

## VAT classification of real estate transactions

April 2017

The Polish tax authorities appear to be changing their approach to the VAT classification of real estate transactions trying to deny refunds of VAT charged on the sale of leased commercial real estate (such as retail parks or office buildings). Transactions which previously usually was seen as VAT-able sale of assets nowadays the tax audit authorities often classify as non VAT-able sale of enterprise/organized part of an enterprise. Change of classification of such transactions, beside denying to buyer the refund of VAT charged on the sale, implicates also taxation of the transaction with civil tax. Maximum rate of civil tax for sale of enterprise/organized part of an enterprise would be 2% and it is paid by the buyer.

The current quite aggressive approach of the tax authorities is causing a lot of uncertainty in the real estate market. It is caused specially by attempts of tax authorities to deny protection of an advance individual tax ruling obtained by taxpayers before the transaction, in which tax authority competent to issue tax ruling classified transaction as VAT-able. As a reason of denying protection of individual tax ruling tax audit authorities indicate that the actual transaction that took place had not corresponded to the conditions described in the tax ruling request.

Recently the Provincial Administrative Court in Szczecin issued the judgment concerning above mentioned matters (judgment of 9 November 2016 case ref. I SA/Sz 901/16), in which position of tax authorities was supported.

### Details of the case:

The Provincial Administrative Court in Szczecin has denied recovery of input VAT to the buyer of a shopping centre on the grounds that it should be classified as a sale of an organized part of an enterprise (a "going concern"). The transaction was performed between related parties. The operation and management of the shopping centre remained substantially unchanged after the transaction.

The court judged that components of the transaction had been organizationally and financially separated within the existing enterprise and constituted a set of functionally-related tangible and intangible components intended to perform specific business tasks. The transaction between related parties allowed uninterrupted continuation of the lease agreements. The court ruled, therefore, that the conditions for classifying the deal as the sale of a going concern had been fulfilled. Although recoverability of input VAT by the buyer had been confirmed in advance by the Ministry of Finance in individual tax ruling, the court stated that the description of the background to the transaction presented in the ruling request lacked a number of facts, so the buyer was not under protection of the ruling.

The decision of the Provincial Administrative Court has been challenged and is currently before the Supreme Administrative Court, so is not yet final and legally valid, nonetheless it may encourage tax authorities to such actions.

### Implications of the case:

The risk of dispute with the Polish tax authorities over VAT refunds and VAT classification of commercial real estate transactions has recently increased. Presently the tax audit authorities more than before are likely to consider sale of leased commercial real estate as non VAT-able sale of enterprise/organized part of an enterprise. However, the general view on classification of such sale presented in recently issued individual tax rulings as well as in judgments of the Supreme Administrative Court (e.g. judgment of 24 November 2016 case ref. I FSK 1316/15) has not changed. Basing on tax rulings and judgments to date, it appears that if only real estate and connected rights are transferred to the buyer (even if the estate is already leased and the buyer will continue the lease agreements), it will be considered as a VAT-able sale of assets, not as a non VAT-able sale of enterprise/organized part of an enterprise.

# TECHNICAL UPDATE

Nevertheless, increased risk of dispute with authorities over classification of transactions causes that to mitigate the tax risk of transactions extra precautions should be taken. In particular, requests for advance individual tax rulings should be prepared carefully and the description of the transaction must be thorough, complete and contain also information about the background of the transaction. Otherwise, in case of dispute with the authorities, the protection of individual tax ruling could be contested, as in case mentioned above. It is advisable also to review past transactions against the descriptions provided in the individual tax ruling requests.

**For enquiries about this Technical Update please contact:**

**BW Corporate Services Sp. z o.o.**

Ul. Sienna 83 lok. 218

00-815 Warsaw

W: [www.bwcs.pl](http://www.bwcs.pl) T: +48 22 292 89 30

Contact the expert: Konrad Jastrzębski [jastrzebskik@bwcs.pl](mailto:jastrzebskik@bwcs.pl)

**For enquiries about Property & Construction please contact:**

**MTG Consulting GmbH**

Kelheim, Germany

W: [www.mtg-group.de](http://www.mtg-group.de) T: [+49 94] 41 297090

Contact the expert: Ted Heaslip. [ted.heaslip@mtg-group.de](mailto:ted.heaslip@mtg-group.de)

AGN International

M: [info@agn.org](mailto:info@agn.org) T: +44 (0)20 7971 7373 W: [www.agn.org](http://www.agn.org)

