KPMG Meijburg & Co Tax & Legal

Updated VAT Property Decree

On December 14, 2023 the Ministry of Finance published the updated VAT Immovable Property Decree. This decree updates the 2013 version of the same decree. Besides containing case law rendered during the period 2013 until the present and EU law concepts already familiar to the property market, the decree also includes new elements. This memorandum only deals with the most important new elements. For example, the decree contains an approval for options for the VAT-taxed leasing of immovable property that does not comply with formal requirements, in circumstances where the parties involved did however comply with the conditions for such an option and the lessor charged VAT. Subject to conditions, it is now possible to elect this option with retroactive effect. The decree also contains important policy changes for the VAT treatment of solar panels, service charges and utility services, which landlords, such as housing associations, will be confronted with as of January 1, 2025.

Building and paving concept

A question that regularly arises in practice is whether the supply of undeveloped land intended for paving with clinker bricks or stelcon slabs is a building site for VAT purposes. The supply of a building site for VAT purposes is subject to VAT by operation of law and its acquisition is in principle exempt from real estate transfer tax. To qualify as a building site for VAT purposes, there must be undeveloped land that is intended to be built on. The decree states the following about this:

- Clinker paving that is part of a whole in which, for example, the top layer has been excavated and which also consists of drainage and site lighting qualifies as a building. Clinker paving with a foundation inlaid with asphalt also qualifies as a building.
- However, if there is an area with clinker bricks that is not part of a whole and the clinker bricks can be easily removed, then this does not qualify as a building. This also applies to an area equipped with stelcon slabs. We do not necessarily endorse this limited interpretation of 'building' in all cases, for example if this concerns public roads.

Supply of apartment rights in blueprint stage

For the purposes of assessing the VAT regime for the supply of apartment rights that only exist on a blueprint, the part of the plot of land on or above which the future apartment will be located will be taken into account. If, for example, there are (still) buildings on the relevant plot of land, the supply will in principle be exempt from VAT and the acquisition subject to real estate transfer tax. However, if the plot of land on or above which the apartment right is located is a building site for VAT purposes, then according to the decree the supply will be subject to VAT.

Initial commissioning and phased commissioning of immovable property

It is important to establish and document the initial commissioning of new immovable property. This determines, for example, when the two-year period begins during which supplies of the immovable property are VAT taxed by operation of law and when the VAT adjustment period for VAT recovery (whether or not applied) commences. But also when the six-month period begins during which (usually) the the real estate transfer tax

concurrence exemption can be applied. According to the decree, the initial commissioning concerns the actual first and sustainable VAT use of a building in accordance with the objective designated VAT use of the building in question. This requires a case-by-case assessment. In the case of a building that consists of several independent parts ('units'), the initial commissioning is assessed for each independent part of the building.

When does refurbishment (essentially) concern a new building?

The decree takes account of the case law of the Supreme Court that has appeared since 2013. It follows from this that refurbishment does not always involve a new building for VAT purposes. Only changes in the structural construction, including the replacement of (part of) the existing structural construction, can lead to a refurbishment that has been so extensive that a new building has essentially been created for VAT purposes. Whether such changes have been so extensive is, according to the decree, in line with the case law of the Supreme Court, dependent upon the circumstances of the case. A renovation will rarely be so extensive that it will essentially create a newly constructed building for VAT purposes.

Changes to the (structural) identity, the outward appearance and/or function in the sense of possible uses, the level of investments made, the added value realized by the refurbishment and the public profile of a building before and after the refurbishment can, like other factors, be indications that a refurbishment has been so extensive from a structural point of view that a new building has essentially been created for VAT purposes. They are not the decisive factors, however.

Lease of immovable property and ancillary supplies

Solar panels

Under the new decree, the lease of non-integrated solar panels located on or in the immediate vicinity of the home by the same landlord qualifies as an ancillary supply to the lease. As such, the lease of non-integrated solar panels falls within the VAT exemption for the lease of the home. This deviates from current practice, as the Dutch tax authorities have, until now, assumed a separate VAT-taxed lease of non-integrated solar panels. Based on a reasonable application of the law, landlords who (before 2023) have recovered the VAT on the purchase of solar panels may continue to classify the lease of solar panels as a separate VAT-taxed service until the end of the VAT adjustment period for the solar panels. As a result, the VAT already recovered on the purchase of the solar panels can be maintained in such situations. As of January 1, 2023, the purchase and installation of solar panels in principle fall under the 0% VAT rate. The VAT consequences of the new policy are therefore expected to be limited for landlords.

Utility services and service charges

In the case of the lease of immovable property, landlords typically also charge tenants for utility services and service charges. Under current policy, service charges related to the lease of residential properties generally fall within the VAT exemption, while VAT is calculated on service charges related to the lease of commercial properties (even if the

lease itself is exempt from VAT). This policy is inconsistent with the case law of the Supreme Court and the Court of Justice of the European Union. In the updated decree, this policy has therefore been amended.

Under the new decree, services for which (service) charges are imposed are treated as independent and, in principle, as a VAT-taxed service when the tenant individually or the tenants collectively has/have the option to choose a supplier. It is not necessary for the tenants to actually make use of this option.

In the case of the provision of utility services, there is, in any case, a separate and often VAT-taxed service (in addition to the lease) if the tenant can freely determine their use of utility services (heat, cold, etc.). The presence of an individual meter and billing based on actual use are important indicators in this regard.

This change in policy may have implications for landlords who have acted on the basis of the current policy. It is therefore advisable to reassess and, if necessary, adjust the VAT treatment of service charges. To allow landlords to change their service charge policies, the current policy may still be applied until January 1, 2025.

Energy performance reimbursement

In line with parliamentary records, the new decree stipulates that the energy performance reimbursement is deemed to be part of the payment for the rental of the residential property for VAT purposes.

Approval of the VAT-taxed lease option

A highly relevant new approval for the real estate market concerns the option for VAT-taxed lease. Parties sometimes unintentionally do not, or do not properly, opt for VAT-taxed lease. This can have significant financial consequences in such cases.

The new decree contains important provisions in this respect.

A distinction is made between (1) the situation in which it appears that taxed lease has been opted for by operation of law, and (2) the situation where this is not the case.

(1) Opting for VAT-taxed lease

If the parties have acted in respect of the lease as though they have opted for VAT-taxed lease by operation of law, this option can be applied with retroactive effect. The option takes effect on the date referred to in the parties' option request or on the date included in the amended written lease agreement, if this is prior to the date of filing of the request or the amendment of the lease agreement. This approval is subject to the following two conditions:

1. The 90% norm (for certain branches and sectors, the 70% norm) in respect of the application of the option for taxed lease has been met during the entire period for which the application of the option for taxed lease is requested or the period as included in the amendment of the written lease agreement.
2. Parties have acted throughout the entire period as if taxed lease has been opted for by operation of law. This means that VAT has been charged and stated on

the invoice, and parties accept the consequences that legislation and regulations attach to opting for taxed lease. The agreement of the parties must be apparent from the facts and circumstances.

The approval explicitly applies to the situation that often occurs in practice, where the formal conditions for the application of the option for VAT-taxed lease have not been met in the written lease agreement. The formal shortcoming must be corrected within a reasonable period after the parties become aware of it, for example, through an amendment of the lease agreement.

(2) Not opting for VAT-taxed lease

If the parties have acted as though they have not opted for VAT-taxed lease by operation of law, the new decree states that there is still deemed to be VAT-taxed lease if parties file a request to this end or amend the lease agreement. In that case, opting for VAT-taxed lease can have retroactive effect to no more than three months.

Holiday homes

The decree confirms that residential property and apartments also made available for short stays and furnished for such purposes for payment, qualify as accommodation for holiday let business. The rental income is then subject to 9% VAT. The decree further elaborates on the VAT treatment of holiday home rentals through ‘intermediaries’ such as a vacation park. If the intermediary rents the holiday home in their own name, the owner’s rental to the intermediary falls under the 9% VAT rate, provided that objective data, such as the lease agreement between the owner and the intermediary, indicates that the property is made available solely for short stays. If this cannot be (satisfactorily) demonstrated, it is advisable for the owner to opt for VAT-taxed lease in the lease agreement with the intermediary to retain the right to VAT recovery on costs and investments for the home.

Selection of other topics

- The decree clarifies how land should be accounted for when establishing a right of superficies. It is clarified that only the land beneath a building is relevant for the VAT qualification of the right of superficies.
- Several definitions of terms in the decree, such as ‘immovable property’, ‘element’, 'tool,' and ‘machine’, have been adapted to EU law.
- With regard to exceptions to the VAT-exempt letting of immovable property, a concise descriptive passage has been included about the VAT-taxed rental of tools and machines by operation of law.
- Rights of ground lease and superficies, among other things, can be regarded as supply or lease of immovable property for VAT purposes. There is a lease if the price for the right in rem is lower than the value, at least the cost, of the immovable property. Under the new decree, subject to conditions there is nevertheless a supply if the price has fallen below the cost due to deteriorating market conditions.
- The decree includes a new section regarding the place of supply in relation to immovable property. The policy on this point is primarily descriptive, as it refers

to the EU VAT Implementing Regulation that has direct effect in the Netherlands.

Closing remark

As noted, in this memorandum we have focused on what we consider to be the most important topics and changes. However, the new property decree contains a multitude of (detailed) technical VAT topics that could be important for your organization. We would be happy to assess with you which aspects of the new property decree may be relevant to your organization.

KPMG Meijburg & Co
December 15, 2023