

Dutch Supreme Court provides step-by-step plan for VAT qualification of land with remanent buildings

On February 9, 2024 the Dutch Supreme Court ruled on the qualification of land as developed or undeveloped for VAT purposes. The case concerned a plot of land that still had a 96 meter long wall on it at the time of supply, which acted as a retaining wall. The Supreme Court ruled that the wall remaining after demolition was negligible in relation to the undeveloped part of the land and that the entire plot therefore must be regarded as undeveloped land. The qualification of land as developed or undeveloped is relevant for VAT purposes, because the supply of developed land is, in principle, VAT-exempt, while the supply of undeveloped land may be subject to VAT as a building site, whereby the acquisition is then often exempt from real estate transfer tax. The step-by-step plan that the Supreme Court has now provided for qualifying land with remanent buildings for VAT purposes offers welcome practical guidelines.

Facts and circumstances

In 2002 the taxpayer acquired a plot of land with an old candy factory on it. The factory building was subsequently demolished, with the exception of a side wall ('the wall'). The wall covers almost the entire side of the plot, is 96 meters long, 2.4 meters high and 0.25 meters wide, with a two meter deep and one meter wide foundation. The taxpayer sold part of the plot and in 2016 transferred it to another party. This land was undeveloped, with the exception of the aforementioned wall. The wall acts as a garden partition and outside wall of the newly built garages and as a retaining wall for the adjacent plots on the other side of the wall.

The question at stake here for VAT purposes is whether there is undeveloped land or whether the presence of the wall means that there is developed land. Under certain conditions, the supply of undeveloped land qualifies as the supply of a building site subject to VAT. VAT is charged on such a supply by operation of law and the acquisition is, in principle, exempt from real estate transfer tax. Parties with a VAT recovery right generally prefer this. At the moment that there is no building site for VAT purposes but developed land, the supply is exempt from VAT by operation of law and the acquisition is subject to real estate transfer tax. Parties without a VAT recovery right will prefer this, for example housing associations or property investors.

District Court and Court of Appeal

The District Court had ruled that there cannot be undeveloped land and therefore there was no supply of a building site subject to VAT. The Court of Appeal had ruled that the wall acted as a retaining structure at the time of supply. According to the Court of Appeal, the wall is therefore essentially subservient to the land, because the land cannot exist without the wall. It went on to conclude that the wall is inextricably linked to the land and is by no means negligible. According to the Court of Appeal, that is the reason why the wall was not demolished. The Court of Appeal therefore ruled that there is a supply of developed land.

Supreme Court

The Dutch Supreme Court has provided a step-by-step plan for qualifying the land for VAT purposes.

1. Is the land linked to the building?

If the supply of an immovable property concerns a single plot of land comprising not only a building (such as the wall) but also undeveloped land, what first has to be assessed is whether that plot, as a whole, must be regarded as a building and its land linked to the building. There is linked land if the undeveloped part is, according to societal views, regarded as belonging or subservient to the buildings on that plot of land.

2. Buildings negligible in relation to undeveloped land?

If the undeveloped part is not regarded as linked land, it must subsequently be assessed whether the converse is the case. That situation arises if the building must be regarded as negligible in relation to the undeveloped part of the plot. In that case, the plot is regarded as undeveloped land.

3. One or more independent supplies for VAT purposes?

It is only if a developed part of a single plot cannot be regarded as negligible in relation to the undeveloped part and the undeveloped part cannot be regarded as land linked to the developed part that the question may arise as to whether there are parts that must be taken into account separately for VAT purposes and must be treated differently. Of importance is that the plot must not be artificially divided. There is an artificial division if the various parts, from an economic perspective, are indivisible or constitute a single whole.

The Supreme Court ruling

Contrary to the Court of Appeal, the Supreme Court ruled on the basis of the step-by-step plan that the wall is negligible in relation to the undeveloped part and that the entire plot must be regarded as undeveloped land. The Supreme Court therefore ruled that this involved the supply of undeveloped land.

Building site subject to VAT

Based on the current definition of a building site for VAT purposes, what must be assessed after it has been established that there is undeveloped land, is whether the undeveloped land is (apparently) intended to be developed. If that is the case, then the supply of the undeveloped land is subject to VAT and the acquisition is exempt from real estate transfer tax.

The judgment offers welcome practical guidelines. Whether there is a building site for VAT purposes is of major practical importance and must always be assessed on a case-by-case basis. The advisors of KPMG Meijburg & Co's Real Estate Indirect Tax Group would be happy to help you assess this. Feel free to contact one of them or your regular advisor.

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