



# **VAT and immovable property**

**Update from an EU perspective**

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- Building = any structure fixed to or in the ground
- Member States **may** lay down rules /criteria
  - conversion of building
  - land on which building stands
  - first occupation
  - building land

- The rule: taxation
  - actually, limited to the supply of « new buildings » by building contractors (regular activity...)
- VAT exemptions of
  - supply of building which is not « new »
  - supply of land which has not been built
  - leasing « or letting » (?) of immovable property
    - (art. 135, 136 and 137 of the VAT Directive)

# VAT exemptions

(art. 135, 136 and 137 of the VAT Directive)

## Exceptions to exceptions

- But compulsory taxation
  - accommodation, parking, machines, safes
  - taxation *may* be extended to other operations (eg. warehouses)
- But option (possibly restrictions) to tax offered to business or to non business in case of exemptions
  - supply of building (and part thereof) and the land
  - supply of land which has not been built
  - leasing « and letting » of immovable property

- Options offered to Member States
  - to define operations
  - to extend taxation
  - To apply taxes other than VAT (but under certain conditions ....)
  - To decide who is liable of the payment of the VAT
- Option to tax offered to Business and individuals
  - Formal conditions

# Why such extensive freedom given to Member States ?

- 1967: Member States are free to tax, to exempt or to apply special taxes on operations without influence on intra-community trade
  - Limit the number of « taxable persons » or tax collectors to control
  - Existence of other taxes (transfer taxes, etc)
  - Privacy rules
  - Difficulty to agree on a common treatment of what is a building
  - Inheritance of previous legislations (in particular the German Act of 16 October 1934)

- Cumulation of VAT with other indirect taxes on supply of buildings (eg. Transfer taxes)
- Capital Goods Scheme: revision of VAT initially deducted in case of subsequent VAT exempt supply (sale, letting ..) during a period of adjustment (5 to 20 years)
- Heavy costs if building is used for VAT exempt or « out of the scope » purposes

# European reports on immovable property

- Bours Report (1971)
- Arthur Andersen Report (1997)
  - There is no impact assessment of the economic efficiency of the VAT in the immovable property sector at EU level
  - Copenhagen Group and KPMG Report about the public authorities and the not for profit sector



# Back to basics ..

- Rebecca Millar (2012)
  - Immovable property has more common characteristics with shares than with tangible goods
- Studies of Maurice Lauré (the « inventor » of the French VAT)
  - how to consume the « use of a building » ?
  - VAT exemption = taxation of costs + difficulties to make budgets
  - application of VAT on immovable property is not economically rational
    - collection of a consumption tax prior to consumption is massive limitation of capital available for productive investments (consumer has to borrow money in order to pay past taxes)
  - Lauré's proposal: zero rate + yearly tax

# Current activity of the European Commission

- « *Green paper* » on the future of the VAT
  - Broad public consultation (2011)
  - Proposals to be submitted by 2014
- Why ? The EU VAT system is
  - too complex, too burdensome and susceptible of fraud
  - an obstacle to a better functioning of the single market
  - not efficient
  - changes in technology and economic environment
- New circumstances : the economic crisis

# The future of the EU VAT (1)

EU Commission plans

- System based on the destination principle
  - Goods taxed where the consumption takes place
  - Nothing specific on immovable property
- Simple
  - Standardisation of VAT obligations
  - Broadening of the « One Stop Shop »
  - EU VAT portal
  - Guidelines and explanatory notes

# The future of the EU VAT (2)

EU Commission plans

- Efficient and neutral
  - Broadening of the tax base
  - Review of the reduced rates
- Robust and fraud proof
  - Quick reaction mechanism
  - Broadening the automated access to information
  - Better cooperation with third countries
  - Improve the efficiency of the tax administrations of the EU
  - Review the way the VAT is collected and monitored

- EU VAT Forum

- Dialog platform where business and national tax authorities experts informally discuss tax administration issues in a cross-border environment
- Discuss practical insights provided by tax authorities
- Assist the European Commission in promoting good practice

# Immovable Property and CJEU Cases ....

- Case 73/85, Kerrutt
- Case 50/87, Commission v. France
- Case C-173/88, Henriksen
- Case C-63/92, Lubbock Fine
- Case C-468/93, Gemeente Emmen\*
- Case C-60/96 Commission v. France
- Case C-136/97, Norbury Developments
- Case C-358/97, Commission v. Ireland
- Case C-359/97, Commission v. UK
- Case C-12/98, Amengual Far
- Case C-466/98, Camara Municipal do Porto\*
- Case C-400/98, Breitshol
- Case C-150/99, Stockholm Lindöpark
- Case C-326/99, Goed Wonen
- Case C-408/98, Mirror Group
- Case C-108/99, Cantor Fitzgerald
- Case C-269/00, Wolfgang Seeling
- Case C-315/00, Rudolf Maierhofer
- Case C-275/01, Sinclair Collis
- Case C-321/02, Detlev Habs
- Case C-428/02, Fonden Marseliborg
- Case C-487/02, Gemeente Leusden
- Case C-284/03, Temco Europe
- Case C-184/04, Uudenkaupungin kaupunki
- Case C-246/04, Turn und Sportunion Waldenburg
- Case C-72/05, Wolny
- Case C-174/06, CO.GE.P
- Case C-451/06, Walderdorff
- Case C-572/07, RLRE Tellmer Property
- Case C-270/09, Mc Donald Resorts
- Case C-102/08, Salix
- Case C-461/08, Don Bosco
- Case C-269/09, Kirchberg Sarl
- Case C-180/10, Slaby
- Case C-436/10, BLM SA
- Case C-621/10, Balkan and see properties
- Case C-326/11, JJ Komen
- Case C-392/11, Field Fisher Waterhouse

# Why so many litigations before the CJEU ?

- The CJEU has to ensure
  - The compatibility of the legislation adopted by the European institutions with the European Treaties
  - An uniform interpretation of the European legislation
- In indirect taxes, the CJEU gives priority on common interpretation of the VAT Directive above the functioning of the internal market (*see Prof. Rita de la Feria*)
  - Uniform taxable base *ie* common list of VAT exemptions
  - So called « common concepts »
  - EU own resources
- Fiscal neutrality in the recent case law : objective equal treatment at comparable level of production / distribution (>< concept of multistage consumption tax)

# Usufruct as rental of immovable property

Case C-326/99, *Goed Wonen* (!!!!)

- The foundation “Goed Wonen” granted a usufructuary right (a kind of temporary property right) for a term of 10 years in respect of the new dwellings in return for a sum lower than the cost price of those dwellings and request the input VAT on the construction cost
- Dutch taxman: you cannot recover input VAT because this is a VAT exempt rental of a building
- ECJ: indeed Member States may qualify usufructuary right as a VAT exempt immovable property rental “Although the leasing of immovable property is in principle covered by the concept of economic activity within the meaning of Article 4 of the Sixth Directive, *it is normally a relatively passive activity, not generating any significant added value*” (**contra:** Case C-186/89, *Van Tiem*)



# Rental of immovable property

Case C-284/03 *Temco Europe*

- Temco putted undefined space within one building at the disposal of three related companies having a similar activity. The users were not able to oppose any right for using the building against Temco. This was not qualifying as « letting» according the Belgian civil law and therefore Temco considers the operation as taxable
- Tax authorities: this is a letting according to the VAT directive and therefore it is VAT exempt
- Court of justice: this is a VAT exempt letting because it is a « *relatively passive activity* » (*Is this a VAT concept ?*), but finally the Court of appeal of Brussels decided that it was a taxable operation

# Article 113 of the Treaty of Lisbon

(as entered into force on December 1, 2009)

- **“The Council shall (...) adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market ~~within the time limit laid down in Article 14 (ie 31 December 1992)~~ and to avoid distortion of competition.”**

- Article 113 of the Treaty of Lisbon cannot be directly invoked by taxpayers against the national legislations and /or the VAT Directive, but
  - the provisions regarding internal market (art. 26 TFUE) are applicable since January 1, 1993
  - the prohibition of discrimination is a « *Principle of Community Law* » that supersedes the text of the directive unless specific exceptions are provided for
  - VAT exemptions on immovable property are applicable « *without prejudice to other community provisions* »

# Principles of Community Law

- Principle of non-discrimination
- Principle of proportionality
- Principle of legal certainty
- Principle of effectiveness
  - Procedural rules intended to safeguard right should not make the exercise of rules excessively difficult
- Tax authorities are not allowed to rely
  - on their own failings
  - on an a Directive provision not implemented in the national legislation
  - on some derogations that have not been notified to the European Commission in due time



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