

Adjusting input VAT on real estate (2/16/19)

Traders that acquire various financial services for improving liquidity and obtaining more current assets might use a ruling made by the Court of Justice of the European Union (CJEU) in Case C-201/18 Mydibel SA on 27 March 2019. The CJEU heard a dispute over the requirement for adjusting input VAT deducted towards the construction, reconstruction or renovation of real estate (RE) that is later subject to a sale and leaseback agreement.

The CJEU analysed the requirement laid down by articles 184–189 of the VAT directive¹ for adjusting any input VAT deduction that exceeds or falls short of what the trader was due.

Under the VAT directive, capital expenditure goods (plant and equipment) have a five-year adjustment period beginning from the year in which they were acquired or manufactured. The adjustment period for any RE acquired as CAPEX equipment may be extended for up to 20 years.

Under the VAT directive, adjustments should be made annually to reflect the actual right of deduction in the year as compared to the input VAT deducted earlier.

Mydibel is a VAT-registered taxable person that makes potato products and owns several buildings on which input VAT has been deducted towards their construction, reconstruction and renovation because the company carries on a fully taxable business. Mydibel entered into sale and leaseback agreements for those buildings with two banks and did not charge VAT on those transactions. Under the terms of the agreements, Mydibel retains title to the RE and continues to fully use it in conducting its taxable business.

The Belgian tax authority had challenged the input VAT deducted originally and demanded adjustments due to the sale and leaseback transactions. The company asserted that, although the sale and leaseback is a financial transaction, this does not change the RE's previous use or purpose.

The CJEU upheld the company's position by stating that the original and the adjusted amount of deductible input VAT depends on the actual or proposed use of the goods or services, and there must be a close and immediate link between the right to deduct input VAT and the later use of the goods or services for making taxable supplies.

The CJEU also finds that Mydibel continues to use the RE in its business after entering into the sale and leaseback transactions, so the circumstances that were taken into account when determining the original input VAT deduction remain unchanged. The CJEU points out that the sale and leaseback forms a single transaction that cannot be considered a supply of goods because the rights examined in the main proceedings that have been assigned to the two banks do not authorise them to deal with the buildings in the capacity as owner. So the VAT directive makes no provision for adjusting input VAT deducted on any RE subject to a sale and leaseback like Mydibel's, according to the CJEU.

We suggest that companies considering similar financial measures should read this ruling to check whether their input VAT deductions need adjusting. Any companies that have already adjusted their input VAT deductions in similar circumstances might consider filing adjusted VAT returns unless the filing deadline has expired.

¹ Directive 2006/112/EC of the Council of 18 December 2006 on the common system of value added tax (OJ L 355, 22.12.2006, p. 1).

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax