

## **Transfer of assets and VAT treatment**

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The transfer of all or part of a company's assets is not deemed by the provisions of the Romanian Fiscal Code as a supply from a VAT perspective. Acquiring a business is therefore not subject to VAT. This sounds simple, but classification can be difficult. Here, then, are the requirements and specifics.

### **Background**

The Romanian Fiscal Code defines the transfer of the totality of a company's assets, and the transfer of a part of the assets of a business line. In such cases the transferee of the assets is considered to be the successor of the transferor, regarding the adjustment of the right to deduct VAT.

If VAT was deducted on the initial purchase of the assets transferred, or VAT has been levied on goods and services used to produce such assets, it is important to clarify the criteria which qualify a transfer of business or transfer of assets to make sure it is not VAT taxed.

The value of the transferred assets is usually substantial and the VAT impact would be the same in case the operation was classified as a supply of goods. The consequences would be a significant negative cash-flow impact for the successor, and would impose a subsequent burden to recover the VAT paid.

### **Requirements**

To qualify as a transfer of assets, such assets must form a structure which is independent from the technical point of view, ie. a structure which is capable of carrying out economic stand-alone activities. The mere transfer of buildings or production facilities where the assets are situated does not by itself classify the operation as a transfer of assets. The business (or activity related to the assets) transferred to the successor can be continued by the successor in a different location, as long as the activity is maintained.

It is questionable whether such activity can be altered by the transferee in any way whilst maintaining the assets' structure as when they were transferred. The European jurisprudence indicate that, in one case<sup>i)</sup>, a tax authority established that the transferee must continue to operate the same type of business as the transferor because he is treated as the latter's successor. In the tax authority's view there can be no continuation of the same legal entity without continuation of the same type of business, even though the VAT law of the country did not mention this obligation. The European Court of Justice ruled that it is not crucial that exactly the same type of activity must be carried out by the transferee.

Also, the mere transfer of assets (in total or part) does not qualify as a transfer unless the successor of the assets proves its intention to carry out the activity which was transferred and not to liquidate the activity or sell the assets. The transferee must therefore provide an affidavit to the transferor which states its intention.

## Consequences for the buyer

The transferee will undertake the rights and obligations regarding the assets transferred. If the buyer is not registered for VAT purposes in Romania, the VAT already deducted by the vendor (transferor) regarding the assets must be adjusted by the buyer, which is a cumbersome operation. This reflects the principle that a VAT deduction is not appropriate when the input tax was paid on supplies which are not used to produce taxable supplies.

The adjustment of the VAT will be made at the date when the assets were obtained by the transferor and not at the date of the transfer.

For instance: a piece of equipment is purchased in January 2010; in September 2018 it is then sold to a business not registered for VAT purposes, as part of an asset transfer not subject to VAT. In this case, the VAT adjustment should be done by the transferee for the January 2010 VAT. The consequent adjustment is cumbersome and costly. It is, then, strongly recommended that the buyer should be registered for VAT in Romania in order to avoid such a problem.

## Conclusion

The transfer of assets, either in their totality or parts thereof, is a complex operation and may be subject to interpretation from the Romanian tax authorities which can result in a classification different to the parties' initial intention.

Steps are best taken to avoid VAT-corrections, and the risks of the parties involved should be distributed contractually. A detailed analysis by the parties might be a good preparation.

## Contact and further information:



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<sup>i</sup> Zita Modes Sarl, Luxembourg, C-497/01