



Supply of land with a building which will be demolished (ECJ case C-71/18)

On 19 March 2019, the Advocate General of the European Court of Justice (ECJ) delivered his official opinion for the case C-71/18, with regards to whether the transfer of land on which there is an existing building, where the parties clearly intend at the moment of transfer that the purchaser or a subsequent purchaser of the land will completely or partially demolish that building in order to construct a new building, constitutes a transaction which is exempt from VAT.

1. Facts of the case

In April 2012, the Odense Municipal Council in Denmark adopted an urban plan for an area in the port which includes a warehouse. KPC Herning A/S (a Danish project development and construction company) and Boligforeningen Kristiansdal (housing association) worked together on a project from May 2013 for the construction of youth housing in the port of Odense. In November 2013, KPC purchased the property. The transaction was considered VAT exempt, as the transfer related to property with an existing building. However, in the event that the transaction was subject to VAT, the agreement provided that any VAT due would be paid by KPC.

On 5 December 2013, KPC entered into agreements with Boligforeningen stating that Boligforeningen will purchase the property in order, as a builder and operator, to convert it into housing units which it would subsequently rent out and manage, and that KPC, as a condition of the sale of the property, reserved the right to carry out the design and conversion of the property into housing units as contractor. It was also agreed that Boligforeningen was to take care of demolishing the warehouse (except of the middle part of the warehouse's eastern gable that was to be preserved) at its own expense and risk. On 7 March 2014, Boligforeningen entered into an agreement with another company for the demolition. It is undisputed that Port of Odense, KPC and Boligforeningen had a common understanding for the construction work that was to be undertaken, including the demolition of the warehouse. The housing units on the property were ready for occupation on 15 August 2015.

2. Question referred to the ECJ

Is it compatible with Article 135(1)(j), and Article 12(1)(a) and (2), on the one hand, and with Article 135(1)(k), and Article 12(1)(b) and (3), on the other hand, of the VAT Directive for a Member State, in circumstances such as those in the main proceedings, to consider a supply of land on which at the time of supply there is a building as a sale of building land subject to VAT, when it is the parties' intention that the building is to be demolished completely or partially in order to make room for a new building?

3. Analysis of the case

The Advocate General takes the view that, in principle, both transactions should be exempt from VAT because the evaluation of a potential supply of building land under the VAT Directive must follow the same logic as the assessment of any other transaction, which is the *objective character* of the transaction *at the moment of the supply*. At that time, the warehouse was still intact and no demolition works had been started. The date of demolition was not even foreseen with certainty and the process was to be set in motion by a subsequent buyer, not KPC.

The national rules of Denmark have a clear provision that 'if it is agreed that the building will be demolished by the seller or if it appears from the contract of sale that the buildings are acquired for demolition by the buyer, it is a sale of building land'. The Advocate General states that this provision determines whether the transaction is subject to VAT without taking into account the state of affairs when the supply takes place but on the basis of events which are supposed to take place in the future.

In addition, the parties' intention as stated in the contract becomes the conclusive element in the assessment, whilst all objective characteristics of the transaction at issue are disregarded. The Advocate General also states that the fact that part of the gable of the old building was kept in the new building is immaterial.

4. Opinion of the Advocate General

The Advocate General concluded that a national rule, such as that at issue in the main proceedings, according to which supply of land on which there is a building constitutes a sale of building land subject to value added tax if the parties' intention is that the building be demolished to permit construction of a new building, is not compatible with Article 12 and Article 135(1) (j) and (k) of the VAT Directive. He proposed that the Court should answer the question referred for a preliminary ruling taking into account this conclusion.

5. Significance of the case

This opinion, if adopted by the ECJ in the final judgement, will shed light upon the VAT treatment of the supply of land with a building which the parties intend to demolish. In particular, if the ECJ decides that such supply is exempt from VAT, businesses and individuals engaged in the supply of a building, after its first occupation, may be able to issue their invoice without charging VAT, irrespective of the buyer's intention, even if the buyer's intention is to demolish the building in order to construct a new building.

It is worth mentioning that the Cypriot VAT legislation has a provision that the term 'non-developed building land', which is subject to VAT, includes plots with a building that will be demolished based on a planning permission for demolition. If this opinion is adopted by the ECJ, this provision may need to change.

Our team will be closely monitoring the developments at the ECJ and will be keeping abreast whether the final judgement of the ECJ will follow the opinion of the Advocate General.

6. Way forward: How PwC can help you

Our designated team of indirect tax specialists is at your disposal to discuss the impact of this case on your business and assist in the correct application of the rules.

7. Your contacts for Indirect Tax matters in PwC Cyprus



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