

Guidelines on transfer tax treatment of commercial real estate deals in Poland

Poland: December 2018

In Brief

On 11 December 2018, the Polish Ministry of Finance published guidelines on the transfer tax treatment (VAT vs. Civil Law Activities Tax - CLAT) of the supply of commercial real estate. The guidelines outline the conditions to determine whether a given transaction comprises separate assets subject to VAT or an enterprise / organized part thereof (OPE) outside of the scope of VAT and subject to CLAT, as well as some case study examples.

The Ministry tends towards asset deals subject to VAT, with enterprise / OPE deals being exceptions in specific cases.

The guidelines provide that in order for a transaction to be considered to be an enterprise / OPE, the following circumstances should be in place at the time of the transaction:

- the buyer's intention to continue the business activities of the seller using the same set of assets; and
- it being possible for the buyer to do so based on the assets acquired, without the need to take any further action or engage any additional assets.

In addition, according to the guidelines, the following four elements should transfer with the enterprise / OPE transaction (along with the real property and lease agreements, which are transferred by virtue of law):

- rights and obligations under the finance agreements which the seller entered into for the acquisition, modernisation or reconstruction of the transferring real estate (if debt financing exists);
- the property management agreement;
- the asset management agreement;
- cash receivables related to the transferred assets.

As a rule, all of these elements should transfer. **If not, a deal should be classified as an asset deal subject to VAT.** However, the guidelines allow exceptions where the transferred set of assets allows the continuation of the business activity of the seller (it is not very clear in which cases this will apply).

Our view

Although from a technical perspective the classification between separate assets vs. enterprise / OPE is still controversial, the guidelines favour asset deals subject to VAT.

As a result, it may be reasonably expected that the Polish market will return to this type of transaction from the prevailing enterprise / OPE deals (asset deals dominated until the mid-2016s). The approach of the Polish tax authorities will be tested in the coming months, following the first VAT refund requests submitted by buyers.

From a formal perspective, the guidelines are deemed to have the protective power of an individual tax ruling. However, due to the fact that their wording is not always clear and each transaction requires separate analysis, the parties may still want to secure their tax position via a standard pre-transaction tax ruling. Such a ruling may cover also (i) a buyer's right to deduct VAT and (ii) lack of not CLAT on a transaction, which is not explicitly covered in the guidelines.

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