisciplinary cost-sharing association with Deloitte Belastingconsulenten BV CVBA.

© 2019. For information, contact Deloitte Belgium.