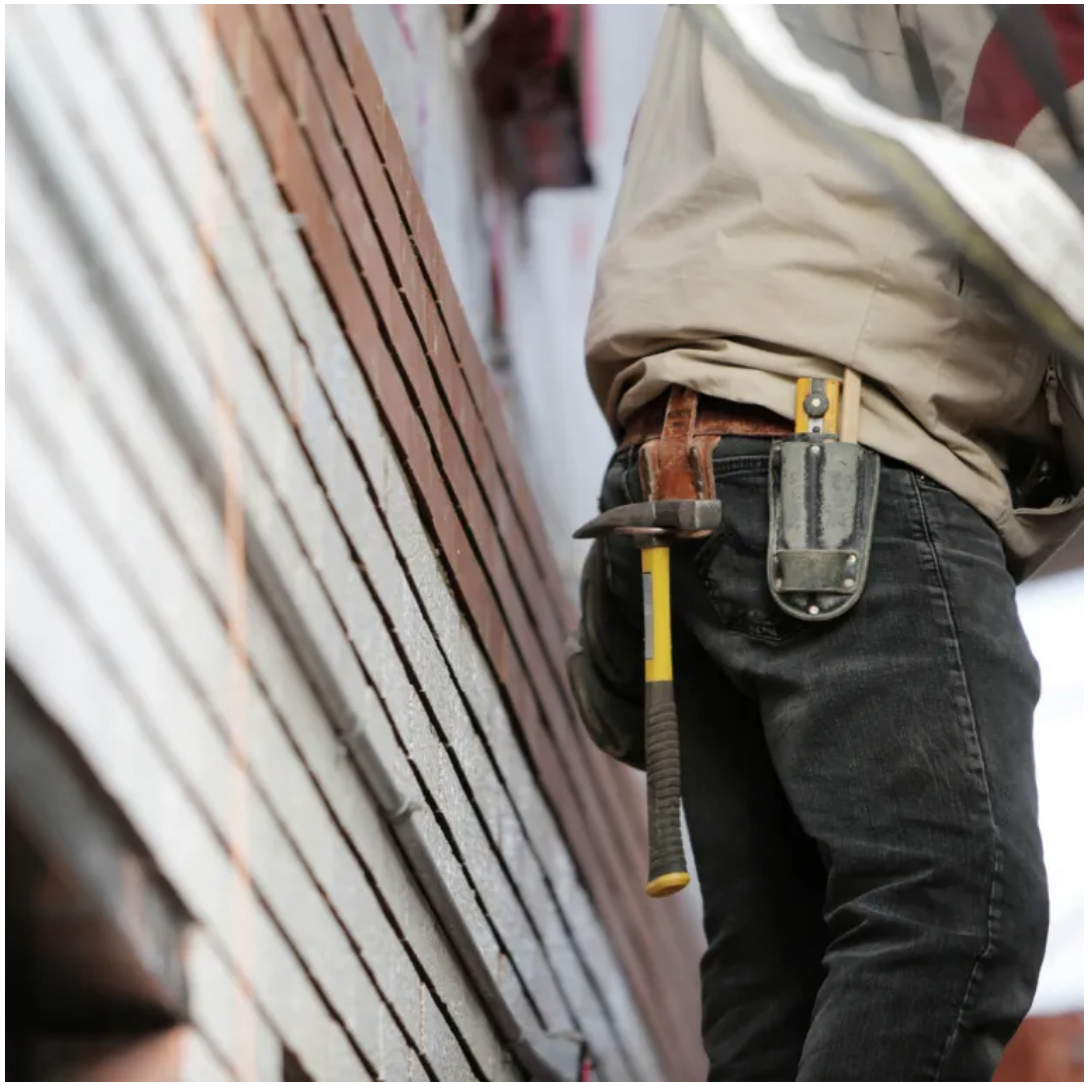
VAT deduction for the maintenance costs of the property that can be rented both taxed and exempt

By **Editors** - June 26, 2020



VAT deduction for the maintenance costs of the property that can be rented both taxed and exempt

Since 1 February 1996, the interested party has owned a property that it offers for rental and that is suitable for use as office space. The building was vacant from 1 January 2008 to 31 July 2009. From 1 August 2009 to 19 December 2011, the interested party leased part of the property exempt from VAT to a municipality. During the period when the building was vacant, interested goods and services have decreased to keep the building in good condition. She deducted the VAT charged to her on these maintenance costs in her returns. The tax authorities levied this VAT because it cannot be attributed to the use of the property for taxed services.

The Court has ruled that the interested party is not entitled to a VAT deduction, because the interested party has not provided any objective information from which it can be deduced that it intended to find a tenant with whom it was possible to opt for taxed rental.

The Supreme Court states first of all that the purpose of the tax deduction scheme is to fully relieve the entrepreneur of the VAT owed or paid in the context of all his economic activities. The documents in the proceedings do not allow any other conclusion than that it could not reasonably be ruled out in advance that, after a tenant was found, the taxable lease would be chosen. This means that the interested party is entitled to a VAT deduction with regard to the maintenance costs. This also applies to VAT in respect of the costs of services related to the search for a new tenant for an empty building.

High Council High Council Court of Justice Court High Council Court of Justice

Court

Authority
High Council
Date of judgment
06/26/2020
Date of publication
06/26/2020
Case number
18/02840
Jurisdictions
Tax law
Special characteristics
Cassation

Content indication

Sales tax; art. 15 OB Act; vacancy of immovable property; deduction of turnover tax in respect of maintenance costs of immovable property that is suitable for both taxed and exempt use.

Locations

Rechtspraak.nl
Viditax (FutD), 26-06-2020
VN Today 2020/1677
FutD 2020-1920
NTFR 2020/2021 with annotation of Mr. A. Vroon
Enriched statement

Statement

SUPREME COURT OF THE NETHERLANDS

TAX ROOM

Number 18/02840

Date June 26, 2020

JUDGMENT

in the case of

[X1] BV in [Z] (hereinafter: interested party)
against

THE STATE SECRETARY OF FINANCE

to the appeal in cassation against the judgment of the Arnhem-Leeuwarden Court of Appeal of 23 May 2018, nos. 16/00911 to 16/00914, to the appeal of the interested party against a decision of the Gelderland District Court (nos. AWB 15 / 2720 through AWB 15/2723) concerning additional tax assessments imposed on the interested party for the years 2008 and 2009, the associated decisions regarding tax interest and the fining decisions given to the interested party regarding the additional tax assessments for the years 2009 to 2011. The judgment of the Court is attached to this judgment.

1 Proceedings in cassation

The interested party lodged an appeal in cassation against the judgment of the Court. The appeal in cassation is attached to this judgment and forms part of it.
The Secretary of State has lodged a statement of defense.

2 Assessment of resources

2.1 The following can be assumed in cassation.

2.1.1 Since 1 February 1996, the interested party is the owner of an immovable property that it offers for rent (hereinafter: the property). The property is suitable for use as an office space.

2.1.2 From 1 January 2008 to 31 July 2009, the building was vacant. From 1 August 2009 to 19 December 2011, the interested party leased part of the property to a municipality. The sales tax exemption as referred to in Article 11 (1) (b), preamble, of the Sales Tax Act 1968 (hereinafter: the Law) has been applied to this rental.

2.1.3 During the period referred to in 2.1.2 above, in which the building was vacant, interested goods and services have purchased to keep the property in good condition (hereinafter: the maintenance costs). She deducted the sales tax charged to her on maintenance costs in her returns. The Inspector has levied this turnover tax because, according to him, this tax cannot be attributed to the use of the property for taxed services.

2.2 The Court has ruled that the interested party is not entitled to deduct the turnover tax referred to in 2.1.3 above. According to the Court, this deduction requires that the interested party, during the vacancy period, had the intention to lease the immovable property subject to Article 11 (1), introductory sentence and letter b (5) of the Act. The Court has inferred this from the judgments of the Court of Justice of the European Union of 28 February 2018, C-672/16, Imofloresmira - Investimentos Imobiliários SA, ECLI: EU: C: 2018: 134 (hereinafter: the Imofloresmira judgment) and September 9, 2004, C-269/03, Vermietungsgesellschaft Objekt KirchbergSàrl, ECLI: EU: C: 2004: 512. The intention, existing during vacancy, to rent out the immovable property must be supported on request with objective data. As proof of this, the intention to rent the property is not sufficient (ie exempt or taxed). The interested party has not provided any objective information from which it can be deduced that it intended to find a tenant with whom it was possible to opt for taxed rental, according to the Court.

2.3.1 Submission I is directed against the judgment of the Court stated above in 2.2 that the intention to lease is not sufficient to deduct the sales tax in respect of the maintenance costs during the period of vacancy of the property while that immovable property is nature lends itself to both exempt rental and taxed rental. The plea in support of this argument is based on the judgment of the Supreme Court of 13 June 2014, ECLI: NL: HR: 2014: 1376.

2.3.2 Pursuant to Article 15 (1) of the Act, the entrepreneur is entitled to deduct the turnover tax charged to him insofar as the supplies of goods and services made to him are used for taxable transactions. For the application of this provision, the Supreme Court ruled in the judgment of 4 December 20091 that the entrepreneur immediately uses the goods or services that he obtains to keep a business asset in good condition within the framework of his business, also during a period of that the asset temporarily yields no revenue. In the event that the entrepreneur purchases goods and services to keep a business asset that temporarily yields no income, in good condition, it cannot simply be assumed that the goods and services in question are used for taxable transactions. Nevertheless, the entrepreneur is entitled to deduct the sales tax that has been charged to him in respect of these goods and services, if and insofar as he intends to use the relevant business asset for taxed transactions.2

2.3.3 Under Article 11 (1), introductory phrase and point (b), under 5º of the Act, the legislator has made use of the option offered by Article 137 (1), introductory phrase and point d of the 2006 VAT Directive to provide taxable persons with the to grant the right to opt for taxation with regard to the rental and letting of immovable property. Under Article 137 (2) of the VAT Directive 2006, Member States are to lay down provisions for the exercise of the right of option referred to in paragraph 1 and Member States may limit the scope of the option.
The Dutch legislator has excluded this right of option for immovable property or parts thereof that are used as a home, and has limited this option for all other immovable property to letting to tenants who use the immovable property for purposes for which a full or almost full right to deduct exists (hereinafter also: option for taxed rental). The legislator has not attached any conditions to the exercise of the option, other than that, according to the written rental agreement, the landlord and the tenant have opted for taxed rental or, in other cases, have jointly submitted a request for taxed rental to the inspector.
This arrangement means that for real estate that by its nature is suitable for both taxed rental and exempt rental, it is only clear when a tenant has been found whether the real estate concerned is opting for taxed rental. The exercise of the right of option therefore partly depends on the cooperation of the tenant and the purpose for which he will use the real estate, that is to say, circumstances beyond the control of the landlord.

2.3.4 In this context, the Supreme Court states that the purpose of the tax deduction scheme is to fully relieve the entrepreneur of the turnover tax owed or paid in the context of all his economic activities.3 The effectuation of this objective could be undermined be made

if there is no right to deduct sales tax in respect of the maintenance costs of an unoccupied real estate asset for rental in cases where it cannot reasonably be ruled out in advance that, after a tenant has been found, it will be opted for taxed rental . Therefore, in those cases it must be assumed that the intention of the entrepreneur to rent out an immovable property is the intention to make use of the option of taxed rental. For the sales tax in respect of goods and services that the entrepreneur purchases in those cases during the period of vacancy in order to maintain the immovable property, this means that this tax - as attributable to intended taxable transactions - is eligible for deduction. Contrary to the assumption made by the Court, the judgments of the Court of Justice set out above in 2.2 do not lead to a different opinion. Those judgments concern the situation in which a Member State has imposed conditions on the exercise of the right to deduct in cases where tax letting is opted for. This situation does not arise in the Netherlands. this means that this tax - as attributable to intended taxable transactions - is eligible for deduction. Contrary to the assumption made by the Court, the judgments of the Court of Justice set out above in 2.2 do not lead to a different opinion. Those judgments concern the situation in which a Member State has imposed conditions on the exercise of the right to deduct in cases where tax letting is opted for. This situation does not arise in the Netherlands. this means that this tax - as attributable to intended taxable transactions - is eligible for deduction. Contrary to the assumption made by the Court, the judgments of the Court of Justice set out above in 2.2 do not lead to a different opinion. Those judgments concern the situation in which a Member State has imposed conditions on the exercise of the right to deduct in cases where tax letting is opted for. This situation does not arise in the Netherlands. has set conditions for the exercise of the right to deduct. This situation does not arise in the Netherlands. has set conditions for the exercise of the right to deduct. This situation does not arise in the Netherlands.

2.3.5 With its judgment set out above in 2.2, the Court has ignored what was considered above in 2.3.3 and 2.3.4. Means I succeed.

2.4 The other pleas cannot lead to cassation. The Supreme Court does not have to motivate why it came to this judgment. Indeed, when assessing these resources, it is not necessary to answer questions relevant to the unity or development of law (see Article 81 (1) of the Judicial Organization Act).

2.5.1 From what has been considered in 2.3.5 above, it follows that the judgment of the Court cannot be upheld. The Supreme Court can settle the matter.

2.5.2 The documents in the proceedings do not allow any other conclusion than that it could not reasonably be ruled out in advance that, after a tenant was found, the taxable lease

would be chosen. This means that the interested party is entitled to deduct the turnover tax in respect of the maintenance costs. In that case, there is no dispute between the parties that the additional assessment for 2008 must be canceled and that the additional assessment for 2009 must be reduced to € 2,229.

3 Process costs

The Secretary of State will be ordered to pay the costs of the cassation proceedings. It is hereby taken into account that the cases with numbers 18/02840, 18/02841 and 18/02843 are interrelated within the meaning of the Administrative Law Proceedings Decree.

4 Decision

The high Council:

- declares the appeal in cassation well founded,

- annuls the judgment of the Court of Justice, the judgment of the Court of Justice and the Inspector's judgments, but only insofar as these concern the additional tax assessments for the years 2008 and 2009 and the related decisions regarding tax interest,

- annuls the additional assessment for 2008 and the associated decision on tax interest,

- reduces the additional assessment for the year 2009 to € 2,229 and, accordingly, the related decision on tax interest,

- instructs the State Secretary of Finance to reimburse the interested party for a court registry fee of € 508 paid by the interested party to hear the appeal in cassation, and

- orders the State Secretary of Finance to pay the costs of the interested party for the cassation proceedings, set at a third of € 1,050, therefore € 350 for professional legal assistance.

This judgment was delivered by the EN Punt counsel as chairman, and the PMF van Loon, LF van Kalmthout, ME van Hilten and EF Faase counsel, in the presence of the acting registrar E. Cichowski, and delivered it publicly on 26 June 2020.

1 Cf. HR December 4, 2009, ECLI: NL: HR: 2009: BG4109, legal consideration 3.4.6.

2 Cf. Imofloresmira, paragraph 39, and CJEU 17 October 2018, Ryanair Ltd, C-249/17, ECLI: EU: C: 2018: 834, paragraph 30.

3 Cf. Imofloresmira, paragraph 38, and the case-law cited there.

ECLI: NL: HR: 2020: 1045

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