Get the RET right

The tax side of real estate
periodic newsletter for the Real Estate sector
September 2021

Companies that rent apartments for the residential purposes of their employees will have to pay VAT, according to the general ruling issued by the Minister of Finance on October 08, 2021 (PT1.8101.1.2021)

The ruling concerns taxpayers that rent apartments and then sublease them to others for residential purposes.
"Summing up, services that consist in the lease of residential property (e.g. apartments) or part thereof, rendered by an active VAT payer to an individual/entity (...) that uses such leased property for the purposes of business operations, e.g. by subleasing it to others for residential use, are subject to taxation at the basic VAT rate," noted the Minister of Finance.

It is possible to contest the entries made in the land and building register with respect to buildings through reference to evidence and documents on the basis of which such entries are made, according to the ruling issued on October 13, 2021 by the Supreme Administrative Court (case files no. III FSK 225/21)

The case concerned a company that owns an office building categorized in the land and building register as a commercial development. The company claimed that in fact, the building serves residential and commercial purposes alike. While the Supreme Administrative Court upheld the prior ruling (which was unfavorable for the company) because the site visit had shown that the building did not actually have a residential function, it nonetheless admitted the possibility to challenge the building categorization in the land and building register if it does not reflect the real status.

An amount paid for the consent for early termination of a lease agreement should be considered as a fee for services, which is subject to VAT, according to the advance tax ruling issued on September 23, 2021 by the President of the National Fiscal Information (0112-KDIL3.4012.264.2021.1.AW)

The case concerned an agreement between the lessor and tenants, on the basis of which one of the tenants was obliged to pay a specific fee in return for the lessor's consent for early termination, and for the resulting waiver of further obligations. The tenant retains the right to deduct VAT. The authority did not provide a statement of reasons to the ruling.
An important issue was brought up by taxpayers that submitted the application for the advance tax ruling: *"The legal relationship between X and Y (i.e. the parties to the agreement) involves reciprocal services. It needs to be noted that (as indicated above) Y is going to receive the Fee specified in Agreement II for its consent for X's sanctionless termination of the Lease Agreement. Consequently, there is a direct and tight link between Y's consent and the Fee due to Y for that consent."*

"The ruling confirms the existing practice of tax authorities which assume that payment of a fee for early termination of an agreement should be categorized as services, as long as such fee is intrinsically related to a specific action taken by the other party."

Real estate tax has to be paid on the entire company building that is included in the register of fixed assets, even if, in fact, only part thereof is used for business operations, according to the rulings issued on October 07, 2021 by the Supreme Administrative Court (case files no. III FSK 121/21 and III FSK 122/21)

The owner of a wholesale facility was only using part of its building for the purposes of business operations. Nevertheless, after an occupancy permit was obtained, the entire building was listed in the company's register of fixed assets. The Supreme Administrative Court decided that the actual use of the building was irrelevant because what matters is the fact that it is included in the register of fixed assets. As a result, it is necessary to pay real estate tax on the entire building, at the rate applicable to buildings intended for business activity.

The value (introduced in 2018) of the excess of financing costs that are not subject to the so-called thin capitalization (article 15c of the CIT Act) is determined as the total sum of PLN 3 million and 30% of taxable EBITDA, according to the ruling issued on October 20, 2021 by the Supreme Administrative Court (case files no. II FSK 390/19)

As of now, tax authorities tend to assume that the value of the excess of financing costs, which is excluded from the thin capitalization regulations, should be set at PLN 3 million or 30% of EBITDA. On the other hand, administrative courts predominantly decide that such value should correspond to PLN 3 million and 30% of EBITDA.

"I hope that the favorable (from the taxpayers' perspective) ruling of the Supreme Administrative Court will be reflected in the approach taken by tax authorities. It needs to be noted, however, that starting from 2022, the value of the excess of financing costs which are not covered by thin capitalization will be set at the higher of PLN 3 million or 30% of EBITDA."

The municipality's return of expropriated real estate should not be regarded as a supply of goods and is not subject to VAT because such return is made as part of reinstatement of the pre-expropriation status, according to the ruling issued on October 26, 2021 by the Supreme Administrative Court (case files no. I FSK 119/18)

The return of real property should not be aligned with the supply of goods, as defined in the VAT Act. Consequently, such return is not VAT-taxable. The amount paid by heirs as part of property restitution is not categorized as compensation.

The application of PIT exemption (in case of property disposal) as a result of expenses incurred for one's own residential purposes – categorization of certain costs related to renovation and adaption (fit-out) – the general ruling issued by the Minister of Finance on October 13, 2021 (DD2.8202.4.2020)

The Minister of Finance has recently issued a general ruling based on which expenses incurred to purchase and install (among others) household appliances, ceiling/wall lighting, kitchen hoods, custom-made furniture and kitchen furniture fit within the definition of costs intended for residential purposes, and can thus be included in the calculation of the tax exemption base.

"Given their functionality and intended purpose, this equipment should be regarded as an intrinsic part of a residential building (unit). In order for a building (unit) to serve residential premises, it needs to be adjusted to satisfy the basic life needs. It has to be highlighted here that the equipment aimed at fulfilling those needs should not include the so-called "small household appliances," such as coffee makers, toasters, microwaves, etc. These are just accessories, rather than indispensable elements without which a kitchen would lose its functionality," concluded the Minister of Finance.

"In my opinion, this general ruling is a clear sign for taxpayers that will soon be obliged to settle their housing tax relief. Importantly, the Minister of Finance focuses on the social aspects of basic residential purposes (as shown by the coffee maker example), rather than the connection between a specific cost and the real property."

Need any assistance? Got any questions? Call or e-mail us

Małgorzata Wąsowska
Tax Advisor / Partner / Head of Tax
+48 691 477 047
malgorzata.wasowska@actlegal-bsww.com

Michał Brzozowicz
Tax Advisor / Attorney-at-law / Senior Associate
+48 665 667 110
michal.brzozowicz@actlegal-bsww.com

Jakub Świetlicki vel Węgorek
Tax Advisor / Senior Associate
+48 505 703 768
jakub.swietlicki@actlegal-bsww.com

Szymon Kokot
Tax Advisor / Trainee Attorney-at-law / Associate
+48 691 557 507
szymon.kokot@actlegal-bsww.com