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VAT on margin: the condition of identity of the property is validated by the Council of State

Deliveries of building plots and buildings completed more than 5 years ago subject to VAT may in certain cases be based on the margin achieved by the seller. This is the case when the prior acquisition of the property by the transferor has not given the right to deduct VAT (for example, acquisition of the property from a person not subject to VAT).

The tax authorities had added to this condition of non-deduction of the upstream VAT, a condition of identity between the acquisition and resale of the physical characteristics (although strictly identical in terms of surface area of the land tenure for example) and legal (a building plot or building had to keep the same legal nature). This condition of identity had introduced a real legal insecurity, in particular on the operations in progress of developers and developers who proceed by definition to plot divisions.

This position was supported by four departmental responses in 2016 [1] before being partially discontinued in a said response Ministerial Vogel 2018 [2] coming **delete the physical identity criterion well** .

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It is on this precise question of the existence of an identity condition for the application of VAT at the margin that a judgment of the Council of State delivered on March 27, 2020 came to provide clarification [3]. A company acting as a merchant of goods had acquired built land on which a building was built before proceeding with its demolition and parcel division. The company subsequently sold plots of building land from these operations.

La Cour d'appel avait validé l'application de la TVA sur la marge à la revente en considérant sans incidence la modification des **caractéristiques physiques et de la qualification juridique** du bien entre l'acquisition et la revente.

Le Conseil d'Etat vient invalider cette position. Interprétant l'article 268 du CGI à la lumière de la directive qu'il transpose en droit français [4], le Conseil d'Etat considère que la modification des caractéristiques physiques et juridiques du bien faisait obstacle à l'application de la TVA sur marge.

Il convient de noter que si le Conseil d'Etat casse la décision de la Cour d'appel en ce qu'elle a permise l'application de la TVA sur la marge sans rechercher si le bien avait fait l'objet de modifications **tant** physiques que juridiques, cette décision doit être lue à la lumière de la réponse Vogel précitée qui ne retient plus la condition d'identité physique.

En conclusion, cette décision vient principalement sécuriser les opérations de lotisseurs ou aménageurs. Ces derniers pourront ainsi toujours donc procéder à des divisions parcellaires de terrains à bâtir (sans procéder à des démolitions) avant la revente en collectant une TVA réduite sur la marge dès lors que l'acquisition initiale des terrains n'aura pas ouvert droit à déduction de la TVA.

[1] *De la Raudière, n ° 94061, Bussereau n ° 96679, Savary n ° 94538 and Guidicelli n ° 904*

[2] *Response from the Ministry of the Economy and Finance to written question No. 04171 by Mr. Jean Pierre Vogel published in the OJ Senate of May 17, 2018 - page 2361*

[3] *CE 27 March 2020, n ° 428234*

[4] *Article 392, Council Directive 2006/112 / EC of 28 November 2006*

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