

Dutch Supreme Court asks CJEU for clarity about VAT on the sale of leased property by a project developer

On Friday, November 21, 2025 the Dutch Supreme Court rendered an interlocutory judgment important for the (real estate) practice regarding the applicability of Section 37d Dutch VAT Act 1968 ('VAT Act'; Article 19 EU VAT Directive) in the situation where a project developer transfers a residential apartment complex with rented apartments to a property investor. The case concerns the question whether, and if so, under which conditions such a transfer can remain outside the scope of VAT as a transfer of a going concern. The interlocutory judgment leads to (continuous) uncertainty for the (real estate) practice.

1. Background and points of law

The case concerns the situation in which the taxpayer, a property developer, purchased an office building in 2015. The office building was converted into 77 residential apartments. From May through July 2017, the taxpayer signed tenancy agreements for the apartments, including parking spots. On June 28, 2017 an investor put in an offer for the building. This offer resulted in a signed letter of intent early in August 2017. The tenants moved into the apartments after the building was put into use on August 1, 2017. The contract of sale with the investor was concluded on October 24, 2017 and the legal transfer of the leased building to the investor took place on November 15, 2017. At that time, the apartments in the building had been rented on a VAT-exempt basis for about three and a half months.

This case concerned, among other things, the answer to the question whether the transfer by the project developer of the (short-term) leased property qualifies as the transfer of a going concern for VAT purposes (hereinafter also referred to as 'the relief') as referred to in Section 37d VAT Act. What is important here is that, although the taxpayer is not entitled to recover VAT on the all-in building costs because the building is leased to the tenants on a VAT-exempt basis, no non-recoverable VAT is due on the higher selling price paid by the buyer. After all, under the VAT Act the supply of a building within two years of its conversion is subject to VAT if the conversion involved 'essentially new construction' (the latter was moreover also in dispute).

In 2022 the Arnhem-Leeuwarden Appeals Court ruled that the relief as referred to in Section 37d VAT Act applied. In 2024 Advocate General Ettema advised the Supreme Court to declare the cassation proceedings initiated by the Deputy Minister of Finance ungrounded.

2. Supreme Court interlocutory judgment

The main question in the cassation proceedings is whether the Appeals Court was right in ruling that the VAT assessment must be canceled due to the application of the relief. In its ruling the Appeals Court left open the question whether the transfer – without application of the relief – would have been subject to VAT.

The Supreme Court first addressed (apparently at its own initiative) the question whether the Appeals Court was right in taking as its starting point that the relief covers all situations in which the goods supplied are only used for VAT-exempt activities. In its reflections on this question, the Supreme Court attaches much importance to the

objective of the relief, which is intended to simplify transfers of businesses by avoiding the need to charge large amounts in VAT, which the buyer can then recover (who is then thus merely prefinancing large amounts). From this point of departure, the Supreme Court arrived at the following considerations:

- According to the Supreme Court it is not clear whether the relief also applies to situations where a business is transferred that only has VAT-exempt (no VAT recovery right) turnover and the buyer continues that business unchanged. After all, in that case the buyer is not merely pre-financing, because any VAT charged is not eligible for recovery.
- Article 136 of the EU VAT Directive provides a VAT exemption for the supply of goods (both movable and immovable goods) that are only used for VAT-exempt services. The Netherlands did not adopt this provision for immovable property, because that could be in violation of the mandatory VAT-taxed supply up to two years after the (essentially) new construction was put into use. According to the Supreme Court, the direct effect of the rules of Article 136 EU VAT Directive mean that they apply to the present transfer, because it has been established that the apartment complex is only used for VAT-exempt activities. Despite the fact that the taxpayer has not invoked this rule of law, the Supreme Court found that the taxpayer may apply this rule of law *ex officio*.

The Supreme Court does not come to a conclusive answer to the question raised by the taxpayer and therefore has asked the Court of Justice of the European Union (CJEU) for a preliminary ruling on this. Only after the analysis of this 'preliminary question', does the Supreme Court deal with the following question, over which parties disagree.

- Can the relief also be used if the vendor had intended right from the start of the economic activity (the renting of apartments) to (quickly) sell the apartment complex? In other words: is the question whether it only needs to be assessed if objectively a going concern has been transferred or that it is also worth paying attention to the intention behind the vendor having developed the immovable property and started leasing it after it was completed i.e., with a view to selling it?

Here too, the Supreme Court doesn't come to a conclusive answer and proceeds to request a preliminary ruling from the CJEU.

3. The request for a preliminary ruling

Due to the ambiguities identified by the Supreme Court, it has formulated the following questions for a preliminary ruling from the CJEU:

- Does the relief in the EU VAT Directive cover the supply of immovable property that is only used for VAT-exempt economic activities (in this case VAT-exempt property rental), whereby the vendor has not received a VAT recovery right, and therefore is that supply under Article 136, introduction and 136(a) EU VAT Directive or otherwise under Article 135(1)(j) EU VAT Directive (VAT-exempt sale of an old immovable property) exempt from VAT?

- If so, for the purposes of applying the relief is it sufficient that the immovable property is rented out by the vendor and supplied in that rented out state, so that objectively speaking an independent business is being transferred? Or should the intention with which the vendor developed the immovable property and started renting it out after its completion also be taken into account, and (thus) the circumstance that the renting of the apartments was begun in order to facilitate the sale of the immovable property?

What especially stands for us is the way the first question is formulated. The question no longer addresses the fact that the buyer could not have recovered VAT if it had continued the business unchanged and the question that is thus not asked is whether that is sufficient to render the relief inoperative. We tentatively deduce from this that the Supreme Court would not find such an outcome in line with the text of the EU VAT Directive.

Furthermore, what also stands out is that the Supreme Court does not make a problem of Article 136 EU VAT Directive (the exemption for supplies if a good is only used for VAT-exempt activities) for supplies of immovable property, while the EU VAT Directive (in Article 12) also expressly allows Member States to make supplies of immovable property subject to VAT by operation of law up to two years after the (essentially) new building was put into use. In our view, it would have been logical for the Supreme Court to explicitly ask which of these two provisions must take precedence if a Member State opts for the two-year period.

Generally, the CJEU passes VAT cases onto the General Court. The General Court is expected to rule on the questions within one or two years.

4. Relevance for the (real estate) practice

Unfortunately, this interlocutory judgment leads to more questions for the (real estate) practice and not to answers. Moreover, the judgment only addresses the VAT aspects of the transfer. Whether or not to exempt a transaction from VAT may also impact the applicability of the concurrence exemption for real estate transfer tax purposes. In short and without fully addressing this, the exemption from real estate transfer tax may only be applied if a supply is subject to VAT by operation of law or if there is the transfer of a going concern (if the supply would have been subject to VAT by operation of law if the relief had not been applied). The fact that the Supreme Court allows Article 136 EU VAT Directive to be directly invoked and, in particular, the question whether the possibility that this direct invocation hinders the application of the relief, leads to the risk that the acquirer will be liable for real estate transfer tax if the vendor in situations such as in the present case has not charged any VAT (on the basis of the legislative text) and there is therefore no overlap between VAT and real estate transfer tax.

Moreover, we see several principled and practical arguments to prevent or mitigate the risk of setting aside the relief by directly invoking the EU VAT Directive.

The practice has long been eagerly awaiting a definitive answer to whether the relief can also be applied by project developers who sell immovable property in a (short-term)

leased state. An answer to this question is expected, although no-one knows when that will be.

More generally, the Supreme Court has created (some) doubt as to whether the relief can be applied to transfers to a buyer who will continue the VAT-exempt activities with the transferred business. This doubt may also have an effect outside the real estate practice, for example in transfers of a going concern in the insurance sector or the transfer of a dental practice.

In practice, we therefore recommend that, where necessary, the VAT and real estate transfer tax consequences of proposed transactions are carefully identified, thereby always taking account of the ambiguities arising from this interlocutory judgment. The tax advisors of KPMG Meijburg & Co's Real Estate Indirect Tax Group and our other VAT specialists would of course be happy to help you identify any potential tax consequences and mitigate risks in the coming uncertain period. Feel free to contact one of them or your usual advisor.

KPMG Meijburg & Co
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