

TAX ALERT
September 2022

The French Administrative Supreme Court rejects application of VAT exemption to regularizations of VAT deduction rights¹:

For more information on this tax alert you can contact :

Marie Dessimond
E: mdessimond@sl-avocats.fr

Sybille Salmon-Legagneur
E: ssalmon-legagneur@sl-avocats.fr

It decides that the exemption mechanism provided by *article 257 bis of the French Tax Code* can only benefit to a transfer subject to VAT and thus rejects its application to the VAT regularization twentieths due in case of transfer of a real estate completed more than five years ago.

This decision based on a literal reading of the law, deviates from the stable case law and from the administrative doctrine which assimilates the transfer of a real estate allocated to a rental activity and recorded as fixed asset to a transfer of a going concern eligible to an exemption of the tax itself or an exemption of the regularization of the previously deducted tax.²

The exact scope of this decision is uncertain since the beneficiary was acting as a real estate dealer (under real estate VAT regime applicable till March 10, 2010³) without intent to operate himself the economic activity transmitted, since he immediately resold the real estate. He was thus prevented from raising the above-mentioned administrative doctrine.

This restrictive decision from the Supreme Court does not prevent the taxpayer from the possibility to invoke the administrative doctrine - more favorable – which remains enforceable. This invocation may be necessary in cases where the amount of the VAT regularizations is significant (with different financial and tax consequences depending on the possibility to reinvoice the VAT regularization to the purchaser, or not⁴).

The option to voluntarily elect for VAT on a sale to avoid a VAT regularization (in the initial deed, or pursuant to a clause providing for a rectifying deed in case of tax reassessment of the seller) seems nevertheless risky if the exemption conditions appear as met, preventing the seller to elect voluntarily for VAT⁵. In any case, the uncertainty related to the application of the exemption to VAT regularizations can be managed through a clause anticipating the possible tax reassessments and their re invoicing to the purchaser.

Salmon-Legagneur & Associés
Avocats à la Cour
A.A.R.P.I.
62 avenue des Champs-Élysées
75008 Paris
Tel. : +33(0)1 56 89 20 20
www.sl-avocats.fr

¹ Conseil d'État, 8ème - 3ème chambres réunies, 31/05/2022, 451379

² BOI-TVA-DED-60-20-10 n°285, 03-01-2018

³ This regime differs from the current one notably regarding the possibility for a purchaser not acting as real estate dealer to nevertheless take a commitment to resell.

⁴ Pursuant to article 207, III-3 of the annex II to the FTC

⁵ BOI-TVA-IMM-10-10-10-40 n° 40 et 50, 7-1-2013.