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# *Real Estate Going Global*

Worldwide country summaries

*Tax and legal  
aspects of real  
estate investments  
around the globe*

2012/2013



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# *Real Estate Going Global Argentina*

*Tax and legal aspects of  
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All information used in this content, unless otherwise stated, is up to date as of 16 August 2012.

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## ***Real Estate Tax Summary – Argentina***

A foreign investor may invest in Argentine property directly or through a local corporation (*sociedades anónimas*), a local limited liability corporation (*sociedad de responsabilidad limitada*) or trusts.

- At the national level, real estate rental income from properties located in Argentina is subject to a 35% income tax rate for legal entities and a scale based rate for residents.
- A withholding tax regime is applicable when paying; both local and foreign tax payers.
- Value added tax is applicable to rents exceeding the amount of ARS 1,500 and to construction works.
- Rental incomes, as well as real estate developers are subject to Gross Revenue Tax.
- A national tax on net wealth is levied on personal assets held by local or foreign individuals.
- A tax on minimum hypothetical income is applicable to legal entities and individual owner of rural real estate.

# *Real Estate Investments – Argentina*

## *Rental Income*

At the national level, real estate rental income from properties located in Argentina is subject to a 35% income tax rate in case of legal entities.

For individuals, the applicable tax rate is determined depending on the amount of the taxable matter, as follows:

Withholding tax applies upon payment to local taxpayers, provided that rental income exceeds ARS 1,200, net value, monthly. The withholding rate applicable is 6%, or 28% in the case of non-registered taxpayers. The amount withheld represents payment on account of income tax for registered taxpayers.

### *Foreign beneficiaries*

Income accrued to foreign beneficiaries is subject to a withholding tax of 35% upon payment pursuant to domestic rules. The taxable basis on which the withholding tax should be made is determined according to the following rules.

- Under the general rule, utilizing the legally prescribed assumption that the taxable income is 60% of the rental amounts paid, resulting in an effective withholding rate of 21%, derived from the application of a 35% tax rate upon a 60% notional income.
- By deducting the actual expenses incurred in Argentina, which are necessary for obtaining and maintaining the income or preserving the source, and deducting other allowances permitted under the law from the gross rental amounts paid or credited.

In the event that a grossing-up mechanism were to be applied, meaning that the withholding cost was supported by the paying agent, the effective withholding rate would be increased accordingly.

Furthermore, Argentinean income tax law considers the rental value of properties that their owners, in the case of individuals as opposed to legal persons, use for leisure, vacation or other similar purposes, and the hypothetical rental income of properties transferred free of charge or for an undefined price, as forming part of the owners' taxable income.

### *Thin capitalisation rules*

Thin capitalisation rules (2:1 debt-to-equity ratio) are applicable upon interest paid on cross border intercompany loans. Note that thin capitalisation rules should not be applicable in cases where the interest payment is subject to an effective withholding tax rate of 35%.

Local banks, leasing companies and financial trusts are generally not subject to these rules either.

## Value Added Tax

Rental value corresponding to real estate properties belonging to local taxpayers exceeding ARS 1,500 a month is assessable with 21% VAT. Rent related to real property occupied by the tenant exclusively for dwelling purposes is exempt from VAT.

## Gross revenue tax

At the provincial level, rental income is subject to gross revenue tax. Rental income paid to individuals, as opposed to legal persons, is exempt from this tax, provided the maximum number of rented housing units does not exceed the maximum established by each jurisdiction, i.e. province of Buenos Aires: five, Buenos Aires City: two. The tax rates levied on the excess amount range between 3% and 5% depending on the jurisdiction.

## Stamp duty

Rental contracts are subject to stamp duty, which is levied by the provinces, at rates varying between 0.5% and 2.5%.

## Capital gains on the sale of property

### *Income Tax*

Income from the sale of real estate is subject to income tax. If the sale is made by a legal entity or a permanent establishment, it is always taxable.

However, such income earned by a local individual is only taxable when it is sufficiently regular to lead to the inference that the source and its qualification are permanent.

Non-resident sellers can determine net income subject to withholding tax by utilizing the legally prescribed assumption that the taxable income is 50% of the proceeds of the transfer for valuable consideration, provided that the assets are located or economically used in Argentina, and belong to companies or partnerships organised, established or located abroad. This results in an effective withholding rate of 17.5%, as a result of applying a 35% tax rate on a 50% notional income.

Alternatively, net income subject to withholding tax can be determined by deducting the expenses actually incurred in Argentina in order to obtain, maintain and preserve the aforementioned assets, and claiming the legally prescribed deductions from the gross income paid or credited to the seller.

The taxable income, so determined, is subject to 35% tax. However, Argentina has concluded tax treaties with various countries, under which lower withholding rates and different rules may apply.

In the case of individuals, the transfer of ownership (i.e. sale) involving real estate property located in Argentina is not subject to income tax (except in case of habitual activity), then it is subject to a special 1.5% tax on the transfer of real estate. When selling one primary residence in order to acquire another, it is possible to include the option of not paying this tax in the deed of sale.

## *Value added tax (VAT)*

The value added tax (VAT) law provides certain rules under which the sale of real property is not liable to this tax. However, construction work carried out on properties owned by a taxpayer is subject to VAT at the time the property is sold. The parties liable to pay the tax in this case are the building companies. For this purpose, building companies are defined as companies that, either directly or through other parties, carry out work on properties they own in order to make a profit through the work itself, or through the subsequent sale of the entire property, or a part thereof. The tax base on which the 21% VAT rate is applied is the price of the work, rather than the price attributable to the land or the buildings that existed before the improvements made by the building company to the real estate property being sold. In respect of dwelling construction, the applicable rate may be lowered to 10.5%.

## *Gross revenue taxes*

The sale of real estate is also liable to provincial gross revenue taxes, except in the case of depreciable assets. The rules for this tax provide for certain exemptions. These exemptions are basically geared towards exempting individuals from this tax on the sale of single housing units, or other real property sales that take place after a certain period of time has elapsed since the previous transfer of title to the property, provided that these operations are not considered regular.

## *Stamp duty*

The transfer of ownership of real estate for valuable consideration is subject to stamp duty. This is a provincial tax, the rate of which varies between 1% and 4%, depending on the jurisdiction. In some jurisdictions, the transfer of standard or inexpensive housing for permanent family dwellings is exempt from this tax.

## *Other taxes*

There is a national tax on net wealth that is levied on personal assets held as of 31 December of each year, either in Argentina or abroad. Those required to pay the net wealth tax are individuals and undivided estates established in Argentina in respect of assets held in Argentina or abroad, as well as individuals and undivided estates established abroad in respect of assets held in Argentina.

The net wealth tax law sets a minimum amount of ARS 305,000 which is exempt from tax which is only applicable in the case of local individuals and undivided estates.

The tax is levied according to the value of the taxable matter, as follows:

- Value from ARS 305,000 to 750,000 at a tax rate of 0.50%
- Value from ARS 750,000 to 2,000,000 at a tax rate of 0.75%
- Value from ARS 2,000,000 to 5,000,000 at a tax rate of 1.00%
- Value from ARS 5,000,000 and up, at a tax rate of 1.25%

Rural real estate owned by individuals domiciled in Argentina is exempt from personal assets tax.

In the case of individuals and undivided estates established abroad, the above ARS 305,000 exemption does not apply. In this case, unless the IGMP (referred to below) applies, a tax rate of 1.25% is levied upon the whole value of the real estate, once reduced by a depreciation equivalent to 2% a year.

Non-productive real estate or real property that is rented out on weekends or holidays or earmarked for lease owned by foreign companies is assumed to belong to individual residents of, or undivided estates located in, Argentina. In this case, the applicable rate would be 2.5%.

## Tax on minimum hypothetical income

There is also a tax on minimum hypothetical income (IGMP), which is in general levied at 1% on assets owned by Argentinean companies. This tax is also applied on urban real estate generating income owned by companies or individuals domiciled abroad and rural real estate either exploited or otherwise owned by foreign companies or individuals domiciled either in Argentina or abroad.

### *Municipal taxes*

A municipal tax is charged on all types of real estate, based on the assessed value of the property.

### *Tax treaties network*

Argentina has concluded tax treaties for the avoidance of double taxation with various countries, under which reduced withholding tax rates can generally be applied on dividends, interest, royalties and certain capital gains. The countries that have signed a double tax treaty with Argentina are Australia, Belgium, Bolivia, Brazil, Canada, Chile<sup>1</sup>, Denmark, Finland, France, Germany, Italy, Norway, Russia (to be ratified), Spain<sup>1</sup>, Sweden, Netherlands and the United Kingdom.

## Additional comments

### *Rural land law*

On 28 December 2011, Law 26737 was published in the Argentine Official Gazette which imposes limits to the ownership or possession of Argentine rural land.

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<sup>1</sup> The Argentine government has recently terminated its tax treaties with Chile and Spain. The revocation of the treaty with Chile significantly impacts multinationals that relied on certain favourable provisions, particularly with respect to the taxation of dividends and capital gains (which were only subject to tax on the source country). Additionally, payments for technical assistance and/or advisory services would remain subject to domestic withholding tax rates up to 31.5%. Also, a full tax exemption from Argentine Wealth Tax will be no longer available.

As a consequence of the revocation of the tax treaty with Spain, Argentine's income tax withholding on royalty and technical assistance payments to Spanish residents may now be subject to rates as high as 31.5%. Furthermore, withholding tax on cross-border interest payments may be as high as 35% (versus the treaty's significant lower rates). Additionally the non-discrimination provisions allowed tax payers to mitigate certain restrictions established by Argentine tax law that limit deductions for trademark and patent royalty charges when paid abroad. Also, full relief from Argentine wealth tax will no longer be available.

The law imposes greater limits to the ownership and possession of rural land by foreign individuals or legal entities, irrespective of whether land will be for use or production, on the grounds of national sovereignty, economy and the non-renewable nature of the land.

Quantitative limits for foreign ownership are established, distinguishing between the core zone and other zones. A foreign person or entity shall not own more than 1,000 hectares or equivalent surface in the core zone. For other zones, equivalent limits are to be determined by a Ministerial Counsel.

In addition, there is a 15% limit to the total amount of rural land in the Argentine territory which may be owned or possessed by foreign individuals or legal entities.

The Rural Land Law bans outright all foreign persons from owning coastal lands or other land adjacent to significant and permanent bodies of water. The law further prohibits foreign ownership of land within border security zones, without prior consent from the Ministry of Domestic Affairs.

Any transaction executed in violation of the law will be null and void, with no right to compensation whatsoever to the parties, who will be personally and severally liable for any damage caused.

However, it is worth mentioning that the law states that it will not affect vested rights since it will not be applied retroactively.

### *Depreciation of real estate*

The items that may be deducted in computing net taxable income include real property depreciation charges corresponding to the properties owned by the taxpayer and for as long as those properties are affected, by operations generating assessable income. The depreciation charge allowed is 2% a year of the building or construction costs or the portion of the acquisition cost that is allocable to buildings, based on the ratio of buildings to land according to the ratable value of the property or an assessment thereof. Depreciation is allowed until the original acquisition cost or value has been entirely written off. Depreciation must commence as from the year the asset is placed in service. Depreciation rate is 2% a year, except for the acquisition/habilitation year, for which the building must be depreciated quarterly, at 0.5% each quarter, as from the quarter the asset is placed in service.

The original acquisition cost of depreciable property also includes expenses incurred in connection with the purchase of the property, such as taxes, realtors' commissions, etc., with the exception of any actual or hypothetical interest included in the purchase transaction.

The lessee, as opposed to the owner of the building, cannot deduct any depreciation, but will consider the monthly renting expense as deductible from its taxable income.

However, improvements carried out on rented properties are also subject to depreciation, in which case depreciation will be computed as a deductible expense by the renting party, as opposed to the owner of the building. Depreciation rates regarding such improvements are generally determined according to contractual rental periods.

In the event of irregular fiscal periods, i.e. periods less than 12 months, depreciation must be apportioned according to the number of months of a given period.

## Tax loss carryforward

Losses may be used to offset Argentinean rental profits arising in the same company. Any amount of tax losses that could not be used in the year in which they were incurred can be carried forward for five years. Tax losses cannot be carried back.

## Foreign exchange control regulations

As a general rule, incoming flows of currency (as financial loans or capital contributions) are subject to a compulsory one-year temporary deposit, for which 30% of funds granted brought by non-residents to Argentina must be kept in a reserve (*encaje*) for the term of 365 calendar days. This bank deposit is made in US dollars and does not earn interest.

Direct investments such as holdings in Argentine companies (minimum 10%) or purchase of real estate and certain financial loan transactions, are not subject to said rule.

Regarding outflows of capital, the following remittances abroad do not require authorisation from the Argentine Central Bank (“BCRA”):

- Remittances for portfolio investments up to USD 2m per calendar month.
- Loans repaid after at least 365 days counted since the inflow of the foreign currency through the foreign exchange market (“MULC”) (contract needed).
- Dividends (supported by audited financial statements).
- Non-residents in Argentina can transfer abroad the sale of a direct investment -partial or total liquidation – provided (i) the minimum term of permanence of the investment of 365 calendar days is fulfilled, and (ii) if the capital contributions, the purchases of shareholdings or real estate were done since 28 October 2011, is it required the demonstration of inflow of the funds through the MULC.

By other side, for the payments of services certain rules established by the Tax Authority (“AFIP”) –that depending on the amount of the contract and the type of service, it has to be informed to the AFIP, and for accessing to the MULC, the operation informed has to be in state “exit”- and by the BCRA – that depending on the concept of the service to be paid, the amount and if the payment is going to be done to an entailment company or to a country of law taxation or to a company incorporated in a country of law taxation, the prior authorization for doing the payment is required- must be fulfilled.

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# Real Estate Tax Summary – Armenia

## Introduction

Armenia encourages foreign trade and investment, and the laws allow foreigners to purchase businesses and property, repatriate revenue and profits, and receive compensation if property is nationalised.

Armenia is a relatively easy country in which to do business. The World Bank study, *Doing Business 2012*, ranked Armenia as the 55th easiest country to do business out of 183 countries surveyed.

## General

Foreign investors may invest in Armenia real estate directly, or through a local company or a non-resident company.

Foreign investors are free to purchase Armenian properties in their own names, but they may not purchase the land that the property sits on.

There are no restrictions on land ownership by Armenian companies, even if 100% owned by foreign investors. Land may be leased (normally for 99 years) by foreign investors.

## Rental income

An Armenian resident company or registered branch/representative office of a foreign legal entity is subject to corporate tax at a rate of 20%. The tax year is the same as a calendar year and ends on 31 December.

Taxable income is based on the net profit calculated using normal accounting principles, and subject to proper documentation of expenses. There is no group consolidation. Most expenses, other than those of a capital nature, may be deducted, provided that they are properly documented and incurred wholly and exclusively for the purposes of earning income in the Armenian business.

Interest may be deducted, but the amount is restricted to double the banking settlement rate defined by the Central Bank of Armenia (at 31 December 2011, the settlement rate was 12%).

In addition to the existing cap (twice of the Armenian Central Bank's settlement rate), from January 2012 the deductible interest expense payable within the tax year should not exceed:

- nine times the value of net assets of a taxpayer, if borrowings received from banks and credit organisations, or
- twice the value of net assets of a taxpayer, if borrowing received from other entities.

The net assets are a positive difference between the taxpayer's assets and liabilities. The value of net assets should be considered based on results of the reporting year.

The restriction does not apply to the banks and credit organisations and to the funds borrowed from international organisations specified by the government. The restriction also does not apply to the interest payable on funds attracted from publicly placed debt instruments (securities).

There is a 10% withholding tax on Armenian source interest paid to companies that are not resident in Armenia, subject to any reduction or exemption allowed under an applicable tax treaty. Armenia does not have thin capitalisation rules.

## Depreciation (capital allowances)

Depreciation is calculated for each asset on a straight-line basis.

Buildings and constructions of hotels, boarding-houses, rest homes, sanatoriums and educational institutions may be depreciated at a maximum annual rate of 10%. Other buildings and constructions may be depreciated at a maximum annual rate of 5%.

## Property tax on buildings

The tax base for buildings is determined by the cadastral value. The tax rate on public and industrial buildings is 0.3% on the cadastral value of property. The tax rate for other taxable buildings depends on the cadastral value of the building assessed under procedure defined by the law. The property tax is paid to municipal budget.

## Disposal of property

Foreign investors who dispose of Armenian property and have not created a permanent establishment would be subject to tax on the gain realised on disposal of the property at a rate of 10%.

Gains realised by an Armenian company are liable to corporate tax at the same rate as operating income (20%). Gains are reduced by allowable expenses, provided they are properly documented.

## Loss carry forward

Losses arising from an Armenian rental business may be carried forward for five years for Armenian resident companies.

## Dividends and withholding tax

Dividends paid by Armenian resident companies are subject to withholding tax of 10%, subject to any reduction or exemption allowed under an applicable tax treaty.

## Value added tax (VAT) – commercial property

Generally, services associated with the construction, alteration, or refurbishment of any building and the sale of buildings are subject to the standard VAT rate of 20%.

The sale of residential buildings by individuals is not subject to VAT. However, the second or subsequent sales of the same type of certain properties during one year if the property is sold within a year of acquisition are subject to VAT.

When an investor purchases a building, he would normally be able to recover VAT charged on the purchase and on all future expenses relating to the building. However, obtaining a VAT refund can be problematic and VAT on acquisition may need to be recovered against the VAT on future revenues.

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All information used in this content, unless otherwise stated, is up to date as of 25 June 2012.

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# Real Estate Tax Summary – Aruba

## General

A foreign corporate investor may invest in an Aruba property directly or through a local (e.g. a limited liability company [*naamloze vennootschap* or *N.V.*] or private limited liability company [*vennootschap met beperkte aansprakelijkheid* or *V.B.V.*] or non-resident company or through a partnership (*vennootschap*).

Non-resident companies receiving income from real estate located on Aruba are subject to the same tax rates with regard to the rental income as local companies.

## Rental income

Companies are subject to the standard flat corporate tax rate of 28%.

Local and non-resident companies and partnerships owning Aruba property are allowed to deduct interest expenses (on loans borrowed from third parties and banks or sister companies) and property-related costs from their taxable income. They are also allowed to deduct the majority of other types of business costs including acquisition costs. Certain expenses, such as architect's fees and refurbishment costs incurred during construction, cannot be deducted when incurred and must be added back to the acquisition price of the property.

There is no withholding tax (WHT) on tax-deductible interest on loans in Aruba. However, in case of a mortgage loan, the interest will be taxed in Aruba as income of the loanholder (unless a resident within the Kingdom of the Netherlands, and non-resident of Aruba, grants the loan. In that case, the interest is taxable in the country of residency). In case of a loan without mortgage, the interest will not be taxable in Aruba.

## Thin capitalisation rules

The following restrictions apply in Aruba with regard to the deduction of interest.

First of all the interest has to be “at arm’s length”. However, in that case the interest is still not deductible unless one of the following circumstances occurs.

Interest is fully deductible in case it is shown that the recipient is not, directly or indirectly, a related person or corporation; the shares in the recipient are, directly or indirectly, held by a corporation whose shares are registered at a major stock exchange; or the interest is taxable to the recipient at an effective tax rate of at least 15%.

In case the interest is not taxable to the recipient at a rate of at least 15% but at a lower rate, the interest will be deductible for 75%. In other cases the interest may not be deducted.

## Depreciation and investment allowance

Property should be capitalised against the historic cost price (i.e. including acquisition costs). An annual depreciation charge on buildings (exclusive of land) ranging from 2% to 3.3% is in general accepted by the tax authorities. A residual value of 10% must be taken into account. In case of extensive maintenance, the expenses may not be deducted when incurred, but must be added to the acquisition price. In case the maintenance regards a specific component of a property, such as a façade, the heating system, or the roof, this may be booked individually and may be depreciated at a higher rate than the regular 2% to 3.3%.

The investment allowance was re-introduced temporarily for the years 2011 and 2012. The investment allowance amounts to 6% of the amount of the investment. It is an additional deduction on the profit of a company and does not reduce the depreciable basis. It can be claimed on the investment in real estate by a company, although some exceptions do apply.

## Capital gains on the sale of property

Companies are subject to profit tax on realized capital gains at the ordinary tax rate. Taxation on capital gains realized on the sale of Aruba property can be deferred by creating a so-called 'replacement reserve'. The property that has been sold must in that case be replaced by a comparable asset within (in principle) four years. The capital gain should be deducted from the purchase price of the newly acquired property, resulting in a lower depreciation charge in future years.

## Other relevant taxes

### *Transfer tax*

The acquisition of legal title to Aruba property is subject to 6% transfer tax (*overdrachtsbelasting*). (The tax rate is 3% in case the sale price is AWG 250,000 or less than AWG 250,000 (approximately USD 139,000)).

### *Turnover tax*

A 1.5% turnover tax (*omzetbelasting*) is levied in connection with the sale of real estate, if no transfer tax is due. The rent of real estate is also subject to the turnover tax.

### *Real estate tax*

An annual real estate tax (*grondbelasting*) is levied of 0.4% of the value from the proprietor or anyone who has a right to the property.

# Real Estate Investments – Aruba

## General

### *Introduction*

This guide comprises an overview of the tax and legal aspects relating to the acquisition of commercial real estate in Aruba. It is not intended to be comprehensive and consequently should only be relied on as an introduction to general matters relating to Aruba property law and tax.

The tax aspects are considered with respect to investments made by corporate investors under the ultimate control of non-resident corporate investors. We have also included some key information on non-trading investments realized by individuals.

### *Foreign investment control*

There is no restriction on the purchase and sale of real estate which constitutes a foreign direct investment in Aruba. Non-residents may also freely incorporate a company in Aruba. No formality is required to acquire a company that owns investment property or has a real estate activity.

## Direct investments

### *Ownership*

Ownership of a property is the right to enjoy and use of the property in the most absolute manner, provided the use is not prohibited by laws or regulations (freehold). Leasehold rights which confer on the tenant a real estate interest also exist but are quite rare and often land owned by the Government. It is possible for the bare ownership (*bloot eigendom*) to vest with one owner and the usufruct (*vruchtgebruik*) that gives the right to possession or the income, to vest with a different owner.

Any sale of real estate, whether freehold or leasehold, must take place through a notary public.

### *Freehold*

A person owning the freehold of a property (*volle eigendom*) is the owner in perpetuity. They may use the property as they please, as long as the law does not prohibit it. Subject to exceptions, they own the land and everything above and below it, including all buildings and vegetation.

### *Timeshare*

It is possible to buy and sell timeshare units. A property (an apartment or a house) will in most cases be sold in units of one week. The timeshare owner is entitled to the use of his real estate during that specific period.

### *Deed of sale*

The deed of sale must be executed before a notary. The deed of sale will identify the parties and the property and set out the T&C of the sale.

## Formalities

When the deed has been executed, the notary public will lodge a copy with the Land Registry for registration and arrange for any outstanding mortgages to be removed.

## Acquisition costs

Unless otherwise agreed, the buyer bears all acquisitions costs, including the notaries' fees and expenses, the Land Registrar's fees and the registration duty.

## Tax aspects

### Taxation of the acquisition of real estate

Either turnover tax or transfer tax will be payable on the purchase of real estate in Aruba.

### Transfer tax

Transfer tax is payable in case real estate is sold. It is calculated on the purchase price. Unless the parties agree otherwise, the cost of the transfer tax is borne by the buyer.

If the tax inspector considers that the actual market value of the property is higher than the price or the market value declared, he can levy transfer tax on the actual market value.

The transfer tax is fully tax deductible, either as expenses or by way of depreciation allowances where transfer tax is capitalised.

### Turnover tax

Turnover tax is payable in case the transaction is exempt from transfer tax. This may inter alia be the case when the owner of real estate sells the economic ownership but does not transfer the legal ownership.

### Taxation of income and capital gain

Income from, and capital gains realized on the sale of, real estate in Aruba are taxable in Aruba, whether an Aruba resident company or a non-resident company receives them. This will not be the case in case of a gain made on the sale of shares in a company whose assets consist mainly of Aruba real estate, regardless of whether the company is an Aruba resident or not. In that case the participation exemption applies.

### Permanent establishment in Aruba

In principle, the ownership of an Aruba property by a non-Aruba company does not in itself constitute a permanent establishment (PE) in Aruba.

Nevertheless, the direct holding of Aruba properties may constitute a PE when one of the following criteria is met:

- The non-Aruba company carries on part of its activities in Aruba through a fixed place of business.
- The non-Aruba company carries on activities in Aruba through a dependent agent acting on its behalf and which has an authority to conclude contracts in the name of the company (e.g. conclusion of lease agreements).

Should the Aruba property constitute a PE, the net profit would be subject to profit tax. The net after-tax profit may be distributed freely, as Aruba does not levy a branch tax.

### Corporate income tax

The taxable rental income corresponds to the gross rental income less deductible expenses both determined on an accrual basis, whether realized directly, or through a given Aruba vehicle.

If the investment is realized through a corporate structure the income is subject to Aruba corporate tax. The standard rate of corporate tax is 28%.

When the investment is realized through a partnership type company which is not liable to corporate tax, the taxable income is determined at the level of the company, but the burden of tax lies in the hands of the shareholders.

### Personal income tax

When a taxpayer holds a property directly or through a tax transparent company, the taxable rental income corresponds to cashed rental income less deductible expenses.

The net rental income received is subject to rates ranging from 0% to 58.95% (for income received in 2012).

## Purchase of a real estate company

### *Legal aspects*

Unlike the case of a direct real estate purchase, the intervention of a notary public is not mandatory. The seller and buyer typically instruct their usual lawyers and other advisers to advise them in connection with the deal.

### *Tax aspects*

The transfer of shares is in principle exempt from corporate income tax based on the application of the participation exemption and in case the seller is a non-resident shareholder who had not been resident on Aruba for at least ten years.

### Direct tax liabilities

As opposed to an asset deal scenario where the purchaser does not bear any previous tax liability in connection with the property itself, in a share deal scenario the purchaser will inherit all current or pending tax liabilities which may exist at the level of the target company.

Consequently, as part of a due diligence exercise, the purchaser should carry out a tax review of the company before the purchase and negotiate a price discount and/or a tax warranty in order to protect its interests.

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# *Real Estate Going Global Australia*

*Tax and legal aspects of  
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*2012*

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All information used in this content, unless otherwise stated, is up to date as of 2 July 2012.

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# *Real Estate Tax Summary – Australia*

## General

Non-residents may invest in Australian property by direct ownership of the property from offshore, or through interposed companies, partnerships or unit trusts (either resident or non-resident).

Many investments in Australian commercial property by non-residents do not require government approval. However, investment approval will be required from the Foreign Investment Review Board (FIRB) if the value of the property exceeds AUD 53m (or AUD 5m for heritage properties) or if the acquisition is of shares or units in an entity that is land rich. Any acquisition by a foreign government (which is widely defined), requires FIRB approval. FIRB rarely withholds approval except when the acquisition is of residential property or vacant land.

## Rental income

Net rental income derived from Australian property is taxable in Australia. If the property owner is a company (whether resident or non-resident), the corporate tax rate of 30% applies. If the property owner is a non-resident individual, tax at progressive rates from 32.5% to 45% apply. If the property owner is a trust (whether resident or not), the trust itself is generally not taxed, rather the ultimate beneficiary is subject to tax. Where a trust qualifies as an Australian managed investment trust (MIT), distributions of net rental income will be subject to 15% withholding tax if the investor is resident in an information exchange country (IEC) or 30% if the investor is not a resident of an IEC.

The Government has also announced that from 1 July 2012 MIT's that only hold newly constructed energy efficient buildings will be eligible for a 10% MIT withholding tax rate. This proposal will apply where construction of the building commences after 1 July 2012. Draft law has not yet been introduced, so the exact scope of this announcement is unclear.

## Interest deductibility

Interest on borrowings used to acquire property is generally deductible against rental income. Thin capitalisation rules can restrict this interest deductibility. Broadly speaking, these rules restrict interest deductions relating to total debt liabilities of non-resident investors, or Australian operations controlled to the extent of 50% or more by non-residents, where the maximum allowable debt has been exceeded.

Under the rules, the maximum allowable debt is calculated as the greater of the following:

- The safe harbour debt amount
- The arm's length debt amount

The safe harbour debt amount is currently 75% of an entity's net assets (excluding loans). The arm's length debt amount requires the entity to determine a notional amount of debt capital that the entity would be reasonably expected to borrow from a commercial lending institution if they were dealing at arm's length and certain assumptions were made.

Interest payments made by Australian residents to non-resident lenders or by non-residents with an Australian permanent establishment to non-residents are subject to a withholding tax of 10% on the gross amount of interest paid. Certain borrowings can qualify for relief from interest withholding tax, including borrowings under qualifying, widely held bonds, borrowing from qualifying foreign pension funds and borrowing from lenders in certain countries under double tax treaties.

Australia's transfer pricing rules can also apply to loans in certain circumstances. Australia also has debt/equity rules that apply to loans.

## Other expenses

Other property costs incurred in deriving rental income such as insurance, property management, and repairs and maintenance (unless they constitute a replacement and are capital in nature) are also deductible.

Costs that are capital in nature, such as stamp duty and legal costs incurred in relation to the acquisition of property are generally not deductible, but form part of the capital gains cost base of the property.

## Depreciation and building capital allowance

Deductions for depreciation and building capital allowances may be available against rental income.

Depreciation deductions are allowable for assets that have a limited useful life, and can reasonably be expected to decline in value over the time they are used. Values for depreciation generally depend on an allocation of the purchase price of the property, which may be specified in the purchase contract, or determined by appraisers. The assets are depreciable for tax purposes generally over their useful lives, which are either self-assessed or determined by reference to tables published by the Commissioner of Taxation.

The building (or structural) part of a property may be eligible for a capital allowance write-off. No write-off is available for buildings constructed prior to 20 July 1982. For buildings constructed on or after this date, the write-off rate is either 2.5% or 4% yearly.

The capital allowance (unlike depreciation) is always calculated on the original construction cost. The costs of improvements or extensions may also qualify.

Both depreciation and building allowances previously claimed may be recaptured on disposal if proceeds exceed the tax written down value.

## Sale of property

The capital gains tax (CGT) provisions apply to the sale of property acquired after 19 September 1985 regardless of the residence of the seller. The CGT provisions can also apply to the sale of securities held in entities that are land rich (broadly, more than 50% of the entity's assets is Australian property).

# *Real Estate Investments - Australia*

## *Acquisition tax issues*

### *Government approval*

FIRB approval is required for any proposed acquisition of Australian real estate depending on the nature (commercial, undeveloped vacant land, etc.) and the value of the Australian real estate. The rules can also apply to the acquisition of securities in entities owning Australian real property.

An application for approval must be lodged with FIRB prior to entering into any agreements unless the agreement is conditional upon obtaining FIRB approval.

### *Stamp duty*

The Australian states impose a stamp duty on a range of transactions, including the acquisition of real property (up to 7.25%), share transfers (0.6%) and mortgages (up to 0.4% of the amount of the loan although not charged in some states). The rates vary slightly between states. There are “land rich” and “landholder” rules that apply to the transfers of shares in companies or interests in trusts, where the underlying entity is predominantly invested in real estate, or where the value of real estate assets exceed a threshold (the actual tests vary by state).

There is no stamp duty on the transfer of listed marketable securities except in limited circumstances involving the takeovers of listed land rich/landholding entities.

### *Goods and services tax*

Goods and services tax (GST) is a form of “Value Added Tax” applied to supplies in Australia. Purchases of non-residential real property in Australia are generally subject to GST at the normal rate of 10% unless the acquisition is part of a supply of a GST-free going concern. The purchaser needs to be registered for GST in order to recover the GST paid.

A supply of a going concern is a supply under an arrangement under which:

- The supplier supplies to the recipient all the things that are necessary for the continued operation of an enterprise; and
- The supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

A supply of a GST-free going concern means that the purchase price has no GST. In order for an acquisition to be treated as a supply of a GST-free going concern, one of the conditions is that the purchaser must be registered for GST.

In the event that the investor acquires residential property:

- A purchase of new residential property is subject to GST. Usually, the GST amount is calculated based on GST margin scheme (this means the GST included in

the purchase price is less than 10%). The purchaser is not entitled to recover the GST paid.

- A purchase of residential property (not new) is not subject to GST. The issue or acquisition of securities in an entity is GST-free.

## Ongoing tax issues

### *Net rental income*

Income derived from Australian property is taxable in Australia. A deduction is usually available for property costs incurred in deriving rental income such as insurance, property management, and repairs and maintenance (unless they are of a capital nature).

Costs that are capital in nature, such as stamp duty and legal costs incurred in relation to the acquisition of property are generally not deductible, but form part of the cost base of the property for capital gains tax purposes.

For the acquisition of a leasehold interest, the costs of stamping a lease are deductible (e.g. stamp duty and legal costs).

### *Business capital costs*

Certain business expenses are deductible over a five-year period on a straight-line basis. This includes expenditure to establish a business structure, to convert an existing business structure and expenditure incurred in raising equity.

### *Borrowing costs*

Costs of obtaining finance, including legal costs and stamp duty on the loan transaction, are generally deductible over the period of the loan.

### *Interest deductibility and thin capitalisation provisions*

Interest on borrowings used to acquire real property is deductible against rental income.

The thin capitalisation rules can restrict interest deductibility where the maximum allowable debt has been exceeded. The maximum allowable debt for foreign investors, or for entities that are owned 50% or more by a foreign investor, is the greater of the following amounts:

- The safe harbour debt amount
- The arm's length debt amount

Broadly, the safe harbour debt amount is 75% of the average value, for the income year, of the entity's assets less non-debt liabilities. The entity's balance sheet is used as the starting point for determining the average assets. A number of adjustments are made (which are predominantly designed to ensure that there is no "double-counting" of the 75% threshold). The Government is currently considering reducing the safe harbour

debt amount to 60% in the future. However, the timing of this possible change is still unclear as no announcement has been made.

The arm's length debt amount is an amount the entity would reasonably be expected to borrow from a commercial lending institution if they were dealing at arm's length and certain assumptions were made.

The thin capitalisation provisions apply to all debt interests (i.e. third party bank debt and related party debts). Note that the transfer pricing rules are also relevant to loans and interest deductions.

### *Debt and equity rules*

The deductibility of interest may be restricted by the application of debt/equity rules. Generally, a financial arrangement will be a debt interest for tax purposes if there is a non-contingent obligation on the borrower to pay an amount to the lender that is at least equal to the amount borrowed. Where the term of the instrument is greater than 10 years, a net present value calculation is required.

### *Depreciation and building capital allowances*

Depreciation deductions are allowable for an asset that has a limited useful life, and can reasonably be expected to decline in value over the time it is used.

Values for depreciation depend on an allocation of the purchase price of the property, which may be specified in the purchase contract, or determined by appraisers. Review of contracts may be required to determine these values.

Assets are depreciable over their useful lives, which are either self-assessed or determined by reference to tables published by the ATO. Most depreciating assets can be depreciated using the straight-line or diminishing value method.

The building (or structural) part of a property may be eligible for a capital allowance. No allowance is available for buildings constructed (in Australia) prior to 20 July 1982. For buildings constructed on or after this date, the allowance rate is 2.5% or 4%.

The capital allowance is always calculated on the original construction cost (not the purchase price) on a straight-line basis.

Both depreciation and capital allowances previously claimed may be recaptured on disposal if proceeds exceed the tax written down value (TWDV).

In the case of buildings, this recapture is part of the CGT calculation (through a reduction in cost base of amount previously deducted). There is no CGT on depreciable assets (the difference between proceeds and TWDV would effectively be treated as income/deduction as opposed to a capital gain or loss).

There are certain rules that can apply in specific circumstances that impact on depreciation and building allowance deductions.

### *Taxation of financial arrangements*

Australia has had a period of significant tax reform. One such reform relates to the Australian income tax treatment of foreign currency gains and losses. The Taxation of Financial Arrangements (TOFA) provisions generally apply, subject to transitional elections, to foreign exchange gains and losses on transactions entered into on or after

1 July 2003. The timing of assessability/deductibility of financial arrangements is also governed by the TOFA rules where, subject to certain elections, the arrangement is entered into, on or after 1 July 2010. This may impact both the taxable income and compliance obligations of taxpayers.

### *Real estate held via a foreign entity*

Where real estate is held via a foreign entity, that entity must calculate its taxable income applying Australian tax principles. The foreign entity must then pay tax on that taxable income. The rate of tax depends on the nature of the foreign entity (e.g. 30% if a company).

### *Real estate held via an Australian entity*

Where real estate is held for rental purposes, it is generally held via an Australian Unit Trust (AUT). Ordinarily, the AUT should not be subject to Australian income tax on the basis that it distributes all of its income every year.

Note that losses incurred by the trust cannot be distributed to investors. Rather, the losses are trapped in the trust.

The tax loss of a trust may be carried forward and used to offset future taxable income where the trust satisfies the 50% stake test. Broadly, this test requires a greater than 50% continuity of ownership in the trust.

There are no loss recoupment rules for a trust in respect of carried forward capital losses.

Further, revenue losses can be offset against ordinary income and net capital gains. Capital losses can only be offset against capital gains.

Losses may be carried forward by the AUT and offset against future taxable income, provided that specific loss recoupment rules are satisfied.

The taxable Australian sourced net rental income (and, in certain cases, capital gains) distributed by the AUT to a non-resident will be subject to withholding tax. The rate of withholding tax depends on whether the AUT is an MIT or not.

If an MIT, the rate of the tax will be 15% if distributed to an IEC resident or 30% if not an IEC resident. The Government has also announced that from 1 July 2012 MIT's that only hold newly constructed energy efficient buildings will be eligible for a 10% MIT withholding tax rate. This proposal will apply where construction of the building commences after 1 July 2012. Draft law has not yet been introduced, so the exact scope of this announcement is unclear.

If the AUT is not a MIT, it must withhold tax from the distributions. The rate of tax depends on the type of investor (30% if a company).

This is not a final tax (unlike MIT withholding tax) so the non-resident is required to file an annual income tax return and can claim a credit for the tax withheld by the AUT. The non-resident will also be able to claim deductible expenditure relating to the derivation of the income from the AUT.

If the non-resident claims deductible expenditure, tax which was withheld by the AUT that exceeds the non-resident's tax liability will be refunded by the ATO.

The MIT qualification requirements are summarised under the heading "*Managed Investment Trusts*".

## Exit tax issues

### *CGT implications*

Any capital gains arising from the sale of Australian real property will be included in the taxable income of the foreign investor and taxed at their marginal tax rate (30% for companies). If the sale is via an AUT, the tax treatment is as per on-going income (as summarised under the heading "*Real estate held via an Australian entity*").

Where a foreign investor disposes of securities in an entity, this will be subject to CGT if:

- the non-resident holds an interest of 10% or more in the entity; and
- more than 50% of the entity's total assets (by market value) consists of taxable Australian property (Australian real property or an indirect interest in Australian real property).

The capital gain will be included in the non-resident's taxable income and taxed at their marginal rate (30% for companies).

### **GST**

The vendor is generally required to include GST of 10% in the sale price, unless the property is sold as part of a supply of a GST-free going concern.

No GST should be applicable on disposals of interests in entities.

### **Stamp duty**

Stamp duty is generally an obligation of the acquirer of a dutiable asset. In some states the seller and the acquirer are jointly and severally liable to stamp duty. However, the duty burden is usually commercially carried over to the acquirer.

## Other Australian taxes and maintenance costs

### *Charges on land*

#### **Land tax**

Land tax is an annual tax imposed by each Australian state and territory and is calculated as a percentage (up to 3.7%) of the unimproved capital value of land (as assessed by the state) owned at a particular date during the year. The marginal 2012 rates are e.g. 2% in NSW and 2.25% in Victoria.

#### **Local council tax**

Local councils charge landholders an annual tax called "rates". Council rates are determined with reference to the size and assessed value (as determined by the Valuer General) of a particular parcel of land. Each council applies a different formula influenced by a range of factors.

## Water rates

Water rates are assessed at a flat rate imposed by the local water authority for the provision of standard services (such as sewer and water access). An additional amount is charged relative to the amount of water used on the land.

## Managed Investment Trusts

Broadly, an AUT will be a MIT in relation to an income year where all of the following conditions are satisfied at the relevant test time:

- The AUT has a relevant connection to Australia, i.e. the AUT has an Australian resident trustee or central management and control of the AUT is in Australia;
- The AUT is not a trading trust;
- A substantial proportion of the investment management activities carried out in relation to the assets of the AUT will be carried out in Australia throughout the income year;
- The AUT is a managed investment scheme (MIS) (as defined in section 9 of the Corporations Act 2001). Broadly requires the AUT to have at least two investors;
- The AUT is either registered under section 601EB of the Corporations Act 2001, or, is not required to be registered in accordance with section 601ED of the Corporations Act 2001 (whether or not it is actually registered);
- The AUT satisfies one of the widely held tests applicable to the AUT. Different widely held tests apply depending on the classification of the AUT as either a registered wholesale trust, unregistered wholesale trust or registered retail trust; and
- If the AUT is not required to be registered, then the AUT must be operated or managed by:
  - a financial services licensee (a defined term) that holds an Australian financial services license and whose license covers providing financial services (a defined term) to wholesale clients (a defined term); or
  - an authorized representative of the above (authorized representative is a defined term).
- Notwithstanding the above, for an AUT to qualify as a MIT:
  - Where the trust is classified as a wholesale trust, 10 or fewer persons (non-qualified investors) cannot hold a MIT participation interest of 75% or more in the trust.
  - For other trusts, 20 or fewer persons (non-qualified investors) cannot hold a MIT participation interest of 75% or more in the trust.
  - A foreign resident individual cannot have a MIT participation interest of 10% (direct or indirect) or more in the AUT.

The relevant testing times will depend on whether the AUT made a “fund payment” during the income year.

Where a trust has made a “fund payment”, the testing time is at the time of the first “fund payment” in relation to the income year except for the investment management test, the trading test and the closely held test. These three tests must be satisfied throughout the income year.

A “fund payment” is broadly a distribution of the taxable income of an AUT which is attributable to Australian sources and taxable Australian property and not already subject to withholding. Distributions of net rental income or proceeds from the sale of properties are fund payments for the purposes of the MIT withholding rules.

The widely held requirement is for the trust to have either 25 or 50 (depending upon trust type) investors. There are specific investor tracing rules for the purposes of the widely held tests referred to above. That is, where a member of the trust is a qualified investor, the members will be deemed to represent a higher number of members equal to 50 times the qualified investor’s percentage interest in the trust.

Note that there is no tracing through companies to ultimate investors in order to determine who is a qualifying member.

Broadly speaking, a qualified investor is a beneficiary of a trust that is:

- An Australian life insurance company.
- A complying superannuation fund (or foreign pension fund equivalent) with at least 50 members.
- A pooled superannuation trust (PST) that has at least one member that is a complying superannuation fund with at least 50 members.
- A MIT in relation to the income year.
- A regulated foreign collective investment vehicle with at least 50 members.
- An entity, the principal purpose of which is to fund pensions for the citizens or other contributors of a foreign country if:
  - the entity is a fund established by an exempt foreign government agency; or
  - the entity is established under a foreign law for an exempt foreign government agency; or
  - the entity is a wholly owned subsidiary of an entity mentioned above.
- An investment entity that is wholly owned by one or more foreign government agencies, the entity is established using only the public money or public property of the foreign government concerned and all economic benefits obtained by the entity have passed, or are expected to pass, to the foreign government concerned.
- An entity established and wholly-owned by an Australian government agency, if the capital of the entity, and returns from the investment of that capital are used for the primary purpose of meeting statutory government liabilities or obligations (such as superannuation liabilities).

It is important to note that there are effectively two sets of tax rules for a MIT and its non-resident unitholders. The first relates to the liability of a foreign entity for MIT tax

(the assessing provisions) and the second which requires a MIT to withhold an amount from such payments (the collection provisions).

Under the assessing provisions, where the foreign entity is presently entitled to a fund payment, then the foreign entity will be liable to tax on that share. The rate of tax applicable to that share is dependent on the residency of the foreign entity.

Under the collection provisions, where the trustee of the MIT has made a fund payment directly to an entity which has an address outside Australia, the trustee must withhold an amount from the fund payment at the rates set out below.

The key difference between the assessing and collecting provisions is that the rate of tax in the assessing provisions depends on whether the foreign entity is resident of an IEC, whereas the rate of tax for the purposes of MIT withholding depends on whether the foreign entity has an address in an IEC. Where the two countries are the same, the tax rate is the same and so the withholding tax becomes the only and final tax.

The foreign entity will be a resident of that foreign country where it is a resident for the purposes of the tax laws of that country. Where there are no tax laws or residency status cannot be determined, then the foreign entity will only be considered to be a resident of that country if the entity is incorporated or formed in that country and is carrying on a business in that country.

The applicable tax rates are:

- If the place of payment, address or residency is in an IEC: 15%
- In any other case: 30%.
- MIT's that only hold newly constructed energy efficient buildings could be eligible for a lower MIT withholding tax rate (e.g. 10%) if a draft law that has been announced by the Australian government will be passed. When passed, it may likely apply retrospectively from 1 July 2012 where construction of the building commenced on or after 1 July 2012.

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# Real Estate Tax Summary – Austria

## General

A foreign individual or corporate investor may invest in Austrian property directly or through a local company, such as an *Aktiengesellschaft* (AG) or *Gesellschaft mit beschränkter Haftung* (GmbH) or a partnership.

## Business income vs. rental income

Generally, in Austria, income earned from the leasing of real estate will be classified as rental income. Income earned by legal entities (corporations, limited liability companies) is always classified as business income. Income earned by a local partnership is also classified as business income, provided the partnership performs business activities other than pure rental activities.

From 1 January 2006 onwards, any income earned by a non-resident corporate investor holding real estate in Austria is classified as business income. The same applies to a non-resident individual, holding Austrian real estate in a business abroad.

## Income taxation

The income tax rates for non-resident individuals range from 0% on the first EUR 2,000 of taxable income to 50% on income in excess of EUR 60,000, i.e. a progressive rate.

Foreign legal entities are taxable on their income at 25% corporate income tax. If the investment is classified as a real estate investment fund under Austrian tax law, a special tax regime is applied (see comments below on *ImmoInvFG*).

Rental income is measured by the excess of receipts over income-related expenses. Expenses are deductible provided they are related to Austrian real estate. The following deductions among others are allowed:

- maintenance and repairs
- expenses for administration
- financing costs and interest payments for financing loans
- insurance premiums for the real estate
- depreciation and
- real estate tax.

A withholding tax (WHT) of 25% is levied on interest paid on deposits with Austrian banks, and on interest paid on bonds. If the foreign corporation declares that the interest is part of its taxable profit, it will be exempt from the WHT.

There is no existing legislation that specifically foresees thin capitalization rules.

## Group taxation model

If two or more companies fulfil the requirements for the group taxation model and exercise the option to form a tax group, the taxable results of the domestic group members will be attributed to their respective parent company and will be taxed at the level of the group parent. As a result, tax losses of (also foreign) group companies can be consolidated with taxable profits of other group companies. The requirements for the group taxation concept are:

- a participation of more than 50%,
- a written application to form a tax group, which has to be filed with the competent tax office.

In the case of a domestic tax group, the whole income is attributed to the parent company, irrespective of the holding quota. With regard to foreign group members, only negative income to the extent of the capital ownership percentage is attributed to the parent company. Therefore it is necessary to “recalculate” the foreign losses in accordance with the Austrian tax law requirements. Beginning with the tax period of 2012 the possibility to deduct foreign losses will be capped with the amount actually suffered based on foreign law. Generally, an appropriate system of tax allocations between the group companies has to be established, mainly to ensure that the minority shareholders are neither advantaged nor disadvantaged.

The use of losses is recaptured if and to the extent that such losses can be used in the subsidiary’s state of residence or the foreign subsidiary ceases to be a member of the Austrian tax group. From July 2009 a new recapture taxation mechanism was determined. The amendment provides for a recapture, not only if the subsidiary ceases to be a member of the group, but also if the loss generating business unit is sold, closed down, or has materially decreased in scope since, when the losses were generated. According to the Austrian tax authorities the materiality threshold requires a 75% decrease in scope.

## Depreciation

The basis of depreciation includes the acquisition costs of the building, but not the value of the land. Tax depreciation must be calculated using the straight-line method, according to which the annual depreciation is a fixed percentage of cost. If a non-resident investor holds the building directly or as private property, depreciation can be carried out at a rate of 1.5% a year. If the building serves as an asset of a business, depreciation rates vary between 2% and 3% (4% for buildings in lightweight construction). A higher depreciation rate can only be applied in case of providing a corresponding expert opinion.

Furthermore, an accelerated depreciation for certain tangible assets, newly acquired or produced in 2009 and 2010, was introduced. The accelerated depreciation amounts to 30% of the acquisition or production costs (including the ‘normal’ straight-line

depreciation) and is available in the year of the acquisition or production. The accelerated depreciation and the ‘normal’ depreciation may not exceed the historical acquisition or production costs. However, real estate and buildings as well as leasehold investments, passenger cars (with exceptions), aircrafts, used assets, etc. are excluded.

## Goodwill depreciation of domestic participations

For share deals involving an Austrian company after 31 December 2004, the goodwill including the hidden reserves in depreciable assets (e.g. buildings) must be deducted for tax purposes over a period of 15 years, subsequent to the formation of an Austrian tax group. The depreciation basis is limited by 50% of the total share purchase price. The acquired company must be engaged in active business, it must be resident for tax purposes in Austria and it must be acquired from a non-related party. The goodwill depreciation for share deals is only available within the Austrian group taxation model.

## Capital gains on the sale of property

Up to 31 March 2012 capital gains derived from the sale of real estate by non-resident (corporations or individuals) direct investors was only treated as taxable income if they qualify as speculative gains or business income.

Business income is derived from either an Austrian PE, an Austrian permanent representative, Austrian real estate held by a non-resident corporate investor, or a non-resident individual having a business abroad.

Up to 31 March 2012 capital gains of non-resident individuals, having no PE in Austria and holding the real estate as private property, were only taxable if real estate and related rights were disposed of within 10 years, or within 15 years under certain circumstances (speculative gains).

Starting from 1 April 2012, the speculation period will be abolished. Gains from the sale of properties which were acquired as from 31 March 2002 will be taxed at 25%. In certain cases, already acquired assets as from 31 March 1997 are also treated as new assets. The tax assessment base will be the profit calculated using sales price less acquisition costs. After a holding period of 10 years an inflation reduction can be used to decrease the capital gain by 2% per year, limited with a maximum 50% deduction. This deduction is only possible if the tax regime for new assets applies, thus only if the full 25% real estate revenue tax is applicable. Real estate property that is already beyond the speculation period under the old regime (“old real estate assets”) will be subject to special transition rules. “Old” properties (acquisition before 31 March 2002) which were rededicated from land sites to building sites after 31 December 1987 will be taxed at 15% of the sales price. “Old” properties without rededication will be taxed at 3.5% of the sales price. However, in both cases the new regulation provides the option to tax the gains similarly to “new real estate assets”. The amount of real estate revenue tax thus depends on the time of acquisition of the property.

Gains arising from the sale of real estate that was held for at least seven years as business property by individuals (not corporate investors) are not taxed under the condition that such gains are used to reduce the book value of fixed assets

purchased or manufactured in the same year, or within the following 12 months. The minimum holding period is increased to 15 years under certain circumstances. As of 2012 the rollover relief for the hidden reserves is only available in cases where the replacement asset is used within a domestic PE. Hidden reserves from the sale of land may only be used to reduce the valuation basis of land and buildings. Hidden reserves from the sale of buildings may only be used to reduce the valuation basis of buildings. If the reserve is not used within this 12-month period, or 24 months under certain circumstances, it has to be added back to taxable income.

Corporations are not eligible for the rollover credit system through which realised hidden reserves can be withdrawn from an immediate taxation in case of a reinvestment. Individuals who hold real estate through a partnership can still benefit from this rollover credit system.

In Austria, the sale of shares in a company whose assets mainly consist of Austrian property is not treated as the sale of the property owned by the company. With regard to real estate transfer tax, a transfer of Austrian property is assumed where an investor obtains the 100% share in a domestic property owning company (see below under the section *'Real estate transfer tax'*).

## Participation exemption/withholding tax on dividends

Dividends received by a resident corporation from its domestic subsidiary are exempt from corporate income tax on the basis of the national participation exemption. Dividends received by a resident corporation from a foreign subsidiary are exempt from corporate income tax on the basis of the international participation exemption, if the conditions regarding seniority and participation are fulfilled and the anti-abuse provisions are kept.

Dividends received by a resident corporation from a foreign subsidiary in an EU Member State, a member state of the European Economic Area (EEA) or of a third-party country are also exempt from corporate income tax on the basis of the international participation exemption, if the participation is at least 10% and Austria has concluded a double tax treaty with comprehensive administrative assistance.

However, if the foreign subsidiary is taxed at 15% or less the participation exemption is not applicable. In this case a tax credit system is applied. Dividends paid by an Austrian company to its domestic or foreign shareholders are generally subject to 25% dividend WHT under domestic law. For direct or indirect participations over 10%, no WHT has to be deducted. For foreign subsidiaries a holding period of more than one year and the application of the EU Parent-Subsidiary Directive is provided. In those cases, dividends can be paid from the asset owning company to the EU parent company free of WHT. The WHT exemption is subject to anti-abuse legislation in Austria. Dividends paid to non-resident individuals are subject to the full WHT rate, although this rate might be mitigated or eliminated by existing double tax treaties.

Following the European Court Decisions on the 'Amurta' and 'Aberdeen Property Fininvest' cases, the general possibility of a reclaim of Austrian WHT was introduced in the latest amendment to the Austrian Corporate Income Tax Act. Corporations resident in other EU Member States or Norway are entitled to a refund of the WHT on dividends received from Austrian companies if and to the extent the foreign company provides

evidence that no tax credit will be granted for the Austrian WHT in its country of residence under an existing tax treaty. The new reclaim provision is applicable, irrespective of the extent of participation as well as the holding period and will be of interest for corporations not fulfilling the tight prerequisites of the EU Parent-Subsidiary Directive.

## Loss carryforward/tax credit carryforward

Operating losses from businesses may be carried forward without time limit if the losses have been calculated according to proper bookkeeping practices. From 2001 onwards, losses carried forward may only be used to offset income of the following years to the amount of 75% of the respective income each year. There is no loss carryback available. No loss carryforwards are available for rental income.

A change on crediting foreign taxes paid for foreign sourced income taxable in Austria has taken place. Foreign taxes comparable to the Austrian corporate income tax that cannot be credited in Austria in one year, due to tax losses, may be carried forward by the Austrian company, if the Austrian company provides an accurate documentation of the economic double taxation and no foreign tax credit forward is granted to the company. Foreign WHTs can still not be carried forward.

## Real estate transfer tax

A real estate transfer tax is levied on the acquisition of real estate, including buildings on land owned by third parties, situated in Austria. The tax rate is basically 3.5%. However, in certain cases, the rate is 2% of the purchase price. An additional registration duty of 1.1% is also due. If there is no purchase price (e.g. gifts), or in case one shareholder holds 100% of the asset-owning company, the taxable base is three times the assessed standard value. The assessed standard value is calculated only for taxation purposes and usually far below the market value.

## Value added tax (VAT)

In principle, sale, rental and lease transactions are VAT-exempt, with no input VAT credit. However, rental for accommodations, such as apartments and family houses, is taxable at the rate of 10% with input VAT tax credit. In the case of the sale of real estate, or rent or lease of offices, industrial premises, plants and other non-residential real estate, the supplier, i.e. the lessor, may opt for taxation at a rate of 20% with input VAT tax credit. In this respect the Stability Act 2012 comes up with restrictions for lease contracts concluded after 31 August 2012. Regarding those lease contracts it is only allowed to opt for taxation with the possibility to deduct input VAT in case the tenant himself is performing VAT-able turnovers. With regard to sales subject to VAT, the VAT amount forms part of the basis for real estate transfer tax.

If input VAT was credited according to the provisions of the Austrian Value Added Tax Act, this amount has to be adjusted if circumstances decisive for input VAT tax credit change. With respect to real estate, an observation period of nine years from the year the asset has been used for the first time has to be taken into account. A change taking place within this period leads to a pro rata adjustment of one-tenth of the input VAT credited. In the course of the Stability Act 2012 the observation period of nine years has

been extended to nineteen years for those properties used for business purposes for the first time after 31 March 2012. In case of lease contracts, the extended observation period applies for contract concluded after 31 March 2012.

## Reverse-charge regarding construction services

To tackle VAT fraud in the real estate industry, the VAT liability resulting from the supply of construction services, i.e. work on buildings, is passed from the subcontractor to the general contractor (reverse-charge mechanism for construction services). Work on buildings cover all services in connection with construction, restoration, maintenance and demolition of buildings, as well as alterations to constructions and cleaning performances. The secondment of personnel to render such services is considered as construction services, too.

According to the VAT regulation regarding construction services, the tax liability passes over to the recipient of the services under the following conditions:

- If construction services are performed by an entrepreneur, who is subcontracted to perform a construction service (e.g. by a general contractor); or
- If construction services are performed by an entrepreneur who habitually renders construction services himself.

If the tax liability passes over to the recipient of the services, the invoice has to be issued without VAT. In addition, the invoice has to include the following:

- The VAT identification number of the recipient of the services.
- Reference that the recipient of the performance is liable for the VAT payable by indicating 'reverse charge'.

## Inheritance and gift tax

An individual non-resident in Austria directly owning an Austrian real estate property used to be subject to Austrian inheritance and gift tax.

In 2007, the Austrian Supreme Constitutional Court abolished the legislation with regard to inheritance and gift tax, after having declared it a violation of constitutional principles. According to this decision, the Austrian inheritance and gift tax finally phased it out on 31 July 2008, i.e. beginning 1 August 2008 there is no inheritance and gift tax in Austria.

However, a Gift Announcement Law 2008 was published, which stipulates a compulsory obligation to notify asset transfers due to a gift transaction to the Austrian Tax Authorities. The disclosure obligations apply for securities, cash, shares in companies and tangible assets if certain thresholds are exceeded. However, the transfer of real estate due to inheritance or gift is excluded from this announcement obligation as these transactions will be subject to 2% or 3.5% real estate transfer tax.

## ImmobilienInvestmentfondsgesetz (ImmoInvFG)

The ImmoInvFG, which came into effect on 1 September 2003, aims at establishing legislation for real estate investment funds in Austria.

According to the ImmoInvFG, a real estate investment fund is a pool of commercial and residential real estate property, held in trust by a capital investment company (legal owner) on behalf of the unitholders (beneficial owners). To increase security for the investors, the emission and management of the shares in the fund is controlled by both the depositary bank and the Financial Market Supervision Authority.

The real estate investment fund itself is not subject to corporate income tax. It is treated as transparent for Austrian income tax purposes. Taxation is triggered at the level of the investors.

The real estate property must be valued yearly by two experts on a net asset value basis.

A real estate investment fund under Austrian tax law must invest according to the principle of risk diversification. Risk diversification is assumed under the following conditions:

- An investment into at least ten properties (five in certain cases) must be targeted with an initial investment period of four years.
- The gearing ratio must not exceed 50% on a long-term basis.
- One single real estate investment must not be larger than 20% of the fund's volume.

The qualification is done on an overall perspective; however, if one of these criteria is not met, the fund would not, according to current interpretation of the law, qualify as a real estate investment fund.

The real estate fund can invest within the EU/EEA on an unlimited basis, and outside the EU/EEA up to 20% of the fund's volume. Under new legislation, real estate investment funds can also invest in property holding companies, in Austria or abroad, up to 49% of the real estate fund's volume.

The yearly income includes the rental income of the fund plus the realised capital gains, minus capital losses. Additionally, the income must include 80% of the changes in value resulting from the expert's valuation. This percentage is increased to 100% if the fund is not publicly offered. Instead of depreciation, a reserve is allocated.

All income of the fund is deemed to be distributed to the investors, regardless of whether the fund actually makes a distribution or not, and is subject to an Austrian 25% WHT (final tax for Austrian private investors) as far as the fund is publicly traded. If the fund has been privately placed, all income is subject to standard taxation at the normal tax rate.

For non-resident corporate or individual investors, the WHT can be reduced or eliminated by the Austrian Double Tax Treaties. In case of non-publicly offered real estate investment funds, the WHT of 25% has to be retained at source without

an immediate reduction of the WHT. The non-resident investor will subsequently have to file an application for repayment of the taxes withheld at source.

The redemption of shares, as well as an actual sale of the shares, is a disposal for tax purposes. If the shares were privately held, this disposal is only taxed if effected within one year after acquisition (applicable for all shares purchased until 31 December 2010). For shares purchased after 31 December 2010, realised increase in value due to a sale is subject to tax, irrespective of the holding period. If the shares were held as Austrian business property, a disposal is taxable regardless of the holding period.

The sale of the shares is not subject to real estate transfer tax.

Under certain circumstances, foreign entities that hold real estate according to the principle of risk diversification, qualify as real estate investment funds under the Austrian ImmoInvFG. In this case the tax treatment of investments in Austrian real estate of such foreign entities must be checked in detail as some of the above-mentioned provisions are basically applicable to the Austrian investments.

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# *Real Estate Going Global Belarus*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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# *Real Estate Tax Summary – Belarus*

## *Preface*

Belarus is steadily trying to be more open for foreign investments and makes all possible steps in order to attract foreign investors to the national market. Although certain restrictions are imposed on foreign individuals and companies, there is still a number of possibilities to invest in Belarusian real estate especially by means of incorporation of a new company in Belarus or buying shares/stocks in an already existing company.

## *Tax Summary*

Acquisition, use and disposal of real estate may generally entail the following taxes and duties in Belarus:

### *Corporate income tax*

Rental income as well as capital gains from the sale of real estate derived by Belarusian companies or foreign companies acting through permanent establishments in Belarus are considered a part of business profits of such companies and charged with corporate income tax. General tax rate is 18%. Reduced tax rate of 9% is applicable to capital gains from the sale of shares/stocks in a Belarusian company.

### *Withholding taxes*

Rental income and capital gains derived by foreign companies not carrying out their activities through permanent establishments in Belarus are subject to withholding taxes. General tax rate is 15%. Income from sale of shares/stocks in Belarusian companies is charged with 12% withholding tax. Reduced tax rates and exemptions can be applicable according to double tax treaties concluded by Belarus.

### *Value added tax (VAT)*

Sale or leasing of real estate is generally subject to 20% VAT.

### *Real estate tax*

General tax rate is 1% of the residual value of buildings and constructions owned by taxpayers.

### *Land tax*

Tax rates depend on location, purpose of use and cadastral value of a land plot.

### *State duties*

State duties are charged for state registration and notarisation of transactions with real estate.

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# ***Real Estate Investments – Belarus***

## **General**

According to the Civil Code of Belarus real estate includes land plots, subsoil plots, separated water bodies, other items attached to the earth that cannot be moved without considerable damage to their purpose and items that are equated to real estate by legislation.

Real estate can be in state or in private ownership, be subject to any form of alienation, lease, mortgage, fiduciary management, etc.

Subsoil, waters and forests are exclusively owned by state. Moreover, certain types of land cannot be transferred into private property: agricultural lands; lands used for nature protection, recreational, historical and cultural purposes; forestry and water fund lands; lands under roads and other transportation lanes; lands subjected to radioactive contamination.

As provided by the Land Code of Belarus, only Belarusian citizens, Belarusian legal entities, foreign states and international organizations are granted the right to own land plots. Foreign citizen can become an owner of a land plot in Belarus only if it was inherited from relatives.

Transfer of land plots into possession of Belarusian citizens and legal entities is subject to numerous legislative constraints including the following:

- land plots are sold by tenders unless an exception is provided for in legislation;
- land plots are transferred and can be used for certain predetermined purposes only;
- size of a land plot that can be owned by a certain individual or a legal entity is limited depending on location of a land plot, purpose of its use and other conditions.

The title to a land plot can be transferred to a foreign state for the purpose of diplomatic mission or consular office location; and to international organisations – for the purpose of location of their representative offices.

Land plots owned by the state can be transferred to Belarusian legal entities by right of permanent use or by right of temporary use for up to 10 years (general term) and for up to 20 years (mining operations). Moreover, land plots can be given to Belarusian and foreign legal entities by right of temporary use for up to 99 years under concession agreement.

Both domestic and foreign individuals and legal entities are entitled to lease land plots for a period not exceeding 99 years.

Real estate (land plots, enterprises, buildings, etc.) can be subject to mortgage. Obligations arising from credit, loan, sale, lease or other agreements can be secured thereby. Privately-owned land plots can be mortgaged only in order to secure timely

payment of a bank credit, whereas mortgage on state-owned land plots is forbidden. Mortgage on an enterprise can secure an obligation that does not exceed the half of the enterprise's value.

Origin, change or termination of rights to real estate as well as all transactions therewith are subject to state registration.

## Tax and Legal Matters

### *Depreciation*

Buildings and constructions can be depreciated using the directly proportional (straight-line) depreciation method or production depreciation method. Generally applicable for other assets indirect disproportionate depreciation method cannot be used with regard to buildings and constructions. Useful life of buildings and constructions is defined on the basis of standard indicators set out in legislation and can be up to 125 years. Buildings and constructions are subject to mandatory annual re-evaluation as of 1 January of the year following the reporting one.

Land plots are not depreciated.

Application of an upfront premium is possible, i.e. taxpayers are entitled to classify/record part of the initial value of fixed assets as costs of production and supply of goods (works, services) for corporate income tax purposes as of the date when such assets were initially accounted for. The amount of a premium is limited to 10% of the initial value of buildings and constructions. A premium shall be recaptured if a relevant asset is sold within three years from the date when it was initially accounted for.

### *Loss carryforward*

Belarusian companies are entitled to carry forward losses to future tax periods within 10 years following the tax period when losses have occurred. Losses incurred by a company from transactions with securities and derivative financial instruments as well as from transactions on disposal of fixed assets and constructions in progress shall be carried forward prior to other losses and only against income derived from the same groups of transactions.

Transfer of losses from one company to another is not allowed except for the case of restructuring of a company.

### *Financing the property*

As from 1 January 2013 thin capitalisation rules will become effective in Belarus. These rules will be applicable with regard to debts of a Belarusian company owed directly or indirectly to a foreign company given the latter holds at least 20% share in the statutory fund of the former.

In case the debt/equity ratio of a Belarusian company exceeds 3:1, interest on the excess of the loan over the mentioned ratio is not deductible for corporate income tax purposes. The debt/equity ratio is calculated as of the last date of a tax period, i.e. 31 December.

The Tax Code does not establish general safe haven rules, thus not providing a Belarusian company with a possibility to justify high debt/equity ratio as an arm's length ratio.

### *Rental income*

Rental income is considered a part of business profits of a company and taxed either with corporate income tax at 18% rate if gained by a Belarusian company or a foreign company acting through a permanent establishment in Belarus or with withholding tax at 15% rate if gained by a foreign company.

### *Capital gains*

Capital gains derived by Belarusian companies or foreign companies carrying out activities in Belarus through permanent establishments from the sale of real estate are taxed as a part of business profits of a company. General corporate income tax rate of 18% is applicable.

Capital gains from the sale of shares/stocks in a Belarusian company are subject to corporate income tax under a reduced 9 % tax rate.

### *Withholding taxes*

Generally, income received by a foreign company not carrying out activities in Belarus through a permanent establishment is subject to withholding tax (hereinafter – WHT):

- from sale or lease of real estate – at 15% rate;
- from sale of shares/stocks in statutory funds of Belarusian companies – at 12% rate;
- dividend income – at 12% rate;
- interest income – at 10% rate.

It shall be considered that double tax treaties concluded between Belarus and other states may contain rules that will lead to application of reduced WHT rates or complete exemption from WHT. In order to take advantage of such a reduction or an exemption one needs to submit to the local tax authorities a certificate confirming residence in a state party to the relevant double tax treaty.

Currently, Belarus has 63 effective double tax treaties.

### *Value added tax (VAT)*

Generally, alienation as well as leasing of real estate is subject to VAT at the rate of 20%. However, sale of items of residential construction as well as items of residential construction in progress is VAT exempt.

Sale of shares/stocks in companies is not subject to VAT taxation.

## *Real estate tax*

Real estate tax is levied at the annual rate of 1% on the residual value of buildings, including separated premises, and constructions owned by legal entities. 2% annual rate of immovable property tax is charged on late construction in progress (if construction works take longer than the deadline established in technical documentation).

The tax base with regard to buildings and constructions located in the territory of Belarus and leased by individuals to legal entities will be the contract value of the leased real estate not less than its value established by the evaluation. Evaluation can be made in the order approved by the President of Belarus as well as by a certified appraiser or a local authority responsible for state registration of real estate.

When real estate subject to taxation is located in Belarus and leased by a resident company to a lessee, the lessee is considered a real estate taxpayer provided that the leased real estate is accounted for in its balance sheet. The lessee is also obliged to pay the tax due on real estate leased from foreign companies that are not considered to have a permanent establishment in Belarus.

The amount of tax, except for the tax due on late construction in progress, is deductible for corporate income tax purposes.

The tax reporting obligation must be fulfilled by a taxpayer before 20 March of the reporting year. The tax is paid on a quarterly basis by equal parts, no later than the 22nd day of the third month of each quarter.

## *Land tax*

Belarusian and foreign entities are subject to land tax collected by the local tax authorities with respect to land that they own or use in Belarus.

The tax base depends on plot location and purpose and is normally determined pursuant to cadastral value of a land plot.

The Tax Code provides for a number of land plot categories that are exempt from, or not subject to, land tax in Belarus.

The tax is payable on an annual basis at the rates established by the Appendixes to the Tax Code of Belarus. Tax rates for agricultural plots vary from BYR 208 to BYR 56,661 per hectare. Tax rates on the land plots located in towns and rural areas range from 0.025% to 3% payable on the cadastral value. Municipalities are entitled to increase/decrease these rates with regard to certain groups of taxpayers.

Land tax is deductible, with some exceptions, for corporate income tax purposes.

Land tax is reported annually, not later than 20 February of the current reporting year. Generally, the tax is paid quarterly by equal parts, before the 22nd day of the second month of each quarter. Some exceptions concerning payment terms for land tax due on agricultural plots can be applied.

## *Lease fees*

Generally, consideration for leasing of a state-owned land plot includes a lump sum payment for the right to conclude a lease agreement and lease fees.

The amount of a lump sum payment for the right to conclude a lease agreement depends on the duration thereof and varies from 3.2% to 50% of the cadastral value of a land plot for 99-year lease.

The amount of lease fees is defined in a lease agreement at an annual rate varying from 0.025% to 3% of the cadastral value of a land plot. Municipalities are entitled to increase/decrease these rates with regard to certain groups of lessees.

### *State duties*

Real estate transactions are subject to state registration. State duty imposed upon registration of real estate is BYR 200,000 (approximately EUR 19). General rate of state duty on registration of sale of real estate as well as mortgage of real estate is BYR 500,000 (approximately EUR 48). Sale of an enterprise is subject to state duty in the amount of BYR 2,500,000 (approximately EUR 240).

Rates of state duties on notarisation of agreements of sale and mortgage of real estate are equal to those imposed upon state registration of real estate transactions.

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# Real Estate Tax Summary – Belgium

## General

A foreign corporate investor can invest in Belgian property through a local or a non-resident company, or through a partnership.

Foreign investors usually invest in Belgian real estate through a property company, which allows more flexibility upon exit of the structure.

## Rental income

Rental income is taxable in Belgium at the rate of 33.99% for both local and non-resident companies.

Local and non-resident companies are, in principle, allowed to deduct costs in connection with the Belgian investment. Regional taxes (except for e.g. the immovable withholding tax) and retributions are not tax-deductible.

Belgium allows for a tax deduction of a fictitious interest to be calculated on the equity (the so-called '*notional interest deduction*' – NID).

## Depreciation

Land cannot be depreciated. On the other hand, ancillary expenses relating to the acquisition of land can be deducted for tax purposes provided a justifiable reduction in value is booked in the year of acquisition.

Certain types of costs have to be capitalised and depreciated: Office buildings at 3%, industrial buildings at 5%. A limitation may apply to the depreciation in the year of acquisition and no depreciation for tax purposes is allowed in the year of disposal.

## Financing

Interest expenses related to the acquisition of real estate are, in principle, fully tax-deductible, provided that they do not exceed the market rate.

Interest paid will not be tax-deductible if the foreign beneficiary is not subject to tax, or is subject with respect to the interest received to a tax regime that is significantly more advantageous than the Belgian regime. However, if the Belgian borrower demonstrates that the interest relates to effective and sincere transactions and that it does not exceed normal limits, the interest will remain tax-deductible.

In the framework of a recent Belgian tax reform, a (general) thin capitalisation rule (5:1 debt/equity ratio) has been introduced. In this context, the tax deductibility of interest on intra-group loans or on loans whereby the beneficial owner is not subject to income taxes (or, with regard to the interest income, is subject to a tax regime which is

substantially more advantageous than the Belgian tax regime) paid or accrued during a given financial year will be denied to the extent that the total amount of these intra-group loans exceeds five times the net equity of the company.

Besides the 5:1 thin capitalisation rule, the specific 1:1 thin capitalisation rule needs to be monitored to avoid reclassification of tax-deductible interest into non-tax-deductible dividends (only applicable under specific circumstances).

Belgian tax law has, subject to the fulfilment of a number of conditions and formalities, numerous withholding tax (WHT) exemptions (e.g. nominative bonds, payments to credit institutions, payments to Belgian companies etc.). Furthermore, the Interest & Royalty Directive has been implemented and Belgium has an extensive tax treaty network (on the basis of which several WHT reductions are available).

## Capital gains

Both local and non-resident companies are taxable on capital gains on the sale of property at the full rate. Subject to a number of conditions (mainly reinvestment of sales proceeds), the taxation of the capital gain can be deferred. The taxes on the capital gains realised by foreign companies are withheld by the notary enacting the transfer deed as a professional WHT.

Capital gains realised by a Belgian company (or Belgian branch) on the transfer of shares are 100% tax exempt if certain conditions are met and a minimum holding-period of one year is reached.

## Real estate transfer tax/VAT

The acquisition of property is subject to a 10% or 12.5% registration duty (10% for real estate located in the Flemish Region, 12.5% for immovable property located in the Brussels Capital or Walloon Region) calculated on the higher of the contractual price, or the market value.

A reduced transfer tax rate is applicable in case of acquisition of a right *in rem* (long lease or building right) or when the property is sold to a 'professional trader' or in case of resale of the asset within the two years of its acquisition in certain circumstances.

As a general rule, the sale of land and buildings as well as the rental agreements thereon are exempt from VAT without input VAT credit.

New buildings and the adjoining land can be acquired and disposed of under the VAT regime.

The VAT group regime offers opportunities to limit the VAT leakage in case of VAT-exempt letting.

The sale of a company's shares is generally not considered a sale of the property itself (unless, in very specific circumstances, re-characterisation or simulation would occur).

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# *Real Estate Investments – Belgium*

## *Preface*

In recent years, property investors and developers have become much more international in their outlook. Property has effectively become part of the global marketplace. However, the tax and legal systems that apply to property transactions differ with every jurisdiction and players in this market need to understand the local legal and tax implications of their proposed transactions.

This guide has been prepared by the Real Estate team of the tax consulting firm PwC Belgium and provides an introduction to the Belgian tax and legal regime that applies to real estate investors.

## *General*

### *Introduction*

Investors wishing to invest in Belgian real estate will have various options to the best way to structure the acquisition. Basically, the choice will be between a direct acquisition of an asset (“asset deal”) and an indirect acquisition, i.e. a purchase of shares in the company that owns the targeted asset (“share deal”).

Rather than actually participating in the management of properties, some investors may also wish to obtain returns on property through purely financial investments (transferable securities). For these investors, Belgium offers a number of interesting options such as real estate certificates (BRECs) and shares in closed-end real estate investment companies (SICAFIs).

The consequences and characteristics of these various solutions are analysed below, together with some tax and legal features regarding the construction of a new building.

### *General anti-abuse measure*

Belgian tax law provides for a general anti-abuse measure for corporate income tax, registration duties and inheritances purposes. Recently, this anti-abuse measure has been substantially modified.

Under this new measure, a legal deed (or set of legal deeds) is not binding on the tax authorities if they show that there is tax abuse. For the purposes of the anti-abuse rule, ‘tax abuse’ is defined as:

- a transaction in which the taxpayer places himself – contrary to the purposes of a provision of the Income Tax Code/Registration Duties Code/Inheritance Tax Code (or related Royal Decree) – outside the scope of that provision;
- a transaction that gives rise to a tax advantage afforded by a provision of the Income Tax Code/Registration Duties Code/Inheritance Tax Code (or related Royal Decree) whereby conferral of that tax advantage would be contrary to the purposes of that provision and securing the tax advantage was the essential goal of the transaction.

If the tax authorities find that a legal deed or a set of legal deeds can be considered as tax abuse, it is up to the taxpayer to prove that the choice of that legal deed or set of legal deeds was motivated by reasons other than tax avoidance (reversal of the burden of proof). If the taxpayer cannot prove this, the transaction will be subject to tax in line with the purposes of the respective tax law, as if the tax abuse had not taken place.

The extent of this new anti-abuse rule is still uncertain. In July 2012, the tax administration has published a circular letter with respect to the presence or not of tax abuse in the context of registration duties and inheritance tax. The non-exhaustive list of acts which can be considered tax abuse includes a long lease construction, i.e. a split purchase of real estate by related companies (so-called 'split-sale').

## Acquisition of real estate

### *Asset deal – Direct tax aspects*

The basis for depreciation in general is the historical cost of the asset, i.e. the acquisition price (as referred to in the acquisition deed), plus related costs (registration duty, brokerage fees, notary's fees, architect's fees, etc.).

The tax-deductible annual depreciation rate will usually be 3% for office buildings, houses and apartments, and 5% for industrial buildings.

In the year of acquisition of an asset, only the pro rata of an annuity can be accepted as depreciation for income tax purposes. This limitation only applies to companies that cannot be considered as small and medium sized companies ("SMCs") as defined by article 15 of the Companies Code. An SMC is a company that does not exceed more than one of the following criteria: 50 employees, a turnover of EUR 7.3m and total asset value of EUR 3.65m. These thresholds are to be evaluated on a consolidated level. According to the position of the central tax administration, no depreciation can be accepted for the year in which the asset is disposed of.

Ancillary expenses incurred at the time of acquisition can only be depreciated in the same way as the asset to which they relate – so no full deduction in the year of acquisition. On the other hand, ancillary expenses relating to the acquisition of land can be deducted for tax purposes provided a justifiable reduction in value is booked in the year of acquisition.

In the hands of the seller (corporate entity), any capital gain realized upon the disposal of immovable property will be taxable at the standard corporate income tax rate of 33.99%. The realized capital gain can be reduced by the respective selling costs, financing costs, running costs, notional interest deduction and tax losses carried forward which are available at the level of the seller. The taxation of the capital gain can be deferred under certain conditions (mainly reinvestment – see below).

### *Asset deal – Indirect tax aspects*

#### **Registration duties**

Whether resident or non-resident, the purchaser of a property located in Belgium must register the deed evidencing the transfer of the property. The registration duty is 12.5% or 10%, depending on the location of the immovable property, in principle calculated on the selling price (i.e. the price agreed upon by the parties).

A reduced registration duty rate of 0.2% is applicable in case of acquisition of a right *in rem* (long lease or building right).

The taxable basis cannot be lower than the market price. The market price is defined as the selling price that could be obtained in the open market from a potential purchaser fully aware of all the circumstances (fair market value). Where the selling price is proven to be artificially low (sham), the tax authorities are empowered to impose a penalty on the purchaser and on the seller equal to the amount of the tax evaded (i.e. in the Brussels Capital Region and the Walloon Region a total tax charge of 37.5%: 12.5% duty plus 12.5% penalty in the hands of each party; in the Flemish Region a total tax charge of 30%: 10% duty plus 10% penalty in the hands of each party).

When certain formalities are complied with, the above registration duties can be partially recovered (3/5 – 36% in the Brussels Capital Region) when a property is resold within two years of its acquisition. Instead of this recovery, it is possible now in the Flemish Region to carry forward these registration duties for the future transfer tax due on a new acquisition of a single private residence located in the Flemish Region.

A 4% (5% in the Walloon Region and 8% in the Brussels Capital Region) reduced rate will apply in the Flemish Region to purchases by corporate entities (or individuals) whose business activities mainly consist of buying and selling real estate, i.e. merchant traders. Merchant traders will have to provide evidence that they qualify by carrying out successive sales within the five years following their application for recognition. In particular, the reduced rate is only available if the property is sold within eight years (ten years for the Walloon Region and the Brussels Capital Region) following the year of purchase, and the sale attracts registration duties at the standard rate of 10% or 12.5%.

In addition to transfer tax, a notary's fee is due on the transfer value of real estate at rates ranging from 0.057% to 4.56%.

## VAT

As a general rule, the sale of land and buildings, as well as the rental agreements thereon are exempt from VAT without input VAT credit. There however a number of exceptions.

Under certain conditions, the supply of new buildings (including adjoining land) can be subject to VAT instead of registration duties. As of 1 January 2011, the supply of land that belongs to a new building or part of a new building is indeed subject to VAT insofar as the supply of the building itself is subject to VAT (see above). The VAT regime will apply to sales, granting and transfer of rights *in rem* on new buildings or so-called VAT leasing of new buildings where certain conditions are met.

The supply of a 'new' building will be subject to VAT if the seller is a so-called building constructor, or a taxpayer, or a private person who has opted to supply the new building under the VAT regime. It is not the purchaser who decides whether or not the sale will take place under the VAT rules.

If the supply/acquisition is carried out under the VAT regime:

- the supplier will have input VAT credit on (most) relating costs/investments; and

- the purchaser will be entitled wholly or partly to deduct the input VAT insofar as the purchaser uses the building as part of those of the purchaser's economic activities that are subject to VAT.

In the case where the acquirer stops using the building in the framework of an economic activity that entitles the acquirer to deduct input VAT, within the adjustment period (15 years for buildings constructed, or acquired with VAT as of 1 January 1996), the acquirer will have to refund the deducted VAT for  $x/15$ , i.e. one-fifteenth for each remaining year of the adjustment period. The adjustment period normally start the year of the first use of the building.

Such VAT adjustment will also apply on immovable works (transformation, renewals, etc.). In this case the adjustment period is 5 years.

## *Asset deal – Legal and environmental aspects*

### *The right of ownership*

Under Belgian civil law, ownership is defined as the right to enjoy and dispose of assets in the most absolute way, provided that no use is made thereof that is prohibited.

The scope of the ownership of real estate is governed by the following three principles:

- Ownership of land includes ownership of the ground and of the subsoil.
- Ownership of land includes all the proceeds and income deriving therefrom.
- Ownership of land includes ownership of all that is attached to it; this is the so-called principle of accession.

From a legal viewpoint, accession is a method of acquiring ownership whereby the owner of a principal asset becomes the owner of all that is annexed thereto.

According to this principle, the owner of a plot of land or building becomes the owner of any constructions erected on their estate and of any improvements or transformations made to the building, regardless of the identity of the person who erected the building and/or the ownership of the building materials.

### *Sales agreement, pre-contract, notary deed and registration*

The purchase of a property is made by the conclusion of a sales agreement governed by the rules of general law. According to these rules, there is a sale as soon as there is an agreement between vendor and purchaser on the asset sold (even if that asset does not yet exist) and on the price (even if the price is ascertainable, albeit not yet determined).

However, the sale will require a written contract for the purposes of evidencing the transaction and payment of the registration duties. This written contract may be drafted privately, i.e. without the intervention of a public notary. It is then commonly called a 'preliminary sale agreement' (*compromis*).

The pre-contract is only enforceable between the parties. In order to be enforceable vis-à-vis third parties, the sale must be registered at the mortgage registry, i.e. by means of an entry in the register (transcription/*overschrijving*).

As only duly certified deeds (and judgements) may be entered in the register, the sale must be recorded in a notary deed. Since the registration duty needs to be paid at the latest four months after the signing of the pre-contract, it is advisable to have the sale recorded in a notary deed within a term of four months following the pre-contract. The notary deed is then produced for entering in the register by the public notary themselves.

The client is free to choose its notary. In case seller and purchaser appoint a different notary, the two notaries will share the fees relating to the deed between them. The choice of a notary by each of the parties will therefore not entail any increase in costs for the buyer.

### Environmental and town planning aspects

Over the last few years, Belgium has faced an incredible substantial increase in the number of laws, acts and decrees in the fields of environment and town planning. The fact that the legal framework in these matters vary from one region to another makes it even more complicated for real estate investors. We have outlined below the most significant impacts of this legislation on real estate investment.

#### Permits

##### *Building permit*

In the three regions, prior to the destruction, construction, external, or substantial refurbishment of a building, a building permit must be obtained within the municipality where the building at stake is/will be located.

Performing these works without a building permit or in contradiction with the plans and/or the conditions provided by the building permit and maintaining it constitutes a breach to the applicable town planning laws. Apart from in the Flemish Region, the maintenance of such illegal works is considered a continuous breach. This implies that the purchaser of a building can be held liable for the illegal works performed before its acquisition.

The Flemish Region, the Walloon Region and the Brussels Capital Region have moreover enacted comprehensive legal frameworks regarding the energy performance of a building, which impose new obligations for the building permit application and the new construction, together with some information duties to be complied with within the framework of a transfer of the property.

##### *Environmental permit*

In each region, an environmental permit has to be delivered for buildings where activities or installations harmful for the environment are operated and located. The concerned activities and installations have been listed in implementing decrees.

If the building is sold, the change of operator must be notified to the relevant authority. The absence of notification can impact the liability of the former and new operators, and can be subject to criminal and administrative fines, depending on the region where the activities/installations are located.

##### *Socio-economic permit*

The socio-economic permit is required for setting up one or more retail trades with a certain surface area. In order to obtain such a permit it is necessary to follow a procedure set out in the Federal Act of 13 August 2004. This Act of 13 August 2004 is however in contradiction with the applicable European legislation as enacted in the so-

called Services Directive and is therefore in the process of being modified to bring it in line with the said Directive. These modifications will mainly relate to the criteria based on what the application of a socio-economic permit will be tested.

### Town planning

Each region has adopted a comprehensive set of land allocation plans. These plans are enacted at regional and municipal levels. They can cover the whole territory of a region or municipality or only a part of it.

A land allocation plan divides the covered territory into various parcels of land for which a specific use is prescribed. The plans can also prescribe specific provisions related to the configuration (e.g. maximum height) and the activities performed in the building located within a block.

When a building permit is granted, the municipality has to comply with the provisions of the land allocation plans. These plans are also enforceable for the authorities granting the environmental permits.

### Soil formalities

In the Flemish Region and the Brussels Capital Region, the acquisition of a plot of land or of the premises can be subject to the performance of prior soil formalities.

#### *Soil formalities – Flemish Region*

The Flemish Soil Clean-up Decree is aimed at safeguarding the quality of the soil in Flanders by imposing a duty to clean up the soil in cases where a critical level of soil pollution is reached. This obligation is imposed on the operator, the owner or the person having control over the soil.

Since 1 October 1996, before transferring a piece of land, the transferor has to provide the transferee with a ‘soil certificate’. This certificate is issued by OVAM (the Flemish Waste Management Authority) and provides the transferee with information on such soil pollution as is known to OVAM. Furthermore, a preliminary soil investigation is required before any transfer of land on which potentially polluting industrial activity is (or was) carried out (cf. the activities listed in *annexe 1, VLAREBO*). On the basis of the results thereof, OVAM may require a second, more thorough investigation to be carried out, in order to determine the exact extent of the pollution.

If a critical pollution level has been reached, the transfer will only be allowed if the transferor draws up a soil clean-up plan, gives a formal commitment to clean up the land and offers adequate financial guarantees covering their obligations.

These obligations apply to all transactions relating to a ‘transfer of land’ as defined by the Flemish Soil Clean-up Decree. This concept not only refers to the transfer of ownership but also comprises the following:

- Concession agreements for an aggregate period exceeding nine years;
- Operations vesting or terminating limited rights *in rem*: usufruct (*usufruit/vruchtgebruik*), long leases (*droit d’emphytéose/erfpachtrecht*) or building rights (*droit de superficie/opstalrecht*);
- Business operations – mergers or demergers.

Any breach of these obligations carries a criminal penalty (up to EUR 495,707). Moreover, the purchaser and OVAM may apply for the annulment of the transfer.

On 20 October 2006, the Flemish Parliament enacted a new version of the Soil Clean-up Decree. Among the modifications brought to the soil legislation, the conclusion, transfer, or termination of lease agreements, leasing and right to use will not be considered anymore as ‘transfer of land’ requiring performance of the soil formalities. However, a concession granted to the public domain remains considered as a transfer.

The new decree provides for a transitional rule stipulating that the termination (and the transfer) of lease concluded under the Soil Clean-up Decree of 22 February 1995, i.e. with performance of the soil formalities, remains considered as a transfer of land subject to the soil procedure described in the new Decree.

### *Soil formalities – Brussels Capital Region*

The Brussels Capital Region enacted its initial legislation regarding soil pollution by means of the Ordinance of 13 May 2004 regarding the management of contaminated land and its implementing decrees of 9 December 2004.

The Soil Management Ordinance comprises two chapters, one related to the information and the second one related to the management of contaminated lands. The soil clean-up is considered a management measure among others.

### **Information**

The information system put in place by the Ordinance of 13 May 2004 is based on an ‘inventory of contaminated lands or of lands for which could be presumed contaminated’.

A third party such as a buyer or lessee only has access to a limited part of the data of the inventory. They are only entitled to access the entire information with the express agreement of the owner or holder of a real immovable right.

The performance of a soil investigation is required in the following cases:

- Accident or an accidental discovery of soil/groundwater pollution.
- Before the transfer of a land whereupon a ‘risk activity’ is or has been performed and before the transfer of the corresponding environmental permit.
- Before the start of any new ‘risk activity’ on the site.
- Before the start of any activity on a land listed in the inventory.
- Cease the operation of a ‘risk activity’.

The soil investigation must be performed by the transferor of a real immovable right listed in the inventory, by the transferor of the environmental permit, by operator or the person liable for the accident.

### **Pollution management**

If the soil investigation reveals pollution, a ‘risk investigation’ has to be performed by the persons mentioned above. The risk investigation must determine the risk level occurred by the soil pollution for human health and for the environment taking into

account the concrete use of the land or its appropriation in the allocation plan. The risk investigation must also determine if decontamination is required and/or if conservatory measures can be taken. The clean-up of the site is considered a measure among others, e.g. containment or pollution management.

Any breach of the obligation set forth in the Brussels Ordinance carries a criminal penalty. Moreover, the purchaser may apply for the transfer to be avoided.

On 5 March 2009 the Brussels Capital Region enacted a new version of the Soil Management Ordinance, the aim of which is to correct some inconsistencies of the previous Ordinance, to introduce a new concept such as the historical pollution (caused before 20 January 2005), which will trigger different obligations and to optimise the information system.

The core modifications of the new Soil Management Ordinance that entered into force on 1 January 2010 can be summarised as follows:

- Under the new Soil Management Ordinance, the transferor of a real property that is obliged (after execution of a soil investigation) to proceed with additional investigations and/or sanitation or other measures, can proceed with the transfer, subject to providing a guarantee to the competent authority (IBGE/BIM – the Brussels Environment Management Authority) to cover its obligations under the Soil Management Ordinance to proceed with such additional investigations and/or execute such sanitation or other measures.
- Under the new Soil Management Ordinance, a clear distinction is made between ‘new’, ‘historical’ and ‘mixed’ pollution and the related liabilities for owners and operators are more clearly stipulated.

The information system in case of transfer of a real property or the vesting of a right *in rem* on a real property, as put in place by the old Soil Management Ordinance, has been optimised.

### *Soil formalities – Walloon Region*

The Walloon Region enacted new legislation regarding soil pollution by adopting the Decree of 3 December 2008 regarding the management of contaminated land. It has not been published yet in the *Official Gazette* and the implementing decrees are still in preparation. Its entry into force is still a question mark.

### **Measures of which performance does not depend on the transfer of land**

The Decree makes a distinction between historical pollution (soil pollution caused before 30 April 2007) and new pollution (soil pollution caused after 30 April 2007).

In case of new pollution and provided that the cap of pollution for a specific parameter as mentioned in the Decree is exceeded, a cleaning measure such as removal, confining, treatment, etc. of the polluted soil has to be performed, notwithstanding a possible transfer of land. The type of measure shall depend on the destination of the site (residential, industrial, retail, etc.).

In the case of historical pollution and provided that the cap of pollution for a specific parameter as mentioned in the Decree is exceeded and the authorities consider that such pollution constitutes a serious threat for human health and the environment,

a cleaning measure such as removal, confining, treatment, etc. of the polluted soil has to be performed in order to suppress at least the serious threat, also notwithstanding a possible transfer of land.

### Measures of which performance does depend on the transfer of land

According to article 21 of the Decree, a transfer of land is deemed to be concluded under the condition precedent of the fulfilment of all the mandatory obligations as set forth in the Decree such as the performance of a soil investigation, risk assessment investigation and/or soil cleaning. This condition precedent has to be fulfilled within two years as from the signing of the preliminary sales agreement. If it is not the case, the buyer and/or the authorities can request the nullification of the sales agreement. The authorities can confirm the fulfilment of the condition precedent before the end of this two-year period, provided that the seller transfers an amount sufficient to carry out the soil measures on a blocked account of the notary in charge of the execution of the notary deed of sale.

It is impossible at this stage to foresee the date of entry into force of this article 21, since contrary to the other provisions of the Decree, it depends on the decision of the Walloon Government.

### *Share deal – Direct tax aspects*

Capital gains on shares are not taxable in Belgium in the hands of corporate investors in case a minimum holding period of one year is reached, except if the shares were issued by companies not meeting the subject-to-tax conditions. Besides a number of exceptions (e.g. in case of transfer of a significant shareholding to an investor resident outside the European Economic Area (EEA)), capital gains are in principle exempt in the hands of private individual investors. The exemption will, however, only apply on the net capital gain realised on shares, i.e. the costs made in order to sell have to be deducted from the capital gain. Therefore, the sale of the real estate company will usually be more advantageous to the seller than the sale of just a property.

However, contrary to what happens in the case of a direct purchase, the purchaser will not benefit from any step-up on the asset, which will keep the tax value it previously had. As a result, according to our experience, the purchase price for the shares of a company owning real estate is usually determined, taking into account a discount of 50% of the standard corporate tax rate (i.e. 16.995%) on the difference between the fair market value of the property and its tax value (i.e. on the 'profit latency').

The deduction of tax losses, the investment deduction carried-forward and the non-used part of notional interest deduction within Belgian companies is disallowed in case of a change in control of the company, unless this change can be justified by legitimate financial or economic needs which are to be assessed in the hands of the company with such tax assets. The tax authorities apply the aforementioned rules ('legitimate financial or economic needs') more severely and stringently if a change of control occurs in a pure real estate company. Based on our practice, we noted that, in such change of control, it is more difficult to prove the existence of the legitimate financial or economic needs (e.g. due to the lack of employment in the real estate company). The tax authorities often argue that a change of control over a pure real estate company is rather tax driven. Should the Belgian tax authorities be successful in demonstrating that no legitimate financial or economic needs are available in the case at hand, any potential tax assets in the hands of the real estate company could be forfeited for future use.

It is worth underlining at this stage that tax-free restructurings (mergers, splits, partial demergers, or contributions of a line of business) are possible in Belgium (provided certain conditions are met).

On 12 January 2009, the Act implementing the EU Merger Directive into Belgian tax law was published in the *Belgian Official Gazette*. This Act introduces a tax-neutral regime for cross-border reorganisations. It also brings the existing tax provisions applicable to purely Belgian reorganisations in line with the EU Merger Directive.

### *Share deal – Indirect tax aspects*

From an indirect tax viewpoint, in principle, the sale of a company is not subject to registration duties, whatever the type of assets held by that company. One should however be aware of the fact that the sale of shares in a property company has already been challenged by the tax authorities, who considered in some extreme cases that the intention of the contracting parties was obviously to sell the property itself rather than the company. The authorities consequently tried to levy the 12.5%/10% registration duty on the transaction. This risk has increased as a result of the introduction of the new general anti-abuse measure (see above).

The sale of shares is not subject to VAT.

### *Share deal – Legal and environmental aspects*

From a legal viewpoint, the transfer of shares in a Belgian company is not subject to major procedures: if what is involved are registered shares in a limited liability company, they are transferred by a declaration of transfer recorded in the share register. Similar procedures are required for other forms of business organisations.

Neither the notification of a change of operator (environmental permit), nor soil formalities are applicable in case of share deals. Nevertheless, the new shareholder must be aware that they may have to confront the soil legislation at a later stage, i.e. because of the periodical obligation to carry out a soil investigation, or when accomplishing a transaction considered as a ‘transfer of property’.

### *Construction – Direct tax aspects*

From a direct tax viewpoint, the erection of a building does not raise any specific issue. It should however be noted that the (acquisition) cost of the building may include any direct or indirect cost, including, for instance, architects’ fees, consultants’ fees, non-deductible VAT and even interest charges incurred for financing the construction up to the moment that the building is ready to be used.

The capitalisation of all construction costs will allow the company to avoid incurring significant losses during a period when the asset is not producing any income.

### *Construction – Indirect tax aspects*

In the process of planning the construction of a building, the VAT status of the transactions will be of significant importance. The main issue at that stage will be to determine the extent and timing of the building constructor’s right of deduction.

The exercise of the right of deduction depends on the building constructor’s status and the intended final use of the building.

- If the building constructor is a professional developer, the building constructor is entitled to deduct upfront input VAT on (most of the) relating costs/investments. Input VAT will not need to be pre-financed by the developer. A professional developer can be defined as any person who regularly supplies or intends to supply new buildings for consideration, or transfer rights *in rem* on new buildings that were acquired or constructed under the VAT regime. They are registered VAT payers and their supplies of new buildings, as well as the rights *in rem* on new buildings transferred by them, are always subject to VAT. The professional developer may have to perform a correction of the VAT deducted if the building is not sold with VAT within a certain timeframe.
- If the building constructor is not a professional developer, they must opt for taxation in order to be allowed to supply (e.g. sell) the building with VAT. Input VAT will be deducted at the time the building constructor sells the building with application of VAT. VAT will need to be pre-financed by the building constructor.
- The reduced VAT rate of 6% is applicable on renovation works on private dwellings older than five years.
- The reduced VAT rate of 6% is also applicable on the demolition of a building followed by the reconstruction of a private dwelling.
- Reduced VAT rates are applicable in other specific cases (social housing).
- Immoveable work services are subject to the reverse charge mechanism in Belgium (provided certain conditions are met). As a consequence, immoveable work services' providers are often in a VAT refund position. In order to mitigate the pre-financing of the VAT, such services' providers are allowed to ask the refund of the VAT on a monthly basis.

## Construction – Legal aspects

### Permits

One of the basic issues before erecting a building in Belgium is obtaining the necessary permits, i.e. building permits, environmental permits and socio-economic permit. This primary step is usually very expensive and time-consuming. Obtaining in due time the required permits will greatly increase the value of a plot of land.

### The contractor's status

A principal/contractor is jointly and severally liable with his contractor/sub-contractor for outstanding tax and/or social security liabilities. The principal/contractor can be relieved from such liability by retaining certain amounts on the invoices to be paid. The tax and social security status of such contractors can be verified via a public database, which came online on 1 January 2009. The amount to be retained for tax liabilities is the lower of 15% of the amounts invoiced (excluding VAT) and the tax liability outstanding as confirmed in a certificate issued by the relevant authority and the amount to be retained for social security liabilities is the lower of 35% of the amounts invoiced (excluding VAT) and the social security liability outstanding as confirmed in a certificate issued by the relevant authority. Under the 22 December 2008 Finance Act, invoiced amounts of less than EUR 7,143 are not subject to the certification requirement (*de minimis* rule) and in principle will trigger the 15% retention. This means that the amount to be retained on invoices lower than EUR 7,143 will be 15% of the invoiced amount and not the amount of the tax liability

outstanding as confirmed in a certificate issued by the relevant authority in the event that this amount would be lower than 15% of the invoiced amount. A similar rule already applies to social security withholdings.

New legislation has been enacted at federal level on 6 April 2012 which regulates (amongst other) the following: (i) in the context of the joint liability of the principal/contractor for social security and tax liabilities, a principal/contractor can now also be held liable for the social and tax liabilities of all sub-contractors going down the chain; and (ii) a principal/contractor can be held jointly liable with its contractor/sub-contractor in the context of the payment of the salaries by the (sub-)contractor(s) to its employees.

## Operating real estate company

### *Taxation of real estate and deductions available*

#### **Resident investors**

It should be noted that there are no significant differences in the way companies and individuals using a real estate for business purposes are taxed. We therefore develop the Belgian tax regime for both of them under the same titles. Note, however, that the taxation of individuals owning real estate that is affected to non-business purposes is fundamentally different.

The starting point for determining taxable income is the company's annual accounts. Some adjustments are nevertheless made in order to bring the figures in line with the tax accounting rules. Among these adjustments are the disallowed expenses, the addition of provisions not immediately deductible for tax purposes, or any other necessary adjustments to the assets and liabilities.

Resident companies are subject to the standard corporate tax rate of 33%, plus 3% additional crisis contribution, i.e. 33.99%. Reduced rates are available in some cases (mostly if privately owned or if low taxable basis).

The company's income can, as a result, be reduced by tax-deductible expenses connected with the real estate such as depreciation of buildings (depreciation of land is in principle not possible), repairs, maintenance, renovation and similar costs, interest on loans taken out to finance the acquisition of real estate, immovable WHT, etc. Regional taxes – except for those listed in article 3 of the Special Communities and Regions Finance Act of 16 January 1989 (e.g. property immovable WHT) – and retributions are not tax-deductible, including penalties, increases, expenses and late payment interest, relating to these non-tax-deductible taxes and retributions.

Belgian companies/branches can claim a tax deduction for their cost of capital by allowing them to deduct for tax purposes a notional (deemed) interest on their equity (the so-called 'notional interest deduction' – NID). The equity is the amount reported in the Belgian generally accepted accounting principles (GAAP) balance sheet at the end of the prior year established in execution of the Belgian Companies Code.

However, in order to avoid double use, some items have to be deducted from the starting base (e.g. participations, treaty branch assets less treaty branch liabilities, revaluation reserves, etc.)

The rate of the NID is based on the average of the ten-year Belgian Government bonds rate. The NID-rate to be applied is 3.425% for assessment year 2012 (financial year ending as of 31 December 2011 or later). The NID-rate has been recently capped at maximum 3%. Consequently, the NID-rate for assessment year 2013 (financial year ending as of 31 December 2012 or later) is 3%. Please note that the NID-rate should be increased by 0.5% for SMCs as defined by article 15 of the Companies Code. An SMC is a company that does not exceed more than one of the following criteria: 50 employees, a turnover of EUR 7.3m and total asset value of EUR 3.65m. These thresholds should be evaluated on a consolidated level.

Under the current rules, excess NID can be carried forward for a maximum of seven years, if there is insufficient tax capacity in the year of deduction. However, pre-draft legislation provides that new excess NID could no longer be carried forward. The 'stock' of excess NID stemming from previous years could still be carried-forward for seven years (with certain limits as regards the amounts). These measures have not yet been enacted, but it is expected that (once they become law) they will be applicable as from assessment year 2013. Please note that the carried forward NID can be deducted prior to the current-year NID (FIFO).

With the exception of land, most tangible and intangible assets can be depreciated for tax purposes. The depreciation methods allowed for tax purposes are the straight-line and the declining-balance methods. However, the declining-balance method is not allowed where the use of the asset has been transferred to a third party (e.g. renting). It is the original acquisition cost that is generally the basis for depreciation, and the depreciation rate should be based on the normal useful life of the asset. That said, the Belgian tax authorities provide for depreciation rates that are acceptable from a tax point of view. The annual depreciation rate of real estate generally ranges between 3% (e.g. office buildings) and 5% (e.g. warehouses and operational real estate) of the property's investment value.

Capital gains that are merely reflected in the company's accounts but not realised (revaluation surpluses) are in principle temporarily tax-exempt, provided that an amount equal to the revaluation surplus is booked on a separate account on the liabilities side (tax-free reserve). The depreciation of the revaluation surplus, however, will be considered as a disallowed expense and consequently be taxable. After realisation of the asset, this taxation is compensated by a lower (taxable) capital gain (i.e. timing difference).

Taxes are required to be paid on a prepayment basis at quarterly intervals over the course of the business year. If the tax prepayments are inadequate or none are made, for assessment year 2013 (financial year as per 31 December 2012 or later) a 2.25% tax surcharge becomes payable at the time the taxes are finally assessed. The timely made tax prepayments can be deducted from such surcharge at a rate of 3%, 2.5%, 2%, or 1.5%, depending on whether they have been made in the first, second, third or fourth quarter of the year.

Tax returns are to be filed annually, in principle no later than six months after the accounting year-end. The tax will then be assessed by the authorities on the basis of the information provided in the tax return and become payable at the latest, two months after the assessment.

The normal assessment period is three years as from the first day of the assessment year. However, this period may be extended to seven years (as of January 2009) in cases of fraud. Please note that the assessment period of three/seven years is also

applicable for the professional, moveable and immovable WHT. In relation to property companies (which are often in a loss-making position during the initial years of business), it should be noted, however, that the tax authorities can question the amount of tax losses carried forward in the assessment year they are used. The amount of the tax losses carried forward can therefore be adjusted by the tax authorities in the year of utilisation (even if exceeding the three-year term).

Interest expenses related to the acquisition of real estate are, in principle, fully tax-deductible, provided that they do not exceed the market rate.

Interest paid will not be tax-deductible if the foreign beneficiary is not subject to tax, or is subject with respect to the interest received to a tax regime that is significantly more advantageous than the Belgian regime. However, if the Belgian borrower demonstrates that the interest relates to effective and sincere transactions and that it does not exceed normal limits, the interest will remain tax-deductible.

In the framework of a recent Belgian tax reform, a (general) thin cap rule (5:1 debt/equity ratio) has been introduced. In this context, the tax deductibility of interest on intra-group loans or on loans whereby the beneficial owner is not subject to income taxes (or, with regard to the interest income, is subject to a tax regime which is substantially more advantageous than the Belgian tax regime) paid or accrued during a given financial year will be denied to the extent that the total amount of these intra-group loans exceeds five times the net equity of the company. An anti-abuse rule is introduced stating that, if the loans are guaranteed by a third party or if loans are funded by a third party that partly or wholly bears the risk related to them, the third party is deemed to be the beneficial owner of the interest, if the guarantee or the funding has tax avoidance as its main purpose.

Besides the 5:1 thin capitalisation rule, the specific 1:1 thin capitalisation rule needs to be monitored to avoid reclassification of tax-deductible interest into non-tax-deductible dividends (only applicable under specific circumstances).

Belgian tax law has, subject to the fulfilment of a number of conditions and formalities, numerous withholding tax (WHT) exemptions (e.g. nominative bonds, payments to credit institutions, payments to Belgian companies etc.). Furthermore, the Interest & Royalty Directive has been implemented and Belgium has an extensive tax treaty network (on the basis of which several WHT reductions are available).

Losses related to real estate can be offset against any other income. Tax losses may in principle be carried forward indefinitely. The NID can only be carried forward for seven years and should be deducted from the taxable result prior to offsetting the tax losses. As already mentioned, it is expected the NID can no longer be carried forward as from assessment year 2013.

The Belgian tax regulations require that transactions between related parties, including domestic or foreign companies, should be carried out on an arm's length basis. In cases where the tax authorities consider that an 'abnormal or gratuitous benefit' has been granted in a transaction with a foreign-related company or a company located in a tax haven country, to the detriment of the Belgian company's profits, they will seek to increase the taxable basis of the Belgian company.

On the other hand, the Belgian Corporate Income Tax Code also provides for the possibility to apply for a decrease of the taxable basis. Article 185, §2, b) of the Belgian Income Tax Code (ITC) enables adjustment of a taxable basis resulting from

cross-border-related party transactions in view of complying with the arm's length principle. This legal framework provides for tax relief for those profits, which a Belgian company would not have realised if the conditions made between both companies had been those that would have been made between independent companies. This adjustment can only be obtained by the advance ruling procedure.

Article 207 ITC (read in conjunction with article 79 ITC) prescribes that when a Belgian tax-resident company or branch receives abnormal or benevolent advantages from a related company, these advantages cannot be offset against the carried forward and the current year tax losses, the carried forward and current year investment deduction, the carried forward and current year NID, the dividends received deduction and the patent income deduction. Moreover, according to the tax authorities (based on a parliamentary question), any abnormal or benevolent benefit received constitutes the minimum taxable basis for the company having received such a benefit.

### Non-resident investors

The mere fact that a foreign company holds or leases real estate in Belgium means that it has a taxable presence in Belgium. However, such taxable establishments are generally not considered to be a permanent establishment (PE) in Belgium within the meaning of most double taxation treaties, unless it actively carries on real estate business in Belgium.

The profits of the Belgian establishments of foreign companies are not subject to corporate income tax but to non-resident income tax. Nevertheless, to a large extent, the determination of the taxable profits of a Belgian branch is subject to the same rules as for a Belgian company. However, no deduction may be claimed for interest or royalties paid by a branch to its home office, or to another branch of the same company (except when the specific funds used in Belgium are raised by the foreign company or branch from a third-party lender).

If the non-resident company that owns the Belgian real estate operates through a PE, a reasonable portion of the foreign home office's overhead expenses can qualify as deductible expenses for Belgian tax purposes. This will not be the case if the non-resident company does not operate through a PE in the sense of the double tax treaty, i.e. if real estate transactions are not the company's main activity. In such a case, only those charges directly relating to property management will be deductible from the Belgian income base.

As is the case for resident companies, the tax rate applicable to non-resident companies is 33% plus 3% crisis contribution, i.e. 33.99%.

Please note that non-resident investors can also benefit from the NID, irrespective of having a legal branch in Belgium. In case the taxpayer is not obliged to prepare Belgian generally accepted accounting principles ("GAAP") accounts, he can however benefit from the NID if he spontaneously establishes annual accounts and keeps accounting books in compliance with Belgian GAAP.

## Sale of real estate (exit)

### *Asset deal – Direct tax aspects*

#### Corporate income tax

Capital gains realised by Belgian companies or branches of foreign companies on the sale of land, buildings or equipment are taxed at the normal corporate income tax rate (i.e. 33.99%).

Note that the non-resident companies are subject to a WHT on the capital gain realised. This professional WHT is withheld by the public notary who registers the transfer deed and only constitutes a prepayment, as it may be offset against the final corporate tax bill.

In order to calculate the capital gain, the agreed price for the property reduced by the costs linked to the sale should be compared to the tax book value of the latter (i.e. historical cost less tax-deductible depreciation and/or write-offs, plus any taxed revaluation surplus) at the beginning of the accounting period during which the sale will take place.

Nevertheless, a deferred taxation of this capital gain is possible. Only the net capital gain is however considered. The costs made in order to sell have to be deducted from the capital gain. Indeed, in accordance with article 47 ITC, provided that the company can prove that it has held the tangible fixed asset for more than five years prior to its disposal, taxation of the capital gain can be deferred, provided the full sale, exchange or contribution proceeds (not only the capital gain) are reinvested in qualifying assets. This regime is optional.

In case of reinvestment, the taxation is spread following the depreciation period of the asset(s) in which the realisation proceeds are reinvested. The advantage of the regime is the positive timing difference. The longer the depreciation period of the asset(s) in which the realisation proceeds are reinvested (e.g. reinvestment in buildings), the lower the net present value of the tax charge will be.

The application of the deferred taxation regime is subject to the following conditions (summarized):

- Reinvestment of the total realisation value of the tangible fixed assets in new or second-hand depreciable tangible or intangible fixed assets (land is therefore excluded) that are used in EEA countries.
- The reinvestment should be made in depreciable assets; the way this reinvestment is paid (financing by cash, by shares, or takeover of debts) is not relevant. In this respect, a qualifying reinvestment can be made in the form of acquisition of full ownership of a real estate property, or the conclusion of a long-lease agreement (payment by cash), a contribution (issue of new shares), a taxed contribution of universality (payment made partially by the issue of new shares and partially in the form of takeover of debts from the contributor company). It is however of the utmost importance that the (depreciable part of the) assets contributed or acquired are at least equivalent to the amount of realisation.
- Reinvestments should take place within a delay of three or five years, depending on the asset(s) in which the realisation proceeds are reinvested.

- The capital gain should be recorded on a blocked reserve account on the liabilities side of the balance sheet and should not be taken into account to calculate the annual appropriation to the legal reserve or any remuneration or attribution. The blocked reserve account is transferred to the P&L account to the extent that the capital gain concerned becomes taxable.
- An appropriate form 276 K (commitment to reinvest) should be annexed to each of the corporate income tax returns relating to the financial year of realisation of the capital gain and to each of the subsequent financial years until the capital gain concerned is fully taxed.

If all the above conditions are complied with, the taxation of the capital gains is spread over the depreciation period (allowed for tax purposes) of the asset(s) that is acquired to fulfil the reinvestment obligation. The blocked reserve account is transferred to the P&L account to the extent that the capital gain concerned becomes taxable. Deferred taxation occurs at normal corporate income tax rate of 33.99%.

Ultimately, the capital gain, which has not yet been taxed on the basis of the depreciation of the reinvestment, will be immediately taxed upon the disposal or the discontinuation of the reinvested property.

In order to avoid substantial tax increases, sufficient tax prepayments must be made in the year the capital gain, or part of it, becomes taxable.

The sale of the real estate may then be followed by the liquidation of the Belgian company, in order to repatriate the sales proceeds to the shareholders. The amount of the distribution exceeding the paid-up capital (liquidation surpluses) qualifies from a tax point of view as a dividend and is subject to a 10% WHT.

Treaty protection or the Parent-Subsidiary Directive may still offer relief.

Capital losses realised on the sale of real estate are fully tax-deductible.

### Individual tax

In principle, capital gains realised on the dwelling home are not subject to taxation.

Capital gains realised on a built immovable property sold more than five years from its acquisition will, in principle, be exempt while capital gains realised on a built immovable property sold less than five years from its acquisition will in principle be taxed at 16.5% (to be increased by municipal taxes).

The same 16.5% tax rate applies on capital gains realised upon the sale of a property by the beneficiary of a gift if the sale occurs within three years of the donation of the property and within five years after its acquisition by the donator for a valuable consideration.

Capital gains realised on land sold within eight years after its acquisition for a valuable consideration are taxed at 33% (16.5% when sold after five years but within eight years after its acquisition). The same tax rates apply on capital gains realised upon the sale of a land by the beneficiary of a gift if the sale occurs within three years of the donation of the property and within eight years after its acquisition by the donator for a valuable consideration.

Furthermore, notwithstanding the above, a separate tax rate of 33% can apply if speculation is successfully invoked by the tax authorities.

### *Asset deal – Indirect tax aspects*

Regarding the indirect tax aspects of the sale of property, we refer to the chapter '*Acquisition of real estate*'.

### *Asset deal – Legal aspects*

Regarding the legal aspects of the sale of property, we refer to the chapter '*Acquisition of real estate*'.

### *Share deal – Direct tax aspects*

#### **Corporate income tax**

In principle, capital gains realised on the sale of shares in a property company (with the exception of SICAFIs) are tax-exempt in the hands of its Belgian parent company, provided the company to which the shares relate is subject-to-tax and a one-year holding period is reached. If the capital gain is realised before the one year minimum holding period is reached, the capital gain is taxed at a rate of 25% (3% surcharge = 25.75% + tax increase in the event of insufficient prepayments). Capital losses realised on such sales are not deductible, except where the company is wound up, and even then, only up to the amount of the loss of paid-up capital of the liquidated company.

#### **Individual tax**

Capital gains realised by Belgian resident individuals on shares that are not held for business purposes are in principle tax-exempt, unless the transfer of the shares cannot be regarded as falling in the scope of the normal management of one's private estate. If the transfer of the shares cannot be regarded as falling in the scope of the normal management of one's private estate, any capital gains will be taxable at 33% (to be increased by municipal taxes).

Also, the capital gains realised by Belgian resident individuals upon the transfer of shares will be taxable at 16.5% (+ municipal taxes) if the following cumulative conditions are met:

- The transferor owned, at any time during the five years preceding the transfer, alone or with close family members, more than 25% of the shares of the Belgian company of which the shares are sold.
- The transfer is for a consideration.
- The transfer is made to a company or an association that does not have its registered seat or principal place of business in a country located within the EEA.

Note that a transfer of such shares to a Belgian company followed by a second transfer (within 12 months) to a foreign company located outside the EEA will be hit by this taxation as well.

Capital gains realised by individuals on the sale of shares held for business purposes are normally taxed at the general progressive income tax rate. A separate tax rate of 16.5% (to be increased by municipal taxes) applies if the shares were held for more than five years. The minimum holding period of five years is not applicable in the case where

the capital gains are realised at the occasion of the complete and definitive end of the professional activities, or of a branch thereof.

Taxable capital gains on shares realised by individuals can benefit from a temporary exemption to the extent they are realised at the occasion of a merger, a demerger, or another qualifying corporate restructuring, or a contribution of the shares to an EU company. The taxation will then occur upon the future disposal of the shares.

## *Share deal – Indirect tax aspects*

### *Registration duties*

The sale of shares in a real estate company will in principle not be subject to registration duties. Please refer however to the chapter relating to the acquisition of real estate.

### *VAT*

The sale of shares is a VAT exempt operation.

## *Share deal – Legal aspects*

Regarding the legal aspects of the sale of shares, we refer to the chapter relating to the acquisition of shares.

# *Special real estate investment vehicles*

## *Real estate certificates*

Real estate certificates offer a significant advantage for small and medium-sized investors to tap into real estate income without the disadvantage of having to acquire and manage the underlying properties.

In the case of a public emission, the investments in real estate are made by specialised bodies, as required by the Financial Services and Markets Authority. The price of the investment is distributed among a certain number of certificates to be subscribed by interested investors (individuals or companies).

The certificates are transferable securities incorporating a debt. They can be bearer or registered, and can be transferred without any specific formality. As a general rule, such certificates confer upon their owners the right to variable interest and a share of the potential capital gain resulting from the realisation of the real estate.

Although participating in a real estate investment, the certificate holder does not, from a legal viewpoint, have any title to the property funded; their right is assimilated to that of a creditor and not to that of a joint owner.

From an economic viewpoint, however, the certificate holder is in the same situation as the owner of a let property. The holder receives part of the rents in proportion to the holder's share in the investment. The holder bears all the risks of the investment (if the asset ceases to be rented, the certificate holder might not even recover the investment; if the asset is sold with a significant capital gain, this will be distributed in full to the certificate holders).

From a tax viewpoint, the main advantage of the instrument lies in the fact that, in spite of its hybrid character, income deriving from real estate certificates is considered, from a tax viewpoint, as interest (moveable income).

In the hands of the issuing company, any distribution (in case of public emission) in excess of the refund of capital will consequently be tax-deductible, such as 'normal debenture' interest charges would be. The predetermined depreciation of the debt vis-à-vis the certificate holders usually corresponds to the depreciation of the asset so that 'interest' distributed to the holders will correspond to the income obtained from the asset less the operating expenses, i.e. the company's taxable result before deduction of interest.

In the hands of certificate holders, any amount received in excess of the refund of the capital subscribed will be subject to Belgian WHT on interest. In most issues, provision is made for the full distribution of the operating balance to certificate holders. The issuing companies consequently should not bear any actual tax burden (taxable basis equal to zero after deduction of interest).

In particular, for investors for whom the WHT is a once-and-for-all tax on interest income, real estate certificates will appear to be advantageous. Apart from WHT (possibly waived or reduced by internal law or treaty provisions), the certificate holders should not bear any tax charge, even if the investment actually consists of real estate, and even if a significant capital gain is realised on the asset.

As a result of the conversion of the Interest-Royalties Directive into the Belgian internal law, interest paid or attributed by a Belgian company to a related EU company whose legal form is mentioned in the annex of the said Directive is exempt from the Belgian WHT of 21%. Two companies are related when:

- One company holds directly or indirectly a participation of more than 25% in the other company during an uninterrupted period of one year (or commits to do so).
- Another EU company holds directly or indirectly a participation of more than 25% in both companies during an uninterrupted period of one year (or commits to do so).

This WHT exemption is also applicable for real estate certificates, except for the financial portion relating to the sale of the underlying building.

Please note that a private emission is equally possible. Nevertheless, in the hands of the issuing company, contrary to a public emission, any distribution in excess of the refund of capital will only be deductible if the 'market interest rate' is respected. The deductibility of interest paid on the last coupon (i.e. the distribution of the capital gain) can therefore be questioned.

### *The SICAFI (closed-end real estate collective investment company)*

In Belgium, collective investment institutions have been given the opportunity to opt, among others, for investments in real estate. A regulatory framework has been put into place already in 1990. The aim of the creation of the Belgian closed-ended real estate collective investment company (SICAFI or '*Société d'investissement Immobilière à Capital Fixe*') was to promote investments in real estate in a relatively safe (diversified, regulated, controlled) and tax favourable environment. By using the Belgian SICAFI in

a pan-European real estate structuring, taxes at the level of the investor, the investment and the vehicle can be optimised.

The regulatory framework of SICAFIs has been laid down in the new Royal Decree of 7 December 2010, which replaces the previous Royal Decrees. The most important novelty of this Decree is the introduction of a regulatory framework for institutional SICAFIs (see hereafter). Furthermore, besides aligning the SICAFI regime with the changed legal framework for collective investment vehicles, the new Royal Decree provides more flexibility to attract funds. It allows a SICAFI explicitly to issue other securities than shares (e.g. convertible bonds) and henceforth a SICAFI can increase its share capital through an accelerated procedure without application of the normal preference rights (provided that existing shareholders receive an irreducible allotment right upon distribution of the new shares). Moreover, the new Royal Decree also increases investor protection (strengthening of the conflict of interest rules and the mortgage and debt restrictions, increasing the independence of the real estate expert and of the management, expanding the responsibility of the promoter especially in respect of the free float) and no longer requires the appointment of a depository.

### Definition

The SICAFI can be described as a company whose main activity is to invest in immovable property. This term is defined broadly. It includes the following:

- Real estate as such and any right *in rem*.
- Option rights over real estate.
- Shares in another SICAFI or in affiliated companies investing in real estate.
- Real estate certificates (see above) and immovable leasing rights.

Investments in moveable property are allowed to a very limited extent (as to the duration and the level of the investment), provided that such business is authorised by the SICAFI's articles of association.

### Form

The company must take the form of a public limited liability company or partnership limited by shares. Its share capital must be at least EUR 1.2m. At least 30% of its shares must be listed on a stock exchange (free float).

### Prior recognition

Prior to beginning its activities, the SICAFI must be recognised by the Financial Services and Markets Authority (FSMA - the Belgian supervisory authority for financial transactions).

A number of conditions must be fulfilled. Among them are the following:

- At least 30% of the issued shares should be publicly marketed.
- The SICAFI must certify that a financial plan for the first three financial years has been made as well as a minimum investment budget allowing to meet the risk diversification criteria within two years.

- In principle, it cannot invest more than 20% of its assets in the same project (investment diversification criteria). However, the said 20% spread of risk restriction no longer applies to properties subject to long-term commitments of a member state of the European Economic Area (EEA) or international organisations in which one or more EEA member states participate as lessee of the real estate concerned. As Belgium is hosting a large number of international organisations, including the European Commission and NATO, this exception to the risk diversification requirements is important.
- The SICAFI's consolidated debts cannot exceed 65% of its consolidated assets and the relating financial charge cannot be higher than 80% of the total operational and financial income.
- Some activities are not allowed, such as acting as a property developer, or granting loans to companies other than its subsidiaries or providing any securities other than in the framework of the acquisition of real estate.

A minimum of 80% of the net result realised by the SICAFI (reduced by the amounts corresponding to the net decrease of its debts) must be distributed to its shareholders by means of dividends.

The corrected net result is the net profit realised during the accounting year, excluding non-cash results (e.g. write-offs, variations in the fair market value of the real estate, etc.) and capital gains realised on real properties to the extent that the amount of the capital gain will be reinvested in qualifying assets within four years. The part of the capital gain that is not reinvested within this period of time is added to the corrected net result for the following accounting period.

### Tax regime

SICAFIs are subject to the standard corporate tax rate at 33.99%, but on a reduced basis. Only disallowed expenses (restaurant expenses, income tax, etc.), abnormal or benevolent advantages granted to the SICAFI (excessively high rents, etc.) and secret commissions are taxed (at 309%).

SICAFIs are, nevertheless, 'subject to corporate income tax'. This factor may be of importance for the application of foreign participation exemption regulations.

Dividends distributed by SICAFIs are exempt from WHT provided that at least 60% of their assets are invested in Belgian immovable property allocated to residential use. Belgian tax law also provides for an exemption from WHT on dividends paid to non-Belgian residents that do not run any business or are not involved in profit-making transactions that are exempted from income tax in their country of residence. If no exemption is applicable, the rate of 21% applies. SICAFIs are subject to an annual tax of 0.08% on their net asset value.

In principle, contributions to the SICAFI's share capital in kind (real estate) or in cash are exempt from capital duties. Only the fixed duty of EUR 25 will be due.

However, unless exceptions, the capital gain triggered by a contribution by a corporate body will be subject to the standard corporate income tax rate. Nevertheless, in the case of transformation, merger, split and partial split, the capital gain realised will be taxed at a favourable corporate income tax rate of 16.995%.

In general, SICAFIs are viewed as being taxable persons for VAT purposes. When exploiting buildings, the services performed by a SICAFI will follow the normal VAT regime, i.e. letting is exempted, with the exception of letting parking spaces, warehouses, or a financial lease submitted to VAT.

### Introduction of institutional SICAFI

The programme law of 22 December 2008 has extended the special tax regime of the SICAFI to its subsidiaries, who are recognised by the FSMA as institutional SICAFI. Like the 'public' SICAFI, the 'institutional' SICAFI will in principle benefit from treaty protection (e.g. WHT reductions/exemptions).

An institutional SICAFI is a real estate investment vehicle, which, contrary to a public SICAFI, does not offer its shares to the public, but merely to institutional or professional investors (e.g. banks, insurance companies, very large companies exceeding certain thresholds, etc.). The new Royal Decree describes the safeguards that must be put in place to ensure the institutional or professional character of their investors. The regulatory framework of the institutional SICAFI is aimed at protecting the underlying investors in the public SICAFI.

To be recognised as an institutional SICAFI, a number of conditions have to be met, the most important of which are the shareholder restrictions. The institutional SICAFI's investors need to be professional or institutional investors and the institutional SICAFI needs to be exclusively or jointly controlled by a public SICAFI.

### Accounting

According to a European Directive, only publicly quoted companies such as SICAFIs are to use the International Financial Reporting Standards (IFRS) for their consolidated annual accounts. Given the limited number of SICAFIs, the legislator wanted to enhance the comparability of the annual accounts of the SICAFIs and has made IFRS also compulsory for the statutory annual accounts of all SICAFIs.

For the same reason, the chart of accounts has been redrafted to better serve the needs of a SICAFI.

Under IFRS, real estate investments should be recorded in the books at fair value, which is the price a well-informed third party would pay for the real estate after deduction of the transfer taxes (valuation by real estate experts in practice includes transfer taxes – '*acte en main*').

## Property taxes

### *Immoveable withholding tax*

For income tax purposes, a deemed rental income (the so-called *revenu cadastral/kadastraal inkomen*) is calculated for all real properties located in Belgium. This income is determined by estimating the 'normal' net annual rental income of any property, or material or equipment that is regarded as immoveable property. This deemed income is determined by the Land Survey Register (*Kadaster/Cadastre*). An appeal can be filed with the Register claiming reduction of the amount of this deemed rental income.

In principle, properties are reassessed every ten years. At present, however, this deemed income is still based on the annual rental value of the property on 1 January 1975. Limited indexation of the deemed income is nevertheless provided for every year.

Based on this deemed income, an immovable withholding tax (WHT) is levied annually by way of assessment in the hands of the owner, usufructuary, or beneficiary of another real right. The immovable WHT on real estate assets amounts to 1.25% (2.5% in the Flemish Region) on the deemed rental income as indexed on 1 January of the tax year. Furthermore, provincial and municipal surtaxes can be levied on the (regional) immovable WHT. The basis for levying such surtaxes is the base immovable WHT and not the deemed rental income. The local surcharges increase the effective rate to 18%–50% or more (of the deemed rental income), depending on the municipality where the property is located.

Despite the name given to it in Belgium (*précompte immobilier/onroerende voorheffing*), Belgian immovable WHT is to be considered a once-and-for-all tax, as it will not be refunded and cannot be credited against corporate income tax. However, it is entirely deductible from the companies' taxable basis as a business expense.

It is to be noted that the immovable WHT is always assessed in the hands of the person who was the owner of the property, of the usufruct or of a right *in rem* on 1 January of the year in question. If the property is transferred after that date, the purchaser will not have to bear that charge for the first year, unless the transfer deed contractually provides otherwise.

## Local taxes

### General

Belgian legislation stipulates that municipalities, provinces, regions and communities may, under certain conditions, decide on the establishment, modification or abrogation of local taxes.

There are two main local real estate taxes, i.e.:

- surtaxes;
- local taxes levied by the municipalities, provinces, regions and communities.

### Surtaxes

Provinces, agglomerates and municipalities are in principle not authorised to levy surtaxes on income or similar taxes, except where they are expressly allowed to do so by a provision of federal law. Practically, they are allowed to levy surtaxes on Belgian personal income tax and on Belgian immovable WHT.

### Surtaxes on personal income tax

The surtaxes on personal income tax are computed on the basis of the amount of personal income tax due. Please note that this surtax will normally have no impact for professional investment since most investments will be structured through a corporate structure and no surtaxes may be levied on corporate income tax.

## Surtaxes on immovable WHT

See above '*Property taxes*'.

## Local taxes

Article 170 of the Belgian Constitution stipulates that Belgian communities, provinces, regions and communities are authorised to levy certain local taxes. The rate and the kind of these local taxes may vary, depending on the municipality, province, region, or community levying said taxes. However, they may not be in breach of higher legal provisions.

The most current Belgian local taxes are as follows:

- local tax on offices;
- local tax on parking places;
- local tax on abandoned estates;
- local tax on second residence;
- local tax on advertisements;
- local tax on commercial land;
- local tax on construction works;
- local tax on waste and wastewater.

## Conclusion

### *Structuring Belgian real estate investments*

Obviously there exists no single ideal scheme for carrying out every type of real estate investment in Belgium. The optimal structure will usually be determined in consideration of the following factors:

- the quality of the top investor (Belgian or foreign, individual or company, pension fund or corporate investor, etc.);
- its objectives, i.e. the purpose and term of the investment (construction and rapid sale, long-term management, etc.);
- the characteristics of the project and the prospects concerning future returns and further investments.

At present, most large Belgian investments by groups specialised in the real estate business are structured in such a way that each separate project or investment is made using a special purpose company (one project – one company).

These companies in principle do not suffer a huge corporate tax burden on the regular income from the property, due to interest deduction on the leverage and NID on the equity. Although it is basically oriented to the long-term management of the properties, this structure also offers great flexibility on sales, provided the potential

purchasers agree to purchase the whole activity of a company. However, this structure is quite burdensome (numerous companies, each requiring separate legal forms and management). Also, corporate taxation at full rates will often result from direct sales of assets.

An alternative for structuring large investments in Belgian properties is the single company structure. In this structure, all assets are managed within the same legal entity. The advantage of such a structure derives from its lower management costs and from the fact that, in cases of direct sales, the company can spread the tax on capital gains under the reinvestment condition. In this respect, the single company structure is useful if the objective is one of continuous growth and reinvestment. Nevertheless, this structure does lack flexibility (only direct sales of assets are feasible); a global sale of the company will be difficult. If the original investor wishes to divest itself of its properties progressively, it could contemplate transforming the company into a SICAFI (public issue of shares).

When it is a single Belgian project that is being targeted, it is difficult to define the optimal tax structure. When possible, the structure should at least provide for suitable VAT planning (VAT sales of constructed buildings, constitution of rights *in rem* rather than mere leases, financial VAT leases, etc.) in order to avoid the high registration duty rates in Belgium and to obtain a neutrality of the VAT cost. Operating Belgian properties normally should not trigger substantial corporate tax charges, at least not until the sale of the asset, except when they are unusually profitable. However, these successful tax-saving schemes need to be defined beforehand, when the economic and financial characteristics and the destination of the asset are determined. Also, any of those should be tested against their financial and economic justification, especially in the light of the newly introduced general anti-abuse rule.

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# *Real Estate Going Global Brazil*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 11 July 2012.

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# *Real Estate Tax Summary – Brazil*

## Acquisition of urban real property

Non-residents may invest in property through direct ownership from abroad, or through resident companies or partnerships.

The acquisition of real property by foreign individuals or companies follows the same procedures imposed on Brazilian citizens. Therefore, the acquisition must be formalised through a contract of purchase and sale, as well as through a public deed.

## Acquisition of rural real property

According to Brazilian law, non-residents may invest in rural properties, but there are several restrictions regarding the size of the area to be acquired.

Rural properties acquired by foreign companies shall be destined for the implementation of agricultural, industrial or settlement projects and these activities must be related to the companies' purposes.

## Rental income

Brazilian income tax is a federal tax levied on income and proceeds of any nature received by individuals or corporations. The taxable event is considered to be the acquisition of the right to dispose, economically or legally, of either both or one of the following:

- Income, derived from capital, labour or a combination of both.
- Proceeds of any nature (not included in the above), which imply an increase in the individual's net equity.

According to Brazilian legislation, payment of income tax may be required from whoever is legally or economically entitled to dispose of it, including rental income.

## Individual taxation

Individual taxation in Brazil varies according to the taxpayer's status (resident or non-resident).

Generally, resident taxpayers are in one of the following categories:

- Brazilian natural citizens.
- Naturalised foreigners.
- Foreigners who have held permanent visas since the date of their entry into Brazil.

- Foreigners who have held temporary visas: (i) under an employment contract in Brazil, as of the date of their entry into Brazil; (ii) upon completing 184 days of physical presence in Brazil within any given period of 12 months; (iii) upon obtaining a permanent visa or an employment relationship, if before 184 days, within any given period of 12 months.

Brazilian-resident taxpayers are taxed on their worldwide income, based on the monthly tax table below (using an exchange rate of BRL 2.00 to USD 1).

Taxable basis	Rate (%)	Deductible amount
Up to USD 819	exempt	nil
From USD 819 to USD 1,227	7.5	61
From USD 1,227 to 1,636	15	153
From USD 1,636 to 2,044	22.5	276
In excess of USD 2,044	27.5	378

\* This table is valid for 2012.

Resident taxpayers must also file an annual income tax return (on or before 30 April of each year) to determine the actual amount of tax to be paid for the previous calendar year. The annual return includes a list of assets and liabilities that a taxpayer must report. This list must describe the relevant items of his/her net equity owned in Brazil and abroad (such as properties, vehicles, checking and savings accounts) and their respective values/balances at the end of the subject calendar year, as well as the previous one.

In addition, resident taxpayers are required to inform the Brazilian Central Bank about their assets and rights held outside Brazil, in case the total is more than USD 100,000.

Non-resident taxpayers are only subject to tax on their Brazilian-source income at a rate of 25% or 15% levied on labour and services' revenues. Brazilian-source income is considered to be all income paid by Brazilian-sourced payors, regardless of what, or which, period it relates to.

Current legislation establishes that non-resident taxpayers owning assets or rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, known as an Individual Taxpayer Register, or *Cadastro de Pessoa Física* (CPF). Accordingly, filing the corresponding annual return in Brazil is also a requirement.

## Corporate taxes

Brazilian tax legislation considers all companies including sole proprietorships, domiciled in Brazil, as well as all associations – registered or not – branches, agencies or representatives associated with companies headquartered abroad, as taxpayers.

The Corporate Income Tax, or *Imposto sobre a Renda da Pessoa Jurídica* (IRPJ), is a federal tax, and the Social Contribution on Net Income, or *Contribuição Social sobre o Lucro Líquido* (CSLL), is a social contribution, and both are charged on taxable

income. IRPJ is charged at the rate of 15%, plus a surcharge of 10% on annual taxable income in excess of BRL 240,000.00 (approximately USD 150,000, using an exchange rate of BRL 1.60 to USD 1). CSLL is charged at the rate of 9%. As a result, the maximum combined corporate income tax and social contribution tax rate is 34% (i.e. 25% plus 9%).

Current legislation also establishes that non-resident legal entities owning goods and rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, or *Cadastro Nacional da Pessoa Jurídica* (CNPJ).

## Loss carryforward

Operating losses may be carried forward indefinitely for both income tax and social contribution purposes, and may be offset up to an amount of 30% of each year's taxable income.

Loss carryforwards attributable to capital losses may only be offset against future capital gains.

## Depreciation

Depreciation rates were generally determined by the tax authorities, who normally adopt, for real estate depreciation purposes, the rate of 4% per year.

Law 11638 established new criteria for evaluation of fixed assets. For accounting purposes, the recommendation is that depreciation be based on the lifetime of the asset and on the residual value of the asset. It should also periodically be "reviewed and adjusted to the criteria used to determine the estimated economic life" (impairment) for the purpose of calculation of depreciation, at least periodically. Based on the current Law, for tax purposes, the criteria that result in impairment should only take effect upon its realisation.

## Contribution to PIS and COFINS

The revenues of legal entities are subject to PIS (Employees' Profit Participation Program or *Programa de Integração Social*) and COFINS (Contribution for Social Security Financing or *Contribuição para o Financiamento da Seguridade Social*) at a 1.65% and 7.6% rate, respectively, being allowed the deduction of certain costs and expenses. The sales of fixed assets are not subject to this taxation.

Depending on certain conditions, such as the total company revenues and the corporate tax regime elected, the PIS and COFINS rates can be reduced to 0.65% and 3%. In this case, no deductions are allowed.

## Capital gains on the sale of property

### *Individuals*

Capital gains recognised by individuals on the sale of real property will be subject to Brazilian income tax at a rate of 15%. The gain is determined as the difference between

the sales price and the acquisition cost duly reported on the seller's annual income tax return.

As of October 2005, the capital gain is exempt of income tax on the sale of goods and rights, when the sales price does not exceed: (i) USD 10,000 (equivalent to BRL 20,000 – using an exchange rate of BRL 2.00 to USD 1) for shares sold through the over-the-counter market; and (ii) USD 18,000 (equivalent to BRL 36,000 – using an exchange rate of BRL 2.00 to USD 1) in all other cases.

Also, as of October 2005 onwards, capital gains earned by resident individuals on the sale of residential real estate is exempt of such tax, if the seller, within 180 days from the sale, uses the earnings to buy a new house in the country. This rule is only applicable for a determined individual after a gap of five years between the transactions.

Gains derived from sales of real estate acquired by the seller before 1970 are also tax-exempt for Brazilian residents. Proceeds from the sales of real estate acquired by the seller between 1970 and 1988 have a progressive reduction on the capital gains levied on them.

As of October 2005, there is also a reduction factor applicable to the calculation basis of the capital gain on the sale of residential real estate by resident individuals.

## *Corporations*

Corporate capital gains arising from the sale or exchange of fixed assets are treated as ordinary income and taxed at the regular rates. Due to the fact that Brazil no longer monetarily restates fixed assets for purposes of inflation, the amount of the capital gain will be determined as being equal to the positive difference between the sale price and the disposed asset's original investment value, less the accumulated depreciation/amortisation (see *'Depreciation'* above).

## *Non-residents*

Brazilian non-residents are generally subject to withholding tax at a rate of 15% (unless payments are made as a result of an employment relationship or of a service contract, in which case the rate is 25%) levied on the payment or credit of Brazilian-sourced income, except that tax relief is provided by treaties to avoid double taxation.

It should be noted that income paid, credited, remitted, etc. to a beneficiary domiciled in a tax haven country/territory will be subject to 25% withholding tax. For Brazilian tax purposes, a tax haven is generally considered to be a country that taxes income at a rate lower than 20% (other concepts of tax havens may apply in specific situations). Capital gains realised by non-residents is generally determined as being the difference between the sales price and the cost basis of the asset or right sold, which must be substantiated by the corresponding document, usually issued when the acquisition takes place. If the cost cannot be substantiated in this manner, the acquisition amount will be determined, in some instances, based on the capital amount registered with the Brazilian Central Bank, related to the purchase of the asset or right. In all other instances, the cost will be deemed to be zero.

## Real estate transfer tax (ITBI)

Sales are subject to the ITBI (*Imposto sobre Transmissão Intervivos de Bens Imóveis*), a tax on the transfer of real estate and related rights that is imposed by the municipality, based on the value of the sale or transfer.

The taxable events for the ITBI are as follows:

- Any sales or transfers of real estate, including any objects attached thereto.
- Any transfer of ownership rights to real estate, except for guaranty rights.
- Any assignment of rights in connection with the aforementioned transfers.

Note that this tax is not payable when the transfer of the property or rights is made with the intention that the property or rights be incorporated as part of a company's assets as payment for subscribed capital. The tax is also not payable on a transfer of property resulting from the merger or consolidation of two or more companies, unless the main activity of the purchaser is buying and selling real property. Likewise, the tax is not payable when the transfer results from the separation of the property from the company's assets into which it had been incorporated.

The tax is calculated upon the market value of the property or rights as of the date of the transfer or assignment.

Each municipality imposes its own ITBI rates, and there are no federal or state limitations imposed on them.

## Other relevant taxes – IPTU, ITR and ITCMD

The same rules pertinent to the taxable basis, taxable event and the taxpayer also apply to the ITR, or *Imposto sobre a Propriedade*. A municipal tax called Real Estate Tax, or *Imposto sobre a Propriedade Predial e Territorial Urbana* (IPTU) is imposed on the holding of the real estate (including the buildings or structures thereon, but not including the movable property within them).

The IPTU taxable event is the ownership, dominium, or possession of the real estate. It is calculated, based on the market value of the asset. The IPTU taxpayer is the owner of the property or the one that has possession or dominium. The tax is calculated upon the market value of the property.

As IPTU is a municipal tax, rates vary from one municipality to another, and there is no minimum or maximum rate fixed by federal or state laws.

The same rules pertinent to the taxable basis, taxable event and the taxpayer also apply to the ITR, or *Imposto sobre a Propriedade Territorial Rural*, which is a federal tax levied on the ownership or possession of rural property. An annual return must be filed for ITR purposes, describing the details of each rural property.

The State Tax ITCMD, or *Imposto sobre a Transmissão “Causa Mortis” e Doação de Bens e Direitos*, is levied on inheritances and donations of real estate properties and their rights. Rates vary from state to state.

## Other real estate investment structures

Other real estate investment structures are also available in Brazil, such as real estate investment funds or special-purpose entities. Each one triggers different taxation.

# Real Estate Investments - Brazil

## Preface

Historically, the property market in Brazil was considered less a financial asset and more as a physical asset that could better protect investors from economic instability, inflation and occasional political uncertainty. However, it is common sense that this concept of investment in real estate in Brazil has undergone a significant change. In fact, the decline in Brazil's interest rate and risk level, along with the reduction in external debt and inflation, allied to the regulatory and tax legislation amendments currently in place (mainly those that upgrade the quality of the information available to the investor and those that reduce the latter's tax burden), are universal attractions for real estate investment. Specifically, regarding foreign investors, who may be subject to certain tax benefits, Brazil is in an excellent competitive position relative to other emerging markets in the realty sector.

## Investment in Brazilian property

Corporate and individual investors (mainly foreign investors that could apply for certain tax benefits) will have different options for better structuring their investments in Brazil.

The choice of the best alternative for structuring investments in the property sector will depend on the characteristics of the investment to be proceeded.

As a result, in the following sections we describe different possibilities for investing in real estate in Brazil: (i) indirect acquisition, i.e. through a vehicle (an entity or an investment fund), or (ii) direct acquisition, i.e. the direct acquisition by the future owner of the real estate.

Current legislation establishes that non-resident taxpayers owning assets or rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, known as an Individual Taxpayer Register, or *Cadastro de Pessoa Física* (CPF).

Current legislation also establishes that non-resident legal entities owning goods and rights subject to public registration in Brazil are required to apply for and obtain a federal taxpayer identification number, or *Cadastro Nacional da Pessoa Jurídica* (CNPJ).

## Indirect acquisition

### *Indirect acquisition through a Brazilian entity*

#### Corporate taxes for a Brazilian entity

Income tax (IRPJ) and social contribution on net profits (CSLL) or 'Corporate taxes' can be paid on a real profit basis or on a presumed profit basis.

The real profit basis is obtained through net accounting profit adjusted by certain additions and exclusions, and subject to a rate of 15%, with a surcharge of 10%

on annual taxable income in excess of around USD 120,000 (using an exchange rate of BRL 2.00 to USD 1). CSLL is a federal contribution levied on a similar basis, at a rate of 9%.

In this case, the costs or expenses incurred on the improvement of the real state, e.g. can be deductible from the net accounting profit (either at the sale of the units, if the costs incurred were incorporated at the asset value or if accrued direct to P&L) and, as a consequence, from the calculation basis of IRPJ and CSLL.

IRPJ and CSLL can be paid on an annual basis, through monthly prepayments, or on a quarterly basis.

The presumed profit basis is applicable for companies with gross income lower than around USD 24,000,000 (using an exchange rate of BRL 2.00 to USD 1) a year and it involves the application of a presumed rate depending on the activity of the company and on the gross income of the company for the means of calculating a presumed net income, over which the above referred tax rates will be applicable.

This basis plus other revenues, such as financial revenues, will be subject to the rate of 15%, with a surcharge of 10%. CSLL is a federal contribution levied on a similar basis, at a rate of 9%.

Basically, the choice of one or other basis will depend on the Brazilian entity's profit expectations.

### Transactional taxes for a Brazilian entity (PIS and COFINS)

Revenues earned with real estate (selling, rental and others) will be subject to the Employees' Profit Participation Program (PIS) and Social Contribution on Billings (COFINS):

PIS and COFINS are contributions levied on gross revenue, thereby considered the sum of the company's total revenue, less unconditional discounts, cancelled sales, goods and service export revenue and other deductions legally established.

Depending on the choice adopted, the real profit or the presumed profit bases, the calculation of PIS and COFINS will also change.

In fact, if the Brazilian entity adopts the real profit basis, the company will be automatically subject to the payment of PIS and COFINS in accordance with the non-cumulative system.

In accordance with this non-cumulative system, the financial revenues are subject to a rate of 0%.

If a Brazilian entity decides to apply for the presumed method, all the revenues obtained will be submitted to the PIS and COFINS cumulative system, i.e. all the revenues will be taxed without the possibility of deduction of credit; however, the rates will be lower.

As of January 2008, the Brazilian Social Contribution Due on Cash Flows (CPMF) rule was revoked.

In the place of CPMF, certain transactions, mainly related to loans or to exchanging amounts can trigger the Tax on Financial Operations (IOF).

Certain foreigner investors, whenever investing through Resolution CMN 2689, for variable income assets traded in financial and capital markets, will be taxed by IOF at 0% on the inflows and outflow of resources in the country.

Other foreign investments in Brazilian financial and capital markets through Resolution CMN 2689 – mainly fixed income assets – will be taxed by IOF at 6% on the inflow and 0% on the outflow. However, if acquiring a Brazilian asset directly (not through 2689), foreigner investors will be taxed by IOF on the inflows and outflows of resources at 0.38%.

### Remittance of profits by a Brazilian entity

The profit from real estate activity (selling or rental) can be remitted as dividends or interest on net equity (INE).

The dividend will not be subject to withholding tax (WHT).

The payment of INE will be subject to the WHT. However, since a Brazilian entity adopts the real profit basis, it will be allowed to deduct the expense relating to INE from its IRPJ and CSLL, if paid up to the limits established by law.

Please note that as from 2010, Brazil started to impose thin capitalisation rules in relation to the loans between affiliated entities and specifically more conservative rules applicable for loans with parties located in a tax haven jurisdiction.

### *Indirect acquisition: Capital gains on disposal of a participation in Brazilian entity*

#### Non-residents

Brazilian non-residents are generally subject to WHT at the same rate as Brazilians (unless payments are made as a result of an employment relationship or of a service contract) levied on the payment or credit of Brazilian-source income, except that tax relief is provided by treaties to avoid double taxation.

It should be noted that income paid, credited, remitted, etc. to a beneficiary domiciled in a tax haven country/territory will be subject to a less favourable rate. For Brazilian tax purposes, a tax haven is considered to be a country that taxes income at a rate lower than 20%.

Capital gains realised by non-residents is generally determined as being the difference between the sales price and the cost basis of the asset or right sold, which must be substantiated by the corresponding document usually issued when the acquisition takes place. If the cost cannot be substantiated in this manner, the acquisition amount will be determined, in some instances, based on the capital amount registered with the Brazilian Central Bank related to the purchase of the asset or right. In all other instances, the cost will be deemed to be zero.

At last, Brazilian legislation is not clear in reference to the method of calculation of the capital gain in Brazilian currency or foreign currency registered at the Brazilian Central Bank (BACEN).

The outflow for remitting capital gains derived from investments generated through Law 4,131 (private participation into a Brazilian entity) will trigger IOF at 0.38% of the amount remitted.

## Corporations

Corporate capital gains arising from the sale or exchange of fixed assets are treated as ordinary income and taxed at the regular rates (please see detailed comments on item “*Corporate Taxes*” of the *Real Estate Tax Summary*). Due to the fact that Brazil no longer monetarily restates fixed assets for purposes of inflation, the amount of the capital gains will be determined as being equal to the positive difference between the sale price and the disposed asset’s original investment value less the accumulated depreciation/amortisation.

## Individuals

Capital gains recognised by Brazilian individuals on the sale of real property will be subject to Brazilian income tax at a rate of 15%. The gain is determined as the difference between the sales price and the acquisition cost duly reported on the seller’s annual income tax return.

## *Indirect acquisition through a Brazilian investment fund*

Depending on the structure to be adopted, the most applicable investment fund on real estate investment structuring is: (i) real estate investment Fund or FII (whose portfolios encompass real estate); (ii) participation investment fund or FIP (whose portfolios encompass interest in entities that can own properties); and (iii) receivables investment fund or FIDC (whose portfolios can encompass real estate receivables). Other funds can be applicable, such as a Stock investment fund.

## Corporate and transactional taxes for an investment fund

Fund quota holders are subject to WHT on profit distribution, quota redemption or quota sales.

Investment fund portfolios are not subject to IRPJ, CSLL, PIS or COFINS. If the quota holder redeems the investment prior to 30 days of the acquisition, Tax on Financial Transactions (IOF) will be due.

## Remuneration of quotes of investment funds

A taxable event for the owner of a participation in an investment fund is remuneration of the quotes. The tax treatment applicable will vary in accordance with the characteristics of the investor, as described below.

## Non-residents

Non-residents who participate in investment funds, in accordance with Resolution 2689, and if not resident or domiciled in a tax haven jurisdiction, are submitted to a beneficial treatment in terms of WHT levied on the remuneration of quotes. Others are submitted to the same rules applicable to Brazilian residents.

Remuneration of FIP is tax-exempt if the rules regarding concentration are accomplished (provided the investment is in accordance with Resolution 2689 and the investor is not located in a tax haven jurisdiction).

Under certain conditions, it is possible to consider that capital gains on the sale of some assets through an exchange are not submitted to WHT.

The operation of inflows of amounts for acquiring quotas will be taxed by IOF at 0%.

## Corporations

Remuneration of quotes will be subject to WHT varying in accordance with the holding period. WHT can be offset by IRPJ due by the quota holder.

## Individuals

Remuneration of quotes will be subject to WHT, varying in accordance with the holding period. WHT cannot be offset with IRPJ due by the quota holder.

# Direct acquisitions

## *Direct acquisition for non-residents*

Capital gains on the disposal of real estate is subject to beneficial rates, unless the investor is resident in a tax haven jurisdiction. Income derived from real estate (such as rental) is also submitted to WHT.

There is a controversy in relation to the capital gains under the disposal of real estate from one non-resident to another non-resident.

## *Direct acquisition for residents*

### Corporations

Income arising from real estate will be subject to corporate and transactional taxes as described above under '*Corporate taxes for a Brazilian entity*' and '*Transactional taxes for a Brazilian entity (PIS and COFINS)*'

Capital gains will be taxable, for corporate tax purposes, at 34%.

### Individuals

Income arising from real estate will be subject to a progressive rate, which can vary from 0% to 27.5%.

Capital gains will be subject to 15%. Also, as of October 2005 onwards, the capital gain earned by a resident individual on the sale of residential real estate is exempt of such tax, if the seller, within 180 days from the sale, uses the earnings to buy a new house in the country. This rule is only applicable for determined individuals after a gap of five years between the transactions.

Gains derived from the sales of real estate acquired by the seller before 1970 are also tax-exempt for Brazilian residents. Proceeds from the sale of real estate acquired by seller between 1970 and 1988 have a progressive reduction of the capital gains tax levied on them.

As of October 2005, there is also a reduction factor applicable to the calculation basis of the capital gain on the sale of residential real estate by resident individuals.

# Municipal Taxes

## *Real estate transfer tax (ITBI)*

Sales are subject to the ITBI (*Imposto sobre Transmissão Intervivos de Bens Imóveis*), a tax on the transfer of real estate and related rights, which is imposed by the municipality, based on the value of the sale or transfer.

The taxable events for the ITBI are as follows:

- Any sales or transfers of real estate, including any objects attached thereto.
- Any transfer of ownership rights to real estate, except for guaranty rights.
- Any assignment of rights in connection with the aforementioned transfers.

Note that this tax is not payable when the transfer is related to the special purpose entities (SPEs) that own real estate as well as in the case of some corporate reorganisations involving real estate assets and SPEs.

In addition, this tax is not payable on the transfer of investment fund quotes. The tax is calculated upon the market value of the property or rights as at the date of the transfer or assignment.

Each municipality imposes its own ITBI rates, and there are no federal or state limitations imposed on them.

### *Other relevant taxes – IPTU, ITR and ITCMD*

A municipal tax called Real Estate Tax, or *Imposto sobre a Propriedade Predial e Territorial Urbana* (IPTU) is imposed on the real estate itself (including the buildings or structures thereon, but not including the moveable property within them).

The IPTU taxable event is the ownership, dominium, or possession of the real estate. It is calculated based on the market value of the asset. The IPTU taxpayer is the owner of the property, or the one that has possession or dominium.

The tax is calculated upon the market value of the property.

As IPTU is a municipal tax, rates vary from one municipality to another, and there is no minimum or maximum rate fixed by federal or state laws.

The same rules pertinent to the taxable basis, taxable event and the taxpayer also apply to the ITR, or *Imposto sobre a Propriedade Territorial Rural*, which is a federal tax levied on the ownership or possession of rural property. An annual return must be filed for ITR purposes describing the details of each rural property.

The State Tax ITCMD, or *Imposto sobre a Transmissão “Causa Mortis” e Doação de Bens e Direitos*, is levied on inheritances and donations of real estate properties and their rights. Rates vary from state to state.

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# *Real Estate Going Global Bulgaria*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 15 June 2012.

# Real Estate Tax Summary – Bulgaria

## General

There are no legal restrictions upon foreign companies and individuals acquiring ownership over buildings (or parts thereof) in Bulgaria; they are also allowed to hold limited property rights (such as the right to build, right to use, etc) over land plots.

The legislation is less clear concerning the possibility of foreign individuals or legal entities holding ownership over land plots. After the Treaty for Accession of the Republic of Bulgaria to the European Union (hereinafter referred to as TARBEU) entered into force on 1 January 2007, some important amendments to the internal legislation concerning the legal regime for acquisition of land in Bulgaria by foreign legal persons entered into force. The latter is due to the fact that in the course of pre-accession negotiations Bulgarian State undertook the commitment to adopt and implement in its statutory system the basic principle of *acquis communautaire* for free movement of capitals. In this respect in 2005 Bulgarian Parliament amended art. 22 of the Constitution (State Gazette No. 18/2005, effective as from the date of entry into force of the Treaty of Accession of the Republic of Bulgaria to the European Union, not applicable to pre-existent international treaties). Para. 1 of the said decree embeds the imperative rule that aliens or non-resident legal entities may acquire a right of ownership over land under the terms arising from the accession of the Republic of Bulgaria to the European Union or by virtue of an international treaty which has been ratified, which has been promulgated, and which has entered into force for the Republic of Bulgaria, as well as through legal succession. Furthermore, art. 22, para. 3 of the Constitution reads that the regime applying to the land shall be established by statute. It is obvious that art. 22 refers to the provisions of the TARBEU and to the internal legislation which sets up the detailed legal framework of the acquisition of land in Bulgaria.

It should be noted, however, that the current Bulgarian legislation, notwithstanding the fact that the accession to the EU already took place, still lays down some restrictions as to acquisition of different types of land by nationals and legal persons from the EU-states and from the states which are party to the European Economic Area Agreement (EEAA). The said restrictions shall be in force for a certain period of time as per TARBEU as follows:

1. Bulgaria is entitled to maintain in force for five years from the date of accession the restrictions laid down in its legislation on the acquisition of ownership over land for secondary residences by natural persons of EU-states and EEAA-states who do not reside in Bulgaria, as well as by legal entities formed in accordance with the laws of another EU-state or EEAA-state. Furthermore, the 2nd subparagraph of art. 3, para. 1 of appendix VI of TARBEU provides that nationals of the EU-states and nationals of EEAA-states who lawfully reside in Bulgaria shall not be bound to the above provisions or to any other rules or procedures other than those to which nationals of Bulgaria are subject.

Given the fact that the five-year period mentioned in the preceding paragraph elapsed on 1 January 2012 a conclusion may be inferred that the restrictions on the acquisition of ownership over land should be removed by Bulgarian legislation.

The wording of the TARBEU suggests that such removal should be explicit, i.e. through a legislative amendment, rather than an automatic lapse of the respective restrictions. Please note that in 2007 already an amendment has been introduced to that effect. Still, some ambiguous notary practices and interpretation prevail to the effect that until 1 January 2012 the restrictions were effective.

2. Bulgaria is entitled to maintain in force for seven years from the date of the accession the restrictions laid down in its legislation on the acquisition of agricultural land, forests and forestry land by nationals and legal persons from the EU-states and EEA-states. However, the 2nd subparagraph of art. 3, para. 2 of appendix VI of TARBEU provides that self-employed farmers who are nationals of another Member State and who wish to establish themselves and legally reside in Bulgaria shall not be subject to the above provisions (herein stated in item 2) or to any procedures other than those to which nationals of Bulgaria are subject.

Finally, it should be noted that as per TARBEU, the European Council is entitled after three years from the accession elapse, acting unanimously, on a proposal from the Commission, to shorten or to terminate the transitional periods stated above in items 1 and item 2.

## Rental income

Rental income is subject to general corporate income tax of 10%.

Interest expenses incurred in relation to real estate are generally tax-deductible. However, as of 1 January 2009, companies applying IFRS are obliged to capitalise interest expenses in the value of the property. The rental income realised from foreign individuals or legal entities are generally subject to 10 % withholding tax unless exempt or reduced under an applicable double tax treaty.

## Thin capitalisation

Interest expenses incurred by a domestic or a foreign resident company may not be fully deductible if the debt/equity ratio (D/E) of the company exceeds 3:1 of the respective year. The ratio is to be determined, taking into account the average between the amounts as of 1 January and as of 31 December of the year. However, even if the D/E test is not met, the thin capitalisation restrictions may not apply if the company has sufficient profit before interest to cover its interest expenses.

Interest under bank loans/financial leases is not restricted by the thin capitalisation rules, unless the transaction is between related parties or the respective loan/lease is guaranteed by a related party. Interest and other loan-related expenses capitalised in the value of an asset in accordance with the applicable accounting standards would be outside the scope of the thin capitalisation restrictions.

Even if some interest expenses are disallowed under the thin capitalisation rules, they may be reversed during the following five consecutive years, if there are sufficient profits.

## Depreciation

For tax purposes depreciation is calculated in accordance with the straight-line method only.

The tax depreciation is computed on the basis of tax depreciation plans, which have to be prepared separately from accounting depreciation plans. Corporate tax depreciation rates vary from 4% to 50%, depending on the nature of the asset. The maximum depreciation rate for buildings is 4% yearly.

Land may not be depreciated for tax purposes.

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# ***Real Estate Investments – Bulgaria***

## **Introduction**

The real estate market in Bulgaria has been affected by the global economic crisis, which started at the end of 2008. By virtue of the growth of many years (2002-2007), accumulated surpluses (before the start of the crisis the fiscal reserve of the country was above BGN 8.5bn), high level of direct foreign investments, the well-capitalized banking system, the financial system and the public finance of the country were not so vastly affected such as other countries in our region.

As a result from the crisis the following consequences may be mentioned: scanty investments, cease/delay of projects and decreasing rent/sale prices are the main consequences of the economic downturn in the local real estate sector, moderate decrease of the profit levels of the banks due to increase of accrued bad debt provisions in relation to the mortgage loans etc.

## **Legal aspects**

In the course of the pre-accession negotiations with the EU, the Bulgarian State undertook the commitment to adopt and implement in its statutory system the basic principle of *acquis communautaire* for free movement of capitals. The process of implementing the European policy of free movement of capital started in 2005, prior to the accession of Bulgaria to the EU, when the Bulgarian Parliament amended the Constitution abolishing the general prohibition for foreign individuals and legal entities to hold ownership over land in Bulgaria. The amendment became effective on 1 January 2007, when the Treaty for Accession of the Republic of Bulgaria to the European Union (hereinafter referred to as 'the Treaty'), referred to above, entered into force.

Now the Constitution embeds the imperative rule that aliens or non-resident legal entities may acquire directly or through legal succession a right of ownership over land under the terms arising from the Treaty or by virtue of an international treaty, which has been ratified and promulgated, and which has entered into force for the Republic of Bulgaria.

Being an organic law that sets only the legal framework, the Constitution stipulates that the regime applicable to acquisition of different types of land has to be established and further detailed by a statute that is in compliance with the Constitution.

In March 2007, the statutes regulating the regime of the different types of land were amended accordingly so as to comply with both the provisions of the Treaty and the Constitution. The internal legislation now also has a different approach to individuals and legal entities coming from countries that are members of the EU or are a party to the European Economic Area Agreement (EEAA countries), and to such coming from any other country (non-EU and EEAA countries). While the legislation concerning the acquisition of agricultural, forest and forestry land is clear, the one regulating the acquisition of residential, administrative and industrial land by persons from EU and EEAA countries remains perplexing and engenders different interpretations. As

a result, although the general prohibition was abolished in 2005, there is still no clarity on how the provisions of the Treaty should be interpreted and applied as to the acquisition of such types of land by non-resident individuals or legal entities from EU and EEAA countries. Furthermore, the public notaries still refuse to certify contracts for transfer of ownership in favour of these persons. From formal point of view, effective 1 January 2012, the restrictions for acquisition of residential and administrative land should be considered abolished.

By 1 January 2007, due to the existence of the general restriction on the acquisition of ownership over land by foreign persons, foreign companies that wished to acquire real estate in Bulgaria established or acquired Bulgarian companies in order to be able to acquire land plots.

Ownership of real estate can be acquired through a purchase contract or donation, on the basis of a contribution to a company, or on other bases stipulated by law (e.g. inheritance).

Any contract transferring ownership over a real estate or establishing limited property rights over real estates (such as right to construct, right to use, etc.) or mortgages must be executed in the form of a notary deed, drawn up by a notary public. Afterwards, the notary deed should be registered with the Real Estate Register kept with the respective registry office as per the location of the real estate. The registration, itself, does not concern the acquisition of the ownership right, but has the purpose to make third parties aware of the transfer of ownership over the real estate or of its encumbering with any third parties' rights. If the notary deed has not been duly registered, it cannot be opposed to third parties who have acquired the ownership or a limited property right over the estate prior to the registration of the notary deed.

## Taxation aspects

When investing in real estate in Bulgaria, the following points should be considered:

- There is a flat 10% corporate income tax;
- Special purpose investment companies are exempt from corporate income tax. These legal entities are joint stock companies, which may invest only in real estate and receivables and are obliged by law to distribute not less than 90% of the realized profit to their shareholders.
- Tax losses can be carried forward over the following five consecutive years;
- Group taxation is not allowed in Bulgaria;
- Withholding tax (WHT) at 10% applies to certain income payable to non-residents (e.g. interest, royalties, technical services fees, rental payments and capital gains). Dividends and shares in a liquidation surplus are subject to 5% WHT. An exemption is provided for dividends and shares in a liquidation surplus distributed to EU/EEAA resident companies.
- A transitional period for the implementation of the Interest and Royalties Directive has been agreed. The tax rate on interest and royalty payments payable to associated companies cannot be higher than 5% for the period 1 January 2011 –

31 December 2014 and will drop down to zero (i.e. not subject to taxation) as from 1 January 2015;

- Foreign exchange fluctuations are recognised for corporate income tax purposes.
- The real estate annual tax rate is between 0.01% and 0.45%, determined by each municipality. Likewise, the transfer tax may vary from 0.1% to 3.0%;
- Additional to the transfer tax when transferring a real estate in Bulgaria registration fee (amounting to 0.1% of the higher between “the tax value” and the price agreed in the notary deed) and notary fee (under a scale up to BGN 6,000) is due;
- No capital duty is levied in Bulgaria.

## *Corporate tax*

Legal entities established under Bulgarian law are taxed on their worldwide income.

The taxable profit represents the financial result of the company adjusted for tax purposes. Generally, tax depreciation of buildings, repairs and maintenance are tax-deductible, whereas the impairment and the revaluation of the assets are not recognised for tax purposes.

Bulgarian tax law requires that transactions between related parties be carried out at an arm’s length basis, i.e. at usual market prices. If the price of a transaction differs from the price that would be agreed between independent persons, the domestic tax authorities may challenge the contracted price and adjust the tax base by the ascertained difference.

## *Value added tax (VAT)*

The VAT rate is currently 20%. There is a reduced rate of 9%, which applies for accommodation in hotels and other similar places.

The VAT registration is mandatory (e.g. when reaching a taxable turnover of BGN 50,000 for a period of 12 months, performing intra-community acquisitions, supply/receipt of services subject to reverse charge, etc.) and voluntary.

Foreign resident companies not established in another EU Member State may be registered for VAT in Bulgaria only through a fiscal representative, except if the company has a branch in Bulgaria. For the purposes of the mandatory VAT registration, the Bulgarian revenue authorities could register a foreign company, which is required to appoint a fiscal representative, even if it has failed to do so.

The transfer of ownership over land and the rent of land is generally VAT-exempt. However, the transfer of regulated land plots (i.e. land that is eligible to be built upon) is a VAT-able supply.

The disposal of buildings for which the stage of ‘rough construction’ has been completed, or for which more than five years have passed from the date of issuance of the permit for their use, is VAT-exempt. The sale of ‘new’ buildings or units in them is always subject to VAT.

The rent of buildings is a VAT-able supply, except for when the buildings or units in them are rented out to individuals for residential purposes.

Where the above supplies are VAT-exempt, there is an option for the supplier to treat them as subject to VAT.

The sale of construction rights over land is VAT-exempt until the issuance of construction permit.

If a company uses a building partly for the provision of taxable supplies, it would be entitled to partly recover the input VAT. A change of the use of the building from non-exempt to exempt activities over a period of 20 years may have an impact on the right of input VAT credit, which is to be adjusted, based on a specific formula.

Real estate-related services (such as those performed by consultants, architects, engineers, supervisors, intermediary brokers, etc.) are always considered with place of supply in Bulgaria and attract Bulgarian VAT when the real estate is located in the country. VAT is charged by the recipient of the above services (a taxable person) in Bulgaria under the reverse charge mechanism in case the supplier is a taxable person not established in Bulgaria.

The general period for VAT recovery is 2 months and 30 days after the submission of the relevant VAT return. A foreign company may recover VAT incurred for real estate-related services in Bulgaria under certain conditions.

### *Real estate tax*

An annual real estate tax is levied on land and buildings. The tax rate is determined between 0.01% and 0.45% by each municipality. The tax is calculated on the tax value of the respective property. When a real estate represents an asset of a legal entity, the real estate tax is levied on the higher between the tax value and the gross book value of the real estate as per the balance sheet of the company. The tax is due from the owner of the real estate in two instalments: from 1 March to 30 June, and until 30 October of the current year. The tax can be paid in one instalment with a small discount.

### *Withholding tax*

Dividends are subject to a 5% WHT. The rate may be reduced under an applicable double tax treaty (DTT). As a step forward after the implementation of the Parent-Subsidiary Directive, as of 1 January 2009, the dividend distribution made by a local company in favour of a company, residing in an EU/EEAA country are exempt from WHT without any conditions.

There is no WHT on dividends payable between Bulgarian companies. Such dividends are not taxable for the receiving company.

Interest paid to non-resident lenders is subject to WHT at a rate of 10%. The rate may be reduced in accordance with the relevant DTT. The Interest and Royalty Directive would be fully applicable in Bulgaria as of 1 January 2015. Pursuant to the transitional clauses the Bulgarian WHT on interest would not exceed 5% for the period 2012–2014. The current WHT rate on interest qualifying under the Directive is 5%. The tax obligation is triggered by the accrual of the interest and may precede the payment.

# Real estate acquisition

## *Legal aspects*

### Methods of acquisition

An investor may either establish a Bulgarian legal entity that will acquire the real estate directly, or acquire shares in a Bulgarian company that owns the property. Also, effective 1 January 2012, investors may directly acquire residential or administrative land.

In view of the general business environment, as elsewhere in the region, it is advisable to conduct a thorough due diligence review of the target company before acquiring its shares. In such a due diligence review the legal and tax position of the company should be examined. If necessary, the seller of the shares should be asked for certain guarantees regarding the legal and tax position of the company, although it should be remembered that the enforcement of such guarantees may not always be reliable.

### Choice of entity

Under the Bulgarian Commerce Act, the following Bulgarian legal entities may be established:

- General partnership (*sabiratelno drujestvo*).
- Limited partnership (*komanditno drujestvo*).
- Partnership limited by shares (*komanditno drujestvo s akcii*).
- Limited liability company (*drujestvo s ogranichena otgovornost*).
- Joint stock company (*akcionerno drujestvo*).

All these types of entities may own real estate, even if they are fully owned by foreign entities, or foreign individuals.

A limited liability company and a joint stock company are the most frequently used types of companies for holding real estate. A limited liability company may be founded by one or more resident or non-resident persons, who may be either legal entities, or individuals. The minimum registered capital required for new limited liability companies is BGN 2. The minimum quota value is BGN 1.

A joint stock company can be founded by one or more resident or non-resident persons, who may be either legal entities or individuals. A joint stock company can be established without a public offer and requires a minimum share capital of BGN 50,000. The minimum share value is BGN 1.

### Acquisition of land by individuals and legal entities from non-EU and EEAA countries

Irrespective of the particular designation of the land (residential, agricultural, forestry, etc.), individuals and legal entities from non-EU and EEAA countries may acquire ownership only if there is an international agreement concluded between Bulgaria and their country of citizenship, concluded after the amendments of the Constitution came into force on 1 January 2007 (i.e. after Bulgaria's accession to the EU) and allowing

them to do so. The agreement also has to be ratified by the Bulgarian Parliament and promulgated in order to enter into force and become applicable.

### Acquisition of land by individuals and legal entities from EU and EEAA countries

In 2007, the internal legislation was amended in compliance with the provisions of the Treaty and now differs depending on (i) the type of the land, and/or (ii) whether the land is acquired by an individual or a legal entity.

### Residential, administrative and industrial land

According to the Treaty, Bulgaria may maintain in force for up to five years as from its EU accession, i.e. until 1 January 2012, the restrictions on acquisition of ownership over land for secondary residence by nationals of EU and EEAA countries, who do not reside in Bulgaria, as well as by legal entities formed in accordance with the laws of another EU state or EEAA state.

As an exception of the above, the Treaty stipulates that Bulgaria shall have no right to keep the restrictions in the legislation on acquisition of land by individuals of the EU states or EEAA states who lawfully reside in Bulgaria. They shall have the right to acquire land as from the date of accession, i.e. 1 January 2007, and shall not be bound to any rules or procedures other than those to which Bulgarian nationals are subject.

The Treaty does not envisage an exception from the above five-year transitional period as regards legal entities established in the EU states or EEAA states.

The amendments to the Bulgarian legislation made in 2007 reflect the above regulation of the Treaty but without giving any further details. Therefore, the interpretation of the text and some of the terms used in the Treaty remain unclear for the practitioners, including the public notaries, and hence, are non-applicable in practice. Effective 1 January 2012, residential and administrative land could be purchased directly from EU investors.

### Agricultural, forests and forestry land

According to the Treaty, Bulgaria is entitled to retain the existing restrictions in its legislation concerning the acquisition of agricultural land, forests and forestry land by non-resident individuals and legal entities from the EU states and EEAA states for a seven-year transitional period, i.e. until 1 January 2014.

The only exception of the general restriction applicable during the above transitional period is provided for self-employed farmers who are nationals of another EU state and who wish to establish themselves and legally reside in Bulgaria, even though without becoming Bulgarian citizens. They shall not be subject to any procedures other than those to which nationals of Bulgaria are subject.

Taking advantage of the possibility granted by the Treaty, Bulgaria introduced the above transitional period in its internal legislation and, save for the above exception, persons from EU and EEAA countries are currently not allowed to acquire ownership over agricultural land, forests and forestry land by 2014.

## *Tax aspects*

### **Capital gains and losses on the sale of property or shares**

Capital gains realised on the sale of property is included in the corporate income tax base of the company and taxed at the regular corporate income rate of 10%. Capital losses from the sale of real estate are generally deductible for corporate income tax purposes.

Capital gains derived from the sale of shares in a domestic company by a foreign shareholder are subject to Bulgarian WHT of 10%, unless the share transfer is executed on a regulated market in EU/EEA. The tax liability may be reduced under an applicable DTT. However, certain DTTs (e.g. with the US, Ireland, Sweden, Canada, Ukraine) provide that the tax exemption does not apply if the main assets of the company are directly or indirectly holdings in real estate.

In case the shareholder selling the shares is a Bulgarian company, the capital gain/loss realised from the respective sale would be reflected in the assessment of the taxable profit.

### **Real estate transfer tax**

The transfer of real estate, as well as of limited property rights over real estate, is subject to real estate transfer tax. The term 'real estate' is defined in the Property Act. Under this definition, real estate is land, buildings and other structures and, in general, everything that is firmly fixed to the land or the structure.

The real estate transfer tax rate is determined by each municipality between 0.1% and 3.0%. The tax base is the higher between the sales price of the property and its tax value.

Registry fee of 0.1% and certain notary fees capped at BGN 6,000 are also due upon acquisition of property.

Generally, these taxes and fees are due from the buyer. However, the parties can agree on other arrangements. If they agree to split the taxes and fees, by law, they will be jointly and severally liable for them. If they agree that the seller will pay the taxes and fees, the buyer will be considered guarantor of the payment. The notary who executes the notary deed on the transaction checks if the transfer taxes and fees have been paid.

Within seven days of buying the property, a foreign buyer should register for statistical purposes at the local BULSTAT registry office. This registration would be used for identification of the investor before the Bulgarian authorities.

The buyer should also file with the municipality a tax registration form within two months of the acquisition.

No real estate transfer tax obligation arises in case the property is transferred to a company in the form of an in-kind contribution or as a result of transformation of the company (e.g. merger, spin-off, etc).

Real estate transfer tax paid to the Bulgarian municipalities is to be capitalised into the value of the respective property.

### Value added tax (VAT)

If VAT is to be levied, then generally the tax base for VAT purposes is the sales price of the real estate, increased with the due transfer taxes and statutory fees. The VAT liability arises when the ownership of the property is transferred or when a payment for the acquisition of the property is made, whichever occurs earlier.

### Use of separate property holding companies

Common practice is for foreign investors to invest in real estate in Bulgaria through separate special purpose investment companies. The subsequent sale of the real estate through a share deal instead of an asset deal would not be associated with transfer tax and VAT liabilities related to the respective real estate.

## Financing real estate in Bulgaria

### *Debt financing*

#### Thin capitalisation rules

According to the Bulgarian thin capitalisation rules, the interest expenses incurred by a resident company may not be fully deductible if the average debt/equity ratio of the company exceeds 3:1 in the respective year. However, even if the debt/equity test is not met, the thin capitalisation restrictions may not apply if the company has sufficient profit before interest to cover its interest expenses.

Interest under bank loans/financial leases are not restricted by the thin capitalisation rules, unless the transaction is between related parties or the respective loan/lease is guaranteed by a related party. Also, if the interest expenses are capitalised into the value of the property, the thin capitalisation rules would not be relevant.

Even if some interest expenses are disallowed under the thin capitalisation rules, they may be reversed during the following five consecutive years, if there are sufficient profits.

#### Foreign exchange differences

Foreign exchange fluctuation on receivables and payables in a currency that is different than EUR (the Bulgarian currency is linked to the EUR) are accounted for on an accrual basis and are recognised for tax purposes if converted as per the Bulgarian National Bank's exchange rates.

#### Transfer pricing

Under the Bulgarian transfer pricing rules taxpayers should determine their taxable profits and income by applying the arm's length principle to prices at which they exchange goods, services and intangibles with related parties. Interest on loans provided by related parties should be consistent with the market conditions effective at the time when the loan agreement is concluded.

In case the conditions on transactions between related parties are not arm's length-based, the tax authorities may challenge the deductibility of the respective expenses or increase the taxable profit and levy additional corporate income tax.

#### Withholding tax

Interest payments to foreign lenders are subject to a 10% WHT. This rate may be reduced by an applicable DTT. The Interest and Royalty Directive will be fully

applicable in Bulgaria as of 1 January 2015. Pursuant to the transitional clauses, the Bulgarian WHT on interest will not exceed 5% for the period 2012–2014. The current WHT on interest qualifying under the Directive is 5%.

### **Reporting duty**

Bulgarian residents are obliged to declare any loans of more than BGN 50,000 received from abroad to the Bulgarian National Bank within 15 days of conclusion of the loan agreement – the declaration is a standard procedure and is for statistical purposes only. Also, the status of the loan should be reported quarterly to the National Bank.

## ***Equity financing***

### **Increase of registered share capital**

According to the Bulgarian Commerce Act, certain formal procedures are to be followed in terms of increasing the registered share capital of a company incorporated in Bulgaria. The registered capital can be increased either with cash or with an in-kind contribution, subject to a resolution of the company's shareholders. Debt financing is also a practical approach used when investing in real estate (i.e. receiving a loan either from a shareholder or from a third party). At a further stage the lender can contribute its receivable towards the company (as an in-kind contribution) to the company's registered capital.

### **Other contributions**

Pursuant to the Bulgarian Commerce Act, monetary contributions can be made to a company without reflecting their value in the company's registered capital. These are usually calculated pro rata on the basis of the value of the shares held by the respective shareholder and are subject to repayment by the company, unless otherwise resolved by the shareholders.

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# *Real Estate Going Global Canada*

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All information used in this content, unless otherwise stated, is up to date as of 13 June 2012.

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# Real Estate Tax Summary – Canada

## General

Foreign investors may invest in property in Canada by direct ownership of the property from offshore or via resident corporations, partnerships, or trusts.

## Acquisition of property by a non-resident

The purchase price paid for the acquisition of a property will form the tax cost of the acquired land and building. The portion of the purchase price that is allocated to the building can be depreciated for income tax purposes (CCA discussed below). For this purpose, the allocation of the purchase price should be based on the fair market value of each of the land and building. There is no prescribed allocation ratio.

Any incidental expenses related to the acquisition of a property are capitalized to the cost of the land and building. The capitalisation of the incidental expenses to land and building should be based on the direct purpose for which the expenses were incurred. For example, if an expenditure incurred directly relates to the building, the expense should be capitalized to the cost of the building. However, if the expenditures relate to both land and building, it may be appropriate to use the fair market value allocation ratios. Types of incidental expenses include land transfer tax and registration fees, brokerage fees, legal fees and accounting fees.

Costs incurred to set up entities (i.e. to form a partnership or corporation) are not immediately deductible. Where the entity carries on a business, 75% of these costs may be amortized for income tax purposes at the rate of 7% per annum using a declining balance method.

Costs to obtain financing are deductible, rateably, over a 5 year period, but adjusted in the case of a taxation year shorter than 12 months. If the financing is repaid in full during the amortisation period, the unamortised financing costs become deductible immediately.

## Rental income

The taxation of Canadian source rental income earned by non-residents depends upon whether it is characterised as income from carrying on a business, or income from property. As a general proposition, the greater the level of services that are provided to the tenants, the more likely it is that the landlord will be considered to be carrying on a business. There is a rebuttable presumption that the income earned by a corporation in the exercise of its corporate objects is income from a business.

If rental income received by a non-resident is considered to be income from property, the rents paid or credited by a person resident in Canada to the non-resident person will generally be subject to withholding tax at the rate of 25% on the gross rents. Applicable tax treaties may reduce the percentage withheld. (Note: Where a non-

resident earns rental income through a Canadian corporation, withholding taxes on gross rents would not apply.)

The non-resident can elect, however, to pay tax on the net rental income as if they were a resident of Canada. The non-resident who makes this election may only deduct reasonable expenses incurred in earning the rental income, including tax depreciation or capital cost allowance (CCA). The CCA cannot generally be used to produce a rental loss. It is the position of the tax authorities that the election applies with respect to all income from real property, and cannot be made in respect of individual properties. The non-resident pays tax on the net rental income at the rate that would be applicable if the non-resident person were resident in Canada. The tax rate will vary widely depending on how the property is held, and in which of Canada's ten provinces and three territories the property is located. The election is not permanent, and the non-resident who has made the election in a particular year may decide not to make the election in a subsequent year. When an election is made to pay tax on net rental income, the non-resident must file a tax return within six months after the year-end. Where an election is not made, the non-resident may, within two years after the end of the year, file a tax return and pay tax on net rental income in order to recover taxes otherwise withheld on gross rents.

If rental income received by a non-resident is considered to be business income, the gross rents will generally be subject to the same 25% withholding tax, unless the non-resident obtains a waiver and undertakes to file a Canadian income tax return with respect to its Canadian sourced income. The rate of tax applicable depends on the character of the non-resident, i.e. an individual, corporation, testamentary trust, or inter vivos trust. Provincial income taxes could also be payable.

## Tax depreciation (capital cost allowance or CCA)

Non-residents are generally subject to the same rules relating to depreciable property and CCA which apply to a resident of Canada. However, a non-resident person cannot claim CCA in respect of property situated outside Canada. Depreciation, as determined for accounting purposes, is not deductible. However, CCA may be claimed on buildings and other structures at rates generally varying from 4% to 10%. Enhancements have been made to the CCA rates for newly constructed assets acquired after 18 March 2007, generally resulting in a 6% CCA rate for non-residential buildings.

CCA is based on pools, with separate tax classes provided for various types of property. The deduction for CCA is always calculated on the tax cost of the entire pool. Most rental properties (i.e. buildings which cost more than CAD 50,000) are required to have separate tax pools such that CCA is claimed on a property by property basis as opposed to being claimed on a combined pool of properties. This also creates the possibility of depreciation being recaptured on the sale of each individual property.

CCA cannot be claimed on a rental property to create or increase a tax loss unless the CCA claim is being made by a corporation, the principal business of which is the leasing, rental, development or sale of real property.

## Thin capitalisation

The Canadian thin capitalisation rules may apply where the lender to a Canadian corporation is a non-resident person who alone or with other related persons owns more than 25% of the Canadian corporation's shares, and interest expense on the loan would otherwise be deductible to the Canadian corporation. If the ratio of these debts to equity exceeds 2:1, the interest on the excess is not deductible.

For taxation years beginning after 2012, the permitted level of such non-arm's length interest-bearing debt will be reduced from the currently allowable debt-to-equity ratio of 2:1 to a revised ratio of 1.5:1.

For taxation years that begin after 28 March 2012, the thin capitalisation rules will also apply to debts owed by a partnership in which a Canadian-resident corporation is a member and interest bearing debt is extended to the partnership by a non-resident party that does not deal at arm's length with a member of the partnership.

In addition, for taxation years ending after 28 March 2012, disallowed interest under the thin capitalisation rules will be deemed to be a dividend for Canadian withholding tax purposes. The dividend will be considered paid to the non-resident at the time the recharacterised interest amount is paid (or at the end of the year, to the extent of the portion of any such interest that is unpaid at year-end) and will be subject to dividend withholding tax of 25%. This withholding rate may be subject to reduction under a tax treaty.

## Deductibility of fees paid to related parties

Fees paid to related parties are generally deductible if reasonable in the circumstances and incurred for the purpose of gaining or producing income from the business or property. However, the level of fees must be supportable and may not exceed what an arm's length party would pay for the services being performed.

## Currency issues

Foreign exchange gains or losses on account of income (i.e. relating to operations) are generally considered currently taxable/deductible. However, foreign exchange gains or losses on account of capital (i.e. relating to capital items such as fixed assets or debts) are only taxable/deductible when realized. Realized foreign exchange gains or losses on account of capital are treated as capital gains or losses for tax purposes in the period in which the gain or loss is realized. Only 50% of a capital gain or loss is subject to tax. A capital loss is only deductible against capital gains.

Gains or losses on hedging of currency exposures will be treated as either on account of income or on account of capital depending on the nature of the item being hedged.

Where a corporation has a functional currency other than the Canadian dollar, an election may be available in certain circumstances to compute and pay income tax in the corporation's functional currency.

## Disposition of property by a non-resident

Where there is a disposition of non-depreciable capital property, e.g. land, the non-resident is subject to Canadian tax on the taxable capital gain, i.e. 50% of the gain (proceeds of disposition less capital cost of the property), at the rate that would apply if the non-resident were a resident of Canada. Certain applicable tax treaties may reduce the portion of the capital gain of a non-resident.

In addition to being subject to Canadian tax on any taxable capital gain on the disposition of depreciable property (e.g. a building), to the extent that proceeds of disposition exceeds the property's undepreciated capital cost, the excess amount (up to the capital cost of the property) is taxable to the non-resident, at the tax rate that would apply if the non-resident were a resident of Canada, as recaptured depreciation.

A gain on the sale of shares of an unlisted non-resident corporation, or a foreign partnership or trust interest, may be taxable in Canada if the corporation, partnership, or trust owns certain types of properties, including real property in Canada and where the share or interest derives its value primarily from such properties.

A non-resident who disposes of property is required to report the entire amount of any taxable gain and/or recaptured depreciation resulting from the disposition in the year of disposition, even though all or a portion of the proceeds may not be due until after the year of disposition.

The non-resident in most situations will be required to report the transaction and make an advance payment on account of their tax liability before the disposition occurs. If the non-resident fails to do so, the purchaser is required to withhold a portion of the purchase price and remit the withheld amount to the Canada Revenue Agency.

Where the disposition is on income account, i.e. non-capital trading assets such as inventory, the non-resident will be taxed on the resulting profit less applicable expenses, subject to possible relief by tax treaty.

## Loss carryforward

In determining the deductibility of losses, a distinction between losses from property and losses from business must be recognised. Losses incurred in the year by a non-resident from property, whether inside or outside Canada, are not deductible and cannot be carried back or forward. However, losses incurred in a taxation year from a business carried on in Canada are deductible from income, other than income from property, which is subject to tax in Canada for the year. Such losses, if not used in the current year, can be carried back 3 years and carried forward 20 years. However, losses of a non-resident from a business carried on outside Canada are not deductible in Canada.

Capital losses, resulting from the disposition of taxable Canadian property of a capital nature, can be carried back three years, and forward indefinitely, to reduce taxable capital gains from taxable Canadian property in those years.

## Withholding taxes

Certain amounts, such as interest paid to related parties or paid or credited in respect of participating debt arrangements, dividends, rents, or royalties by Canadian residents to non-residents are subject to a withholding tax of 25% on the gross amount of the payments. Interest paid to arm's length non-resident lenders is generally exempt from Canadian withholding tax, unless the interest is paid in respect of a participating debt arrangement. The rate of the withholding taxes may be lower under applicable tax treaties. Exceptions to the above may exist for certain payments.

## Other relevant taxes

A non-resident may be subject to the 5% federal Goods and Services Tax (GST), similar in application to the European VAT, on the purchase of real property and on certain expenses incurred in connection with the operation of the property, although such GST paid is usually recoverable (subject to significant restrictions in respect of residential rental properties). In most cases, a landlord is required to collect and remit GST on commercial rents received. However, a non-resident vendor of real property is not generally required to collect GST on the sale of real property.

In addition, most provinces impose a sales tax or have harmonised their sales taxes with the GST. The harmonised sales taxes function as the GST, described above. However, to the extent that a non-resident owns a property in a province that imposes a sales tax that is not harmonised with the GST, the non-harmonised sales tax will represent a non-recoverable additional cost on certain expenses incurred in connection with the operation of the property.

Many provinces and some municipalities in Canada levy a land transfer tax on the purchaser of real property (land and building) located within their boundaries. The tax is expressed as a percentage, occasionally on a sliding scale, of the sales price or the assessed value of the property purchased. Rates may be up to 3% of the property value. The tax is generally payable at the time the legal title of the property is registered or on the transfer of a beneficial interest. It may be possible to avoid land transfer tax in certain provincial jurisdictions depending on the structuring.

In addition, most cities and towns impose an annual realty and/or business tax on real property. These taxes are based on the assessed value of the property at rates that are set each year by the various municipalities

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# *Real Estate Going Global China*

*Tax and legal aspects of  
real estate investments  
around the globe*

2013

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All information used in this content, unless otherwise stated, is up to date as of 19 April 2013.

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# *Real Estate Tax Summary – China*

## General

Real Estate Industry belongs to 'Restricted Foreign Investment Industries' in China. Meanwhile, Chinese government stepped up the macro adjustment policy in recent years. The restrictions on foreign investment in real estate market are tougher than previous years

## Rental income

Rental of property in China is subject to Business Tax at a rate of 5%.

Net rental income is subject to Corporate Income Tax at a rate of 25%.

## Thin capitalisation rules

The new China Corporate Income Tax Law (which took effective from 1 January 2008) has introduced the concept of thin capitalisation rules. The purpose is to disallow the deduction of interest expenses pertaining to debts from related parties when the ratio of debt to equity exceeds a certain prescribed debt/equity ratio. The interest expenses shall include interests, guarantee fees, mortgage fee, etc.

There are two prescribed debt/equity ratios – one for enterprises in the financial industry and the other one for non-financial enterprises. The former is set at 5:1, while the latter at 2:1. As such, real estate enterprises are subject to the ratio of 2:1. Where the ratio of the debts from related parties to the equity exceeds the certain ratio in a year, the interest expense pertaining to the debts from related parties shall not be deductible in that year (and no carry-forward to future years), except in the following situation:

The excessive interest expenses may still be deductible if an enterprise can provide documentation to support that the inter-company financing arrangements comply with the arm's length principle; or if the effective tax rate of the borrowing enterprise is not higher than that of the lending enterprise in China.

Furthermore, the non-deductible outbound interest expense paid to overseas related parties would be deemed as a dividend distribution and subject to withholding income tax ('WIT') at the higher of the WIT rate on interest and the WIT rate on dividends.

## Depreciation

Property held for trading purpose should be booked as inventory of the real estate enterprise. No depreciation should be booked for such assets.

Property held for investment purpose (such as operating a shopping mall by the enterprise, renting the property to other enterprises) should be booked as fixed assets. According to general PRC accounting standards, fixed assets as buildings should be depreciated in at least 20 years by the straight-line method.

Depreciation expenses can be deducted for corporate income tax purpose.

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# *Real Estate Investments – China*

## *General*

### *Introduction*

This guide comprises an overview of the tax and legal aspects relating to investment in the real estate industry in China. It is not intended to be comprehensive and consequently should only be relied on as an introduction to general matters relating to Chinese property law and tax.

We have excluded from this guide the specific rules relating to operators who buy and hold property as stocks with the intention of resale.

The tax aspects are considered with respect to investments made by corporate investors under the ultimate control of non-resident corporate investors. We have also included some key information on investments realized by individuals.

### *Foreign Investment Control*

Real Estate Industry belongs to ‘Restricted Foreign Investment Industries’ in China. Meanwhile, Chinese government stepped up macro adjustment policy in recent years. The restrictions on foreign investment in real estate market are tougher than previous years.

Foreign investors are required to establish a real estate development Foreign Investment Enterprises (‘FIEs’) in China to undertake infrastructure construction, building construction, sales and lease of properties.

According to the prevailing Foreign Investment Guidelines issued by the PRC government, foreign investors are restricted to be engaged in (1) large scale property development under the joint venture mode; (2) the construction and management of high-grade hotels, high-level office buildings and international meeting and exhibition centres; (3) a real estate agency.

Generally, foreign investors are not restricted to engage in the development and construction of common residences and villas.

However, foreign investors are not allowed to use their equity interests of a real estate enterprise to invest in another enterprise in China.

## *Direct investments in Chinese real estate*

### *Legal aspects*

#### *Ownership and leasehold*

In China, the state government holds the ownership of all the land. Enterprises or individuals only have a land use right (i.e. leasehold) and the ownership of the property built on the land. Generally, leasehold of the land and property for common residence purpose is 70 years. For land and property for commercial use, the leasehold period is 40 years.

## *Real estate acquisition*

A Wholly Foreign Owned Enterprise ('WFOE') may be allowed for foreign investors to engage in the non-restricted real estate projects, such as development and construction of common residences and villas. For other restricted real estate projects, only joint venture ('JV') would be allowed in the PRC at the current stage. Please note that an advanced discussion with the local PRC approval government authority in this regard is required.

Pursuant to the prevailing PRC regulations, it stipulates the following requirements for the establishment of real estate development FIEs:

- Having a minimum registered capital of CNY 1m;
- Having at least 4 certified full-time professionals in real estate and/or construction engineering;
- Having at least 2 certified full-time accountants; and
- Having completed approval procedures in accordance with the relevant PRC regulations concerning the establishment of FIEs.

Nevertheless, please note that the local PRC government may set out more stringent requirements in respect of the above mentioned capital and professional staff requirements.

## *Equity joint venture ('EJV')*

EJV has the legal status of a limited liability enterprise, where the Chinese and foreign partners share rights and obligations, profits and losses, according to their respective proportion of registered capital contributed by each party. The relevant PRC laws have not stipulated the maximum percentage of equity interest required to be held by the foreign partner. In general practice, foreign investors usually own no less than 25% of the equity interest, but the maximum amount of foreign ownership is not specified. However, we have seen cases where the Chinese partner is a silent partner and only holds a nominal percentage of equity interest of a real estate development JV. Capital contribution in EJV may be in cash or in such kind as building, land-use-right, equipment, industrial property, etc.

## *Contractual joint venture ('CJV')*

A CJV can or cannot be a legal-person in China. Incorporated CJV has the legal status of a limited liability enterprise whereas unincorporated CJV does not have a legal person status. The rights and obligations, share of profits and losses, way of management and ownership of properties upon the expiry of the co-operation period should all be prescribed in the joint venture contract (JV contract). The JV contract terms would largely depend on the negotiation results of the JV partners rather than proportion of equity contributed by each party. The investment contribution by each party may be their cooperation conditions or obligations. In practice, the Chinese partners usually contribute in such kind as land or land-use-rights, natural resources, labour, equipment, buildings etc., while the foreign partners normally provide capital, advanced technology, key equipment, etc. The parties to the CJV may share the profits/losses, the revenue or the products according to the stipulations in the JV contract.

## Foreign-invested partnership (“FIP”)

The partnership model is a relatively new form of investment in China. A FIP may be formed by two or more foreign partners or jointly by foreign partners and Chinese partners. In other words, it is acceptable that all the partners in the FIP are foreign corporations and/or foreign individuals. As a generic advantage of partnership, the FIP structure is flexible in terms of profit sharing and undertaking of liability because they can be agreed upon among partners. However, there are still some concerns that would need to be clarified in order to determine whether partnership is a suitable and effective form of investment for foreign investor.

## Regulatory considerations

FIP provides a more flexible model for foreign venture capital and foreign private equity funds to invest in China. However, real estate industry is a restricted foreign investment industry. FIP is generally allowed in pure equity investment in property rich enterprises.

## Tax aspects

### Corporation

#### *Corporate income tax (“CIT”)*

Enterprises shall pay CIT on income derived from sources inside and outside China. The CIT rate is 25%.

Provisional CIT is imposed on proceeds of the pre-sales of properties by a property developer based on the deemed profit rates which are generally ranged from 3% to 20%. In the major cities in China, such as Beijing, Shanghai, Guangzhou and Shenzhen, the deemed profit rates are as high as 15% or 20%.

#### *Withholding income tax (“WIT”)*

Foreign enterprises which have no establishment or place of business in China or which have an establishment or place of business in China but the income derived is not effectively connected with such establishment or place shall pay WIT on income derived from sources inside China. The applicable WIT is 10% in general. Generally, WIT should be paid on net gains from disposal of assets. For rental of property, WIT should be paid on the gross rental income.

#### *Business tax (“BT”)*

Sales of property and rental of property are subject to BT. The taxable income is sales proceeds of property or rental of property. The applicable BT rate is 5%.

#### *Land value appreciation tax (“LVAT”)*

The land value appreciation amount is subject to LVAT with progressive tax rates from 30% to 60%. For sales of an ordinary standard property unit, LVAT can be exempted if the appreciation portion is not exceeding of 20% of the amount of deductible items.

Provisional LVAT is also imposed on proceeds of the pre-sales of properties, reviewed by a property developer at the rates ranging from 2% to 8% in generally case. A project with a higher appreciation is subject to higher provisional LVAT rate.

### *Real property tax ('RPT')*

For a real property owned by the enterprise, generally, 70% of the appraised value is subject to RPT at a rate of 1.2% per annum. In some cities, such as Shanghai, it is 1.2% on 80% of the appraised value per annum.

For the rental property, rental value is subject to RPT at a rate of 12% per annum.

### *Deed tax ('DT')*

Purchase, transfer or exchange of property is subject to DT at rates ranging from 3% to 5%. The taxable amount is the transaction value.

### *Land use tax ('LUT')*

Enterprises which hold the land use right should pay LUT based on the area of the land. Generally, LUT is ranging from CNY 0.6 – CNY 30 per square metre. In big cities, the LUT rate is higher.

## **Individual**

### *Individual income tax ('IIT')*

Generally, individuals should pay IIT on any gain on disposal of property (gains = sales proceeds – purchase price – relevant expenses). IIT is imposed on the gain at a rate of 20%. If the gain amount is not available, IIT is imposed on the gross sales proceeds based on the deemed tax rate generally ranging from 1% to 3%.

Rental income derived by individuals is subject to a reduced IIT rate of 10%. Moreover, in some cities, the tax authorities adopt a composite tax rate to collect all relevant taxes (including IIT, BT, RPT, LUT, stamp duty and local surcharges) from individuals in relation to disposal of property or leasing of property. For example:

### *Disposal of property*

In Shanghai, a composite rate of 5% on disposal of property is applied (which includes IIT, BT and RPT, etc.).

### *Leasing of property*

In Shanghai, for individual non-residential property, a BT rate of 5% is applied and a composite rate at 12% of gross rental, which is above Shanghai BT threshold (which includes IIT and RPT). For individual non-residential property, BT is exempted if it could not meet the Shanghai BT threshold. But a composite rate at 12% of gross rental still should be applied (which includes IIT and RPT).

In Beijing, for individual residential property, a composite rate at 5% of gross rental is applied (which includes IIT, BT, RP, LUT, SD and local surcharges). For individual non-residential property, a composite rate at 12% of gross rental, which is above Beijing BT, is applied (which includes IIT, BT, RPT, LUT, SD and local surcharges). For individual non-residential property, BT is exempted if it could not meet the Beijing BT threshold. But a composite rate at 7% of gross rental still should be applied (which includes IIT, RPT, LUT, SD).

In Guangzhou, a composite rate ranging from 0% to 14% is applied according to individual circumstances (which includes IIT, BT, RPT and local surcharges).

In Shenzhen, a composite rate at 4.1% or 6% of gross rental is applied (which includes IIT, BT, RPT and local surcharges).

## Corporation and Individual

### *Stamp duty ('SD')*

For transfer of property SD will be imposed on the sales price at a rate of 0.05%. For leasing of property SD will be imposed on rental income at a rate of 0.1%. For construction contracts SD will be imposed on the construction price at a rate of 0.03%.

## Purchase of a real estate enterprise

### *Legal aspects*

In addition to a full audit of the enterprise itself and as in the case of a direct purchase of the real estate, a due diligence of the underlying real property has to be conducted. The seller would be expected to provide, as in the case of an ordinary share deal, warranties and an indemnity in respect of any undisclosed liabilities and any undisclosed matters that adversely affect the enterprise's assets.

### *Tax aspects*

#### **Business tax**

Generally, BT is exempted for equity transfer. However, if the major assets of the seller are real estate properties, it is possible for Chinese tax authorities to deem the transaction as transfer of land and property. If this is the case, BT is triggered at a rate of 5%.

#### **Corporate income tax**

Gain on disposal of equity derived by an enterprise in China is subject to CIT at a rate of 25%. Gain on disposal of equity interest derived by a non PRC enterprise is subject to withholding income tax at a rate of 10%.

#### **Land value appreciation tax**

Generally, LVAT is not applicable to equity transfer. However, if major assets of the seller are real estate properties, it is possible for Chinese tax authorities to deem the transaction as indirect transfer of real estate property. If this is the case, LVAT is triggered if there is appreciation in value of real estate property. The appreciation amount is subject to LVAT at progressive rates from 30% to 60%. For sales of ordinary standard property units, LVAT can be exempted if the appreciation portion is not in excess of 20% of the amount of deducted items.

## Construction issues

### *Legal aspects*

Generally, the following documents need to be retained for a legal and qualified construction project:

- Land use right certificate
- Construction land planning permit
- Construction project planning permit
- Construction permits for construction project

- Real estate sales permit
- Certificate of the completion of the project acceptance
- Commodity residential quality guarantee
- Commodity residential use brochures

## *Building works*

### *Architect*

Technically speaking, foreign investment in the architectural industry is officially allowed in China. However, in practise, it is difficult to obtain the relevant qualification certificate.

### *Construction*

Foreign enterprises are rarely involved in the construction sector. It is rather a cost competitiveness issue than a regulatory restriction.

## *Tax aspects*

### *Corporate income tax*

A construction enterprise shall pay CIT on profit derived from sources inside and outside China at a rate of 25%.

### *Business tax*

Construction service income is subject to BT at a rate of 3%.

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# *Real Estate Going Global Curaçao*

*Tax and legal aspects of  
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*2012*

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# Real Estate Tax Summary – Curaçao

## General

A foreign corporate investor may invest in Curaçao property directly or through a local (e.g. a limited liability company [*naamloze vennootschap* or *N.V.*] or private limited liability company [*besloten vennootschap* or *B.V.*] or non-resident company or through a partnership.

Non-resident companies receiving income from real estate located on Curaçao are subject to the same tax rates with regard to the rental income as local companies.

## Rental income

Companies are subject to the standard flat corporate tax rate of 27.5%.

Local and non-resident companies and partnerships owning Curaçao property are allowed to deduct interest expenses (on loans borrowed from third parties and banks or affiliated companies) and property-related costs from their taxable income. They are also allowed to deduct the majority of other types of business costs including acquisition costs. Certain expenses, such as architect's fees and refurbishment costs incurred during construction, cannot be deducted when incurred and must be added back to the acquisition price of the property.

There is no withholding tax (WHT) on tax-deductible interest on loans in Curaçao. However, in case of a mortgage loan, the interest will be taxed in Curaçao as income of the lender. In case of a loan without mortgage the interest will not be taxable in Curaçao.

## Thin capitalisation rules

There are few restrictions in Curaçao with regard to the deduction of interest paid to related parties, as long as the loan is based on arm's length conditions. It is important to have a written contract that includes a repayment scheme and the term of the loan.

Interest on a loan granted by a related Curaçao exempt company (*vrijgestelde vennootschap*) is not deductible insofar as the loan is higher than three times the net equity of the borrower.

## Depreciation

Property should be capitalised against the historic cost price (i.e. including acquisition costs). An annual depreciation charge on buildings (exclusive of land) ranging from 2% to 3.3% is in general accepted by the tax authorities. Accelerated depreciation is allowed for one-third of the acquisition price of fixed assets, including buildings.

In case of extensive maintenance, the expenses may not be deducted when incurred, but must be added to the acquisition price. In case the maintenance regards a specific component of a property, such as a façade, the heating system, or the roof, this may be booked individually and may be depreciated at a higher rate than the regular 2% to 3.3%. Accelerated depreciation is possible up to 1/3 of the acquisition price.

## Investment deduction

Companies are entitled to an investment deduction regarding investments in buildings (exclusive of land). The investment deduction amounts to 8% of the investment if an existing building is acquired, and 12% of the investment if a new building is acquired, or an existing building is improved. The investor is entitled to the deduction in the year of investment and in the following year, so that the total deduction amounts to 16% or 24% of the investment.

If, however, the building is sold within 15 years after the beginning of the year of investment, a disinvestment addition will be added to the taxable profit of the year of sale and the following year. The disinvestment addition will be computed as 8% (or 12%) of the sales' price. However, the addition will never be computed on an amount higher than the price of acquisition plus later improvements.

## Fiscal incentives

A company that engages in development of land in Curaçao, whereby large plots that lie fallow will be developed by laying out roads and construction of buildings, may be granted various fiscal incentives, such as an exemption for turnover tax and import duties on materials, an exemption for real estate tax and an exemption for profit tax on profits realised through the sale of the developed land. The investor will only be eligible for the aforementioned incentive if the total investment (excluding the investment in land) amounts to at least ANG 2m (approximately USD 1.1m).

## Capital gains on the sale of property

Companies are subject to profit tax on realised capital gains at the ordinary tax rate. Taxation on capital gains realised on the sale of Curaçao property can be deferred by creating a so-called 'replacement reserve'. The property that has been sold must in that case be replaced by a comparable asset within (in principle) four years. The capital gain should be deducted from the purchase price of the newly acquired property, resulting in a lower depreciation charge in future years.

## Other relevant taxes

### *Transfer tax*

The acquisition of legal title to Curaçao property is subject to 4% transfer tax (*overdrachtsbelasting*).

### *Turnover tax*

A 6% turnover tax (*omzetbelasting*) is levied in connection with the sale of real estate, if no transfer tax is due. The rent of real estate is also subject to the 6% turnover tax

unless the property is the home and principal residence of a resident of Curaçao and is leased for a period of at least one year.

### ***Real estate tax***

An annual real estate tax (*grondbelasting*) is levied of 0.3% of the value from the proprietor or anyone who has a right to the property.

# Real Estate Investments – Curaçao

## General

### Introduction

This guide comprises an overview of the tax and legal aspects relating to the acquisition of commercial real estate in Curaçao. It is not intended to be comprehensive and consequently should only be relied on as an introduction to general matters relating to Curaçao property law and tax.

The tax aspects are considered with respect to investments made by corporate investors under the ultimate control of non-resident corporate investors. We have also included some key information on non-trading investments realized by individuals.

### Foreign investment control

There is no restriction on the purchase and sale of real estate which constitutes a foreign direct investment in Curaçao. Non-residents may also freely incorporate a company in Curaçao. No formality is required to acquire a company that owns investment property or has a real estate activity.

## Direct investments

### Ownership

Ownership of a property is the right to enjoy and use of the property in the most absolute manner, provided the use is not prohibited by laws or regulations (freehold). Leasehold rights which confer on the tenant a real estate interest also exist but are quite rare and are often land owned by the Government. It is possible for the bare ownership (*bloot eigendom*) to vest with one owner and the usufruct (*vruchtgebruik*) that gives the right to possession or the income, to vest with a different owner.

Any sale of real estate, whether freehold or leasehold, must take place through a notary public.

### Freehold

A person owning the freehold of a property (*volle eigendom*) is the owner in perpetuity. They may use the property as they please, as long as the law does not prohibit it.

Subject to exceptions, they own the land and everything above and below it, including all buildings and vegetation.

### Timeshare

It is possible to buy and sell timeshare units. A property (an apartment or a house) will in most cases be sold in units of one week. The timeshare owner is entitled to the use of his real estate during that specific period.

### Deed of sale

The deed of sale must be executed before a notary. The deed of sale will identify the parties and the property and set out the T&C of the sale.

## Formalities

When the deed has been executed, the notary public will lodge a copy with the Land Registry for registration and arrange for any outstanding mortgages to be removed.

## Acquisition costs

Unless otherwise agreed, the buyer bears all acquisitions costs, including the notaries' fees and expenses, the Land Registrar's fees and the registration duty.

## Tax aspects

### Taxation of the acquisition of real estate

Either turnover tax or transfer tax will be payable on the purchase of real estate in Curaçao.

### Transfer tax

Transfer tax is payable in case real estate is sold. It is calculated on the purchase price. Unless the parties agree otherwise, the cost of the transfer tax is borne by the buyer.

If the tax inspector considers that the actual market value of the property is higher than the price or the market value declared, he can levy transfer tax on the actual market value.

The transfer tax is fully tax deductible, either as expenses or by way of depreciation allowances where transfer tax is capitalized.

### Turnover tax

Turnover tax is payable in case the transaction is exempt from transfer tax. This may inter alia be the case when the owner of real estate sells the economic ownership but does not transfer the legal ownership.

### Taxation of income and capital gain

Income from, and capital gains realised on the sale of, real estate in Curaçao are taxable in Curaçao, whether a Curaçao resident company or a non-resident company receives them. On the other hand, a non-resident corporation will not be taxed with regard to a capital gain on the sale of shares in a company that is resident on Curaçao. In case a resident company realizes a capital gain on the sale of such shares this will in most cases be tax exempt under the participation exemption.

### Permanent establishment in Curaçao

In principle, the ownership of a Curaçao property by a non-Curaçao company does not in itself constitute a permanent establishment (PE) in Curaçao.

Nevertheless, the direct holding of Curaçao properties may constitute a PE when one of the following criteria is met:

- The non-Curaçao company carries on part of its activities in Curaçao through a fixed place of business.
- The non-Curaçao company carries on activities in Curaçao through a dependent agent acting on its behalf and which has an authority to conclude contracts in the name of the company (e.g. conclusion of lease agreements).

Should the Curaçao property constitute a PE, the net profit would be subject to profit tax. The net after-tax profit may be distributed freely, as Curaçao does not levy a branch tax.

### Corporate income tax

The taxable rental income corresponds to the gross rental income less deductible expenses both determined on an accrual basis, whether realised directly, or through a given Curaçao vehicle.

If the investment is realised through a corporate structure the income is subject to Curaçao corporate tax. The standard rate of corporate tax is 27.5% as of 1 January 2012.

When the investment is realised through a partnership type company which is not liable to corporate tax, the taxable income is determined at the level of the company, but the burden of tax lies in the hands of the shareholders.

### Personal income tax

When a taxpayer holds a property directly or through a tax transparent company, the taxable rental income corresponds to cashed rental income less deductible expenses, unless the leasing of the property does not constitute a business. If the property does not constitute a business the cashed rental income is taken into account at 65%, and no expenses may be deducted except for interest paid on a loan taken out to acquire the property.

The net rental income received is subject to rates ranging from 0% to 49% (for income received in 2012).

## Purchase of a real estate company

### *Legal aspects*

Unlike the case of a direct real estate purchase, the intervention of a notary public is not mandatory. The seller and buyer typically instruct their usual lawyers and other advisers to advise them in connection with the deal.

### *Tax aspects*

The transfer of shares is in principle exempt from corporate income tax based on the application of the participation exemption and in case the seller is a non-resident shareholder who had not been resident on Curaçao for at least ten years.

### Direct tax liabilities

Contrary to an asset deal scenario where the purchaser does not bear any tax liability for debts preceding the purchase of the property itself if the vendor is in default, in a share deal scenario the purchaser will inherit all current or pending tax liabilities which may exist at the level of the target company.

Consequently, as part of a due diligence exercise, the purchaser should carry out a tax review of the company before the purchase and negotiate a price discount and/or a tax warranty in order to protect his interests.

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# *Real Estate Going Global Cyprus*

*Tax and legal aspects of  
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*2012*

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All information used in this content, unless otherwise stated, is up to date as of  
20 August 2012

# *Real Estate Investments – Cyprus*

## Legal

### *EU nationals*

The Acquisition of Immovable Property (Aliens) Law Cap 109, which is the law governing the investment in real estate in Cyprus by non-Cypriots, was amended by law 161(I)/2011 which came into force on 16 December 2011. With this amendment, all restrictions were lifted on the acquisition of real estate by:

- EU citizens with the nationality of an EU or EEA state, and
- companies incorporated under the law of a state of the EU or EEA with their registered seat, central management or main establishment in the EU or EEA.

### *Non-EU nationals and companies*

Non-EU individuals and non-EU companies, including companies controlled by non-EU persons and trusts for the benefit of non-EU persons (“Aliens”), require the permission of the Council of Ministers of the Republic of Cyprus in order to acquire real estate in Cyprus. To “acquire” real estate includes:

- to register title to ownership in real estate,
- to take on lease of real estate for more than 33 years,
- to set up a trust for the benefit of Aliens the subject matter of which includes real estate (either registration of title or lease as above), and
- to acquire such shares in a real-estate-holding Cyprus company (either directly or through a trust) which would result in the company being controlled by an Alien.

The procedure for requesting such permission is straight forward and applications are handled by the local District Administration Office in the district where the real estate is located. There are internal guidelines governing the granting of such permission. Permission is usually granted for one residential property (house or villa) and/or one office premise, or one piece of land not exceeding 3 documents (approximately 4,014 square metres) for the purpose of building a place of residence or office premises.

## Tax

### *Rental income*

#### **Rental income derived from Cyprus property is taxable in Cyprus**

If the property owner is a company (whether resident or non-resident) the corporate tax rate of 10% applies.

If the property owner is an individual, rental income is added on to his/her other Cyprus taxable income and the applicable tax rates are as follows:

As from 1 January 2011

Chargeable Income EUR	Tax rate %	Accumulated Tax EUR
0–19,500	-	-
19,501–28,000	20	1,700
28,001–36,300	25	3.775
36.301- 59.999	30	10.885
60.000	35	

Interest on borrowings used to acquire the property is deductible against rental income.

Other property costs incurred in deriving rental income such as insurance, repairs and maintenance, and property management fees as well as any other expenses incurred wholly and exclusively for the production of the rental income are deductible if the investor is a company.

Individuals are not allowed to deduct such actual costs (except interest), but instead can deduct a notional 20% on the gross rental income, independent of whether any actual expenses were incurred in deriving the rental income or not.

Capital expenditures such as stamp duty and legal costs incurred in acquiring the property are not deductible, but form part of the acquisition costs deductible against sales proceeds realised upon potential disposal of the property.

### *Depreciation allowances*

Annual tax depreciation allowance on the capital costs is available both to the individual and the corporate investor at the rate of 3% for commercial buildings, and 4% for industrial buildings. In case of industrial and hotel buildings that are acquired during the tax years 2012, 2013, and 2014, tax depreciation at the rate of 7% per annum may be claimed.

Upon disposal of the property, a tax balancing allowance/charge is calculated on the difference between sale proceeds and the tax written down value. However, the maximum taxable profit which may be taxed under income tax resulting from a balancing addition is the total tax depreciation allowances claimed during the period of ownership.

Individuals who have been claiming allowances on property from which rental income was received are not subject to the balancing allowance/charge provisions upon disposal.

Further, balancing statements are not required in cases of tax-qualified company reorganisations.

Finally, land does not attract tax depreciation allowances.

### **Capital gains on the sale of property**

Unless the seller is considered to be a trader in real estate, any gains realised upon disposal of immovable property situated in Cyprus will be subject to capital gains tax.

Capital gains tax applies at the rate of 20% on the disposal of property. For capital gains tax purposes property includes real estate property situated in Cyprus as well as shares of companies (not listed in a recognised stock exchange), which own real estate property situated in Cyprus at the date of disposal.

The gain, subject to tax, is the difference between the sale proceeds and the original cost of property as adjusted by an indexation allowance based on the movement of the retail price index. In the case of property acquired before 1 January 1980, the market value as of 1 January 1980 may be used as cost. In addition, sale and other expenses incurred relating to the property for which deduction was not claimed for income tax purposes can be deducted from the capital gain.

The following lifetime exemptions are available to individuals:

- EUR 17,086, of gain arising from the disposal of any property.
- The first EUR 25,629 of gain arising from the disposal of agricultural land by a professional farmer.
- The first EUR 85,430 of gain arising from the disposal of a private residence under certain conditions.

An individual claiming a combination of the above may claim up to a maximum of EUR 85,430.

### ***Dividends and withholding tax***

No withholding tax is imposed on dividend payments to investors – both individuals and companies – who are non-residents of Cyprus in accordance with the Cyprus domestic tax legislation, irrespective of the percentage and period of holding of the participating shares. Therefore, no double tax treaty protection is needed.

### ***Loss carryforward***

Income tax losses may be carried forward and set off against future taxable profits. Income tax losses created from the tax year 1997 onwards can be carried forward indefinitely. In addition, from 1 January 2003 onwards, group loss relief provisions apply for operating losses.

Group relief (set-off of the tax loss of one company with the taxable profit of another) is allowed between Cyprus tax resident companies of a group. A group is defined as follows:

- One company holding directly or indirectly at least 75% of the shares of the other company.

- At least 75% of the shares of the two companies are held by another company (directly or indirectly).
- The surrendering company and the claimant company are both members of the same group for the whole of the year of assessment. However In the case where a subsidiary company is incorporated by its parent company during a specific tax year, the subsidiary company will be considered as being a member of the group for the whole tax year and therefore will be able to claim group relief for that tax year.
- Capital tax losses may also be carried forward and set off against future capital gains tax profits.

### *Annual tax on immovable property situated in Cyprus*

The registered owner of immovable property situated in Cyprus is liable to an annual immovable property tax calculated on the market value of the property as at 1 January 1980, at rates varying from 4 per thousand to 8 per thousand. The first EUR 120,000 of the property value as above however is tax-free.

### *Transfer fees*

In general, the purchaser of immovable property is liable to pay transfer fees when the property is registered in their name by the Land Registry Office, at rates varying from 3% to 8%, depending on the market value of the property at the time of the transfer.

### *Stamp duty and mortgage fee*

Unless otherwise stipulated in the sale-purchase contract, the purchaser is liable for the payment of stamp duty at the rate of 1.5 per thousand on the contract price up to EUR 170,860 and 2 per thousand thereafter.

As from 14 August 2007, an amendment has been introduced in the Cyprus stamp duty legislation, capping stamp duty at a maximum of EUR 17,086 for contracts with a value over EUR 8.54m.

In case of mortgage, the registration fee payment is 1% of the amount secured, plus the relevant stamps.

### *Special contribution for defence (SDC)*

Both individuals and corporate investors who are tax residents of Cyprus are also subject to a 3% contribution for defence on the gross rental income, less a notional deduction of 25% on rental income.

As from 1st July 2011, companies, partnerships, the Government or any local authorities that pay rent are required to withhold SDC at source.

The SDC withheld is paid by the tenant to the Income tax office by the end of the month, following the month in which tax was withheld.

### *Value added tax (VAT)*

The supply of new buildings (before their first use as well as the land on which they are built) is subject to VAT at the standard rate of 17%.

The supply of second-hand buildings (after their first use) is exempt from VAT.

The letting of immovable property is also exempt from VAT except where it relates to the following:

- The provision of accommodation in the hotel sector or a sector of similar character.
- The letting of premises and sites for parking vehicles.
- The letting of permanently installed equipment and machinery.
- The hire of safes.

### *Grant for acquisition of residence*

A grant is given to entitled 'persons' for the construction, or purchase or acquisition of a new house (i.e. a house that is subject to VAT) that is used as the main and primary place of residence.

'Persons' entitled to this grant are individuals who are citizens of the Republic of Cyprus, or of any other EU Member State, who reside permanently in the Republic of Cyprus and who have reached the age of 18 at the time of application. The grant is given for houses whose total covered area does not exceed 250 square metres.

The level of the grant is limited to 130 square metres (extended by 15 square metres for each additional child for families with more than three children) and depends on the type of the property and on whether the house was constructed or purchased. The grant is adjusted annually in order to reflect the increase in the Retail Price Index.

### *Imposition of the reduced rate of 5% on the acquisition and/or construction of residences for use as the primary and permanent place of residence*

The reduced rate of 5% applies to contracts that have been concluded as from 1 October 2011 onwards provided they relate to the acquisition and/or construction of residences to be used as the primary and permanent place of residence for the next 10 years.

For contracts concluded up to 30 September 2011 for the acquisition and/or construction of residences for use as the primary and permanent place of residence, the eligible person must apply for a grant.

The reduced rate of 5% applies for the first 200 square metres of residences of total covered area of up to 275 square metres. In the case of families with more than 3 children the allowable total covered area increases by 15 square metres per additional child beyond the three children.

The reduced rate is imposed only after obtaining a certified confirmation from the VAT Commissioner.

The eligible person must submit an application on a special form, issued by the VAT Commissioner, which will state that the house will be used as the primary and

permanent place of residence. The applicant must attach a number of documents supporting the ownership rights on the property and evidencing the fact that the property will be used as the primary and permanent place of residence.

The documents supporting the ownership of the property must be submitted together with the application. The documents supporting the fact that the residence will be used as the primary and permanent place of residence (copy of telephone, water supply or electricity bill or of municipal taxes) must be submitted within six months from the date on which the eligible person acquires possession of the residence.

A person who ceases to use the residence as his primary and permanent place of residence before the lapse of the 10 year period must notify the VAT Commissioner, within thirty days of ceasing to use the residence, and pay the difference resulting from the application of the reduced and the standard rate of VAT attributable to the remaining period of 10 years for which the property will not be used as the main and primary place of residence.

Persons who make a false statement to benefit from the reduced rate are required by law to pay the difference of the additional VAT due. Furthermore, the legislation provides that such persons are guilty of a criminal offence and, upon conviction, are liable to a fine, not exceeding twice the amount of the VAT due, or imprisonment up to 3 years or may be subject to both sentences.

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# *Real Estate Going Global Czech Republic*

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# *Real Estate Tax Summary – Czech Republic*

## Introduction

The real estate sector in the Czech Republic has experienced stagnation in 2012. The tax environment may be affected by the pending legislative changes aimed at the sustainability of public budgets proposed for the period from 2013 to 2015.

## Taxation

When investing in real estate in the Czech Republic, the following key points should be considered:

- In principle, Czech legal entities, Czech branches of foreign companies, and European Union (EU) individuals and entities may directly acquire Czech real estate, although certain restrictions remain in place.
- The general Czech corporate income tax rate for 2012 is 19%.
- Tax losses may, in principle, be carried forward for five tax periods immediately following the tax period in which the tax loss arose.
- Certain restrictions on the ability to redeem losses apply if there is a substantial change in the ownership of a company.
- There is no carry back of losses in the Czech Republic.
- Tax losses cannot be set off against the profits of a group company.
- Dividends and interest payments are liable to 15% withholding tax (WHT) (this rate may be reduced by a double taxation treaty, if applicable). A 0% WHT applies to qualifying dividend distributions and interest payments, in accordance with the EU Parent-Subsidiary and Interest-Royalties Directives.
- Both realised and unrealised foreign exchange differences are subject to corporate income tax (CIT) in the tax period in which they arise.
- Real estate transfer tax is generally charged at a flat rate of 3% on the transfer of ownership title to real estate. According to the pending law in legislative process, the flat rate is proposed to be increased to 4% as of 2013.
- No capital duty is levied in the Czech Republic.
- Thin capitalisation rules allow a debt-to-equity ratio of 4:1 for loans from related parties to restrict tax-deductible financial costs.

## Legal aspects

Due to foreign exchange restrictions, foreign companies that wished to acquire Czech real estate have, in the past, established or acquired Czech companies. This restriction was based on special conditions agreed between the Czech Republic and the EU, i.e. a seven-year transition period applies since the Czech Republic joined the EU in 2004. Since May 2011, the only restriction on acquisition applies on sale of agricultural land and forest from the property of the Czech state.

Ownership of real estate can be acquired through, e.g. a purchase contract or donation, a contribution to a company, or inheritance.

A contract for the transfer of real estate must be in writing and the signatures must be verified. If real estate is transferred on the basis of a contract, ownership is acquired by its registration with the Real Estate Cadastre, according to specific regulations governing such a transfer (unless a special law provides otherwise).

Review of ownership titles is an important component of legal due diligence in the Czech Republic, because of the transformation of real estate evidence in the Czech Republic in the early 1990s and the previous regime, during which ownership rights were not properly entered into books.

# Real Estate Investments - Czech Republic

## Investing through a local entity

### Methods of acquisition

An investor may either establish a Czech legal entity that will directly acquire the real estate or acquire shares in a Czech special-purpose company that owns the property.

It is advisable to conduct a thorough due diligence review of the target company before acquiring its shares. In such a due diligence review, the legal, financial and tax positions of the company should be examined. Generally, the seller should be asked for certain representations, warranties and indemnities regarding the legal, financial and tax position of the company.

### Choice of entity

Under the Czech Commercial Code, the following Czech legal entities may be established as business entities:

- General partnership (*verejna obchodni spolecnost*).
- Limited partnership (*komanditni spolecnost*).
- Limited liability company (*spolecnost s rucenim omezenym*).
- Joint stock company (*akciová spolecnost*).

All four types of entities may hold real estate, even if they are fully owned by foreign entities or foreign individuals.

A limited liability company and a joint stock company are the most frequently used types of companies for holding real estate. A limited liability company may be founded by one or more resident or non-resident persons (the maximum is 50), who may be either legal entities or individuals. The minimum registered capital required for new limited liability companies to be founded is CZK 200,000. The minimum investment by a participant is CZK 20,000.

Czech law includes a restriction on the ownership of limited liability companies that prevents a limited liability company with a sole shareholder from acting as the sole shareholder of a Czech limited liability company (so called 'anti-chaining law'). The general interpretation is that this restriction also applies to foreign limited liability companies.

A joint stock company may be founded by one founder if this is a legal entity; otherwise, a joint stock company can only be founded by two or more persons. Proposed new joint stock companies require a minimum share capital of CZK 2m if the company is to be established without a public offer of shares, or CZK 20m if the company is to be established with a public offer of shares. There is no minimum share value.

## *Fund vehicles*

The Act on Collective Investments allows real estate investment via either real estate funds or funds of qualified investors. Real estate funds have the form of open-end funds while multiple forms of incorporation are allowed for funds of qualified investors – either as a joint-stock company, closed-end unit fund, or open-end mutual fund. Both types of funds are subject to a reduced corporate income tax rate of 5%.

These entities may become part of existing international fund structures, especially fund of qualified investors where the Parent-Subsidiary Directive may be applied on dividends paid.

## **Tax**

### *Corporate income tax – general aspects*

Legal entities established in the Czech Republic, and foreign legal entities with their place of management in the Czech Republic, are taxed on both their Czech and foreign-sourced income.

The basis for computing the taxable income of a company is the difference between the company's taxable revenues and its tax-deductible costs. Tax-deductible costs generally include depreciation of buildings, structures and other assets; repairs; maintenance; real estate tax paid; real estate transfer tax paid; and other expenses incurred to generate, assure and maintain the company's taxable income. For a number of costs, it is explicitly stated in the law that they are non-deductible.

Czech tax law requires that transactions between related parties be carried out on an arm's length basis, i.e. at usual market prices. If the price of a transaction differs from the price that would be agreed between independent persons under the same or similar business conditions, and the reason for this difference cannot be satisfactorily documented, the Financial Office may challenge the contracted price and adjust the tax base by the ascertained difference. It is possible to apply for binding transfer pricing rulings from the tax authorities.

### *Depreciation*

With the exception of land, real estate is generally depreciable for tax purposes. Many acquisition-related expenses (such as architect's fees, lawyer's fees, notary's fees), should be capitalised as part of the cost of the relevant real estate. With regard to interest costs incurred before putting the asset into use, the taxpayer has the option to capitalise such interest costs or not.

Tax depreciation of buildings acquired through purchase may commence in the year when an application for the registration of ownership title is delivered to the Real Estate Cadastre, supposing that the ownership title is transferred and the real estate is put into use.

In the first year of depreciation, tangible assets are to be classified into one of six depreciation categories, with minimum depreciation periods ranging from 3 to 50 years. The sixth depreciation category includes hotels, 'administrative buildings' (such as office buildings), department stores and some other assets; the depreciation period for such assets put into use after 31 December 2003 is 50 years.

Generally, for newly acquired assets, the owner of the asset will determine the method of tax depreciation. Tax depreciation may be calculated using either the straight-line method or the reducing-balance method, whichever the taxpayer selects. The chosen method of depreciation cannot be changed during the depreciation period. A taxpayer has the right to stall, and then to recommence at a later time, claiming tax depreciation.

Special provisions need to be considered with respect to the tax treatment of fit-out works installed by the lessee in leased premises, in order to avoid disadvantageous tax impacts for both the lessor and the lessee, especially when lease agreements are terminated.

### *Withholding taxes*

Dividends are subject to a 15% WHT. In the case of dividend payments to a recipient abroad, the relevant double taxation treaty may reduce this rate. The Parent-Subsidiary Directive is available to remove WHT on qualifying dividend distributions paid to shareholders in EU Member States or other qualifying Czech entities.

The dividend WHT is deducted at source and, for Czech purposes, is considered as the final tax liability. This implies that if the recipient is a Czech company or resident, they are not taxed on such dividend income.

Interest paid to non-resident recipients is subject to WHT at a rate of 15%. The rate may be reduced in accordance with the relevant double taxation treaty. As of 1 May 2004, a 0% WHT applies to qualifying interest payments, as a result of the implementation of the EU Interest-Royalties Directive.

### *Value added tax (VAT)*

VAT is charged at two rates, the standard rate of 20%, which applies to most goods and services and the reduced rate of 14%, which in general applies to foodstuff and some other expressly listed goods and services. Currently, the Czech government is preparing an amendment that should increase the rates in 2013.

The transfer of land is generally VAT-exempt; however, the sale of 'construction land' is liable to VAT at the rate of 20%.

The transfer of unfinished structures (including buildings, houses) and the transfer of finished structures effected within three years after (i) the first use of the real estate started, or (ii) the very first approval for use of the real estate, whichever occurs earlier, are subject to VAT at 20%. The transfer of residential buildings and the provision of construction work related to residential buildings are subject to 20% VAT; however, real estate that qualifies as 'social housing' is subject to the reduced 14% VAT. According to the current definition of 'social housing', a large portion of residential development will likely fit into this category. Accommodation services in hotels are currently subject to the 14% VAT rate.

The rent of real estate is generally VAT-exempt, but in certain situations it is possible to apply VAT on the rent. In this case the applicable rate is 20%.

If a company registered for VAT purchases a building for entrepreneurial activities, it is, in principle, entitled to claim the related input VAT. A full refund will be granted if the building is only used for activities that generate taxable supplies. However, no refund will be granted if the building is only used for exempt supplies. A partial refund will be given if the building is used partly for taxable and partly for exempt supplies.

A change in the use of a building (e.g. from non-exempt to exempt activities or a change in the ratio of use between non-exempt and exempt use) in the ten years subsequent to its acquisition may have an impact on the input VAT claimed. In certain situations this may imply that part of the claimed input VAT has to be repaid.

From 2012, the construction and assembly work are subject to the reverse charge mechanism.

### *Real estate tax*

Currently, real estate tax is for most corporate owners a negligible cost despite an increase in real estate tax rates. This tax is generally recovered from tenants via service charges.

## Direct investments in real estate

In some cases it may be tax beneficial for a foreign entity to structure an acquisition of Czech real estate through a branch, even if registering a branch is as administratively demanding as incorporating a Czech company. Another significant determining factor will be the exit route. Generally, the same consequences as in the case of a direct sale of real estate by a Czech legal entity will apply, the most significant proceeds being subject to real estate transfer tax of 3% (from 2013 proposed increase to 4%) and capital gains being subject to 19% CIT in the Czech Republic. If a share deal is preferred, this will likely imply that the shares in the foreign company owning the Czech branch need to be sold. This possibly reduces flexibility to a seller.

From a Czech point of view there can be scope for savings of WHT on repatriation of profits from rental of the property, and different tax treatment applies to financing in respect of the amount of interest that can reduce taxable profits. VAT issues also need to be addressed.

## Buying and selling property

### *Capital gains and losses on the sale of property or shares*

There are no separate capital gains taxes. Capital gains are considered business profits and are as such, subject to income tax. Therefore, corporate owners of real estate are subject to CIT on capital gains realised on the sale of property in the Czech Republic, at the standard CIT rate. Capital losses on the sale of real estate, except land, are generally deductible for tax purposes.

If shares in a Czech entity are sold by one foreign shareholder to another, the capital gains derived from the sale of the shares is treated as Czech-sourced income and is, therefore, subject to Czech tax, irrespective of the residency status of the seller and purchaser. In cross-border situations, however, subject to the wording of the relevant double tax treaty, the gain may be outside the scope of Czech taxation. Nevertheless, in certain double tax treaties (e.g. between the Czech Republic and France), such an exemption does not apply if the assets of the entity of which the shares are sold consist only or predominantly of immovable property.

Capital losses from the alienation of shares in a limited liability company are not tax-deductible. The same treatment applies in general to joint stock companies, although certain exceptions may apply.

## *Use of separate property holding companies*

To avoid taxes on the disposal of the property, it is common practice to hold properties in separate special-purpose companies. Disposals are effected by selling shares in the property company.

It is important from the outset for the holding company to be located in a jurisdiction with an appropriate tax treaty and a tax system that refrains from taxing capital gains. The selection of an appropriate jurisdiction is therefore of considerable significance. A jurisdiction is less suitable if its double tax treaty with the Czech Republic treats the sale of shares in a property holding company in the same way as the disposal of the underlying property.

Czech domestic law contains a participation exemption regime with regard to capital gains from the sale of shares in a subsidiary. One of the main conditions for applying the participation exemption is a minimum holding of 10% of shares in the subsidiary for an uninterrupted period of at least 12 months. The participation exemption can be applied to the transfer of shares in a Czech subsidiary and also in a company that is a tax resident in another EU Member State, or in a third country having a double tax treaty with the Czech Republic.

## *Real estate transfer tax*

The paid transfer of ownership title to real estate is subject to real estate transfer tax. For real estate transfer tax purposes, the term 'real estate' is generally interpreted according to the definition of the Czech Civil Code. The Civil Code defines real estate as plots of land and structures connected to the land by a solid foundation.

Real estate transfer tax is charged at a flat rate of 3%. The tax base is generally the sales price or the officially assessed value, whichever is higher.

Real estate transfer tax is generally paid by the seller with the purchaser acting as guarantor. In certain cases (e.g. pursuant to the execution of a court decision, in connection with bankruptcy, or composition proceedings, a public auction, etc.) the obligation to pay real estate transfer tax resides with the buyer.

Real estate transfer tax paid to the Czech tax authorities is considered as a tax-deductible cost for CIT purposes.

There are certain exemptions from real estate transfer tax, one of them being the first paid transfer of new buildings, provided that certain conditions are met. The transfer of real estate as an 'in kind' contribution into the registered capital of a company is also exempt from real estate transfer tax if certain criteria are met. This exemption only applies if the contributing party retains a share in the company for a period of at least five years, subsequent to the contribution.

The transfer of real estate as a consequence of either a merger or consolidation with another company, the transformation of a company into another legal form, or as the result of the division of a company by a demerger process is generally also exempt from real estate transfer tax.

## *VAT*

If VAT is to be levied, then generally the tax base for VAT purposes is the sales price of the real estate (excluding land). The VAT liability arises on the day on which the real

estate is handed over for use, or when the decision from the Land Register is received, or when the change of ownership title is recorded in the Land Register, whichever is earlier.

## Financing real estate in the Czech Republic

### *Debt financing*

#### Thin capitalisation rules

With the exception of thin capitalisation and transfer pricing rules, there are no specific rules in force that limit the tax deductibility of interest on loans for the acquisition of real estate or shares. As of 1 January 2004, interest on borrowings taken up to acquire shares is generally non-deductible, unless proved otherwise. Subject to thin capitalisation rules, expensed interest is generally fully deductible, provided that financing was granted under arm's length conditions and the interest was incurred for generating taxable income.

For thin capitalisation purposes, related parties are defined as entities that directly or indirectly participate in the management, control or capital of the recipient of the credit or loan. Participation in the control or capital means a shareholding exceeding 25% in the registered capital of the recipient of the funds borrowed.

Thin capitalisation limits are determined by the ratio of a company's borrowings to its equity. Interest on the amount of debt exceeding these ratios is non-deductible. For tax purposes, such surplus amount is considered as a dividend (unless the dividend income is paid to a tax resident in another EU country or in another country being part of the European Economic Community) and, in case of payment to a non-resident, generally liable to 15% WHT. This withholding may be reduced by relevant double taxation treaty.

The major features of the thin capitalisation rules are as follows:

- The tax-deductibility test applies to all so-called 'financial costs on loans' (i.e. interest plus other related costs, such as bank fees).
- The debt-to-equity ratio for related-party loans to equity is 4:1.
- Financial costs paid on profit participating loans are fully tax non-deductible.

#### Foreign exchange differences

Unrealised foreign exchange (FX) differences on receivables and payables are for accounting purposes to be recognised and included in the profit and loss (P&L) account. Unrealised and realised FX differences are therefore treated similarly for accounting purposes. This will generally also be the case for the tax treatment.

#### Transfer pricing

Interest on loans provided by related parties should, as with all related party transactions, be charged at arm's length. If this condition is not met, and the difference is not properly documented, the tax authority is entitled to increase the taxpayer's tax base by the ascertained difference.

### **Withholding tax**

Interest payments abroad are usually liable to a 15% WHT. This rate may be reduced by the applicable double taxation treaty. As of 1 May 2004, a 0% WHT applies to qualifying interest payments between related parties, as a result of the implementation of the EU Interest-Royalties Directive.

### ***Equity financing***

#### **Increase of registered share capital**

According to the Czech Commercial Code, certain formal procedures must be undertaken to increase the registered share capital of a Czech company. These are not further commented on in this publication.

#### **Contribution into other capital funds**

Czech legislation expressly states the possibility of making monetary contributions to the equity of a limited liability company that do not form part of the registered share capital. This non-registered equity is referred to as 'other capital funds'. A contribution to the other capital funds account is administratively relatively easy, as it does not have to be registered with the Czech Commercial Register.

A contribution to other capital funds has no influence on the amount of the registered share capital. It should be also possible to repay contributions to shareholders, but only as far as losses have been covered.

A similar possibility to create other capital funds can exist in certain circumstances for joint stock companies having a single shareholder.

## **Municipal tax system in the Czech Republic**

### ***General***

Real estate tax consists of two taxes: land tax and building tax. The administrator and collector of both taxes is the financial office of the district in which the real estate is situated.

Real estate tax is generally payable by the registered owner of the land or buildings. In certain cases the user or the lessee is the payer. The taxable period is the calendar year. Taxpayers must file the tax return with the financial office by 31 January of the taxable period. It does not need to be filed in subsequent years, unless there is a qualifying change in the taxpayer or the character or size of the property. The tax is generally payable in two equal instalments during the year for which the tax is assessed.

### ***Land tax***

Land tax is generally levied on land that is located in the Czech Republic and registered in the Real Estate Cadastre. There are certain exemptions from land tax, such as plots of land owned by the State or used by accredited diplomatic representatives in the Czech Republic, plots of land owned by public universities, provided that they are not used for business activity or rented out. Some of the exemptions have to be claimed in the tax return.

The standard tax rate for construction sites is multiplied by a coefficient according to the size of the municipality in which the land is located. For Prague, the coefficient is 4.5. For other locations, the coefficient is between 1 and 3.5. Municipalities are allowed to increase or decrease (within certain limits) the coefficient for certain parts of the municipality by public ordinance. The coefficient for Prague can be increased to 5 at maximum.

### *Building tax*

Building tax is generally applied to structures for which an approval for use is issued and which are located in the Czech Republic. The real estate tax is also levied on flats and non-residential premises individually registered in the Real Estate Cadastre.

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# *Real Estate Going Global Denmark*

*Tax and legal aspects of  
real estate investments  
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*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 1 August 2012.**

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# ***Real Estate Tax Summary – Denmark***

## **General**

A foreign company can invest directly in real estate in Denmark, or through a public or private limited company, which is resident in Denmark.

Foreign companies etc. or individuals who do not reside in Denmark, and who have not previously resided in Denmark for an aggregate period of five years prior to the date of acquisition, can only acquire real estate in Denmark through permission from the Minister of Justice. EU citizens and EU companies, established in accordance with legislation in a Member State may, under certain conditions, acquire real estate in Denmark without permission from the Minister of Justice.

Special rules apply with respect to holiday houses.

## **Rental income/taxable income**

Public and private limited companies resident in Denmark are taxed at a rate of 25% of their taxable income.

Companies may deduct interest expenses on loans and other expenses from their taxable income, however, subject to thin capitalisation rules as well as rules limiting the deductibility for net financing expenses.

Thin capitalisation rules apply when the total debt-to-equity ratio exceeds 4:1. The rules may limit the deductibility of interest expenses, capital losses and foreign exchange losses on loans from related parties or from third parties, if secured by a related party, provided the loans have not been obtained at full market conditions. Interest should not be subject to thin capitalisation limitations if it can be substantiated that loans have been obtained on market conditions (the company has the burden of proof, which is heavy and generally only substantiated by means of a binding loan offer from a bank).

In addition to the thin capitalisation rules, net financing expenses (i.e. interest income and expenses and capital gains and losses on claims, debt and financial contracts, etc., but not including rental income) are only deductible to the extent they do not exceed 3.5% (2012 figure) of the tax value of qualifying assets. Further, net financing expenses can only reduce the taxable income before net financial expenses by a maximum of 80%. Net financing expenses of DKK 21.3m may, however, always be deducted.

Due to the fact that real estate companies usually have rental income and financing expenses, debt financing should be carefully considered. In principle, interest expenses corresponding to the 3.5% of the tax value of the building may only be deductible.

Certain expenses in connection with the acquisition of real estate and improvements must be added to the purchase price of the real estate or to the value of the shares in case of acquiring a Danish real estate company.

## Tax consolidation

Joint taxation is mandatory for all Danish companies and Danish branches of foreign companies, including real estate, which are part of the group. The definition of a group corresponds to the definition of a group for accounting purposes. Under the joint taxation scheme, losses realised by one company can be offset against profits realised by another company.

Foreign group-related companies may effectively under certain circumstances also be included in a joint taxation group. If so, all foreign group-related companies must be included in the joint taxation and the consolidation must be in place for at least ten years. Rather complex rules apply in relation to taxation of recapture of foreign losses in connection with either a termination of an existing tax consolidation (i.e. due to a takeover), or the election of such tax consolidation.

## Withholding taxes

Interest on intra-group borrowings may be subject to interest withholding tax (WHT) of 25%. In principle, interest WHT should not be levied if the lender is a company covered by the EU Interest and Royalties Directive or is entitled to relief under a double taxation treaty with Denmark. However, it is a requirement that the recipient is the beneficial owner of the interest.

Dividends on shareholdings of less than 10% of the share capital are subject to Danish WHT of 27%. Dividends would not be subject to Danish WHT, provided the recipient holds 10% or more of the share capital and is resident within the EU or a state with which Denmark has a double tax treaty. However, it is a requirement that the recipient is the beneficial owner of the interest.

Since 2009, the Danish tax authorities have raised claims towards Danish companies arguing that interest WHT should have been imposed on interest payments on intra-group loans and on dividend distributions, even though the recipient was covered by the EU Interest and Royalties Directive or the EU Parent-Subsidiary Directive or a double taxation treaty. The arguments have been based on the fact that the recipient cannot be regarded as the beneficial owner of the interest or dividend because the recipient is considered a conduit company and has no power to dispose of the amounts received.

In light of the uncertainty of the Danish tax consequences of interest payments and dividend distributions to foreign related parties, we recommend that a Danish tax advisor is contacted before distributions are made or a financing structure is set up.

## Depreciation

Certain specifically defined buildings that are used for commercial purposes can be depreciated for tax purposes. Land cannot be depreciated.

Depreciations are made on the basis of the purchase price, i.e. according to the straight-line method.

The purchase price must be allocated between land, buildings, installations, machinery and equipment.

The depreciation rate for buildings and installations is 4% a year with effect from the year of purchase. A higher rate may apply if the physical lifetime is 25 years or less.

Machinery and equipment, furniture and fixtures are depreciated on a pool basis, with up to 25% on a declining balance.

## Property tax

Real estate taxes are divided into a municipal land tax and a municipal real estate tax on buildings.

For municipal land tax, tax rates vary between 1.6%-3.4% on the value of the land depending on the municipality in question. For the Copenhagen area the tax rate is 3.4%. The basis for the tax is the value of the land, which generally is less than 50% of the value of the real estate (i.e. building and land).

Municipal real estate tax on buildings used for business purposes is 1% in Copenhagen, but lower in most other municipalities. A basic allowance of DKK 50,000 (approximately EUR 6,700) is granted.

## Capital gains on the sale of property

Companies subject to full Danish tax liability and branches are taxed with 25% on gains from the sale of Danish real estate. The purchase and sales prices are converted to cash values.

The profit is the difference between the sale price and the adjusted acquisition price. In principle, the acquisition price is adjusted by DKK 10,000 per year as a fixed amount. Improvements exceeding DKK 10,000 may also be added.

Any tax depreciations will be recaptured in connection with the sale of buildings. Capital losses realised on the sale of property can only be offset against taxable profit on properties in the year of disposal, or in the following income years.

If the company is engaged in buying and selling real estate as its trade, the profit is fully taxable, regardless of the period of ownership and no adjustments are allowed. Recaptured depreciation is also taxed. In brief, taxable profit is computed as the sales price, less the acquisition price, which has been reduced by tax depreciation. No conversion to cash value is made. Losses are tax deductible and can be carried forward without limitations.

## Capital gains on the sale of shares

Foreign corporate shareholders of Danish real estate companies are not subject to tax in Denmark on capital gains from the sale of shares.

Danish corporate shareholders holding at least 10% of the share capital of a Danish real estate company would not be subject to Danish tax on capital gains from the sale of the shares, and losses would not be deductible.

For shareholdings of less than 10% of the share capital (portfolio share), capital gains would be taxed with 25% and losses would be deductible. Listed portfolio shares are

taxed on a mark-to-market basis, i.e. on an unrealised basis, whereas unlisted portfolio shares are taxed upon realisation, however, with the possibility to opt for mark-to-market taxation.

## Losses carryforward

Any operating losses may be carried forward and offset positive income of the company itself or income of entities that were members of the joint taxation during the period the losses derive from. Change of ownership may restrict the possibility to carry forward losses.

New rules have been adopted whereby losses carry forward may not reduce the taxable income by more than 60%. A safe harbour of DKK 7.5m losses carried forward may always offset taxable income. The new rules have effect for income years starting 1 July 2012 or later.

## Real estate stamp duty/Value added tax (VAT)

In connection with the sale of real estate, a deed is subject to a stamp duty of 0.6% of the purchase sum, or at least of the rateable cash value of the property. In addition, a registration fee of DKK 1,400 is charged.

Mortgage loans obtained to finance real estate are subject to a stamp duty of 1.5% subject to planning around stamp duty on existing mortgages and an additional registration fee of DKK 1,400 is charged.

In principle, the sale of Danish real estate would not trigger Danish VAT. However, as of 1 January 2011 the sale of newly built real estate or real estate that has been substantially rebuilt (more than 50% of the value of the real estate) would be subject to Danish VAT.

We recommend consulting Danish advisors with respect to any VAT issues in relation to acquisition or sale of Danish real estate.

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All information used in this content, unless otherwise stated, is up to date as of 21 June 2012.

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# Real Estate Tax Summary – Finland

## General

A foreign investor may invest in Finnish real estate property through a local company (such as an *Osaakeyhtiö* (Oy)), a local partnership (such as a *Kommandiittiyhtiö* (Ky)) or a non-resident company or partnership. There are no exchange controls and no special investment laws governing foreign investments.

## Rental income

The standard corporate income tax rate in Finland is 24.5% from 1 January 2012 onwards. In computing the tax liability in respect of rental income, deductions will generally be available in respect of items such as depreciation, maintenance, management and administration, interest costs and real estate tax.

Finnish real estate property is often held by a Finnish mutual real estate company (MREC). An MREC is a limited liability company, the shares of which are attributable to certain parts of the real estate property, and the shareholder of the MREC holds/controls the respective parts of the real estate property through the shares (special provisions in the MREC's articles of association are included in this respect). In case of an MREC, rental income will accrue to the shareholder of the MREC, whereas in case of a regular real estate company, rental income will accrue to the real estate company.

## Thin capitalisation

No specific legislation limiting the deductibility of interest expenses paid on intra-group loans is in force for tax year 2012 in Finland. Debt-to-equity ratio must be at arm's length and is to be considered on a case-by-case basis.

## Depreciation

Tax depreciation is limited to the cumulative charges made in the books. Acquisition costs of land may not be depreciated. Acquisition costs of buildings and other constructions are depreciated using the declining balance method, the maximum rates being, e.g. 4% for residential buildings, office buildings or other similar buildings, 7% for shops, warehouses, factories, workshops, power stations or similar buildings; 20% for buildings or constructions or part of buildings or constructions used exclusively for research and development; and 25% for machinery and equipment.

# *Real Estate Investments – Finland*

## Real estate tax

In Finland, there is a separate municipal tax on real estate property. The most significant exemptions concern forests and agricultural land. The tax is payable by those who own the taxable property at the beginning of the calendar year, even if they are non-resident investors.

The tax rate is based on the taxable value of each individual real estate property. The general tax rate may vary between 0.6% and 1.35%. For permanent residences, the tax rate may vary between 0.32% and 0.75%. Municipalities decide annually, within agreed limits, what percentage will be used in their particular municipality.

In real estate taxation, the municipality may impose a separate real estate tax on a vacant plot, if the plot is situated on a town plan area and it is not in residential use or under construction. The tax rate on vacant plot may vary between 1% and 3%.

Real estate tax is deductible for corporate income tax purposes, provided that the property has been used for rental or business purposes.

## Withholding taxes on interest payments and dividend distributions

Finland does not levy interest withholding tax under its domestic tax law from non-resident recipient (as far as the instrument on which the interest is paid on cannot be re-qualified as equity).

The general Finnish domestic withholding tax rate on dividends is 24.5% for non-resident corporations and 30% for non-resident individuals.

However, based on the EU Parent Subsidiary Directive, which has been incorporated into the Finnish domestic tax law, the Finnish dividend withholding tax rate is reduced to 0% in respect of dividend distributions to a qualifying EU resident company that owns 10% or more in the capital of the distributing Finnish company. There is no holding period requirement for the application of the reduced rate of 0% in this respect.

In addition, a non-resident company receiving dividends from Finland should not suffer withholding tax in Finland if the same dividend distributed to a comparable Finnish resident entity would be tax-exempt given that certain conditions are met (recipient is resident in EEA member state, Finland has agreed on mutual assistance and information exchange in direct taxation matters with the resident country, and Finnish withholding tax is not fully credited in recipients' resident country).

The domestic WHT rate is reduced to 18.38% if the requirements for WHT exemption listed above are not met, and:

- if the non-resident recipient is a financial, insurance, or pension institution resident in the EEA member state with whom Finland has agreed on mutual assistance and information exchange in direct taxation matters, and

- if the shares belong to its investment assets, or
- if the non-resident recipient is a non-listed company or a private company resident in the EEA area (with whom Finland has agreed on mutual assistance and information exchange in direct taxation matters) receiving dividends from a resident listed company in which it holds less than 10%.

Furthermore, a reduced dividend withholding tax rate may apply under a tax treaty concluded by Finland.

## Consolidation of profits and losses

Finnish tax law uses the concept of group contributions instead of group consolidation to offset the losses and gains in a group of companies. However, real estate companies are generally not entitled to the group contributions' system.

## Capital gains

Capital gains realised on the sale of Finnish real estate property is taxable income for a Finnish resident vendor. Similarly, capital gains realised on the sale of shares in a Finnish real estate company is generally taxable income for a Finnish resident vendor.

In accordance with the domestic tax law, Finland is entitled to tax the capital gain realised by a non-Finnish resident, e.g. on a transfer of Finnish real property or shares in a Finnish residential housing company or other company, of which more than 50% of the assets comprise real estate property. An applicable tax treaty may have an effect on the on the Finnish taxation of capital gains.

## Loss carryforward

In principle, ordinary tax losses from business activities can be carried forward for ten years. However, carryforward of tax losses might be forfeited in case of a direct or indirect change in the ownership of the company.

Capital losses in respect of non-business assets can only be deducted from capital gains related to such assets in the same accounting year, or in any of the following five years.

## Transfer tax

The transfer of real estate located in Finland and the transfer of shares in a Finnish company is generally subject to transfer tax.

A transfer of a real estate is subject to a transfer tax of 4%, and a transfer of shares to transfer tax of 1.6 % (under certain conditions transfer tax may not be due on the transfer of shares in a Finnish company if neither the seller nor the purchaser are Finnish residents or Finnish branches of financial institutions).

## Value added tax (VAT)

The general Finnish VAT rate is 23%. The general VAT rate will rise to 24% as of 1 January 2013. The supply of shares of a real estate company or a mutual real estate company is not subject to VAT. The supply of immovable property is also not subject to VAT in Finland.

VAT relating to transaction costs is only deductible, if the purchaser is registered for VAT and the transaction relates to the company's VAT-able business. VAT relating to supply or acquisition of shares in a real estate company is usually not deductible. VAT relating to supply or acquisition of shares in a mutual real estate company should be deductible as far as the premises are used for VAT deductible purposes and the purchaser will continue the VAT deductible use. In the light of recent ECJ and Finnish case law, the interpretation regarding the deductibility has also become increasingly stringent and the current practice is uncertain and highly dependent on the individual facts and circumstances of the case. In the tax praxis, the tax authorities have also paid more and more attention to these costs, and have challenged them in several occasions.

### *Letting of real estate*

According to the main rule, letting of real estate is not subject to VAT. Therefore, input VAT is not recoverable.

Applying for voluntary VAT registration for the lease of immovable property and, as a result, recovery of input VAT is possible. However, voluntary VAT liability is subject to special rules and can be applied only under certain circumstances.

### *Adjustment rules*

The rules related to real estate investments changed as of 1 January 2008 applying to construction and refurbishment finished on 1 January 2008 or later. VAT deduction in relation to the new-building and large refurbishment (real estate investment) are subject to adjustment, if the real estate (building, land, permanent construction or a part thereof) is sold or transferred from VAT deductible use to a use which does not entitle to VAT deductions or vice versa.

The adjustment time for negative and positive VAT deduction adjustments is ten years. Every year the actual VAT deductible use is compared to the original use. Every year 1/10 of the VAT is subject to adjustment consideration. The adjustment liability decreases 10% of the original amount each year.

## Reverse charge (VAT) in the construction sector

A domestic reverse charge system in the construction sector came into force on 1 April 2011. The aim of the system is to reduce the potential tax risk associated with VAT fraud. There are two prerequisites that need to be actualized for the reverse charge to apply. The reverse charge mechanism will apply 1) when construction work is performed in Finland or when people are contracted by a Finnish business to perform construction work and 2) when the buyer is a business selling construction services on an ongoing basis.

The reverse charge mechanism applies to e.g. construction services such as excavation and foundation work, construction work, installation work, finishing work, on-site cleaning and supplying contracted employees to a site. It is noteworthy that the scope of services to which the reverse mechanism applies is still relatively unclear so it is advisable to check each service separately before invoicing it.

In situations where the reverse charge applies and the buyer is VAT liable, the seller is required to issue an invoice. It is the seller's obligation to establish whether the buyer meets the requirements for the reverse charge system outlined above. If both the services in question and the status of the purchaser meet the requirements, it is mandatory to invoice the services without VAT using the reverse charge mechanism. The supplies and purchases as well as the Finnish VAT calculated by the buyer are reported separately in the Periodic Tax Return form.

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# *Real Estate Going Global France*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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All information used in this content, unless otherwise stated, is up to date as of 8 April 2013.

# Real Estate Tax Summary – France

## General

A foreign corporate investor may invest in French property directly or through a local (e.g. a *société à responsabilité limitée* [SARL], a *société anonyme* (SA) or a *société par actions simplifiée* [SAS]) or non-resident company, or through a partnership such as a *société civile immobilière* (SCI).

Foreign investors frequently invest in French real estate assets through a two-tier structure in which a French company owns the real estate asset, with the shares of the French entity being held by a foreign holding company (Luxembourg or Belgian holding company). This type of structure is frequently used for the acquisition/holding of French property since the sale of the shares in such a foreign holding company (or even the shares in the French company) may fall outside the scope of French capital gains taxation.

## Rental income

Net rental income is taxable in France at a rate of 33.33%.

The effective rate of corporate income tax is:

- 34.43% (surcharge of 3.3%) should taxable income exceed EUR 2,289,000;
- 35% (surcharge of 5%) should taxpayer's turnover exceed EUR 250m;
- 36.10% if the two above mentioned criterion are fulfilled.

Local and non-resident companies and partnerships owning French property are allowed to deduct interest expenses (on loans borrowed from third parties and banks or sister companies) and property-related costs from their taxable income.

Local and non-resident companies are also allowed to deduct the majority of other types of business costs including acquisition costs. Certain expenses, such as architect's fees and refurbishment costs incurred during construction, cannot be deducted when incurred and must be added back to the acquisition price of the property.

There is no withholding tax (WHT) on tax-deductible interest on loans in France when properly documented.

## Barrier on deductibility of financial expenses

Article 23 of the Finance Act for 2013 introduced a new cap on interest expense deductions for companies subject to Corporate Income Tax in France. Companies with a net interest expense over EUR 3,000,000 are subject to a limitation on their full

interest expense, capping the deductibility at 85% of the interest for financial years closed as of 31 December 2012, and 75% of the interest for financial years opening as from 1 January 2014. The term ‘net finance expenses’ is defined as the total amount of finance expenses incurred as a consideration for financing granted to the company, reduced by the finance income received by the company in consideration for financing granted by the company.

Specific barrier rules apply to a tax consolidation.

## Thin capitalisation rules

Related party loans fall within the scope of the French thin capitalisation rules. Since 1 January 2011, related party loans also include loans granted by a third party (e.g. a bank), whereby repayment is guaranteed by a related party.

First, the interest rate levied on a loan granted by a related party should not exceed the annual average effective rates used by financial institutions for variable-interest loans to enterprises for an initial term of more than two years (3.39% for FY 2012) except where the company is in a position to evidence that the interest rate retained is a market rate. Otherwise, the excess interest would not be tax-deductible and would be treated as a deemed dividend.

Secondly, the interest charge should only be tax-deductible if:

- the related party indebtedness of the company does not exceed 1.5 times the level of its net equity at closing or opening; or
- if the interest charge does not exceed 25% of the operating profit before tax, before depreciation charges, before interest paid to related parties, and before part of the financial leasing charges; or
- if the borrowing entity receives interest from related parties for an amount higher than those paid to related parties.

The portion of interest exceeding the highest of these three thresholds is not tax-deductible during the relevant fiscal year except when this portion is less than EUR 150,000.

It should be noted that there is a safe harbour provision whereby thin cap rules should not apply if a French borrowing entity demonstrates that the overall debt-to-equity ratio (D/E) of the group to which it belongs (including foreign parent and foreign subsidiaries) is higher or equal to its own overall D/E.

Specific thin capitalisation rules apply to a tax consolidation.

At last, according to the new rules set forth by article 12 of the Finance Bill for 2011, when interest is paid on a third party’s financing, and a guarantee for the repayment of that financing is provided either by a related party, or by a party whose commitment is itself secured by another company (which is also related to the borrowing entity), then the portion of interest that is payable on the secured part of the financing is treated as interest paid to a related party and, therefore, subject to the thin capitalisation limits of article 212 of the French Tax Code.

When repayment of the loan is secured by a personal guarantee, the portion of interest that would be reclassified as related-party interest would correspond to the amount of interest paid in relation to the secured portion of the third-party debt.

When repayment of the loan is secured by a guarantee *in rem*, the same principle would apply, except that the portion of the loan that is guaranteed would be determined according to the following ratio: value of the asset at the date on which the security has been constituted against the initial amount of the financing. Accordingly, the interest payable in relation to this secured portion of the third-party debt would be reclassified as related-party interest for thin cap purposes.

The term ‘guarantee’ is not defined. As a result, any kind of guarantee is covered, whether personal guarantees or guarantees *in rem* (for instance, mortgage on a property).

The new provisions do not apply in various situations (e.g. if the financing takes the form of a bond issued by way of a public offering or under equivalent foreign regulations; if the loan is guaranteed by a related party solely by way of a pledge of shares against the borrowing entity; the loan has been obtained in connection with the acquisition of shares or its refinancing; if the loan has been taken out by *Sociétés civiles de construction-vente* (SCCVs) with a guarantee given by their partners limited to the level of the partners’ equity in the capital of the SCCV, etc.).

## Depreciation

Each component of a property must be booked individually and depreciated accordingly, i.e. facade, heating system, structures, interiors, etc.

For properties held by a look-through entity (such as an SCI or a *société en nom collectif* [SNC]), the deductible depreciation charge can be limited by the amount of the net rental income generated by the property (difference between the rents and all the property-related costs, including interest), the excess being carried forward indefinitely.

It should also be noted that under certain circumstances, buildings are not treated as depreciable assets, but as inventory (e.g. when owned by brokers or developers).

## Capital gains on the sale of property

Subject to tax treaties, capital gains realised upon the sale of French properties and the sale of real estate shares by local and foreign companies are taxed at 33.33% (34.43%, 35% or 36.10% including surtaxes payable by French tax residents only), which is the standard corporate income tax rate.

However, capital gains realised upon the sale of listed real estate shares is taxed at a reduced corporate tax rate of 19% where the shares are held for at least two years.

In addition, foreign entities and bodies are subject to a 33.33% WHT on capital gains realised upon the sale of French properties, or shares in companies whose assets mainly consist of French properties. A 19% WHT can apply when listed shares are sold. The 33.33% 19% WHT can be offset against the corporate tax due on the capital gains. If the amount of the WHT exceeds the corporate income tax charge, the excess is then refundable.

## Additional corporate income tax (CIT) on dividends

Section 6 of the Second Amending Finance Bill for 2012 introduced an additional CIT of 3% applicable to dividend payments, or to deemed distribution realized as from 17 August 2012, by French or foreign companies and organisms liable to CIT in France and especially to distributions made by SIIC to their shareholders and to distributions from SPPICAV subsidiaries to their parent entities.

Some distributions are specifically excluded from the scope of the 3% tax:

- Amounts distributed between companies which are members of the same tax consolidated group;
- Distributions of dividends paid in shares (under some conditions);
- Distributions of dividends from SIIC subsidiaries to SIIC parent company and distributions to be paid by SIIC in 2013 to meet the distribution requirements.

### 3% tax

French or non-French entities with or without legal personality, including trusts and similar vehicles, owning either directly or indirectly (and whatever the number of companies interposed between the building and the ultimate shareholders) real estate properties located in France, which do not perform a professional activity other than a rental one, fall within the scope of a 3% property tax. This tax is levied annually and is based on the fair market value of French real estate property owned as at 1 January.

Under certain conditions, automatic exemptions (e.g. sovereign states, entities whose stocks are admitted to negotiation on a regulated market and are regularly and significantly traded, pension funds, non-listed open-ended real estate funds) and exemptions subject to filing requirements may apply.

## Withholding tax/dividends

Subject to tax treaty provisions, a 30% WHT applies to branch profits that are deemed to be distributed to the shareholders of a foreign company having a French branch. However, this WHT is no longer applicable to companies located in EU countries and subject to corporate income tax.

Subject to tax treaty provisions, a 30% WHT is levied on dividends paid by a French company to its foreign shareholder. Pursuant to the EU Parent-Subsidiary Directive and under certain conditions, the WHT does not apply to dividends paid by a French entity to its foreign parent company residing in an EU country.

## Real estate transfer tax/Value added tax (VAT)

The acquisition of the legal title to a property in France can be subject to real estate transfer tax at 5.09%, or to real estate VAT at a rate of 19.6% (20% as from 1 January 2014), depending upon the characteristics and use of the property.

The purchase of shares in French or foreign real estate companies, unless listed, is subject to a 5% transfer duty. The same rules apply to the disposal of shares in foreign companies whose assets predominantly comprise real estate assets and/or rights.

As of the 1 March 2010, VAT rules applicable to real estate transactions have been amended. In substance, the VAT regime applicable to real estate transactions is now driven by the seller, whereas the transfer duty regime is driven by the purchaser.

## Surtax on real estate capital gains

As from 1 January 2013, a new tax applies to real estate capital gains (unless a sale agreement has been signed and has acquired a definite date before 7 December 2012) on sales of property, whether involving real estate assets or rights, when the taxable amount, determined after the application of the allowance for holding period, is greater than EUR 50,000.

Taxes paid on sales of taxable assets (excluding, in particular, sales of main residences) are increased by between 2% (if the amount of the capital gains exceeds EUR 50,000) to 6% (if the amount of the capital gains exceeds EUR 260,000). This surtax rate applies to the full amount of the taxable capital gains. Hence, the taxation rate, currently 19%, will be between 20% and 25%, depending on the amount of capital gains realized.

The surtax is due by individuals or tax transparent entities (companies or groups who are within the scope of articles 8 to 8 ter of the FTC), and by taxpayers who are not French tax resident, but who are subject to the individual income tax.

## SIIC (F-REIT) and OPCI

Favorable tax regimes applicable to specific real estate investment vehicles are developed in the following sections.

# *Real Estate Investments – France*

## General

### *Introduction*

This guide comprises an overview of the tax and legal aspects relating to the acquisition of commercial real estate in France. It is not intended to be comprehensive and consequently should only be relied on as an introduction to general matters relating to French property law and tax.

We have excluded from this guide the specific rules relating to operators who buy and hold property as inventory with the intention of resale. Suffice it to say that those players can benefit from a favourable rate of transfer duties when they acquire property as inventory, provided that certain conditions are satisfied.

The tax aspects are considered with respect to investments made by corporate investors under the ultimate control of non-resident corporate investors. We have also included some key information on non-trading investments realised by individuals.

### *Foreign investment control*

The general rule is that there is no longer any restriction on the purchase and sale of real estate which constitutes a foreign direct investment in France. A declaration has to be filed with the French Treasury once the investment has been made (the investment is deemed made as soon as an agreement has been entered into). A statistical form (*compte rendu*) has to be filed with the French Treasury within a reasonably short period, following the purchase or sale of a direct investment.

A foreign direct investment can take either of the following forms:

- The purchase, creation or extension of a business or branch.
- Any other operation which constitutes the acquisition of, or the increase in, the control of a company carrying on an industrial, agricultural, commercial, financial or real estate activity, or which constitutes an extension of such a company's activity already controlled by the non-resident company or person.

Non-residents may freely incorporate a company in France. If the investment is in excess of EUR 1.5m a statistical form must be filed with the French Treasury within a reasonably short period after the investment is made.

No formality is required to acquire a company that owns investment property or has a real estate activity. However, in the case of an investment in a company whose activity is to construct and sell on or rent out buildings, a declaration must be filed with the French Treasury. A statistical form must be filed on disposal of the investment.

# Direct investments in French real estate

## *Legal aspects*

### *Ownership*

Ownership of a property is the right to enjoy and use of the property in the most absolute manner, provided the use is not prohibited by laws or regulations (freehold). Leasehold rights, which confer on the tenant a real estate interest, also exist but are quite rare. It is possible for the bare ownership (*'nue propriété'*) to vest with one owner and the usufruct (*'usufruit'*) that gives the right to possession or the income, to vest with a different owner. A *'nue propriété'* or *'usufruit'* right purchased by or granted to a corporate investor is limited in time, and cannot exceed 30 years.

Any real estate interest must be filed with the relevant Land Registry to be enforceable against third parties.

### *Freehold*

A person owning the freehold of a property (*'pleine propriété'*) is the owner in perpetuity. They may use as they please the property, as long as the law does not prohibit it. Subject to exceptions, they own the land and everything above and below it, including all buildings and vegetation.

Two forms of ownership exist. They are very similar to freehold ownership, in that ownership is in perpetuity. These are co-ownership units and volume units.

### *Co-ownership*

A property may be divided into a number of co-ownership units, rather like a condominium. The co-ownership (*'copropriété'*) system, originally set up to allow a building to be divided into apartments under different ownership, can be used for offices or any other type of building, which is to be divided up among two or more owners. A co-owner owns unit(s) in perpetuity. The co-owner has the exclusive use of the unit for the purpose for which it is intended and a share in the common parts of the property and in the land.

Units can be conveyed in the same way as freehold property.

The French Law dated 10 July 1965 sets up an obligation for each co-ownership to have its own regulations (*'règlement de copropriété'*), to which the owners are deemed to adhere. The regulations relate to the use and enjoyment of the premises and management of the building.

The co-owners hold a general meeting, at least once a year, to decide on issues that concern the property. The day-to-day management is conferred on a manager (*'syndic'*) appointed by the co-owners, who represents the co-owners in dealings with third parties. The co-owners approve the manager's accounts, and make decisions relating to the maintenance and repairs that may be required, and other matters to be decided on. The co-owners are asked to vote on proposed resolutions. The number of votes they have will depend on their share in the common parts and the land. However, where a co-owner has more than 50% of the votes, the number of votes is scaled down to the total number of votes of all the co-owners put together, in order to avoid any co-owner from having a clear majority.

The majority required to pass a resolution will depend on the nature of the resolution to be voted on. The unanimous decision of the co-owners is required for some major issues such as the change of the general assignment of the property, of the enjoyment rules of the property, or of the split of the expenses among the co-owners.

Generally, the expenses of the co-ownership are met by the co-owners in proportion to their percentage share in the underlying land. Certain expenses, however, may be split differently if they are of greater benefit to some co-owners. (One would not normally expect the owner of ground-floor premises to be liable for expenses relating to the elevator for example.)

### *Volumes*

The division of property into volume units was originally set up to enable the State to allow private ownership of buildings to be constructed over public roads and railways at Paris – La Défense, at Lyon – Part-Dieu and at Montparnasse station in Paris. It has since become fashionable to use volumes for mixed-use developments, so as to avoid creating a co-ownership, which is not particularly well adapted for such properties. This is particularly true of mixed-use complexes: a co-owner of retail premises in a shopping mall will not have the same interests as a co-owner of offices in the same complex, but may need to have a resolution passed by the co-owners to be able to do certain things.

Volume units are a kind of ‘flying’ freehold. The owner of a unit has the absolute ownership, in perpetuity, of the airspace and buildings within the volume as identified by reference inter alia to the height above sea level. The owner’s volume will have the benefit and the burden of all relevant easements.

There can be no common parts. However, as the provisions of the law dated 10 July 1965 relating to co-ownership are mandatory, some properties that have been divided into volumes run the risk of being requalified as a co-ownership.

### *Leasehold*

There are two categories of leasehold: construction leases (*bail à construction*) and other long leases (*bail emphytéotique*). As they confer on a tenant a real estate interest, mortgages may be taken over the leasehold right.

Both leases are granted for a period of between 18 years and 99 years. As all leases granted for a term over 12 years, they have to be registered at the Land Registry, and *ad valorem* duty at the rate of 0.715% has to be paid on the rent with a cap of 20 years’ rent if the term of the lease is longer. The lease must be executed as a notarised deed, so it can be registered at the Land Registry.

Such leasehold rights are not to be confused with other leases, such as commercial leases, which do not create any real estate interest.

#### *Construction lease (bail à construction)*

A construction lease requires the tenant to construct a building on the leased land, which may already be partially built. When the lease expires, the buildings erected by the tenant will revert to the owner of the land.

#### *Long lease (bail emphytéotique)*

These are almost the same as construction leases. The main difference is that, although the tenant may be entitled under the contract to build on the land, there is no

obligation to build. The other difference is that if the premises are used for a commercial activity, the statutory rent review provisions of article L.145-1 and following of the French Commercial Code (governing commercial leases) may apply, but never in the case of a construction lease.

## Real estate acquisition

### *Preliminary negotiations and due diligence*

The notion of ‘subject to contract’ does not exist in France as it does, e.g. in the UK. In the case of a proposed sale, unless the parties intend otherwise, there is a binding contract once the parties have agreed on the price for the property. The price is usually agreed at the outset of any negotiations. It is, therefore, essential that each party should be properly advised at the very beginning of any discussions; even if correspondence is exchanged outside France (even then French law could apply insofar as the deal being negotiated relates to a property in France).

Furthermore, although negotiations can be conducted freely, there is an obligation for the parties to negotiate in good faith. This obligation becomes stronger as the parties progress towards an agreement. If a party does not conduct negotiations in good faith, that party runs the risk of the other party being entitled to claim damages in tort for the loss suffered.

A party may be liable if the party brings negotiations to an end abruptly or fails to reveal information that is likely to prevent the deal from taking place (for instance, giving misleading information on the availability of finance).

A letter of intent or heads of agreement may set out the basis on which the parties are entering into negotiations. The existence of such a letter or agreement will enforce the obligation to negotiate in good faith. Such a document may comprise a number of assumptions. It is important to inform the other party each time an assumption proves to be incorrect or can no longer be relied on.

### *Preliminary contracts*

It is possible to proceed directly to completion, without any preliminary agreement. But almost invariably the parties will enter into a preliminary agreement before dealing with searches and other pre-completion formalities. Also, it may be necessary to obtain consents or building permits before the property can be occupied or developed by the buyer, which can take time.

A properly drafted preliminary contract will stipulate all the terms and conditions (T&C) of the sale. This implies that due diligence (root of title, easements, planning permission, building insurance, permitted use, the result of searches relating to asbestos, lead, termites, soil contamination, etc.) should be done at the outset and not, as still so often happens, after contracts have been exchanged.

In and around Paris, the preliminary agreement usually takes the form of an option granted by the owner to the buyer called ‘unilateral commitment of sale’ (*promesse unilatérale de vente*).

In the South of France, notably, an agreement of sale (*promesse synallagmatique de vente/contrat de vente*) is favoured.

### The unilateral commitment of sale: Option (*‘promesse unilatérale de vente’*)

In the unilateral commitment of sale, the owner undertakes to sell their property to a specific person, the beneficiary.

Accordingly, the seller provides the beneficiary with a free option, either for a fixed or an indeterminate period.

As the commitment of sale becomes a sale as soon as this option is exercised, the commitment must stipulate very precisely at the outset all the T&C regulating the transaction.

In the vast majority of cases, the option is used as a step towards a sale that is expected to happen and the seller will expect a financial commitment from the beneficiary.

This will typically take the form of a restraining compensation, which will be retained by the seller if the option is not exercised. Generally, the amount of the compensation is equivalent to 5% or 10% of the purchase price. This amount will usually be secured by a deposit paid to a stakeholder (which deposit is then applied towards the purchase price if the sale takes place), or by a bank guarantee.

The parties may also include a penalty clause in their commitment, which stipulates the amount that the party failing to honour its commitment must pay to the other party.

In rare cases, the seller may also charge a non-refundable price for the option as separate consideration from the price for the property itself.

If the seller withdraws the option before it has been exercised, the buyer will not be entitled to sue for specific performance of the sale. The buyer will only be entitled to claim damages. It is only if the seller withdraws after the option has been exercised that the buyer may be entitled to claim specific performance of the sale, depending on how the contract has been drafted.

However, there are adequate contractual means that can be provided for to discourage the seller from withdrawing their offer to sell.

It is usual to allow the buyer to assign the benefit of the option.

Unless it is notarised (i.e. signed before a notary), or reproduced in full in a notarised deed, an option relating to a property must be registered within ten days from the date on which the benefit of the option has been accepted by the buyer, failing which it automatically becomes void. The option must, therefore, be in writing. The rule also applies to the assignment of an option. Notice of an assignment must also be served on the seller by a bailiff (*huissier*).

### The agreement of sale (*‘promesse synallagmatique de vente/contrat de vente’*)

In the agreement of sale, both parties are committed: one party is committed to sell and the other party is committed to purchase, as soon as the property is identified and its price agreed upon.

Such an agreement will entitle the parties to sue for specific performance if the other defaults.

There is no requirement to register an agreement of sale.

The agreement will usually contain conditions precedent. But once these conditions are satisfied, and unless the parties have agreed otherwise (i.e. in the case of a *promesse synallagmatique de vente 'ne valant pas vente'*), the sale becomes binding and effective retroactively from the date on which the contract was entered into. It is, however, possible and usually desirable to contract out of the implied retroactive effect.

As in the case of options, it is generally possible for the buyer to assign the benefit of the contract, but this must be done before all the conditions precedent are satisfied, failing which there could be deemed to be two successive transfers for transfer tax purposes. As in the case of options, property dealers are not permitted to sell on the benefit of an agreement of sale.

### *Formalities*

Once contracts have been executed, the following pre-completion searches and other formalities will be carried out:

- Land registry searches: to check that there are no mortgages or other charges registered against the property or, if there are, that the sale proceeds will be sufficient to discharge the mortgages.
- The purge of pre-emptive rights:
  - Urban pre-emptive right: the local municipality (or, in rural areas, the local agricultural authority known as the SAFER) could have a priority in purchasing specific property up for sale in areas that have been defined beforehand by the town council. In this case, the buyer has to enquire with the proper authority whether it intends to exercise its right, by sending to it a declaration of intent to dispose of the property (*Déclaration d'intention d'aliéner 'DIA'*) stating the price and conditions of the sale. The municipality may not respond (waiver of its right), accept the proposed price, or make a counter-offer.
  - Tenant's pre-emptive right: the French law grants to the tenant a priority in purchasing the leased accommodation that the owner wants to sell.
- Other local planning search: to check whether the property is located in a zoned area and, if so, the authorised plot density ratios, and whether the property is burdened by any public easements.
- Obtaining certificates from the authorities confirming that the premises have the requisite use, is not in a termite zone, etc.
- A certificate from the managing agent (syndic) of premises, which are part of a co-ownership. This certificate must state that the seller does not owe any money to the co-ownership.

The purchase will be conditional on satisfactory searches being obtained and the beneficiary of any pre-emptive right confirming that it will not be exercising such a right.

### *Planning permission and other consents*

The purchase may also be conditioned by the delivery of permits, licences or consents, which the buyer may require. The following are frequently encountered:

- A demolition permit
- A building permit is required to erect a new building, or for works to an existing building if these are to change its existing use, change the exterior of the building or its volume, or create additional floors.
- A licence, commonly known as a CDEC licence, required to create new retail premises with a sales floor area that is over 300 square metres (or 1,000 square metres in certain cases), or to change one retail category into another if the sales floor exceeds 2,000 square metres as well as to create hotels with over 50 bedrooms (or 30 rooms, if outside the Paris region) or cinemas with seating for more than 1,500 people.
- A licence (known as an *'agrément'*), required to build, rebuild, extend or occupy offices, warehouses and industrial premises in the Paris region, which are over a certain size.
- A consent, required to convert residential premises to offices, or any other use (noting that the changing office premises into residential premises is not subject to this prior authorisation of the French Administration).

### *Deed of sale*

The deed of sale must be executed before a notary. It is usually preferable for each party to appoint its own notary (in which case, the notaries' fee is split between the two notaries). The deed of sale will identify the parties and the property and set out the T&C of the sale and a full root of title, which has to be established over at least a 30-year period.

As a general rule, a seller will seek to sell the property without giving any warranty with regard to apparent or hidden defects. However, if it can be established that the seller knew of a hidden defect but did not disclose its existence to the buyer, the buyer may be entitled to claim damages from the seller for any loss suffered.

In any event, a seller who is regarded as being a property 'professional' cannot contract out of the statutory warranties provided by the French Civil Code, except if she/he sells his/her property to another professional.

The seller of a building constructed in the past ten years is liable to all future owners during the ten-year period in respect of all structural defects.

### *Post-completion formalities*

Once the deed has been executed, the notary will lodge a copy with the Land Registry for registration and arrange for any outstanding mortgages to be removed.

### *Acquisition costs*

Unless otherwise agreed, the buyer bears all acquisitions costs, including the notaries' fees and expenses, the Land Registrar's fees and the registration duty.

### *Notary's fees and expenses*

Notary's fees are calculated by reference to the purchase price. They are approximately 0.825% plus VAT, calculated on the purchase price. Where two notaries are involved, they will share the fees. If the purchase is being financed by means of a loan to be secured by a charge over the property, a fee will also be payable in that respect. The fee is approximately 0.55% plus VAT of the amount secured by the charge. Expenses relate essentially to pre- and post-completion searches. Notaries' fees are negotiable above EUR 80,000.

### *Land registrar's fee*

A land registrar's fee equal to 0.1% of the purchase price on the purchase and 0.05% of the amounts secured by the mortgage (or any other charge over the property) is payable.

It should be noted that a privilege less expensive than a mortgage can be granted, the so-called '*privilège du vendeur*' or '*privilège de prêteur de deniers*'.

## *Tax aspects*

### *Taxation of the acquisition of real estate*

Either VAT or registration duty (or both) is/are payable on the purchase of real estate in France.

#### *VAT*

The VAT regime applicable to the purchase of real estate depends on the VAT status of the vendor. In substance, if the vendor performs a VAT-able activity on a regular basis (i.e. if the vendor is an '*assujetti*', hereinafter a 'VAT-able person'), VAT at the current standard rate of 19.6% (20% as from 1 January 2013) would be payable by the vendor. Conversely, except in limited cases, no VAT would be mandatorily due if the vendor is not a VAT-able person. In addition, VAT and registration duties are now totally disconnected as the registration duty liability depends solely on the intention expressed by the buyer (i.e. intention to resale/erect/rebuild the building). The following cases illustrate the principles herein above-mentioned:

- The disposal of building land ('*terrains à bâtir*') by a VAT-able company, the vendor will be subject to VAT. If the buyer intends to erect a building on the land, she/he would be subject to a EUR 125 registration duty, provided that the buyer undertakes to complete the building works within four years and complies with the undertaking. This deadline may be extended automatically for a year if the works have commenced by then. Further extensions not exceeding one year each time may be granted if this can be justified by *force majeure* or other very good reason.
- The purchase of a building to be demolished or to be entirely reconditioned would also be subject to VAT if the vendor is a VAT person. The EUR 125 registration duty would apply, provided that the purchaser undertakes to complete the construction within a four-year period.
- The vendor of a building in the course of construction would also be liable for the VAT. Registration duty at the rate of 0.715% would be payable by the buyer.
- The purchase of a new building within the first five years from the date on which it was built would also give rise to VAT for the VAT-able vendor. Registration duty at the rate of 0.715% would also be payable by the buyer.

VAT is calculated on the purchase price increased by any other consideration provided to the seller. Unless the parties agree otherwise, the VAT is due by the buyer. If the French tax authorities consider that the actual market value of the property is higher than the price or the market value declared, they could levy VAT on the actual market value.

According to the new rules and to administrative guidelines, the acquisition of a real estate property subject to VAT may benefit from a VAT exemption provided that:

- the property is not a building land; in that case, the vendor may elect for VAT
- the property is completed for more than five years; the vendor may also elect to submit the sale to VAT
- the vendor is not a VAT-able person.

### *Registration duty*

The total effective rate of registration duty is, as a matter of principle, 5.09%.

Registration duty is calculated on the purchase price increased by any other consideration provided to the seller. Unless the parties agree otherwise, the cost of the registration duty is borne by the buyer.

If the French tax authorities consider that the actual market value of the property is higher than the price or the market value declared, they could levy registration duty on the actual market value.

In this case, the French tax authorities would charge interest for late payment at 0.40% per month (i.e. 4.8% per year). Furthermore, an additional charge of 40% will apply if bad faith is established, or 80% if a fraudulent intention can be demonstrated.

For companies or branch offices in France, registration duty is fully tax-deductible, either as expenses, or by way of depreciation allowances where transfer duties are capitalised.

### *Taxation of income and capital gains*

Income from, and capital gains realised on the sale of, real estate in France are taxable in France, whether a French resident or a non-resident receives them. The same rule applies to the gain made on the sale of shares in a company whose assets consist mainly of French real estate, regardless of whether the company is French or not.

These principles are subject to those of any applicable tax treaty for the avoidance of double taxation, in the case of a non-resident of a State with which France has entered into such a treaty. France has entered into approximately 100 such treaties. According to article 6 of the OECD Model Convention, the form followed by France in the case of many treaties, provides that real estate income and capital gains are taxable in the State where the property is located. Obviously, only a case-by-case analysis will determine if France has the right to tax or not, and there are still few exceptions, especially in the case of old treaties.

Generally speaking, it can, as a result be said that the same rules will apply to rental income realised by a French or a non-French resident, while, as concerns capital gains,

there are specific rules for non-residents holding, directly or indirectly, French real estate assets.

### *Permanent establishment in France*

In principle, the ownership of a French property by a non-French company does not in itself constitute a permanent establishment (PE) in France.

Nevertheless, the direct holding of French properties may constitute a PE either when the conditions provided by the PE article of the relevant tax treaty are met, or in the absence of a tax treaty, when one of the following criteria is met:

- The non-French company carries on part of its activities in France through a fixed place of business
- The activities of the non-French company in France cover a ‘complete commercial cycle’ (applies only in a non-treaty context)
- The non-French company carries on activities in France through a dependent agent acting on its behalf and which has an authority to conclude contracts in the name of the company (e.g. conclusion of lease agreements).

Should the French property constitute a PE, the net after-tax profit would be deemed to be distributed and subject to a branch tax at a rate ranging from 0% to 15% in the presence of a tax treaty, or a fixed rate of 30% otherwise. The branch tax could nevertheless be mitigated:

- if the net after-tax profit has been distributed to French shareholders, no branch tax is due; or
- if the head-office of the branch is located in one of the EU Member States and is liable to corporate income tax, no branch tax is due; or
- if the effective distribution is lower than the net after-tax profit, the branch tax would be levied only on the profits distributed.

### *Corporate tax*

The taxable rental income corresponds to the gross rental income less deductible expenses both determined on an accrual basis, whether realised directly, or through a given French vehicle.

If the investment is realised through the most common corporate structures – French limited liability companies such as *société anonyme* (SA), *société par actions simplifiée* (SAS), or *société à responsabilité limitée* (SARL) – the income is subject to French corporate tax.

The standard rate of corporate tax is 33.33%.

The standard rate of 33.33% is increased by a 3.3% corporate tax surcharge that applies for companies with taxable income exceeding EUR 2,289,000. This surcharge results in an effective overall taxation rate of 34.43%.

The standard rate of 33.33% is increased by a 5% corporate tax surcharge that applies for companies with a turnover exceeding EUR 250m (excluding VAT). This surtax results in an effective overall taxation rate of 35%.

For companies with taxable income exceeding EUR 2,289,000 and a turnover exceeding EUR 250m (excluding VAT), the effective overall taxation rate is 36.1%.

There is no specific rule governing the taxation of either real estate income, or capital gains when French companies make the investment.

When the investment is realised through a partnership type company, which has not elected to be liable to corporate tax, such as unlimited liability partnerships in the form of a *société en nom collectif* (SNC), or a *société civile* (SC), the taxable income is determined at the level of the company, but the burden of tax lies in the hands of the shareholders.

The tax regime applicable to non-resident shareholders is, therefore, rather complex, and it is necessary to examine the relevant tax treaty in order to determine if, in addition to French corporate tax, French tax at source will be levied, either on dividends, or on income of partnership type companies (the standard withholding tax (WHT) rate being 30% reduced to 21% for individuals located in the EU, Iceland and Norway).

### *Personal income tax*

Where a taxpayer holds a property directly or through a tax transparent company, such as an SNC or SC, the taxable rental income corresponds to the cashed rental income less deductible expenses paid.

The net rental income received by a non-resident is subject to rates ranging from 0% to 45% (for income received in 2012). However, a minimum rate of 20% applies unless the taxpayer can demonstrate that had the taxpayer been resident in France, his/her effective rate of taxation would have been lower than 20%.

### *Registration duty*

Regarding registration duty (*droits d'enregistrement*), French tax provisions will apply, in principle, on any transaction performed on a local asset.

### *VAT*

If the rental activity is liable to VAT, the owner will be entitled to recover the input VAT paid on the acquisition of the real estate property, if any, and/or the VAT paid on all its further purchases of services or goods (VAT credits are either deductible or refundable). VAT refund claims can be filled on a monthly basis.

## *Purchase of a real estate company*

### *Legal aspects*

Unlisted real estate companies are limited liability companies, typically an SA, SAS or SARL, or unlimited liability companies, typically a '*société civile immobilière*' (SCI) or an SNC.

In addition to a full audit of the company itself and as in the case of a direct purchase of the real estate, a full audit of the underlying real property has to be conducted. The seller would be expected to provide, as in the case of an ordinary share deal, warranties and an indemnity in respect of any undisclosed liabilities and any undisclosed matters that adversely affect the company's assets.

Unlike the case of a direct real estate purchase, the intervention of a notary is not mandatory. The seller and buyer typically instruct their usual lawyers and other advisers to advise them in connection with the deal.

For the purchase of all the shares of an SCI, the buyer may have to purge the urban pre-emptive right of the local municipality, but only in very specific cases:

- If the local municipality has set up a reinforced urban pre-emptive right (*DPU renforcé*) for the area in which the company is located.
- If the only asset of the purchased company is a property which would have been subject itself to this urban pre-emptive right.

If those conditions are met, the buyer will have to follow the same procedure as described above under section '*Formalities*' (DIA).

After the due diligence process, a share purchase agreement is drafted as well as a representations and warranties agreement.

## *Tax aspects*

### *Registration duty on the purchase of shares*

In principle, a transfer of shares is subject to a 0.1% transfer duty for the transfer of shares in listed or unlisted companies limited by shares. In practice, listed companies rarely are subject to the 0.1% transfer duty.

The rate applicable to the transfer of equity interests in companies whose capital is not divided into shares (e.g. partnerships as SNC or SCI) is 3%.

The rate applicable to the transfer of interests in real estate companies, regardless of the corporate form of the company sold is 5% with the exception of stock-listed companies.

A 'real estate company' is defined as being a company whose assets predominantly comprise (or have comprised at any time during the year preceding the time of the transfer) properties in France or shares in 'real estate companies'. This definition is extremely wide. For example, a company that owns both an industrial business and the building in which the industrial business is operated would be regarded as a 'property company' if the value of the building exceeds the value of the business and other assets owned by the company.

This 5% duty is also applicable to sales of non-French companies meeting the above assets test.

Since the rate of transfer duties levied on a sale of a real estate company's shares is close to the one levied on a sale of property, buyers are now much more likely to prefer buying the real estate rather than the company which owns it. The advantages of a direct purchase are the following:

- It is more straightforward.
- It allows a charge to be taken over the real estate to secure the financing of the purchase.

- The building can be fully depreciated on the basis of the purchase price (and not its historical book value as it is the case with a share deal).
- There is no latent capital gain to monitor post-transaction.

But in certain cases it may still be more advantageous to acquire the company. Also, in the current market, a seller might prefer to sell the shares in the company for the following reasons:

- The gain resulting from the transfer of shares may be exempt in certain cases if the seller is a non-French seller.
- The 5% duty will only apply on the market value of all the assets (including the real estate properties) held by the company reduced by the debt used by the company to acquire the real estate property.
- The seller passes on any risks/liabilities that the latter does not specifically warranty.

The debate remains open, and sellers and buyers might, as a result, have contradictory/opposite goals.

### Direct tax liabilities

As opposed to an asset deal scenario where the purchaser does not bear any previous tax liability in connection with the property itself (save for the royalty due on development of office premises), if the vendor is in default, in a share deal *scenarii*, the purchaser will inherit all current or pending tax liabilities which may exist at the level of the target company, the worst of them being the 3% annual tax liability.

Consequently, as part of the due diligence exercise, the purchaser should carry out a tax review of the company before the purchase and negotiate a price discount and/or a tax warranty in order to protect its interests.

## Construction issues and new buildings

### *Legal aspects*

#### Purchase of a new building under a ‘turnkey’ contract

It is not unusual for a developer to sell a new building in the course of its construction on the basis of a ‘turnkey’ sale and purchase. The buyer will generally make an initial payment at the execution of the deed of conveyance commensurate with how far the works have progressed. Further stage payments will be made as and when the building works progress.

The trend is now for institutional buyers to pay an initial deposit at the outset and the entire balance of the price when the building is completed (the developer’s additional financing costs will be incorporated in the agreed price to reflect this). The final price may be adjustable depending on the level of the rental income achieved, i.e. the seller shares with the buyer the risks and benefits linked to the level of rents achieved for the property.

A seller will want insurances that the buyer will meet its obligation to pay the balance of the price. Usually this will take the form of a bank guarantee. The buyer will want to

ensure that the seller completes the building that complies with an agreed specification, which should be sufficiently detailed, within an agreed time frame.

The deed of conveyance will typically be divided into two sections, the first dealing with the general T&C of the purchase, and the second dealing with the related seller's construction obligations.

The buyer will have the benefit of a guarantee from the seller, backed by an insurance policy, against all hidden defects of a structural nature, or which affect the installations that are incorporated into the structure and which appear during the ten years following the date on which the building is completed. This guarantee and insurance also benefits all subsequent owners during the same period. Hidden defects to other installations in the building benefit from a two-year guarantee.

Special public policy rules, outside the scope of this discussion, apply to residential property, even where an institutional investor acquires an entire apartment building.

### Regulatory issues

Both the Planning Code and the Construction and Housing Code regulate building works.

### Development plan

A development plan (*'schéma de cohérence territoriale'*) is prepared by municipalities that have social or economic interests in common.

The development plan, which may be revised periodically, formulates policy and general proposals for development and use of land and the infrastructure in the area, so as to achieve a balance between urban development, farming and other economic activities and to preserve the quality of the air, of the countryside and of urban areas. Local authorities may be given the power to acquire land by compulsory purchase for planning and related purposes.

Other than in many rural communities, a local municipality (or several municipalities together) will usually prepare a local land use plan (*'plan local d'urbanisme'*) for all or part of the land within its district. The land within the perimeter of the plan is zoned for different use and building density ratios are attributed to each zone. The land may be comprised in a development zone called a *'zone d'aménagement concerté'* (ZAC), which may have its own rules.

### Building permit

In general, any development of land in France requires a formal application for building permit to be made to the local planning authority and the development may not be carried out unless such permit is granted.

A building permit is also required in the following cases:

- Works to convert the use of an existing building,
- Any change to the exterior (shop front, addition of a balcony) or the volume of the building,
- The creation of additional floors.

Building permit must comply with the development plan, the local land use plan as well as specific legislation, which, for instance, restrict building in coastal or mountain areas.

Works to destroy a building require a demolition permit.

The building permit is not granted for a specific period. However, it will lapse if the building works are not commenced within two years (this deadline may be extended by one year) or if the works are interrupted for one year (or three years in the case of certain phased developments).

Once granted, the building permit is attached to the land and will pass to any subsequent owners, on condition that the planning authorities are informed of the transfer and the original owner of the land agrees to the transfer. The authorities then issue a modified building permit showing the identity of the new owner responsible for the works.

A transfer is not required in the case of a ‘turnkey’ sale, as the seller remains responsible for the works until the building is completed.

### Other consents

Other consents may be required as a prerequisite to building permit or even where building permit is not required.

- A licence (commonly called a CDEC licence) is required to create new retail premises with a sales floor area of over 1,000 square metres or to change one retail category into another if the sales floor exceeds 2,000 square metres. A licence is also required to create hotels with over 50 bedrooms (or 30 bedrooms, if outside the Paris region) and cinemas with seating for more than 1,500 people.
- A licence, known as an ‘agrément’, is required to build, re-build, extend or to occupy offices, warehouses and industrial premises in the Paris region and which are over a certain size.
- A discretionary consent is required to convert residential premises to offices or any other use.

### Environment law

This area used to be governed largely by private rights between individuals. Recently there has been a trend towards the creation of wider power and controls over the use of land and the environment that has increasingly taken the form of administrative powers exercisable by public authorities.

Specific rules under a law of 1976 govern ‘installations classées’ which are factories, workshops, warehouses, building sites, quarries, and generally any installation operated by or in the possession of any person which may be dangerous or be the cause of nuisance for the neighbourhood, for health and safety, for agriculture, for the environment or for sites and monuments of interest. A nomenclature identifies the different types of ‘installations classées’, and these are the subject of a prior authorisation or declaration depending on how serious a risk the installation may be.

Even if an installation is not an ‘installation classée’, it may be caught by other legislation relating to waste and noise pollution or the pollution of air and water

depending on the type of the installation, the products produced and stored, and the substances discharged into the drainage system and into air.

In certain areas there is a prohibition on construction, e.g. in conservation areas of natural beauty, near airports and near certain *'installations classées'*. Special rules restrict development in the mountains and along the coast.

The vendor will be required to produce a report from a licensed firm, showing whether or not there is asbestos in the false ceilings, lagging or flocking in the building, and what measures need to be taken, if appropriate.

### Historic buildings

Any works of demolition, alteration or extension of buildings listed in whole or in part as being of historic or artistic importance (*'monuments historiques'*) require a special authorisation from the Arts Minister and are overseen by the authority responsible for listed buildings (*'Administration des Beaux-Arts'*).

In the case of works to other buildings of interest, listed as a subcategory of historic monuments on a supplemental inventory, prior notice must be given to the Arts Minister.

### Building works

#### *Architect*

An architect must be employed for all building works for which a building permit is required, except when a building permit is applied for by an individual for their own use and for a project which does not exceed a certain threshold (a net built floor area (SHON) of 170 square metres in the case of non-agricultural buildings). The employer may also engage a quantity surveyor who measures the amount of work and materials necessary to complete the plans and sets this out in detail in bills of quantities.

#### *Builder's liability*

##### *Ten-and two-year liability*

'Builders', who are defined by the Civil Code to include contractors, architects and other consultants involved with construction works or their design, are deemed liable towards the employer and any subsequent buyer for ten years from the handover of the works for the repair of any defects notified by the employer, which compromise the solidity of the works or effect their constituent elements (services, foundations, structural, enclosed or covered areas), or fixtures and which make the building unfit for its normal use.

During a period of two years from handover of the works, the builder is similarly liable for the repair of any defects notified by the employer, which effect fixtures that are detachable from the constituent elements of the works.

Such presumed liability is mandatory: it is not possible to contract out of it. But it is possible to rebut the presumption. If the builder can establish that she/he was not liable, she/he can avoid liability.

The builder may also be liable under the contract for negligence.

##### *Liability for apparent defects*

During the period of one year from handover of the works, the building contractor is liable for the repair of any defects notified by the employer, either through the *réerves*

(reservations) procedure or by written notification in the case of damage arising after handover of the works. The employer and contractor agree by when the defects must be remedied, failing which the court can determine this.

### *Insurance*

#### *Builder's insurance*

The builder is required to take out insurance to cover their liability for defects covered by the ten-year defects liability period (*'responsabilité décennale'* insurance).

In addition, an employer will want to ensure that a builder has taken out adequate professional indemnity insurance to cover their liability arising through negligence.

#### *Employer's insurance*

The employer is required by law to take out insurance, for the benefit of itself and future owners, to cover the cost of remedying defects covered by the builder's ten-year defects liability period (*'dommages-ouvrage'* insurance). Neither a company over a certain size (as defined by article R.111-1 of the Insurance Code), nor the State is obliged to take out such insurance if the building works are carried out for its own use and do not relate to residential buildings.

The builder is required to take out insurance to cover its liability for building works, which are covered by the ten-year defects liability period (*'responsabilité décennale'* insurance).

These insurance requirements are mandatory. Insurance should be taken out before the works are carried out.

The purpose of the *'dommage-ouvrage'* policy is to enable the owner to receive insurance money quickly to make good the insured defects. The insurer paying under that policy will then seek to identify who, among the builders and consultants, was liable, and their respective share. The liable builders will be covered by their respective *'responsabilité décennale'* policy.

It is prudent to ensure that extra cover is taken in both types of policies, i.e. to cover damage to adjoining buildings, defects covered by the two-year defects liability period, incorporeal loss resulting from insured loss, liability for errors from omissions and the cost of clearing rubble.

In addition, an employer will typically require the builder to have professional indemnity insurance, covering negligence and contractual liability and will take out site insurance to cover any damage to the works.

### *Security in favour of the builder*

Article 1799-1 of the Civil Code requires the employer to provide the builder with security for payment of the price where the amount due exceeds a certain threshold. If the employer has recourse to a loan, the sole purpose of which is to finance the entire cost of the works, the lender cannot advance monies under the loan to anyone other than the contractor, until all monies due to the contractor have been paid. If there is no such loan or the amount is insufficient, and in the absence of any other security, a guarantee from an appropriate financial establishment must be granted.

### *Subcontracting*

Subcontracts are governed by the French Law dated 31 December 1975, the provisions of which are mandatory. If a contractor subcontracts all or part of the work, the identity of the subcontractor and the T&C of payment must be approved beforehand by the employer. If not paid by its principal contractor, the subcontractor has a right to seek direct payment from the employer under the conditions provided by the law.

### *Tax aspects*

#### **VAT**

Value added tax (VAT) at the standard rate (currently 19.6%) (20% as from 1 January 2014) is charged on the provision of construction services and works.

The developer can recover the input VAT in accordance with the ordinary rules, as follows:

- If the purchaser intends to use the building for its professional activities, VAT will be recoverable according to the purchaser VAT recovery ratio.
- If it is envisaged to let the building, the landlord may elect to charge VAT on the rents on unfurnished and unequipped premises. The election is made for a ten-year period on a building-by-building basis, and not on a lease-by-lease basis. The election is effective even in the case of leases to tenants, which are exempt from VAT, provided the lease expressly refers to the landlord's VAT election. The election should be made as soon as is possible to secure input VAT deduction rights.
- Absent of any VAT-able activity, or if the election to charge VAT on rents is made lately, the rights of the investor to recover input VAT could be seriously jeopardised or even eliminated.

It is therefore critical that VAT elections be implemented from the very beginning, to improve the net performance of the investment. Lost input-VAT recovery would qualify as a fixed asset or as an expense only depreciable or deductible against corporate tax, i.e. a maximum 36.1% recovery instead of 100%.

#### **Corporate tax**

The construction of a building does not raise any specific issues as regards corporate tax. Until completion the constructions will be booked as 'assets in progress' so that no depreciation will be possible before being fully accounted for as fixed assets.

#### **Office premises development tax**

There is a specific tax for development of office premises within the Paris area (*redevance pour création de bureaux en Ile-de-France*) whose rates vary from district to district from EUR 94.45 to EUR 377.79 per square metre.

It is paid only once, and is not allowed as a deduction in computing rental income because it is deemed to be part of the acquisition cost of the land (neither deductible nor depreciable); it will, therefore be taken into account only in computing taxable gains upon a disposal.

# Financing the acquisition of French real estate

## *Legal aspects*

### Loans

If the purchase price is financed by means of a loan, the lender will usually require security over the property. There are various kinds of security available.

### Mortgages

A mortgage (*'hypothèque'*) created by contract must be recorded by a notarised deed, so that it may be registered at the land and charges registry. A mortgage may also arise from a judgement or by virtue of a statutory right.

Mortgages take effect from the date on which they are registered at the land and charges registry. Duty at the rate of 0.715% is payable, calculated on the amount secured.

A mortgage can be granted by the owner at any time, and so can be provided by the buyer to a lender to secure any loan she/he may need after the acquisition (for instance, to finance the cost of works).

### 'Privilèges'

Certain creditors have the benefit of a special charge known as a *'privilège'*. These include the seller of a property for the payment of the price if not fully paid on completion (*'privilège de vendeur'*) and a person who advances the funds to the buyer to finance the purchase price, provided certain conditions are satisfied (*'privilège de prêteur de deniers'*).

A *'privilège'* is a charge over the real estate in the same way as a mortgage, save that the *'privilège'* takes effect retroactively from the date on which the deed of conveyance is executed. The *'privilège'* must be registered within two months from the date of the conveyance, failing which it becomes a mortgage, with no retroactive effect. The registration of a *'privilege'* is not subject to the 0.715% duty.

### Antichrèse

This is a real property interest (interest *in rem*) where the owner transfers possession of the real estate to a creditor by way of security. The creditor receives the income derived from the real estate, which is used to pay off the interest, and any surplus is deducted from the principal outstanding under the loan. The agreement must be in the form of a notarised deed so that it may be registered at the land and charges registry. This form of security is very rarely used. The registration triggers the payment of duty at the rate of 0.715% unless the *'antichrèse'* is granted to the creditor under the loan agreement.

### Leasing agreements (*'crédit-bail'*)

Leasing agreements have often a 12- to 15-year duration, the lessee having the right to exercise its option to acquire the property at the end of the lease, or earlier as may be provided under the contract.

## Minimum equity funding requirements

Besides thin capitalisation rules for tax purposes described hereafter, there are minimum share capital requirements for certain French companies.

- SA: EUR 37,000, of which at least 50% must be immediately paid-up, and the remainder within five years.
- SAS: no minimum share capital is required but at least 50% must be immediately paid-up, and the remainder within five years.
- SARL: EUR 1 to be paid-up on incorporation.
- SCI or SNC: no legal minimum.

French company law also requires certain companies, such as an SA, SAS and SARL, to have a minimum level of net equity (*capitaux propres*). When the net equity falls below 50% of the issued share capital, the company will need to restore such a situation within two years.

Such a thin capitalisation rule does not apply to partnership type vehicles such as an SCI or SNC.

## Tax aspects

### Finance lease

The tax regime of these contracts has been totally amended for those concluded as of 1 January 1996. The current rules are set out below (other rules apply for contracts concluded before this date).

### Publication of the contract

If the lease is granted (usually by a dedicated financing company) for a period exceeding 12 years, the contract must be registered at the Land Registry and this gives rise to registration duty at the rate of 0.715% levied on the total rents (minus that part of the rent that corresponds to the financing costs) payable over the entire duration of the lease (subject to a cap of 20 years if the lease exceeds that duration).

### Rental tax or VAT on rents

Rents are either subject to VAT (at the standard rate of 19.6%) (20% as from 1 January 2014) if the rented premises are professional furnished ones or if the lessor has elected for VAT. Otherwise, rents are liable to a rental tax equivalent to 2.5% of the annual rent if the building is over 15 years old.

### Tax deductibility of the rents paid by the lessee

In principle, rents are tax-deductible, except for the portion that corresponds in fact to non-depreciable assets (i.e. essentially the land), with several specific rules for office premises located in the Paris area and completed after 31 December 1995.

The financing company itself communicates the amount of the rent that is deductible to the tenant.

### Purchase of the building at the end of the lease

The purchase of the building by the tenant at the end of the finance lease gives rise to registration duty at an effective rate of 5.09%, which is calculated on the option price only. However, VAT may apply instead of registration duty in the rare cases where

the option is exercised within five years from the date on which the building was completed.

In the case of finance leases signed since 1 January 1996, the rate of duty will be calculated on the market value of the property, appraised as of the date of the purchase by the tenant, if the finance lease was granted for more than 12 years and the contract has not been filed at the Land Registry.

From a corporate tax point of view, the lessee must, in principle, add back to its income an amount equal to the following:

The value of the building at the date of the conclusion of the finance lease contract, less:

- the price payable under the option
- the amount of the depreciation which could have been recorded by the tenant had it been the owner of the premises minus the part of the rents which were not tax-deductible.

## Loans

### *Tax deductibility of interest on loans*

Under French law, there is no mandatory debt-to-equity ratio with regard to the means through which a French company may manage its indebtedness.

However, the French tax authorities tend to look more and more closely at the level of indebtedness of companies. A French company should not borrow from a company within the group to which it belongs, an amount which it could not have obtained from a third-party lender and it should always be in a position to pay all its financial charges as they fall due.

The financial charges borne by a French company in consideration for a loan contracted for the needs of its activity (e.g. in order to purchase assets) are tax-deductible, providing that the T&C of the loan are on an arm's length basis.

In addition, new thin capitalisation rules apply to fiscal year opened after 1 January 2007.

### **Barrier on deductibility of financial expenses**

As developed above, a new cap on interest expense deductions for companies subject to CIT in France. Companies with net interest expenses over EUR 3m are subject to a limitation on their full interest expense, capping the deductibility at 85% of the interest for financial years closed as of 31 December 2012, and 75% of the interest for financial years opening as from 1 January 2014.

### **Thin capitalisation rules**

The thin capitalisation rules apply for the computation of the tax results of all the companies subject to corporate income tax and, according to the French tax authorities (FTA) Guidelines dated 31 December 2007, tax transparent entities owned by companies subject to corporate income tax, French PEs of foreign entities.

Foreign entities owning French real estate are also subject to these rules when computing their taxable income.

The tax deductibility of the interest paid on loans granted by related parties is subject to following limits:

*First limit: Interest rate limitation*

The interest paid to related parties is limited to the highest of:

- interest computed on the basis of the average yearly interest rate granted by credit institutions to companies for medium-term loans of more than two years (e.g. 3.39% for FY 2012)
- interest rate that the borrower could have obtained from an independent bank under similar conditions.

*Second limit: Debt-to-equity ratio*

Tax deductibility of interest charge is denied when the interest exceeds cumulatively all of the three following limits during the same financial year:

- Interest relating to financing of any kind granted by related parties paid in excess of 150% of the net equity of the borrower. This limit is to be estimated (to the convenience of the borrower) either at the beginning or at the closing of each relevant fiscal year. Interpretative guidelines from the FTA allow the borrowing entity to use the share capital (fully paid up) when it is higher than the net equity.
- Interest expenses exceeding 25% of the current result before tax, before interest owed to related parties, before amortisation allowances and before a portion of financial leasing charges.
- Interest received by the borrower in connection with financing granted by the borrower to related parties.

The portion of interest exceeding the highest of these three thresholds is not deductible during the relevant fiscal year except when this portion is lower than EUR 150,000.

Furthermore, under a safe harbour provision, thin cap rules should not apply if a French borrowing entity demonstrates that the overall debt-to-equity ratio of the group to which it belongs (including foreign parent and foreign subsidiaries) is higher.

Specific thin cap rules apply to tax consolidation.

In addition, when interest is paid on a third party's financing, and a guarantee for the repayment of that financing is provided either by a related party, or by a party whose commitment is itself secured by another company (which is also related to the borrowing entity), then the proportion of interest that is payable on the secured part of the financing is treated as interest paid to a related party and, therefore, subject to the thin capitalisation limits of article 212 of the French Tax Code.

When repayment of the loan is secured by a personal guarantee, the portion of interest that would be reclassified as related-party interest would correspond to the amount of interest paid in relation to the secured portion of the third-party debt.

When repayment of the loan is secured by a guarantee *in rem*, the same principle would apply, except that the portion of the loan which is guaranteed would be determined according to the following ratio: value of the asset at the date on which

the security has been constituted against the initial amount of the financing. Accordingly, the interest payable in relation to this secured portion of the third-party debt would be reclassified as related-party interest for thin cap purposes.

The term ‘guarantee’ is not defined. As a result, any kind of guarantee is covered, whether personal guarantees or guarantees *in rem* (for instance, mortgage on a property).

However, the new provisions provide some exceptions where although the financing is guaranteed by related parties, thin capitalisation rules do not apply. This would notably be the case if:

- the financing takes the form of a bond issued by way of a public offering or under equivalent foreign regulations;
- the loan is guaranteed by a related party solely by way of a pledge of shares against the borrowing entity;
- the loan has been obtained in connection with the acquisition of shares or its refinancing; or
- the loan is obtained in the context of a refinancing to allow the debtor to complete the mandatory repayment of a pre-existing debt, which is required as a result of a direct or indirect takeover of the debtor. This exclusion should allow the refinancing of secondary LBOs without the refinanced loans falling within the scope of the new provisions.

### *Withholding tax on interest*

No WHT applies on interest paid to a foreign lender provided that such lender is not located in a non-cooperative country (in this case, a 75% WHT applies). The terms ‘non-cooperative States or Territories’ refers, under French tax law, to any State or country which does not comply with international measures against tax fraud and tax evasion. The list published by the French tax authorities of the ‘non-cooperative States or Territories’ as of 1 January 2012 includes: Guatemala, Montserrat, Philippines, Brunei, Nauru, Marshall Island, Niue and Botswana.

### *Remuneration of shareholders*

#### **Limited liability companies**

After-tax profits distributed to its shareholders by a French limited liability company qualify as dividends. When distributed to non-resident shareholders, dividends are, in principle, subject to WHT, deducted at source, at a rate of 30% for the entities, 21% for the individuals resident in the EU, Iceland and Norway, and 75% if paid in a non-cooperative State or territory.

Applicable tax treaties may however provide for a reduced rate or no taxation in France at all, where certain conditions are met.

In response to the European Court of Justice (ECJ) decision *Denkavit* rendered on 14 December 2006, the French tax authorities have amended the tax treatment of the French source dividends paid to European companies (Administrative guidelines dated 10 May 2007). Accordingly, as of 1 January 2007, dividends paid by a French company to an European company benefit from a WHT exemption if:

- the parent company has held more than 5% of the share capital of the French company during a minimum two-year period ; and
- the parent company cannot deduct the French WHT in its resident state.

### Unlimited liability companies

Profits distributed to the shareholders of a tax look-through partnership-type vehicle, such as a SCI or SNC, are not treated as dividends and are not subject to French WHT on dividends.

Also, more generally, and regardless of the place of residence of the parent company, the mere ownership of shares in a French partnership vehicle does not constitute in itself a PE in France and, therefore, no branch tax liability is due in France in consideration for the profits repatriated. However, these issues need to be checked on a case-by-case basis.

## Managing French real estate

### *Legal aspects*

#### Management

Typically, an investor will engage a managing agent to deal with the collection of the rents and with the day-to-day management of the property.

The activity of purchase and resale of real estate property for third parties is governed by the French Loi Hoguet dated 2 January 1970, under which it is mandatory for any real estate agent or real estate asset manager to obtain a professional card from the French '*préfecture*'. This card mentions the permitted activities of the holder and is delivered by the administration, subject to specific conditions to be met by the applicant, such as:

- Professional skills
- Financial guarantee
- Professional insurance
- Civil conditions (no civil incapacity, interdiction measures etc.)

This card is delivered for a ten-year duration and can be cancelled at any time by the administration if the holder does not satisfy the above-mentioned conditions anymore.

This procedure does not apply if those activities are performed in a group of parent companies.

### Commercial leases

#### *Introduction*

Commercial leases in France are, in principle, governed by a decree (law) dated 30 September 1953, which is now codified under articles L.145-1 et seq. and R. 145-1 et seq. of the French Commercial Code.

The statutory provisions give the tenant certain protection, in particular with regard to rent reviews and a so-called right of renewal. But not all commercial leases benefit from these statutory provisions. Where the statutory provisions would not normally apply, it may be possible for the parties to contract into its provisions.

### *Conditions to be met for the statutory provisions to apply*

To benefit from the statutory provisions, the requirements to be satisfied may be summarised as follows:

- The lease must be granted for a commercial, industrial or craft activity.
- The business must have been effectively carried out in the leased premises during a three-year period prior to the end of the lease or the date of renewal.
- The business must belong to the tenant.
- The tenant must be (whether incorporated or unincorporated) either registered at the Trade and Companies Registry or at the Arts and Crafts Registry for the premises in question. The registration must exist on the date on which (i) notice is given by the owner, or (ii) the application to renew is sent by the tenant to the landlord.
- The tenant must be a member of the EU or, if he is a French resident, must at least (since the law dated 24 July 2006) hold a temporary residence permit authorising him to carry out a professional activity. If the tenant is not a French resident, a simple declaration to the French *‘préfecture’* is sufficient.

The statutory provisions may also apply to leases of schools and some other cases.

### *Characteristics of a commercial lease*

#### **Term**

Commercial leases must be granted for a minimum nine-year term, but the parties may agree on a longer period.

Leases granted for a term exceeding 12 years must be registered at the Land Registry (*‘conservation des hypothèques’*) and so must be executed as a notarised deed. Due to the costs involved (cadastral tax) commercial leases for more than 12 years are very rare.

The tenant has the right to terminate the lease at the end of every three-year period subject to a six-month prior notice. But the tenant may also waive their right to terminate, particularly during the first period of the lease and agree to remain in the premises for the first six years.

This is likely to be in consideration for accommodating a tenant’s request during negotiations, for instance, for a reduction in rent or a rent-free period or for a contribution towards the cost of the tenant’s fit out works.

#### **Renewal**

Under a statutory commercial lease, the tenant benefits from protected tenancy rights. She/he has a statutory right of renewal at the end of the lease. The landlord has the right to serve notice of non-renewal or refuse to renew a commercial lease, but this entitles the tenant to compensation from the landlord. The lease is renewed on

the same T&C as the previous lease for another nine-year period unless the parties expressly agree on a longer term.

The lease may be renewed, even if the parties have not yet agreed on the amount of the rent of renewal.

If the parties remain silent after the expiry of the lease, it is automatically renewed for an undetermined term (all the other conditions of the lease remain the same). In this case, each party is entitled to terminate the lease at any time.

### Rent

The rent is freely determined by the parties at the outset. For retail premises, it is not uncommon for the parties to agree for the rent to be calculated by reference to the tenant's turnover, subject to a minimum annual rent (which itself is usually set up at the market value). This now tends to be the rule in shopping centres and is becoming frequent in certain retail streets.

The rent is usually paid quarterly in advance or in arrears.

### Indexation

It is usually provided that the rent is indexed annually. The index chosen by the parties must either be the INSEE cost of construction index (ICC), which is usually the one chosen, or an index that is in relation to the activity of one of the parties, failing which the indexation clause is void. The parties may also choose the new commercial rents index (ILC, composite index published quarterly by the INSEE), which has been implemented by a Decree dated 4 November 2008. This index is applicable to all the new commercial leases or may be chosen by the parties at the renewal of the lease.

### Guarantee

A landlord will invariably ask for some form of security. This may be a security deposit (equivalent to three or six months' rent). In this case, interest may be payable to the tenant if the amount of the rent payable in advance and the amount of the deposit together exceed six months' rent.

A bank guarantee, in the form of a statutory guarantee or a first-demand guarantee, is commonly required (this guarantee may be transferred to the purchaser of the property unless otherwise stipulated). A parent company guarantee may also be required.

### Subletting

Prohibited, unless the lease provides otherwise.

### Transfer of the right to lease

The lease generally prohibits assignments. However, a landlord cannot prohibit a tenant from assigning their lease to the purchaser of their business. But the lease may lawfully provide formalities to be complied with (e.g., a requirement to inform the landlord in advance), or conditions to be satisfied (e.g. the landlord to be satisfied that the assignee is solvent) to assign the lease to the purchaser of the business.

### Permitted use

Such clauses are now standard. The tenant may not use the premises for any other activity than the activity described in the lease without obtaining the landlord's prior consent. The statutory provisions set out the procedure to be followed for extending

the permitted use to ancillary activities, or to add to, or change the permitted use if the parties cannot agree.

### **Improvement of the premises**

Usually, the landlord will have the contractual right to keep the tenant's improvements at the end of the lease without having to pay any compensation to the tenant. However, the landlord is entitled to require the premises to be reinstated.

### ***Determination of rent on renewal***

The parties may freely determine the rent on renewal but the rent on renewal must correspond to the rental value of the premises.

If the parties do not agree, as is often the case, either party may apply to the court to fix the rent. The court will, in principle, apply the market rent. The following are taken into account in determining the market rent:

- The characteristics of the leased premises.
- The use for which the premises may be employed.
- The parties' obligations under the lease.
- Local commercial factors that have an effect (positive or negative) on the business (these include the importance of the town, area or street where the business is located, the location of the business itself, the nature and whereabouts of the other businesses in the vicinity, the means of transport, the particular attraction of the location for the business in question, and permanent, durable or temporary changes to these factors).
- The current rents in the area.

If the lease to be renewed was granted for a nine-year term, the statutory provisions require the increase (or decrease) in rent to be capped.

If the rent is capped, the rent payable under the new lease cannot exceed the initial rent under the expired lease, as adjusted to take into account the variation of the cost of construction index published quarterly by INSEE (national institution of economic statistics) over the expired nine-year period. The rent payable under a new lease will, as a result, often be less than the market rent, and this can in the course of time add considerable value to a lease.

Capping will not apply if one of the parties can prove that, during the lease to be renewed, there have been substantial and significant changes to the premises, to their use, to the parties' obligations under the lease, or to the local commercial factors used to set the initial rent.

As an exception, the capping rules do not apply to the following situations:

- Leases of land
- Leases of premises required to be used as offices only
- Leases of premises built for a specific single purpose (cinemas, hotels and theatres will often fall into this category)

- Leases with a term of more than 9 years or entered into less than 9 years, but having effectively lasted for more than 12 years (tacit renewal)

In the case of offices, the market rent will apply. For single purpose buildings, the rent is calculated essentially on the basis of a theoretical turnover derived from the number of seats or beds. The rules for land are also different, but it is essentially a market rent that will apply.

### *Compensation for non-renewal: eviction indemnity*

As has already been mentioned, the landlord has no obligation to renew the lease.

If the landlord refuses to renew the lease of a protected tenant, she/he will be under an obligation to pay them an eviction indemnity, unless the tenant has failed to remedy a breach of a fundamental provision of the lease after a formal notice to remedy the situation has been served, or if the premises are about to be totally or partially demolished because they are considered by the authorities insalubrious or dangerous. The purpose of the eviction indemnity is to compensate the tenant's loss suffered by the non-renewal of their lease.

The following will be taken into account to determine the amount of the eviction indemnity:

- The loss of business
- The removal costs
- Relocation, moving expenses
- The price and costs relating to the acquisition of a similar business with an equivalent value

But the amount of the eviction indemnity may be reduced, if the landlord is able to establish that the tenant's loss is less than that determined by these factors.

If the parties are unable to agree, the courts determine the amount of the eviction indemnity.

### *Rent review*

Both the tenant and the landlord are entitled to ask for the rent to be reviewed after at least three years have run from the commencement date or from the previous rent review. The new rent takes effect from the date on which one of the parties has made a proper request for the rent to be adjusted. The request must be made by *huissier* (bailiff), or by letter sent by recorded delivery and must specify the new rent sought by the applicant.

If the parties fail to reach agreement on the new rent, the matter may be referred to the courts.

If it can be established that since the rent was last agreed or reviewed there has been a material change in the local commercial factors, which has alone caused the rental value of the premises to vary upwards or downwards by at least 10%, the judge will fix the rent according to the new rental value of the premises, applying the same criteria as those applicable for the determination of the rent on renewal. The new rent can theoretically be lower than the initial rent.

If, as is usually the case, there has not been any material change in the local commercial factors (or if the rental value of the premises has changed by less than 10%), the new rent will be capped, as the increase or decrease in the rent cannot exceed the variation of the ICC index over the same period. Furthermore, if there has not been any change in local commercial factors, the rent cannot be decreased, even if the rent is higher than the rental value.

It should be noted that in determining the market value of the premises, where relevant, the judge would, in practice, tend to rely on the report of the expert appointed by the court. In the absence of meaningful published figures, the appointed expert will deduce the appropriate rent from other decided rent review cases. Consequently, rents fixed judicially tend to be far less than the true market value. A situation is developing whereby judicially fixed ‘market rents’ and open market rents are drifting apart.

The statutory rent review provisions are mandatory. The parties cannot, therefore, contract out of these. However, certain mechanisms are available to avoid these statutory provisions applying.

### Professional leases

Leases of premises to a tenant carrying on a professional activity are governed by the Civil Code and also by article 57A of a law of 23 December 1986. Professional leases must be granted for a minimum term of six years. The tenant has no right of renewal but has the right to terminate the lease at any time by giving at least six months’ prior notice. There have been a number of attempts to introduce new measures, but so far these have been abandoned.

## *Tax aspects*

### Taxation of rental income

#### *Corporate tax*

Under current tax provisions, tax losses can be used as follows:

- The carryback of tax losses is limited to the fiscal year in which the losses arise – any surplus would only be available for carryforward;
- The carryforward of tax losses is limited when the taxable result exceeds EUR 1m. In this case and for the portion that exceeds EUR 1m, companies are entitled to use tax losses to shelter only 50% of taxable profits (i.e. corporate income tax would be payable on at least 50% of the taxable result). Tax losses that were not used in a given year can be carried forward in their entirety (i.e. there is no forfeiture of unused tax losses).

The taxable income is equal to the gross rental fees less deductible expenses, both determined on an accrual basis such as (provided that they clearly relate to the French rental activity):

- Employee costs.
- Local taxes (e.g. local real estate taxes).
- Registration duty borne on the acquisition of the property which may either be fully deducted as an expense for the financial year in the course of which the acquisition was made, or be depreciated with the property over the useful life of the property.

- Irrecoverable VAT, i.e. VAT borne on purchase of services, or goods that are related to a non-VAT-able activity.
- Other general expenses such as management fees and insurance premiums.
- Interest on a loan contracted in order to purchase and/or refurbish the French property (subject to limitations on related party loans).
- Depreciation allowances (excluding the land element, which is non-depreciable) provided that they are recorded in the accounts.

Since 1 January 2005, French generally acceptable accounting principles (GAAP) have been amended, and therefore, rules governing depreciation of buildings have been changed. Permanent assets are to be split into ‘components’ and depreciated accordingly. Main structure and elements subject to replacement at regular intervals, having different uses or providing the company with economic benefits and following different rhythms, require proper rates and depreciation methods, e.g. for a building, structure/elevator/plumbing are depreciated over the life duration of each of these components. However, the French tax authorities admit that the structure can be depreciated on the basis of the standard rates provided in administrative guidelines before 2005 (i.e. depreciation rate between 2% and 5% for commercial premises, 4% for offices and 5% for industrial facilities/warehouses).

The depreciation of the property has a direct negative impact on the capacity of the company to distribute dividends: the accounting result may be lower than the amount of available cash. Consequently, should the shareholders have minimum cash repatriation requirements, it is necessary to identify other means for repatriation of the excess cash, e.g. shareholder loans and/or share premiums that can be easily reimbursed.

For properties held by a look-through entity (such as an SCI or a *société en nom collectif* (SNC)), the deductible depreciation charge can be limited by the amount of the net rental income generated by the property (difference between the rents and all the property-related costs, interest included).

### *Personal income tax*

Non-treaty-protected individuals owning a property in France without renting it out on an arm’s length basis, are subject to personal income tax on the basis of three times the rental value of the property. Tax treaty protected individuals are not subject to this minimum taxation and are only taxable in France if they let their property.

Non-French individuals who rent out their French property are subject to French income tax on rentals. In accordance with domestic rules, the taxable income is equal to the rental income (including expenses that are paid by the tenant but which should have been borne by the landlord) less deductible expenses such as (provided that they clearly relate to the French property):

- Repairs, maintenance and improvements (other than construction expenses).
- Employee costs.
- Local taxes.
- Managing agent’s fees.

- Insurance premiums for loss of rents.
- Interest on a loan contracted to finance the purchase and/or refurbishment of the French property (provided that the property is rented to a third party).

Registration duty paid upon the acquisition is not tax-deductible from rental income. It is deductible from any taxable capital gain generated by the sale.

Real estate losses, excluding those generated by interest charges, can be set off against the landlord's other taxable income up to EUR 10,700 and carried forward over six years.

### *VAT on rents and rental tax*

The letting of furnished or unfurnished lettings for dwelling purposes is, in principle, exempt of VAT, but subject, if the building is over 15 years old, to a rental tax at the rate of 2.5%, which is levied on the annual rental income.

The letting of furnished professional premises and parking lots is liable to VAT at the standard rate of 19.6% (20% as from 1 January 2014).

Finally, the letting of unfurnished professional premises is, in principle, exempt of VAT and subject to the 2.5% rental tax. The lessor can, however, elect for VAT within 15 days after the beginning of the rental activity (in such a case, rents are exempt of the rental tax).

A VAT election is valid until it is revoked. It has to be made building by building and is possible when the tenant is liable to VAT and uses the building for its commercial activities – the VAT election is also possible when the tenant is not subject to VAT (e.g. an administration that will use the building for its administrative activities), but in such a case, the VAT election must be expressly stated in the lease contract.

### *The 3% annual tax*

#### **Scope**

French or non-French entities, with or without legal personality, including trusts and similar vehicles, owning either directly or indirectly (and whatever the number of companies interposed between the building and the ultimate shareholders) real estate properties located in France, which do not perform a professional activity other than a rental one, fall within the scope of a 3% property tax levied annually, for assets owned on 1 January, on the fair market value of the real estate property located in France.

#### **Exemptions**

The 3% tax does not apply to:

- Sovereign States, public bodies and entities with or without legal personality held for more than 50% by a sovereign State or a public body.
- Entities with or without a distinct legal personality (including trust and similar entities) owning directly or indirectly real estate properties located in France where the fair market value is below 50% of the total value of the French assets held directly or indirectly by the entity. The French properties that are allocated to a professional activity (other than a pure real estate activity) are not included for

purposes of computing the 50% ratio, including where the professional activity is carried out by a related party.

- Entities with or without a distinct legal personality (including trust and similar entities) where the stocks are admitted to negotiation on a regulated market and are regularly and significantly traded and their wholly owned subsidiaries (held directly or indirectly).
- The following entities with or without separate legal personality (including trusts and similar entities) having their registered office in France, in an EU Member State or in a country that has concluded a double tax treaty (DTT) with France that includes an administrative assistance or a non-discrimination clause:
  - Entities owning directly or indirectly French properties, where the share ownership value in said French properties does not exceed either EUR 100,000 or 5% of the fair market value of the French properties.
  - Pension funds (or charities publicly recognised as fulfilling a national interest) whose activity supports the need to own French properties.
  - Non-listed French open-ended real estate funds (SPPICAV and FPI) and foreign funds subject to equivalent regulations.
  - Entities that file each year by 15 May, or undertake to disclose to the FTA at first request, information on shareholders owning more than 1% of share capital. The undertaking to disclose must be filed in principle upon the acquisition of the French property or upon the acquisition of a stake leading to indirect ownership in French properties.
  - Entities that file every year by 15 May, information on shareholders (owning more than 1%) about whom they have detailed information.
  - In all cases, foreign entities must be able to produce tax residency certificates proving that the local tax authorities consider that they are genuine tax residents.

Consequently, the use of entities located in either tax haven countries or which are excluded from tax treaty benefits (or which do not wish to reveal the names of their own shareholders) in order to hold directly or indirectly buildings located in France must be avoided. Otherwise, the 3% annual tax will be due. During years 2010 and 2011, a great number of exchange of information treaties have been entered into with former tax havens (e.g. Jersey, Guernsey, Liechtenstein) enabling companies resident in those countries to be exempt from the 3% tax provided that they meet the exemption requirements (filing/undertaking to disclose information).

It should be noted that the French tax authorities has stated that companies that have failed, in good faith, to file the required documentation, but which could otherwise have benefited from an exemption, may regularise their situation *vis-à-vis* the 3% tax either spontaneously or upon request, without incurring the risk of having to pay the tax.

### **Wealth tax (*Impôt de Solidarité sur la Fortune (ISF)*)**

Under French domestic law, a non-resident individual, owning directly or indirectly, a French real estate property is liable to French wealth tax if the global net value of all

his/her French assets exceeds EUR 1.3m as of 1 January 2013; the rates are those of a progressive bracket scale, which range from 0% to 1.5%.

The indirect ownership test is met either when (i) an individual owns shares in a company, French or not, whose assets mainly consist, directly or indirectly, of French real estate properties or, (ii) in the case where the interposed company's assets do not consist mainly of French real estate properties, if said individual, together with his/her spouse, parents, children, sisters and brothers, holds, directly or indirectly (and whatever the number of interposed legal entities or organisations) 50% of the capital of a legal entity or organisation owning a French real estate property.

The application of these provisions will, of course, depend on the terms of the applicable tax treaty, if any, from which said individual may seek the protection.

In this respect, it must be noticed that not all tax treaties deal with wealth tax issues, and in such a case, French domestic tax provisions will apply unilaterally.

The ISF will be levied either on the value of the property if it is held directly, or otherwise up to the value of the shares held directly by the taxpayer and deriving from the French property.

### Business licence tax (*Contribution Economique Territoriale*)

As of 1 January 2010 the existing business tax has been replaced by the so-called '*Cotisation Economique Territoriale*' ('CET'). CET will consist of two elements: (i) the '*Cotisation Foncière des Entreprises*' ('CFE'), assessed on the rental value of properties and (ii) the '*Cotisation sur la Valeur Ajoutée des Entreprises*' ('CVAE'), computed on the basis of value added.

The CET will impact real estate investors who rent unfurnished properties in France as this type of activity was so far kept outside the scope of business tax as it did not constitute a professional activity for these purposes.

The main changes are as follows:

- Under the new provisions, renting unfurnished real estate (excluding residential property) expressly falls into the category of a professional activity and hence within the scope of the new business tax. Before 2010, where a property was rented out, the rental value of the real estate was assessed to business tax in the hands of the tenant who undertakes the professional activity in the property.
- The CFE will be due by the tenant on the same basis as before and therefore the landlord will not be subject to CFE.
- What is new is that CVAE will now be payable by the landlord of the property that is let and the landlord will be taxable, based on the value added derived from the rental activity. CVAE will be payable by the landlord of the property if their turnover exceeds EUR 500,000.
- The CVAE rate has a progressive rate, which will go from 0.5% for turnover of EUR 500,000 up to 1.5% for turnover exceeding EUR 50m.
- The percentage of revenues and expenses earned in relation to the rental activity and taken into account in order to calculate the value added will be reduced to 10% in 2010, 20% in 2011, 30% in 2012, increasing to 90% in 2018.

### Local real estate taxes (rates)

The two main local taxes are the dwelling tax (*taxe d'habitation*), payable by the individual who disposes of a furnished residential property, and the real estate tax (*taxe foncière sur les propriétés bâties*), payable by the real estate owner. Generally, leases will provide that the tenant is to reimburse the landlord the *taxe foncière*. The *taxe d'habitation*, in the case of residential leases, is borne by the occupant.

Both taxes are based on the cadastral rental value of the property (which is lower than its real rental value) and their rates are fixed, on a yearly basis, by the local authorities.

### Tax on ownership of office premises, commercial premises and warehouses

The tax on the ownership of office premises, commercial premises and storage space in the Paris area (*taxe annuelle sur les locaux à usage de bureaux, les locaux commerciaux et les locaux de stockage en Ile-de-France*) is due annually by the owner of buildings (this tax, which is deductible from the taxpayer's income, is often recharged to the tenants).

For office premises, the amount of tax varies from district to district from EUR 4.96 to EUR 17.48 per square metre (office premises under 100 square metres are exempt from this tax). For commercial premises, the tax varies from district to district from EUR 1.99 to EUR 7.70 per square meter (commercial premises under 2,500 square metres are exempt from this tax). For warehouses, the amount of tax varies from district to district from EUR 1 to EUR 3.97 per square metres (commercial premises under 5,000 square metres are exempt from this tax).

## Sale of French real estate

### *Legal aspects*

The sale of the investment must be carefully examined beforehand, as the methods used to dispose of a real property may totally differ from the methods used to purchase it.

The various investigations sought by the buyer will be made during an audit and preparatory stage. During this stage, the commitment of sale or the agreement of sale (*promesse unilatérale ou synallagmatique de vente*) and other preliminary contracts will need to be executed, and once again, because they are time-consuming, they should be prepared in advance if a given deadline needs to be met for the implementation of the disposal.

The precautions for the seller will mainly be implemented through warranties securing the total payment of the price, which is deemed net of any fees and expenses that are supposed to be borne by the buyer.

There is no warranty provided by the seller except for the declarations and representations mentioned in the notary deed (ownership, etc.). These declarations and representations would not apply if the seller sells shares of the company that owns the property.

## *Tax aspects*

### *VAT and registration duty*

As previously mentioned, the sale of real estate and/or shares of real estate companies are subject either to VAT or to registration duty calculated on the price, or the value of the shares, if higher.

### *Taxation of capital gains*

In principle, based on French domestic tax provisions, any non-resident is liable to a WHT on capital gains arising from the sale of either real estate in France or the shares in a real estate company whose assets mainly consist of French properties.

This WHT will not be levied if it can be considered that the investors carry out a business in France and use the real estate for the purpose of their business (a mere rental activity will not be eligible).

However, the application of this WHT will mainly depend on the provisions of the relevant tax treaty since some of them do not attribute to France the right to tax such capital gains, but this exclusion mainly concerns the sale of real estate company shares.

### *Sale by non-resident companies*

If France has the right to tax the gain, a withholding will be levied, the said WHT being deductible against the company's liability to corporate tax in France, and any excess WHT is refundable.

### *Sale of the real estate*

For the purposes of the WHT payable by a company, the taxable capital gain is equal to the difference between the sale price and the purchase price. The rules differ depending on the country of residence of the company.

If the company is located in the EU, Iceland and Norway, the rules to determine the taxable capital gain are the same than the ones applicable to French resident companies.

Otherwise, the taxable capital gain is reduced by 2% per year of ownership (this 2% reduction only applies to the portion of the acquisition price of the buildings, i.e. excluding the land).

The net capital gain will be subject to a one-third WHT.

The one-third WHT must be paid when the notarised deed of conveyance is filed at the Land Registry and the French tax authorities. The notary will collect the tax from the seller. An accredited French tax representative must be appointed in order to file a tax return and pay the tax on behalf and in the name of the seller. The transfer of the real estate is subject to the payment of the WHT.

### *Sale of the shares in a real estate company*

The taxable basis is equal to the difference between the sale price and the purchase price of the shares.

The net capital gain will be subject to a one-third WHT.

If the real estate company is a French SARL or SCI, the sale of its shares must be filed with the Commercial Registry which, in practice, may refuse to register the sale if, beforehand, the seller has not succeeded in having the share transfer agreement registered with the French tax authorities.

### *Sale of the shares in a SIIC or a listed real estate company*

The sale of the shares in a SIIC or a listed real estate company on regulated French or foreign market is subject to a 33.33% WHT) if the seller holds directly or indirectly at least 10% of the share capital of the company where the shares are transferred. If the seller is an EU tax resident, the WHT rate is decreased to 19%.

### **Sale by non-resident individuals**

If France has the right to tax the gain, the WHT is paid in full and final settlement is made of all tax due in France on the gain made by the non-resident.

The below described regime applies to the sale of:

- the real estate;
- shares in in a tax transparent real estate company;
- shares in real estate company subject to CIT;
- shares in a SIIC, a listed real estate company or a SPPICAV

The capital gain is equal to the difference between the sale price and the purchase price.

In the sole cases of a direct sale of the property by the non-resident individual or the disposal by a French transparent entity held directly by a non-resident individual the capital gain is increased by (i) the acquisition costs effectively borne (or set at 7.5% of the acquisition price), and (ii) the real cost of all the improvement and maintenance works carried out (or set at 15% of the acquisition price if the real estate has been held for more than 5 years).

The gain is reduced by 2% per year between the 6th and 17th year of ownership; 4% per year between the 18th and 24th year; and finally 8% annually after 24 years. Accordingly, after 30 years of ownership, there is no WHT payable on the gain. Capital gains may also benefit from exemptions such as the capital gains tax exemption applying to sales of French residences of non-residents upon specific conditions.

If the seller is an EU tax resident, the net capital gain will be subject to a 19% WHT (same rate as for a French resident), while if the seller is a non-EU tax resident, the net capital gain will be subject to the one-third WHT except when the seller is located in a non-cooperative State or territory (Guatemala, Montserrat, Philippines, Brunei, Nauru, Marshall Island, Niue, Botswana) where the rate is 75%.

The effective rates of taxation are the following:

- as from 17 August, capital gains realised by non-resident individuals upon the transfer of real estate property in France are subject to social security contributions (CSG/CRDS). As result the effective WHT rates currently are 34.5% (19+15.5), 48.8% (33.33+15.5), or 90.5% (75+15.5);

- as from 1 January 2013, a surtax on real estate capital gains greater than EUR 50,000 on sales property applies to non-resident individuals so that the effective taxation rate will be:
  - between 36.5% and 40.5% if the seller is an EU tax resident;
  - between 50.8% and 54.8% if the seller is a non-EU tax resident;
  - between 92.5% and 96.5% if the seller is located in a non-cooperative Country.

This surtax does not apply to capital gains benefitting from an exemption as property hold for more than 30 years or residence in France of a non-resident.

### **Sale by a French limited liability company**

#### *Sale of the real estate*

The taxable capital gain, usually equal to the difference between the sale price of the building and its net book value, is taxed at the standard corporate tax rate (increased by the surtaxes). Clearly, there is a full clawback of the depreciation allowances previously deducted.

#### *Sale of the shares in a non-listed real estate company*

The capital gain, usually equal to the difference between the sale price of the shares and their net book value, is taxed at the standard corporate tax rate.

#### *Sale of the shares in a listed real estate company*

The capital gain, usually equal to the difference between the sale price of the shares and their net book value, is taxed at the standard corporate tax rate or at the reduced tax rate of 19% if the seller has held a 10% ownership for at least two years.

### **Inheritance and gift tax**

Under French domestic law, a non-resident individual who directly or indirectly owns real estate in France is liable to French inheritance and gift tax on that property (tax rates, which vary according to the kinship existing between the deceased/donor and the beneficiary and the amount of the gift, range from 5% to 60%). The indirect ownership test is met either when an individual owns shares of a company, whether French or not, whose assets consist, directly or indirectly, mainly of real estate in France or, where the interposed company's assets do not consist mainly of real estate in France, if the individual, together with his/her spouse, parents, children, sisters and brothers, holds, directly or indirectly (regardless of the number of interposed legal entities or organisations) at least 50% of the capital of a legal entity or organisation owning real estate property in France.

The application of these provisions will, of course, depend on the terms of any applicable tax treaty for the avoidance of double taxation on inheritance and gifts. However, very few tax treaties deal with gift tax issues.

The inheritance or gift tax will be levied on the value of the property, if it is held directly, or on the value of the shares, if the real estate is owned through a company.

## F-REIT or *sociétés d'investissements immobiliers cotées* (SIIC)

### *Main tax rules*

A specific tax regime is offered to listed real estate companies (*sociétés d'investissements immobiliers cotées*).

By virtue of said provisions, companies, whose main activity is the leasing of properties as well as the subletting of properties under certain circumstances, which have a share capital at least equal to EUR 15m and are listed on a French regulated market or on a foreign stock market, which meets the requirements set forth by the EC Directive 2004/39/CE dated 21 April 2004, can, together with their subsidiaries (subject to corporate income tax) held at more than 95%, elect for the regime provided for by article 208 C of the French Tax Code, whereby, said companies are exempt of corporate income tax on: (i) their rental income (or the rental income realised by their tax transparent subsidiaries); and (ii) the capital gains triggered by the sale of their properties (or the properties owned by their tax transparent subsidiaries), or the sale of the shares of their subsidiaries; and (iii) the dividends received, provided the following conditions are met:

- At the time of the election for this tax regime, a 19% exit tax is paid on any latent gain existing on their real estate assets or on the shares of their tax transparent subsidiaries (the payment of said exit tax being in fact spread over a four-year period).
- At least 85% of the tax profits deriving from the rental income realised by the company, which has elected for the SIIC regime (and by its tax transparent subsidiaries), must be distributed before the FY of their realisation ends.
- At least 50% of the tax profits deriving from the sale, by the company, which has elected for the SIIC regime (and by its tax transparent subsidiaries), of buildings or real estate companies shares, must be distributed before the end of the FY following the FY of their realisation.
- 100% of the tax profits deriving from the dividends received by a company, which has elected for the SIIC regime (and by its tax transparent subsidiaries) from a subsidiary itself subject to the SIIC regime or from another listed SIIC held for at least 5% since at least two years, must be distributed before the FY of their reception ends. The Finance Bill for 2008 extended the exemption to dividends received by a SIIC from a SPPICAV or a foreign company that has a similar statute to a SIIC, provided that the SIIC that received the dividends holds at least 5% of the share capital of these entities for at least two years.

### *Opportunities offered by the regime*

In 2011, there were around 40 French SIICs.

Whether or not an existing company and its subsidiaries can elect and/or have an interest to elect for such a regime is to be reviewed taking into account the following elements:

- The dividends distributed out of the exempt profits will not benefit from the parent company EU Directive. Therefore, non-French shareholders may be subject to a 30% WHT at source on the dividends received (said rate may be reduced by the relevant treaties).
- Because the companies that elect for this tax regime cease to be fully subject to corporate income tax, the election to the said tax regime could entail significant tax consequences, such as the termination of an existing tax group, which could induce costly tax consequences;
- The business plan of the group *vis-à-vis* its French portfolio;
- The level of tax liability on latent gains, which has already been booked by the group in its consolidated balance sheet, etc.

Since 1 January 2010, it is possible for SIIC to set up joint venture (JV) entities with OPCI (see section 'OPCI'). In other words, the SIIC regime is now available to French subsidiaries that fulfil the requirements to elect for the SIIC regime, subject to corporate income tax, that are at least 95% held by one or several SIICs or one or several SPPICAVs or jointly held by one (or several) SIIC and one (or several) SPPICAV.

### The anti-captive provision

As of 1 January 2010, the financial and voting rights in a listed SIIC must not be held, directly or indirectly, at any moment during the application of the SIIC regime, at 60% or more, by one or several shareholders acting jointly ('*action de concert*'). In principle, where this ratio is not met, the tax-free regime will not apply in the future (definitive exit). However, under certain circumstances, the tax-free regime can only be suspended for a given financial year (temporary exit).

In addition, a minimum 15% free float needs to be respected (free float being defined as a maximum of 2% per shareholder).

### The 'anti-Spanish' route provision

SIIC dividends paid to French corporations are fully subject to corporate income tax (CIT), whereas SIIC dividends paid to a Spanish parent company may not be subject to any tax in France and in Spain. This distortion has created a certain level of emotion. Accordingly, for dividends distributed as of 1 July 2007, SIICs are subject to a 20% tax on distributions made to shareholders (other than individuals) owning, directly or indirectly, 10% of the share capital, where said shareholders are not subject to CIT on their SIIC dividends, or are subject to CIT for an amount lower than one-third the amount of CIT, which would have been paid in France. The tax is equal to 20% of the dividends paid, before WHT if any. This provision does not apply where the shareholder of the SIIC is a SIIC vehicle or a foreign company with similar status, i.e. with a full distribution requirement, and provided that the shareholders of the said intermediate vehicles own at least 10% of the share capital, would in turn be taxable on subsequent distributions.

The 20% tax is presented as an autonomous tax, but is assessed and collected as CIT. The compatibility of the 20% tax with EU legislation and existing DTT is still being evaluated. One could follow up on how the 20% tax would apply to distributions made to French pension funds, which traditionally are tax-exempt on French source dividends.

## *OPCI (French non-listed REITS)*

The French Government has introduced under French law a new estate investment vehicle, called 'OPCI' (*Organisme de Placement Collectif en Immobilier*).

The OPCI regime is available through two alternative vehicles, which are the *Fonds de Placement Immobilier (FPI)*, having no legal personality (tax transparency) and the *Société de Placement à Prépondérance immobilière à capital variable (SPPICAV)* which has a legal personality (subject to CIT).

OPCI have to be at least 60% invested in real estate properties and have a 50% maximum indebtedness. Moreover, SPPICAV may not exceed a 9% maximum investment in real estate listed companies and may benefit from a corporate income tax exemption available if 85% of rental income and 50% of capital gains are distributed.

Actually, regulatory issue has to be managed with the AMF.

### **Tax aspects of SPPICAV**

- SPPICAVs benefit from a CIT exemption on the entirety of their income/capital gains.
- Dividend distributions from SPPICAVs to companies subject to CIT do not benefit from the parent/subsidiary exemption on dividends and are taxed at the standard CIT rate. Capital gains are subject to corporate income tax.
- Dividend distributions from SPPICAVs are not subject to the new 3% tax on dividends.
- Distributions from SPPICAV to French individuals are treated as dividends. They are subject to a 21% WHT upon their payment to the French individual. Then, the dividends are subject to personal income tax at progressive rates (of up to 45%) accrued by 15.5% of social contributions and the French individual is entitled to use the 21% WHT as a tax credit against its personal income tax liability. As from 1 January 2013, Capital gains (after the application in certain cases of a tax allowance for holding period) on the repurchase of shares are to personal income tax at progressive rates (of up to 45%) accrued by 15.5% of social contributions.
- Retail SPPICAVs benefit from a 3% tax exemption.

The conversion of a company subject to CIT into a SPPICAV benefits from a reduced 19% CIT rate on the latent gains existing on real estate assets (the payment of this tax being in fact spread over a four-year period). The shareholders of the company transformed are not taxable on the surplus on a winding-up.

### **Tax aspects of FPI**

- Rental income collected by FPI (directly or not) and capital gains realised are taxed at the shareholders' level.
- Shareholders subject to CIT are taxed at a standard rate on these gains.
- FPIs attribute mainly rental income and capital gain on real estate that are taxed in France the same way that if the non-resident individual had realised the same income directly. Please refer to our comments above.

- Individual French tax resident shareholders are subject to income tax on rental income and taxed at progressive rates (of up to 45%) accrued by 15.5% of social contributions.
- Non-residents are subject to WHTs on dividends (30% for the entities and 21% for individuals), and capital gains (33.33% subject to the application of DDTs but no WHT applies on interest)
- Retail FPIs benefit from a 3% tax exemption

Furthermore, the transfer of OPCI's shares is exempted from registration taxes, except in certain cases where a 5% transfer tax is levied, when, following the acquisition:

- an individual holds (directly or indirectly) more than 10% of the OPCI shares;
- a legal entity holds (directly or indirectly) more than 20% of the OPCI shares.

The Amended Finance Bill for 2007 extends this exemption from registration taxes to the repurchase of OPCI's shares in the case where the repurchaser is itself an OPCI (subject to both exceptions above).

The Finance Bill for 2010 has amended the SIIC and the OPCI regime in order to facilitate the setting-up of JV entities between SIIC and OPCI.

## Municipal tax system in France

There are four main taxes that depend on French local government (regions, departments and municipalities), which are as follows:

- Business tax
- Real property tax on undeveloped land
- Real property tax on buildings
- Habitation tax

### *Business tax overview (BT)*

As of 1 January 2010 the existing business tax has been replaced by the so-called 'Cotisation Economique Territoriale' (CET). CET will consist of two elements: (i) the 'Cotisation Foncière des Entreprises' (CFE) assessed on the rental value of properties and (ii) the 'Cotisation sur la Valeur Ajoutée des Entreprises' (CVAE) computed on the basis of value added.

The CET will impact real estate investors who rent out unfurnished properties in France as this type of activity was so far kept outside the scope of business tax as it did not constitute a professional activity for these purposes.

What is new is that the CVAE will now be payable by the landlord of the property that is let and the landlord will be taxable based on the value added derived from the rental activity. CVAE will be payable by the landlord of the property if their turnover exceeds EUR 500,000.

The CVAE has a progressive rate going from 0.5% for turnover of EUR 500,000 up to 1.5% for turnover exceeding EUR 50m.

The percentage of revenues and expenses earned in relation to the rental activity and taken into account in order to calculate the CVAE will be reduced to 10% in 2010, 20% in 2011 and to 30% in 2012, increasing to 90% in 2018.

### *Real property tax and habitation tax*

Property tax and habitation tax are based on the real estate rental value of developed land and undeveloped land, according to specific returns filed by the owner of related properties.

The rental value is computed by the real estate tax administration, and is used to compute property tax, habitation tax and part of the business tax.

Owners of properties used for habitation are liable for real estate tax on a real estate rental value basis, computed by the French real estate tax administration, according to a square metre value (EUR/square metre).

Users of habitations are subject to habitation tax on the same real estate rental value as for real estate tax, but with specific rules and some reductions/exemptions, according to the tax status of inhabitants.

Properties used by entities subject to corporate income tax and performing a commercial activity are liable for real estate tax on developed and undeveloped land on a real estate rental value basis, computed by the French real estate tax administration, according to a square metre value (EUR/square metre).

Properties used by entities that are performing industrial activities are subject to real estate tax on developed land and undeveloped land on the real estate rental value basis, computed by the French real estate tax authorities, according to the gross book value of the immovable assets.

The real estate rental value is to be modified on 1 January of each year following an addition/removal of building. Then, any square metre increase/decrease induces an increase/decrease of the real estate rental value for commercial buildings, and any addition/removal of assets should normally be declared to the tax authorities (by the lesser or even the lessee).

Tax rates are levied for the benefit of the regions, departments and municipalities (i.e. public entities that have administrative and taxing powers), so the global property tax rates are then very different from one site to another.

### *Miscellaneous taxes*

Other miscellaneous taxes linked to real estate are levied for the benefit of local governments, such as the following:

- Registration duties on transfer of real estates
- Duties for use of public streets/places
- Mining fees

- Accommodation fees
- Garbage cleaning fees

In addition, several additional municipal taxes have been recently introduced (*‘taxe d’aménagement et du versement de sous-densité’*) or extended and should therefore be carefully considered before implementing any investment in France.

## Conclusion

It will be clear from this introductory guide that any real estate investment in France has to be considered carefully, both from a legal and tax aspect, to optimise the investment.

The choice of the proper vehicle for the acquisition will take into account the following factors:

- The tax impact of the registration duties to be paid both at the time of the purchase and on resale.
- The possibility of reducing the level of payable tax on the rental income (via indebtedness for instance).
- The cash-flow repatriation.
- The ways of avoiding the additional CIT on dividends.
- The ways of avoiding the 3% annual tax.
- The possibility of reducing the future taxation of the capital gains on the resale of the property or of the real estate company.

The most suitable structure will vary from one investment to another, depending on the investment profile, the investor, the country of origin and the envisaged exit plan.

Even if a ‘one-size-fits-all’ target is often sought, we do believe that only tailored structuring will fully fit one’s goals and perhaps allow for those tax and legal opportunities that can, sometimes, be one of the competitive advantages of a deal.

An investor, whether French or foreign, would be well advised to seek professional advice from local advisers from the very beginning of a deal.

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# *Real Estate Going Global Germany*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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All information used in this content, unless otherwise stated, is up to date as of 13 June 2013.

# *Real Estate Tax Summary – Germany*

## *Resident and non-resident status*

German tax law distinguishes between resident and non-resident status. A German resident entity is, in principle, subject to tax on its worldwide income (so-called 'unlimited tax liability'). A non-resident is subject to tax on German-source income (so-called 'limited tax liability') unless exemption from German tax is provided under the terms of a tax treaty concluded between the country of residence and Germany. The international tax treaties concluded by Germany give Germany in principle the right to tax income derived from German real estate.

## *Direct or indirect ownership*

It is possible for a non-resident of Germany to make a direct investment in German real estate or an indirect investment (through an interposed acquisition vehicle). The acquisition vehicle in the latter case may be either a German resident or non-resident entity. A German resident entity is one that has either its seat or place of management in Germany. An indirect investment may be through a newly formed entity established for this purpose or by the acquisition of an existing entity, which owns German real estate.

## *Applicable German tax rates*

### *Corporate income tax*

The rate of corporate income tax payable by a German resident entity and by a non-resident entity is identical, namely 15% (plus 5.5% solidarity surcharge = 15.825%).

### *Withholding tax*

Business income distributed by a German resident corporate entity in the form of dividends is in principle subject to a 25% withholding tax (WHT) (plus solidarity surcharge adding up to 26.375%). A reduced rate of 15% is available for non-resident corporations under further substance requirements. Many of Germany's tax treaties provide for a reduced tax rate, and distributions that are made to a corporate shareholder resident within the European Community are exempt from WHT under the Parent-Subsidiary Directive, provided certain conditions are satisfied.

If the income received by a non-resident investor is business income generated through the activities of a German permanent establishment (PE), or rental income received by a non-resident direct investor in German real estate, German WHT is not imposed.

### *Trade tax*

Trade tax (the revenue from which flows to German municipalities) is imposed on business income generated by the activities of a German PE. The rates vary between 7.0% and 17.15%, depending on the factor determined by the local municipality in which the business operations are carried on.

The effective combined corporate income tax and trade tax rate varies between about 23% and 33%.

## Taxable income

### *Corporate income tax*

In arriving at taxable income for corporate income tax purposes, a taxpayer may deduct expenses incurred in connection with the acquisition and ownership of real property as well as operating expenses, unless they are to be capitalised. Buildings can generally be depreciated straight-line at a rate of 2% or 3%.

The deduction of interest expense may for tax purposes be restricted by the ‘interest capping rules’ (*‘Zinsschranke’*). They apply not only to shareholder loans but also to bank and other loans. In principle, net interest expense may only be deducted up to a maximum of 30% of the taxable EBITDA. However, exceptions are available where net interest expense is less than EUR 3m annually, the company does not belong to a consolidation group or the company can prove that its equity ratio is not lower than the equity ratio of the consolidated group to which it belongs.

### *Trade tax*

The starting point for the determination of the taxable income for trade tax purposes is the taxable income as determined for corporate income tax purposes. A number of trade tax-specific adjustments are to be made. These adjustments include an add-back of 25% of interest expense on loans and of 12.5% of rental expense for immovable fixed assets.

Of particular interest in the case of real estate companies is a provision that permits taxpayers who are engaged exclusively in the administration of their own real estate to exclude such income from their trade tax base, reducing the taxable income to zero. This deduction, referred to as the ‘extended trade tax deduction’, is not available if additional ancillary activities or rental of fixtures ‘taint’ the nature of the income. In practice, careful planning is usually required.

## Capital gains

For companies capital gains derived from the sale of real estate are in principal taxable at standard tax rates.

## Losses

For (corporate) income tax purposes, losses incurred by a taxpayer may be carried back and offset against taxable income of the preceding year (with a current loss carryback limit of EUR 1m). Alternatively, they may be carried forward without time restriction; however, loss utilisation in any one year is restricted as follows: Loss carryforwards may be used to offset profits of a subsequent year unrestrictedly up to an amount of EUR 1m; only 60% of the taxable income in excess of EUR 1m may be offset, however. For trade tax purposes, a loss carryback is not permitted; for loss carryforwards, the same rules apply as for income tax purposes.

## Real estate transfer tax

Real estate transfer tax is imposed on the consideration paid for the transfer of real estate. The general tax rate is 3.5%. Differing tax rates apply in most federal States. A tax rate of 4.5% applies for real estate located in Hamburg, Bremen (as of 1 January 2014 increase to 5% intended) and Lower Saxony. A tax rate of 5% applies for real estate located in Baden-Württemberg, Berlin, Brandenburg, Hessen, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saxony Anhalt, Schlesweig-Holstein (as of 1 January 2014 increase to 6.5% intended) and Thuringia and a tax rate of 5.5% applies for real estate located in Saarland.

Transfer tax is also imposed on certain transactions that are deemed to constitute a transfer of property ownership, i.e. where 95% or more of the shares in a company that owns German real estate are transferred or assembled in the hands of one shareholder, and on changes in the ownership of a partnership, where 95% or more of the partnership capital is transferred within a five-year period. However, certain cases of intra-group reorganisations are exempt from real estate transfer tax.

In a recent amendment of German RETT law a new provision was enacted to abolish so called 'RETT-Blocker-Schemes'. The wording aims to look through indirect holding structures and to consider any indirect holding for calculating the 95% threshold (under current law indirect holdings below the 95% threshold are not considered). As a consequence for calculating the 95% threshold, any direct and any indirect holding in a property company will be considered. The new rules will apply on all transactions from 7 June 2013 on, as the bill has been passed by the German Federal Parliament on 6 June 2013.

## VAT

The VAT rules which apply in the case of the transfer of real estate are complicated and require particular attention. If the item of real estate constitutes the complete business of the seller, or an independent part thereof, the sale is not subject to VAT. Otherwise, the transfer constitutes a taxable event for VAT purposes, but exemption from tax is specifically granted where the transaction is subject to real estate transfer tax.

The seller nevertheless has an option in this case to voluntarily subject the transaction to VAT if the real property is sold to an entrepreneur who intends to use the real estate for the purpose of generating VAT-taxable turnover. The exercise of this option may be attractive for the seller, where this permits the latter to avoid having to repay to the tax administration, input VAT amounts billed to him in suppliers' invoices on the erection of the building, which otherwise would have to have been repaid to the tax administration on a change in usage of the property for VAT purposes (from taxable letting to a tax-exempt sale).

# Real Estate Investments – Germany

Throughout this document, the term ‘corporation(s)’ is used to refer to the German term ‘*Kapitalgesellschaft(en)*’, the term ‘partnership(s)’ to ‘*Personengesellschaft(en)*’, and the term ‘company/-ies’ generally to ‘*Gesellschaft(en)*’, i.e. to both (or either of) corporations and partnerships.

## Understanding the basic tax principles

The taxable income derived from real property in Germany is determined in accordance with the provisions of German tax law, irrespective of whether the owner is a private individual or corporate body, resident or non-resident.

According to the German Income Tax Act (*Einkommensteuergesetz*, EStG), non-resident taxpayers are, in general, liable to German tax only on their German-source income, including the income from real property in Germany. (For this reason, they are referred to as having a ‘limited tax liability’.) The international tax treaties concluded by Germany give the right to tax income derived from such real property to Germany (see also *article 6 of the OECD Model Convention*).

Indirect tax regimes, such as the value added tax (VAT) and the real estate transfer tax (*Grunderwerbsteuer*), apply to transactions involving or related to German real property.

The following (non-exhaustive) section is to provide an overview on the most important taxes in connection with an investment in German real estate.

### Income tax

#### Resident companies

German income taxation depends mainly on the status of the taxpayer as well as on the category of income derived from an activity.

Partnerships do not constitute a taxable entity for income tax purposes; their income is attributed directly to its partners and taxed on their level under the Income Tax Act or Corporate Income Tax Act. However, a partnership is a taxable entity for trade tax purposes.

Legal entities, in particular corporations, which have their seat or place of management in Germany, are referred to as having an ‘unlimited tax liability’ in Germany, i.e. their worldwide income falls within the scope of the German Corporate Income Tax Act.

German income tax law differentiates between seven categories of taxable income. For real estate investments, the differentiation between business income (*Einkünfte aus Gewerbebetrieb*) and rental income (*Einkünfte aus Vermietung und Verpachtung*) is of particular relevance (the taxation aspects of rental income are discussed below).

Income is classified as ‘business income’ either by statutory definition or by business activity.

Most corporations, in particular the limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH), or public incorporated company (*Aktiengesellschaft*, AG), derive 'business income' by statutory definition regardless of whether their actual activities can be characterised as a business activity. Partnerships such as the general partnership (*Offene Handelsgesellschaft*, OHG), limited partnership (*Kommanditgesellschaft*, KG), or civil law partnership (*Gesellschaft bürgerlichen Rechts*, GbR) generate 'rental income' as long as their activities are restricted to the mere holding and administration of real property (*Vermögensverwaltung*).

However, if any of the partnership's activities are viewed as business in nature, all of the income will be deemed to be 'business income'. Limited partnerships in which limited partners are not authorised to manage the partnership and the general partners of which consist exclusively of corporations are deemed to generate 'business income' even if they do not pursue business activities.

Business income is generally determined on an accruals basis. Income is, therefore, attributed to the year to which it economically belongs. Accounting records must be kept and financial statements must be prepared.

In general, all expenses connected with income derived from the real estate are deductible, such as maintenance and repairs, depreciation allowances and financing costs. However, 'interest capping rules' (*Zinsschranke*) may restrict the deductibility of interest expense for tax purposes, not only with respect to shareholder loans but also to bank and other loans (see section below '*Interest capping rules*').

For corporations, the starting point to determine taxable income is the income reported in the company's annual accounts. Basically, all payments relating to the business can be deducted, unless they constitute acquisition or construction costs, in which case they are to be capitalised. Some adjustments are nevertheless made in order to bring the figures in line with the tax accounting rules.

The company's income basis can so be reduced by deductible expenses connected with real estate, such as depreciation of buildings, repair, maintenance and similar costs. With the exception of land, most tangible and intangible fixed assets are depreciable. The depreciation rules as described below do not, however, apply to property held as current assets.

The standard depreciation method is the straight-line method. The basis for depreciation is acquisition or construction cost.

For buildings, the depreciation rates range from 2% to 3%, assuming a useful life of 33 to 50 years. For moveable assets acquired in 2009 or 2010, the declining balance method at a rate of up to 25% may be used. For small and medium sized companies, additional depreciation rates of up to 20% are available.

Capital gains derived from the sale of real estate are, in general, taxable at the standard tax rates if they are classified as ordinary business income, trading in real estate, or the real estate is sold within ten years after purchase.

For income tax purposes, selling an interest in a real estate partnership is considered a sale of the real property. By creating a so-called 'replacement or reinvestment reserve', taxation of capital gains realised on the sale of German land or buildings may be deferred and the tax burden effectively reduced. The capital gains may be offset

against the cost of assets which qualify as reinvestment objects (basically real property) acquired in the year of sale, or during the course of the following four years.

Gains realised by a partner on the sale of an asset that they hold as a sole proprietor or as a special business asset may be offset against the cost of reinvestment objects acquired by the partnership to the extent the partner participates in the partnership. In addition, rollover relief is permitted for capital gains realised by sole proprietors or partnerships on the sale of shares in a corporation (limited to capital gains of EUR 500,000 if a reinvestment is made in corporate shareholdings or tangible assets within a period of two years, or in real property within a period of four years).

The corporate income tax rate is 15%. An additional 5.5% solidarity surcharge is levied (adding up to 15.825%) on the assessed income or corporate income tax, respectively, payable.

Tax prepayments are required to be made at quarterly intervals throughout the year.

Tax returns have to be filed annually, generally not later than five months after the accounting year-end or, if prepared by a professional tax adviser, by end of the year following the accounting year-end. The tax will then be assessed by the authorities based on the information provided in the tax return and will become payable at the latest one month after the tax assessment is issued.

The statute of limitations period is four years, and it commences to run from the end of the calendar year in which the tax return has been filed with the tax authorities, or latest from the end of the third calendar year after the tax year. This period, however, is extended to five or ten years in the case of tax fraud. After expiry of the limitation period, the tax assessed cannot be altered, rectified or rescinded. For income tax purposes, losses suffered by companies (also through participations in transparent partnerships) may either be carried back for one year (maximum limit of EUR 1m), or carried forward without time limit, however, with the following restriction: While the first EUR 1m of loss carryforwards may be offset in full against the taxable income of a subsequent year, taxable income in excess of this figure may only be offset by losses to the extent of 60%. (As a result, a minimum of 40% of the income in excess of EUR 1m is subject to tax.)

To prevent trading in the shares of companies with tax loss carryforwards the utilisation of losses carried forward in case of changes in the ownership structure is restricted. The utilisation of tax loss carryforwards is restricted, not only for a direct, but also for an indirect change of shareholders. The restriction depends on the percentage of share capital or voting rights transferred within a five-year period to one acquirer or person(s) closely related to the acquirer or a group of acquirers as follows:

- A direct or indirect transfer (or equivalent transaction) of up to 25% has no impact on the utilisation of tax loss carryforwards.
- A direct or indirect transfer (or equivalent transaction) of more than 25%, but not more than 50% results in a pro rata forfeiture of the tax loss carryforwards existing at the date of share transfer (or equivalent transaction).
- A direct or indirect transfer (or equivalent transaction) of more than 50% results in a complete forfeiture of the tax loss carryforwards existing at the date of share transfer (or equivalent transaction).

The rules apply to both corporate tax and trade tax loss carryforwards for transfers that take place after 31 December 2007.

Exceptions are available in the case of:

- Internal restructuring of a group 100% held by a single shareholder.
- To the extent the loss carryforwards do not exceed hidden reserves in the transferred company's net assets.

In the case where a loss carrying corporation is merged into another corporation, all loss carryforwards are forfeited.

The new rules apply also to interest carryforwards in the meaning of the interest capping rules and to trade tax losses carried forward by partnerships to the extent the interests in the partnership are held by corporations.

Further anti-avoidance rules exist for so-called 'tax deferral models' (*Steuerstundungsmodelle*), stipulating that losses from such investments may only be offset against future profits from the same investment. These rules are particularly aiming at funds investing in the media, movie, or new energy (e.g. wind parks) sectors.

Losses for trade tax purposes can also be carried forward, but not carried back. The relief for loss carryforwards generally follows the income tax rules. Accordingly, the maximum loss that may be offset in any one year is restricted to EUR 1m plus 60% of the amount by which the taxable income for the year exceeds EUR 1m.

German tax regulations require that intercompany transactions comply with arm's length principles in order to be accepted for tax purposes. Otherwise, adverse tax consequences can result. For instance, where the compensation paid by a German subsidiary to its foreign parent company is in excess of the amount that it would have paid to an independent third party, the excess amount is considered to be a hidden profit distribution, which is non-deductible in determining the subsidiary's taxable income. In addition to the additional corporation tax and trade tax payable by the subsidiary, dividend withholding tax (WHT) (standard rate 25% plus 5.5% solidarity surcharge) may be assessed on the shareholder.

There are detailed transfer-pricing documentation obligations that will have to be observed to avoid the assumption of hidden profit distributions as well as the imposition of penalties for failure to comply. More specifically, failure to produce the necessary records in a satisfactory manner within 60 days (in the case of a transaction not in the ordinary course of business, within 30 days) upon request by the tax authorities may trigger the following sanctions, in addition to a correction of the taxable income:

- Refutable presumption that the income was underreported, entitling the tax authorities to estimate the income at the less favourable end of a price range.
- Penalties in the amount of 5% to 10% of the additional income.
- Penalties for belated production of documents.

## Non-resident companies

Income derived by non-resident corporations from German real estate transactions is generally subject to taxation under the German Income Tax Act. Basically, the same income determination rules apply as for resident companies. The corporate income tax rate applicable to non-resident corporate investors is the same as for resident ones: 15.825% (namely 15% plus 5.5% solidarity surcharge thereon).

Non-resident taxpayers are subject to certain restrictions with regard to the determination of the tax base: Expenses are only tax-deductible if they are economically connected with taxable German income, specifically income that is not tax-free. Concerning the possibility to carry tax losses back or forward, the provisions mentioned above for resident companies are also applicable for non-resident companies if the losses arise in connection with what would have constituted German income. The losses can be offset against both operating income and capital gains realised on the sale of German property. Income subject to WHT, however, cannot be offset against losses from other categories of income, and losses arising under the heading 'income from capital' can neither be carried forward nor back.

Taxpayers are generally allowed to keep electronic books and records in another European Union (EU)/European Economic Area (EEA) country with a regular information exchange with Germany (EU, Iceland and Norway). To obtain the necessary approval by the tax office, certain conditions, basically relating to a proper assessment procedure, are to be fulfilled.

## Resident individuals

Under the German Income Tax Act, individuals who have their residence in Germany or are physically present in Germany for more than 183 days in the tax (calendar) year are subject to so-called 'unlimited tax liability', i.e. they are taxable on their worldwide income.

A German resident individual who receives income from real property is deemed to generate 'rental income' unless they carry out a business activity and the real property is attributable to their business undertaking. The net rental income derived from the property is subject to German income tax. The German Income Tax Act provides for a rate scale, which is proportional at lower and higher income levels, but progressive for middle income levels. The tax rate varies from 14% to 45%, in each case plus 5.5% solidarity surcharge thereon, and with a tax-free amount of EUR 8,130.

The depreciation rules described above also apply to real property owned by individuals.

The taxation of gains realised on the sale of real property depends on the tax classification of the income derived. If the property does not form part of a business, gains on its sale are subject to income tax at normal tax rates if the sale is made: (i) before it has been acquired, or (ii) within ten years after the date of acquisition. If the sale is not concluded within the aforementioned timeframe (i.e. if a ten-year holding period is observed), capital gains are tax-free unless the real property forms part of a business.

## Non-resident individuals

Individuals who are not resident in Germany are subject to so-called 'limited tax liability', i.e. they are taxable only on their German-source income. The determination

of the tax base itself does not differ in principle from that in the case of non-resident companies described above.

### *Definitive withholding tax regime (Abgeltungsteuer)*

Since 2009, a new definitive WHT regime (*Abgeltungsteuer*) applies to certain private investment income and capital gains such as interest paid on profit participating loans, interest paid by banks and dividends, and capital gains on the disposal of shares. The WHT rate is generally 25% flat and definitive (plus 5.5% solidarity surcharge thereon = 26.375%). There is generally no possibility of claiming expenses in the context of such income. Taxpayers are taxed at their regular rates on interest income if interest payer and interest recipient are related parties. The interest received from deposits placed as collateral for the finance of an investment (in at least 10% of the shares) is taxed at full rates if these transactions meet the 'back-to-back' criterion.

The new law provides for further exceptions from the flat tax, particularly for individuals holding 25% or more of the shares in a corporation, or for employees. Rental proceeds or capital gains from the disposal of private real property do not benefit from the 25% flat tax.

With respect to real estate investment fund income, the new flat tax rules generally apply to distributions and deemed distributed income which arise to German individuals investors out of proceeds received by investment funds. The flat rate may in this respect be beneficial in particular for high-net-worth individuals since it covers not only dividend income, interest income and capital gains on the disposal of shares, but also rental income received from German real estate as well as capital gains on the disposal of German real estate, which has been held for less than ten years. If held for more than ten years, such capital gains are tax-free.

Individual taxpayers enjoy a savers' exemption amount of EUR 801 p.a. (EUR 1.602 for married couples). Losses from pertinent investments are eligible to be set-off against income from any other type of income. Partnership type real estate funds are not subject to flat rate tax. Their partners are taxed at ordinary rates.

Dividend income and capital gains of sole proprietorships and individually held partnerships that rank as business income are taxed at ordinary rates, but 40% of such income is tax-exempt and 60% of the related expenses are tax-deductible. Such business investment income includes by definition the disposal of shares in which the taxpayer holds or has held at least 1% at any time over the last five years.

### *Trade tax*

Every company or taxpayer with business activities and a permanent establishment (PE) located in Germany is subject to trade tax (*Gewerbesteuer*), a tax payable to the municipalities.

Rental income is therefore not typically subject to trade tax, unless generated by a corporation or another entity subject to deemed trade tax.

The character of the trade tax is that of an additional (corporate) income tax. The effective trade tax rate ranges from 7.0% to 17.15%, depending on the multiplier levied by the relevant municipality. Trade tax paid by a sole proprietor or an individual

partner in a business partnership or a company limited by shares may reduce their individual income tax liability.

Trade taxable income is determined, based on the taxable income calculated for (corporate) income tax purposes, adjusted by certain add-backs and deductions.

The following addbacks will, inter alia, apply:

- 25% of total loan remuneration (short- and long-term liabilities)
- 25% of total recurring payments (*Renten und dauernde Lasten*)
- 5% of total lease payments for moveables that qualify as long-term assets
- 12.5% of total lease payments for immovable assets that qualify as long-term assets.

These amounts would have to be added to the trade tax assessment basis of the debtor (e.g. the lessee or borrower). A threshold of EUR 100,000 applies in this respect.

On the other hand, 1.2% of the unitary tax value (*Einheitswert*) of real property belonging to the business assets and not being exempted from land tax can be deducted in arriving at the income for trade tax purposes (the 'simple' trade tax deduction, in contrast to the extended trade tax deduction, see next section). The unitary tax value is calculated on a valuation basis as of 1 January 1964 (in the territory of the former West Germany) or 1 January 1935 (in the territory of the former East Germany) and is considerably lower than the fair market value. The deductions therefore usually cannot compensate the addbacks, which may lead to a significant tax burden.

The sale of a partnership interest generally constitutes a termination of business and as such is not subject to trade tax. However, capital gains realised by a corporate partner or by another partner who is not an individual on the sale of a partnership interest (or part of a partnership interest) are subject to trade tax at partnership level.

### Extended trade tax deduction (*Erweiterte Gewerbesteuer-Kürzung*)

Even if a taxpayer's activities are, in principle, regarded as subject to trade tax, tax may be avoided under the following conditions. A taxpayer that merely holds and administers their own real estate may apply for a so-called 'extended trade tax deduction' (*Erweiterte Gewerbesteuer-Kürzung*). Such a deduction is made from the tax base for trade tax purposes of income derived from merely passive rental activities, thereby reducing the tax base for such activities to zero and effectively affording an exemption from trade tax.

A number of restrictions or prerequisites have to be considered in order to benefit from this exemption. For instance, so-called 'business fixtures' (*Betriebsvorrichtungen*) may not be rented out along with the real property without jeopardising eligibility for the exemption. However, provided the dos and don'ts are observed, this exemption in practice provides a tax-saving strategy for high-yield investments and also avoids the imposition of trade tax on capital gains.

The extended trade tax deduction is explicitly excluded: (i) for any capital gains realised on the sale of a partnership interest in a property-owning entity, as well as (ii) for capital gains stemming from disposal of a property that had been contributed on a tax-neutral basis to the company in question within the three preceding years, (iii) for

property that serves the business establishment of a partner, and (iv) for interest received by a partner on their loan granted to the partnership.

## *Real estate transfer tax*

Real estate transfer tax (RETT) is an important cost factor not only in direct acquisitions of property but also in share deals, or corporate reorganisations and restructurings. The object of taxation for RETT purposes is the real property. So-called 'business fixtures' (*Betriebsvorrichtungen*) are not viewed as real property. By contrast, hereditary building rights (*Erbbaurechte*, for details see section below '*Managing German real estate*') and buildings erected on land owned by a third party are also deemed to be real property for RETT purposes.

In purchase agreements, it is German market practice that the purchaser will assume the RETT burden. Regardless, both parties are legally liable for the RETT. General RETT exemptions exist, e.g. for transactions between related persons or transfers by way of inheritance. Other exemptions will rarely be of practical relevance. RETT is levied on a number of other transactions, such as purchase agreements, trade-off agreements, or purchase in a compulsory execution. In addition, an agreement to transfer one of these claims, as well as the transfer of the legal title of ownership without any underlying agreement, is subject to RETT.

Furthermore, where the aforementioned conditions are not met, but a party has *de facto* attained a position similar to that of the legally entitled owner, RETT may be imposed. This is the case where the recipient is able to benefit from all substantial proceeds from the use or disposal of the real property. The conditions differ slightly from the 'economic ownership' concept for income tax purposes. Whether this also applies to cases of financial leasing under German tax law depends on the individual circumstances.

Although, generally speaking, the transfer of shares in a corporation or of an interest in a partnership is not subject to RETT, there are some important exceptions. For example, all of the following are subject to RETT under current law:

- Direct or indirect unification in the hand of one individual, partnership, or corporation of 95% of the shares in a company or partnership that owns real property
- Transfer of 95% or more of the shares in such a company or partnership
- Direct or indirect change of the partners in a partnership-owning domestic real estate will also give rise to real estate transfer tax if the change is effected within a period of five years (for details see section below '*Acquisition of a German property company*' – '*Tax aspects*' – '*RETT*').

In a recent amendment of German RETT law a new provision was enacted to abolish so called 'RETT-Blocker-Schemes'. The wording aims to look through indirect holding structures and to consider any indirect holding for calculating the 95% threshold (under current law indirect holdings below the 95% threshold are not considered). As a consequence for calculating the 95% threshold, any direct and any indirect holding in a property company will be considered. The new rules will apply on all transactions from 7 June 2013 on as the bill has been passed by the German Federal Parliament on 6 June 2013.

Due to these complex rules, RETT may – e.g. in a group structure – under certain circumstances be triggered twice, or even more often, in connection with the acquisition of one item of real estate (see also section below ‘*Acquisition of a German property company*’ – ‘*Tax aspects*’ – ‘*RETT*’).

On the other hand, a tax credit is possible where one taxable transaction follows another that was already subject to RETT. It should be noted that, upon application, the RETT will not be imposed in certain cases, e.g. if the transaction is reversed or the original transaction is rescinded within two years.

Certain cases of intra-group reorganisations are exempt from real estate transfer tax. Such reorganisation must be governed by the German Reconstructions Act, e.g. in form of a merger or spin-off, or similar statutory law of another EU/EEA country. From 7 June 2013 on the ‘Group Clause’ has been amended. Not only mergers and spin-offs will fall within its scope but also contributions of real estate into a company by way of singular succession.

The exemption applies only to groups in which a group parent has directly or indirectly held 95% or more of the shares in the subsidiaries involved in the reorganisation for five or more years and will keep these 95% or more for at least five more years after the reorganisation. The parent must qualify as entrepreneur according to VAT law.

Further, the transfer of property to or by a partnership – which from a tax viewpoint is transparent – is privileged by a partial RETT exemption if a partner participates in the transaction on both sides, either directly or through another partnership. The extent of the exemption depends on the proportion of interest in the partnership held by the participant. Although some legal restrictions apply in special cases and the anti-abuse case law has to be taken into account, the privileges for partnerships can often be used to minimise tax costs.

Proper RETT planning of group and partnership structures is required in conversion and reorganisation situations. The mere change of legal form of a corporation into a partnership and vice versa will, however, not trigger real estate transfer tax.

RETT is levied on the agreed consideration – in most cases the purchase price – at the applicable tax rate. The general tax rate is 3.5%. Differing tax rates apply in most federal States. A tax rate of 4.5% applies for real estate located in Hamburg, Bremen (as of 1 January 2014 increase to 5% intended) and Lower Saxony. A tax rate of 5% applies for real estate located in Baden-Württemberg, Berlin, Brandenburg, Hessen, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saxony Anhalt, Schlesweig-Holstein (as of 1 January 2014 increase to 6.5% intended) and Thuringia and a tax rate of 5.5% applies for real estate located in Saarland. RETT rates are being reviewed all over Germany with the view of a possible increase.

A separate real property value (*Grundbesitzwert*) for RETT purposes applies to a number of special transactions. In detail, that special value basically applies to transactions where no consideration can be determined, such as group reorganisations, contributions in exchange for shares, unification of shares and other transactions based on statutory agreements. For the transfer of a hereditary building right, the tax base is the capitalised value of the ground rent. An appeal at the federal constitutional court regarding the constitutionality of this valuation method is pending. The regulations of real estate transfer tax apply, irrespective of whether or not the transaction itself is also subject to VAT. VAT is not part of the consideration for RETT purposes.

## Value added tax

The basic concepts of the German VAT regime, such as taxable persons, nature of the goods, delivery of goods and supply of services have been brought into line with the EC VAT System Directive. As a result, the German basic regulations are comparable to those applicable in the other EU Member States.

The German VAT system can be summarised as follows:

- A taxable person (entrepreneur) under the German VAT Act is a person who independently carries out an economic activity which, under the German VAT Act, is viewed as a supply of goods or services.
- Therefore, a company may be considered to be an entrepreneur for VAT purposes even though it only performs tax-exempt transactions (in such a case, however, the company will generally not be permitted to recover input VAT).
- The supply of goods means the transfer of the right to dispose of tangible property like an owner. Goods are notably tangible property, and some rights *in rem* giving their holder the right of a user over the immovable property (e.g. hereditary building right). Land and buildings are viewed as 'goods' for German VAT purposes. However, a tax exemption exists for all transactions subject to real estate transfer tax, in particular the sale of real estate.
- Supply of services means any transaction not constituting a supply of goods.

In principle, services supplied in connection with real properties fall within the scope of VAT. Most of these transactions are, however, exempt under German VAT law. This is, for instance, generally the case if real properties are merely rented or leased. This includes lease financing activities in which the lessor is the economic owner.

Although transactions subject to real estate transfer tax (hereditary building rights excluded), especially the sale of real estate, are VAT-exempt, they may voluntarily be subjected to VAT. Such waiver of the VAT exemption can only be exercised and declared in the notarised sale and purchase agreement. In this case, the real estate transaction now subject to VAT is taxed under the reverse charge procedure, i.e. the buyer alone is liable for VAT.

The aforementioned applies if a sale is effected to another enterprise for purposes of the latter's business, regardless of whether the purchaser is entitled to recover input VAT (VAT option). The vendor may, under certain circumstances, opt to subject the sale to VAT either wholly or in part. (For details see section below *'Direct Investments in German property' – 'Direct purchase of assets' – 'VAT'*.)

Under certain circumstances, the VAT option applies to the letting of real estate, the transfer of hereditary building rights and other rights *in rem* (see section below *'Renting' – 'VAT'*). If the VAT option is exercised, the purchaser or lessor may in principle recover input VAT paid on their supplies and services and so reduce acquisition or construction costs considerably. When letting buildings partly for non-business purposes (i.e. letting for housing or to public entities) and partly for business purposes, the VAT option is only applicable to the portion let for business purposes.

In the case where the VAT option is exercised only for part of the letting turnovers, then the input VAT may only be recovered in part as well. In this connection, the relevant ratio is to be determined with regard to the spaces let.

If the lessor waives the option to charge VAT on the rental income within ten years after acquisition, or sells the property without charging VAT on the purchase price within that time frame, a portion of any input VAT initially recovered will have to be paid back.

There is an important general exception. The sale of a whole business or an independent part of a business (*Geschäftsveräußerung im Ganzen*) to an entrepreneur is, in general, not subject to VAT. Even the disposal of one piece of real estate can fall into this category, if it represents the main business asset. Consequently, the purchaser 'succeeds' the seller in his VAT position.

With effect from January 2010, new rules regarding the place of supplied services have been introduced. Business-to-business (B2B) supplies of services are now generally VAT-able where the recipient (not the supplier) of the services is located. The recipient has to account for the VAT under the reverse charge mechanism. The tax residency of the recipient can generally be proven by presenting a valid VAT identification number to the tax authorities. Services in connection to a property keep being taxable at the place where the property is located.

The general VAT rate amounts to 19%. A reduced tax rate of 7% applies to letting accommodation for short periods, e.g. by hotels.

Thorough VAT planning is important, because any VAT leakage resulting notably from non-recovery of input VAT may hit the tax efficiency of an investment accordingly.

## *Land tax*

Land tax is a recurring annual tax levied by the municipal authorities and payable under the provisions of the Land Tax Act (*Grundsteuergesetz*).

All domestic real estate is subject to land tax unless a tax exemption applies. Basically, exemptions are granted if the real estate is used by certain public institutions, or for the public benefit.

The status of the owner and the owner's individual income tax position are irrelevant for the computation of the land tax. The tax base is the unitary value of the property (*Einheitswert*). The unitary value is an estimated fair market value determined as of 1 January 1964 (in the territory of the former West Germany) and 1 January 1935 (in the territory of the former East Germany). Generally the unitary value of real estate is only about 30% of the current fair market value.

Land tax is assessed in a two-step procedure. In the first step, the tax authorities determine the base value (*Steuermessbetrag*) by multiplying the unitary value of the property with the applicable basic federal rate (*Steuermesszahl*). In the second step, the municipal authorities apply their local tax rate (*Hebesatz*) to the assessed base value.

The annual land tax burden presently varies between 0.1% and 0.6% of the fair market value (not the unitary value). Relief from land tax is granted under certain conditions, and is generally applicable to public parks or to real estate constituting an important cultural asset. Relief may also be granted to land that is used for business purposes if the deemed gross earnings (*Rohertrag*) from the real estate are reduced by more than 50% due to exceptional circumstances.

The tax authorities attribute property to the taxpayer when assessing the unitary value. The owner of the property is generally the taxpayer, but the holder of a hereditary building right or the beneficial owner may also become the taxpayer. In the case of the disposal of property, it is attributed to the new owner, holder of a hereditary building right, or beneficial owner only from 1 January of the year following the transaction. Until this date, the property is attributed to the former owner, holder of a hereditary building right, or beneficial owner.

Land tax is a deductible expense for income tax purposes. The economic burden of land tax is usually transferred to the tenants by including it in the incidental rental charges. In case of vacancies, however, the owner is stuck with the respective portion of the land tax.

## Direct investments in German property

Investors wishing to invest in German real estate have various options in terms of the best way to structure the acquisition. Basically, the choice is between a direct acquisition of assets and an indirect acquisition, i.e. through a purchase of shares in a company owning the targeted assets.

Rather than actually participating in the management of real properties, some investors may also wish to obtain a return on real estate through pure financial investments. For these investors, Germany provides a number of interesting instruments, such as open-end or closed-end real estate investment funds or the G-REIT.

The characteristics and consequences of these various alternatives or options are outlined below, together with the tax and legal features regarding the construction of a new building.

### *Direct purchase of assets*

#### *Legal aspects*

##### *The right of ownership*

Under German Civil Law, the ownership right is defined as the right to possess, use and dispose of land in the most absolute fashion as long as no prohibited use is made thereof (absolute ownership). The right of ownership includes, besides the land itself, the following:

- The space above a piece of land and the subsoil to the extent that it is of interest to the owner.
- Property attached to the soil (such as buildings), the products of the land and all items incorporated in a building during its construction.

Exceptions apply to so-called business fixtures (*Betriebsvorrichtungen*) as defined for tax purposes (these being depreciated as moveable property), even if they may be classified as an integral part of the real estate under civil law.

In addition, there are restricted ownership rights, such as condominium ownership and hereditary building rights, the acquisition of which is generally subject to the same statutory provisions as absolute ownership.

### *Sales agreement, transfer of title, notarial deed*

The purchase of real property is effected through the conclusion of a sales agreement. The sales agreement should, inter alia, include an exact description of the property and the encumbrances relating thereto.

In addition, an agreement on the transfer of legal title must be concluded, and this has to be entered in the land register (*Grundbuch*). Legal ownership cannot be transferred to the buyer before the entry is made. Prior to the registration of transfer of title, the tax authorities must issue a clearance certificate (*Unbedenklichkeitsbescheinigung*) confirming payment of real estate transfer tax.

Both agreements and all additional agreements legally relating thereto must be notarised, even if an assembly of business assets is acquired. The notary fees are based on the purchase price.

### **Tax aspects**

#### *Income tax*

In addition to the introductory comments regarding the determination of the tax base (corporate and individual income tax), the computation of acquisition and construction costs is discussed in the following and the depreciation rates applicable to buildings are specified.

As the computation is in principle also applicable to individuals, no distinction is made between individuals and companies in the following.

For an asset with a limited useful life, the basis for depreciation is the historical cost, i.e. the acquisition price (as referred to in the sales deed) plus incidental acquisition costs. The acquisition cost of the land and the additional costs relating thereto (in particular notarisation, land registry fees and real estate transfer tax) cannot be depreciated. Therefore, it is advisable to clearly specify in the purchase deed the portion of the acquisition price to be attributed to the land and to the building, respectively.

- Buildings belonging to a company's business assets, which are not let for housing purposes and were erected after 31 March 1985 (date of application for building permit), can generally be depreciated at an annual rate of 3% over a period of 33 years (straight-line method).
- If one of these conditions is not fulfilled, the annual depreciation rate for buildings erected after 31 December 1924 is 2% (depreciation period of 50 years).
- Buildings erected before that date are depreciated at an annual rate of 2.5% over a period of 40 years.
- Higher depreciation rates can be applied if the taxpayer can substantiate that the residual useful life of the building will be less than the above-mentioned periods.

Instead of applying the standard straight-line rates, buildings serving housing purposes and erected or purchased by end of 2005 may be depreciated on a declining balance basis at fixed rates (accelerated depreciation) if the investor erected them or acquired them in the year of their completion. In this case, the building permit must have been issued, or the building must have been acquired, after 31 December 1995. For buildings serving housing purposes, the declining balance depreciation was abolished from 2006.

Supplementary acquisition or construction costs incurred at a later date increase the depreciation basis for the building. In addition to depreciation, related costs, e.g. maintenance, administration, land tax and financing costs, can be deducted immediately. Plant and machinery may be depreciated separately as moveable property, provided they are not an integral part of the real estate. Integral parts are those parts of the real estate that cannot be separated from the real estate without destroying or substantially altering either the real estate or its components.

Exceptions apply to so-called 'business fixtures' (*Betriebsvorrichtungen*), which are depreciated as moveable property regardless of whether they can be qualified as an integral part of the real estate under civil law. The depreciation terms generally follow the official depreciation tables.

### *Trade tax*

If the acquisition of property subsequently involves activities such as commercial real estate dealings or trading in real estate (in contrast to passive property management), this can be seen as a first step to establishing a liability to trade tax. However, in the case of direct passive property management, trade tax will not be levied if the investor has neither a PE nor a permanent representative in Germany.

If the investor is a company with limited tax liability and is engaged in passive property management but is subject to trade tax because it maintains a PE, it should try to structure the activity in such a way that it qualifies for the so-called 'extended trade tax deduction' for passive real estate companies, thereby potentially reducing the tax base for trade tax purposes to zero. This may require some organisational changes in individual cases (see section above '*Understanding the basic principles*' – '*Trade tax*').

### *Real estate transfer tax*

In contractual practice, it is generally agreed that the costs and taxes incurred during the transaction process such as real estate transfer tax and notary and land registration fees are borne by the purchaser, though generally both parties are liable for these costs vis-à-vis the tax authorities. The seller will, however, assume the costs of freeing the land from encumbrances. Based on case law, the tax basis for the land alone can be increased in certain constellations (so-called 'unitary contractual framework' issue, *einheitliches Vertragswerk*). If, at the time the vendor concludes the sales agreement for the land, other agreements, e.g. a construction contract, have been concluded, and these, together with the agreement for transfer of ownership of the land, can be considered a uniform set of agreements, the consideration that forms the tax basis for calculating the real estate transfer tax payable, consists of the costs for the land and the building, even if the vendor of the property and the building constructor are not identical.

### *VAT*

The sale of real property is in principle exempt from VAT. However, the seller may opt to VAT to the extent the real property is transferred to another entrepreneur for its business purposes. Such waiver of the VAT exemption can only be exercised and declared in the notarised sale and purchase agreement.

## *Acquisition of a German property company*

Real property owned by a corporate entity may be acquired by purchasing the shares in this company rather than purchasing the assets it holds. From a corporate tax

viewpoint, this choice will usually have a significant impact for both the seller and the purchaser.

### Legal aspects

The transfer of shares in a corporate entity with legal form of a limited liability company (*GmbH*) must be notarised.

### Tax aspects

#### *Income tax*

A German property company may be acquired by a resident or non-resident company.

#### Resident corporations

Dividends from one German corporate entity to another are exempt from corporate income tax, irrespective of the holding period and the percentage of the shareholding. However, an amount equivalent to 5% of the distributed dividends is treated as non-deductible business expense. As a result, 95% of the dividends received are tax-exempt. Expenses incurred in connection with such tax-free dividends are, however, fully deductible.

New rules for portfolio dividends apply for dividends received after 28 February 2013. The new rules abolish the participation exemption for dividends received by portfolio investment. A portfolio investment is an investment in which the shareholder holds less than 10% of the share capital of the distributing entity at the beginning of the calendar year in which the dividend is distributed. An acquisition of at least 10% of the shares within a calendar year is deemed to have occurred at the beginning of that calendar year. The bill has no impact on capital gains. Capital gains realised upon disposal of portfolio investments generally will still qualify for the 95% participation exemption, if certain conditions are met. Generally capital losses will still not be deductible.

Simultaneously, capital gains derived by a German corporation on the sale of shares in both German and non-German companies are 95% tax-exempt (provided the shares are held long term).

Withholding tax of 25% (plus 5.5% solidarity surcharge = 26.375%) becomes due on dividends and capital gains but is refundable at the resident parent company level. A reduced rate of 15% is available for non-resident corporations under further substance requirements (see explanation below).

The tax exemption for dividend distributions applies also to trade tax, provided the parent company holds at least 15% of the shares in the distributing company from the beginning of the fiscal year.

A fiscal unity can be established for corporate income tax and trade tax law purposes by concluding a profit and loss (P&L) transfer agreement between a German corporation (subsidiary) and its parent if that parent is a resident business enterprise (sole proprietorship, partnership or company) and if that parent either directly or indirectly holds the majority of the voting stock of the subsidiary (financial integration).

The requirement of financial integration must be fulfilled throughout the entire accounting period of the subsidiary. In order for the fiscal unity to be recognised for tax purposes, the P&L transfer agreement must be recorded in the commercial register by the end of the first year for which it shall apply and must have been concluded for a term of at least five years. A termination of the agreement absent important cause

within the five-year period will lead to retroactive non-recognition of the fiscal unity from the outset.

### Non-resident corporations

A non-resident parent company and a resident subsidiary may enter into a fiscal unity for corporate income tax and trade tax purposes from fiscal year 2012 on if the participation in the subsidiary can be attributed to a German permanent establishment of the non-resident parent company.

The tax treatment of non-resident companies that hold shares in a German resident company depends not only on German tax law but also on the applicability of the EC Parent-Subsidiary Directive and any double taxation treaty (DTT) concluded with the acquirer's home country. The non-resident company with so-called 'limited tax liability' is in principle subject to corporate income tax with its German-sourced income similarly to the rules for resident companies, but WHT is generally not refundable for non-resident companies.

According to the EC Parent-Subsidiary Directive implemented in German tax law, no WHT applies if a German company distributes dividends to an EC corporate shareholder, provided that the latter has held directly 10% of the shares in the German company for an uninterrupted period of 12 months. Furthermore, the EC Parent-Subsidiary Directive is now also applicable in cases where an EC PE of a German or EC parent company receives dividends from a German subsidiary company.

The exemption from WHT (or its refund) only applies if a respective certificate has been issued by the Federal Central Tax Office. Otherwise, the regular WHT rate may be payable at the amount of 25% (plus 5.5% solidarity surcharge thereon = 26.375%). This rate can, upon application, be reduced to the ordinary corporate income tax rate of 15.825% (including solidarity surcharge).

Following most of German DTTs, capital gains derived by a non-resident corporation on the disposal of shares in a German corporation is exempt from taxation in Germany, irrespective of the percentage of shareholding. However, the OECD Model Treaty 2010 changed the allocation of right to tax. Gains derived by a non-resident from the disposal of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other contracting State may be taxed in that other State. In recent DTTs of Germany (e.g. with the UK) this rule is assumed. Even if new Double Tax Treaties provide a right for taxation in Germany, if a gain was derived from a sale of a property holding company, this should presently have no tax impact in Germany. This is due to the fact that the German income tax law does not - up to now - provide a tax clause for the sale of companies which have neither their seat nor their place of effective management in Germany.

### Substance requirements

Like in many other jurisdictions, substance is an important issue in connection with an investment in German real estate.

Strictly viewed, 'substance' is an umbrella term frequently used to refer to a certain number of distinguishable elements, individually or collectively. Broadly speaking, however, what they have in common is that they denote requirements which an entity has to meet in order for that entity to be recognised as existing for tax purposes and to be accorded a certain desired tax treatment, most importantly deductibility of business expenses (notably shareholder loan interest payments) from the German taxable basis, and WHT relief under an EU Directive, or an applicable DTT.

The specific German anti-treaty/anti-directive shopping rule (sec. 50d subject. 3 ITA) provides for relief from German WHTs (whether by refund or exemption), contingent on the entity or its ultimate beneficiaries, respectively, meeting rather strict substance requirements. German withholding tax relief can (only) be claimed to the extent that:

- The foreign company's shareholders would have been entitled to a refund or exemption had they received the income directly, or
- The foreign company's gross receipts in the respective business year stem from own active business activities, or
- For those receipts that do not stem from the foreign company's own active business activities: (i) economic or other significant non-tax reasons exist for interposing the foreign company, and (ii) the foreign company has suitable business premises and equipment to participate in commerce.

The burden of proving that economic or significant other non-tax reasons exist and that sufficient substance exists rests explicitly with the foreign company.

The rules are not applicable to a foreign company, if this company's main classes of shares are materially and regularly traded at a recognised stock exchange, or if the German investment tax laws are applicable to that company (e.g. SICAV).

### Individuals

Any capital gain realised by a resident or non-resident individual on the disposal of shares in a German corporation is subject to tax. If the seller has held 1% or more of the shares in the company at any time over the last five years, 60% of their capital gains are taxable at the ordinary progressive tax rate. If the seller has held less than 1%, 100% of their capital gains are taxable at a flat rate of 25% (plus solidarity surcharge adding up to 26.375%), if the shares were acquired after 31 December 2008 (see section above *'Definitive withholding tax regime'*).

For tax exemption according to double tax treaties see above (non-resident corporations).

However, if the participation forms part of the business assets of a German PE of the foreign vendor, Germany generally has the right of taxation.

### *Real estate transfer tax (RETT)*

The transfer of a shareholding in a corporation or an interest in a partnership as such is not generally subject to real estate transfer tax (RETT). However, RETT will be levied where, as a result of the transfer:

- 95% or more of the shares in a real property-owning partnership are transferred within a five-year period, or
- 95% or more of the shares in a real property-owning partnership or corporation are directly or indirectly assembled in the hands of one individual, partnership or corporation (or, under certain circumstances, in the hands of a group).

The threshold for avoiding the imposition of RETT is, as a result, less than 95%.

An indirect substantial change of the partners in a partnership is also subject to RETT. (This could arise, e.g. where corporate entities are partners, and there are changes

in the shareholders of these corporate entities.) By contrast, the transformation of a company into a partnership by a change in legal form will not trigger real estate transfer tax. Certain cases of intra-group reorganisations are exempt from real estate transfer tax also (see section above '*Introduction*'-'*RETT*').

The applicable tax rates range from 3.5% to 5.5% and are levied on a separate real property value (see section above '*Introduction*'-'*RETT*').

At any rate, it is indispensable to consider RETT implications when contemplating reorganisations within structures involving property-owning entities.

### *Value added tax*

The transfer of shares is usually VAT-exempt, but may be subjected to VAT if the sale is effected to another entrepreneur for purposes of their business (VAT option, see section above '*Direct purchase of assets*' – '*VAT*').

## *Construction and development*

### *Legal aspects*

#### *Building permit (Baugenehmigung)*

Before the erection of a building in Germany commences, a prerequisite is to obtain the necessary state permissions. This primary step is usually expensive and time-consuming. Obtaining the building permit for investments with a considerable yield perspective will vastly increase the value of a plot of land. The applicable rules relating to urban development and the environment differ between the various federal states. However, the rules relating to the planning permission can be briefly described as follows.

The erection of a building requires that a building permit is obtained beforehand from the municipal authorities. If such permission is refused, an objection may be lodged, which is usually decided upon by the higher building authority. Should it again be refused, then a claim may be lodged before the administrative court. Since such a procedure takes several years, an investor should instead try to negotiate with the competent authority in order to obtain the permit.

The competent authority must allow an application and issue a building permit if the planned project complies with public law provisions. To save time, it is common practice to make a preliminary application for a building permit (*Bauvoranfrage*) to clarify specific questions that may jeopardise its approval. In order to coordinate the complex legal, financial and planning questions prior to a development, it is recommended in practice to engage specialised development/property consultants if the investor does not have qualified staff for German investments at their disposal.

#### *The contractor's status*

Buildings of considerable size are usually erected by general contractors (*Generalunternehmer*), or general underwriters (*Generalübernehmer*). A general contractor will execute the construction work partly themselves and will engage subcontractors for the remaining work, whereas a general underwriter will have the work done exclusively by subcontractors.

Both general contractors and underwriters are liable vis-à-vis the investor for the proper completion of the building in due course. Though the engagement of a general contractor or underwriter will usually involve higher building costs,

the appointment is recommendable, as the investor is relieved of administration work, of negotiating with a large number of individual contractors, and of potential risks arising from each individual contract. For extensive building projects, it is also common practice that several contractors form a consortium (*Arbeitsgemeinschaft, ARGE*), usually structured as a civil law partnership, with each member being jointly and severally liable for third-party claims. Such consortia are usually only concluded for the duration of a single project.

## Tax aspects

### *Income tax*

If an investor acquires a piece of land and a new building, they can be considered as having purchased the land and building, or as having acquired the land only and, as such, be the owner and responsible constructor of the building. The distinction is of importance for indirect tax and for income tax purposes in cases where tax allowances are not granted to the buyer of buildings.

In calculating depreciation during a rental period, the building is reflected in both cases at its construction or acquisition cost. This cost also includes fees incurred in connection with the application for the building permit and costs for the connection of the property to public utility services. (For further details regarding income determination see section '*Direct purchase of assets*' – '*Income tax*').

Targeting illegal employment practices in the construction industry, a WHT of 15% applies to the consideration for building services (*Bauleistungen*).

It can be credited against tax payable by the provider of the building services (the contractor) and may be refunded to the provider upon application.

No tax needs to be withheld in cases where the aggregate consideration in any one calendar year falls below the *de minimis* threshold (of EUR 15,000 or EUR 5,000, respectively, depending on the individual case). Furthermore, the contractor can avoid the WHT deduction by obtaining, and presenting to the principal, an exemption certificate issued to them by the competent tax office.

### *Value added tax*

VAT is a relevant cost factor in determining the cost price of a new building. Input VAT may only be recovered if the purchaser uses the building to achieve earnings from activities subject to VAT.

With regard to the above-mentioned tax exemptions, a VAT option may be exercised by the purchaser for resale or letting activities. The complex conditions for options require careful advanced planning to minimise financing costs.

However, also for newly erected buildings, input VAT recovery is subject to later correction if the circumstances under which the input VAT was initially recovered by the entrepreneur change within the ten subsequent years.

## Financial investments in German real estate

### *Closed-end real estate investment funds (Geschlossene Immobilienfonds)*

These funds provide a common investment form for individual investors to participate in partnerships consisting of a large number of participants. Closed-end funds have become a very popular investment form, accumulating huge sums of money to finance projects, and banks and insurance companies currently offer, via their subsidiaries, the greatest investment opportunities.

The vehicle is, in most cases, a limited partnership. The position of the general partner is assumed by a limited liability company (GmbH), whereas the investors join directly or via nominee as limited partners. For German income tax purposes (but not for trade tax purposes) a limited partnership is transparent, i.e. the income is taxed in the hand of the investors.

Though the income (as a net position of rental income and depreciation and other income-related expenses at the fund and investor level) is attributed to the individual investor, losses can only be considered under certain conditions. If the losses are to be considered at the level of the investor, they can be offset with other income sources.

Though closed-end real estate investment funds mainly attract German individual taxpayers with a high German income offset potential, they also attract increasing interest of some foreign investors.

Closed-end real estate funds represent a major share in the real estate market and could be attractive to building companies and real estate developers.

Participations in closed-ended funds may only be marketed to the public after a corresponding prospectus has been submitted to and approved by the competent regulatory authority, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin). BaFin has issued an ordinance prescribing the minimum content requirements for such prospectuses, essentially based on the requirements in place at that time for prospectuses relating to securities. It is important to note that the BaFin only reviews and certifies that the above-mentioned requirements are formally met; it does not engage in any kind of prospectus review regarding completeness or accuracy of content.

On 21 July 2011 the Alternative Investment Fund Managers Directive (AIFMD) came into force, which has to be implemented by the Member States by 22 July 2013. It will affect any closed-end fund asset manager, wherever in the world it is based, seeking to raise institutional capital in Europe. Asset managers not previously affected will need to procure for a regulatory capital of at least EUR 125,000 (EUR 300,000 in the case of an internally managed AIF), face registration and exhaustive reporting requirements and have to provide periodic reporting to national regulators, including details of illiquid assets, leverage and risk management methods. The AIFMD should be implemented in Germany with the German Capital Investment Code (*Kapitalanlagegesetz*), however this bill is still in a draft stadium.

## Open-end real estate investment funds (*Offene Immobilienfonds*)

These funds are also a significant factor in the German real estate market and the German investment fund industry, attracting an enormous amount of money. Both housing property and commercial property may be acquired. Investment in undeveloped land is possible under certain conditions.

There are two types of open-end funds:

- Special funds (*Spezialfonds*): only institutional investors (no individuals) can obtain units in the fund.
- Mutual funds (*Publikumsfonds*): offered to the public, both individuals and corporations can obtain units in the fund.

### Mutual funds

The open-end fund is managed by a capital investment company (KAG) holding qualified assets (e.g. real property) in its own name but on the account of the investors. The KAG is not subject to the Banking Act (*Kreditwesengesetz, KWG*), but must obtain a business licence from the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*), prior to commencing operations.

Investors hold investment units in the fund for which they have a redemption right (i.e. the KAG redeems the units on the request of the unitholder).

The fund and the KAG are subject to legal regulations of the German Investment Act (InvA). The investment fund tax regime is only applicable to funds that comply with the regulations of the InvG. Taxation of the fund and the investors in the fund is governed by the Investment Tax Act (InvTA).

Open-end funds may invest in a limited number of assets (eligible assets), but investment in real estate and real estate companies is generally permitted. Furthermore, the funds' assets have to be held in line with the principle of risk diversification (in case of immovable property this condition is met if at least three properties are held) and separately from the KAG's own assets.

With respect to the eligible investments of the fund, the following applies:

- The value of a single property must not exceed 15% of the overall value of the fund's assets.
- The aggregate value of those properties exceeding an individual value of 10% of the fund's assets is restricted to a maximum of 50% of the value of the fund's overall assets.
- A minimum liquidity reserve of 5% of the fund's assets must be available at a daily basis.
- The value of assets involving a currency risk may not exceed 30% of total value of the fund's assets.
- Investments outside the EEA are only possible under certain conditions i.e. if target countries are specified in the terms of the contract with the fund's investors and

the investments are sufficiently spread. Also, hereditary building rights may be acquired outside the EEA.

- It is in principle permitted to invest in multi-tier structures in case, according to the fund regulations, such investments are allowed.
- The restriction of indirect investments to 49% of the fund's assets does not apply in case of 100% shareholdings in real property companies.
- Up to 30% of the fund may be invested in minority shareholdings in real property companies.
- A real property company may acquire portfolios.
- Certain parts of the fund's liquid assets may be invested in stocks of German or foreign-listed REITs.
- A specific risk-management system and a new concept for valuation of assets by independent experts have been introduced.

Open-end funds are subject to the special tax regime of the German Investment Tax Act (InvTA). Although a fund, as a pool of assets, is technically subject to corporate income tax, the investment fund is exempt from corporate income tax and trade tax. The net income is in general directly attributed to the investors, regardless of whether it is retained or distributed. However, all income derived by German residents qualified not as rental income but as capital income.

The InvA provides for tax transparency of the fund, which means that next to the tax exemption of the fund itself the tax treatment of the investors corresponds to the tax treatment of a direct investment in the funds' assets.

Rental income and capital gains from the sale of real estate are in general, fully taxable on the investor level. However, in the case of foreign real estate, such income is tax-exempt in Germany if Germany has waived its right to tax the respective income according to the relevant DTT.

At the level of the German investors, the investment income will be taxed as follows:

- Income from dividends and income from the sale of shares is tax-exempt for corporate income tax purposes in the hands of corporate investors since these investors may benefit from the participation exemption. However, 5% of this income is considered as non-deductible business expenses at the investor level and, accordingly, only 95% of the dividend income is treated as non-assessable. The income may be fully subject to trade tax.
- Individual investors holding the investment units in their private assets are subject to a definitive WHT of 25% on distributions and deemed distributions from a German open-end fund. This WHT is generally charged to all distributions with the exception of distributions of treaty exempt foreign income, i.e. rental income from foreign properties.
- In case of an individual investor holding the fund units as business assets, 40% of this income derived from dividends or capital gains from share sales are tax-

exempt. The remaining part is subject to the personal income tax rate. The income may be fully subject to trade tax, which can be credited against personal income tax.

- Withholding tax levied on income from the fund is creditable for German investors and can be refunded to non-resident investors. Since 2009, the definitive WHT regime applies.

A foreign real estate investment fund for the purpose of the InvA is defined as a risk-diversified vehicle with real estate assets, which is either subject to local investment supervision, or offers a redemption scheme for the units. Hence, any corporate and partnership vehicle not meeting any of these two criteria is not at risk of falling under the Investment Act rules.

### Special funds

Special funds are a sub-form of open-end real estate investment funds and do not differ substantially from public open-end funds, except that individuals are not permitted to directly invest in such a fund. However, in comparison to mutual funds, they are more convenient for institutional investors who are interested in large investments without having the need to invest in a diversified portfolio.

The regulatory investment restrictions of special funds have been widely liberalised in the past. A special fund can invest into any eligible asset without most of the restrictions applying to mutual funds – the previous restriction on a specified asset class per fund (i.e. real estate special fund) has been abolished.

The number of institutional investors in the (mutual or special) fund is not limited, neither at minimum nor at maximum. A single investor in the special fund is permissible as well as a large number of investors. Unitholders' certificates cannot be transferred without the approval of the KAG.

Special funds are subject to a reduced supervisory regime. The investor therefore benefits from lower management costs. Although still not a common instrument, special funds offer the chance to achieve tax advantages without the full regulatory system of mutual funds. Moreover, if the KAG of a special fund does not fulfil the information and publication requirements normally necessary to qualify for taxation as a transparent fund, no lump-sum taxation will arise.

In case of special funds German-source real estate income is classified as domestic income. There will be a tax assessment for the underlying German-source real estate income.

The legal and regulatory framework of investment funds will change in the future.

The European Parliament recently established the Directive on Alternative Investment Fund Managers 2011/61/EU (AIFMD) that entered into force on 21 July 2011. Referring to Section 66 (1) AIFMD all EU Member States shall adopt and publish the laws, regulations and administrative decrees to comply with the Directive until 22 July 2013.

The AIFMD provides a legal framework and establishes common requirements governing the authorization and supervision of Alternative Investment Fund Managers (AIFM), i. e. license requirements, certain disclosure obligations depositary requirements, defined investment policy. Article 4 (1) (a) AIFMD defines the preconditions of an Alternative Investment Fund (AIF). In accordance to that

Article, ‘AIF’ means collective investment undertakings, including investment compartments thereof, which:

- raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- do not require authorization pursuant to article 5 of Directive 2009/65/EC.

The transformation of the AIFMD is at present discussed in the German parliament bodies. In Germany the AIFMD is implemented by two legislative Acts; the ‘*AIFM-Umsetzungsgesetz*’ that was recently approved by the German Bundesrat and on the other hand with major changes for tax issues the ‘*AIFM-Steuer-Anpassungsgesetz* (AIFM-StAnpG)’ that is currently discussed in the Conciliation Committee (*Vermittlungsausschuss*).

## German Real Estate Investment Trusts (G-REITs)

The G-REIT was introduced with effect as of 1 January 2007.

### Legal aspects

The G-REIT needs to have the legal form of a stock corporation (*Aktiengesellschaft*). The required minimum capital is EUR 15m. Both the statutory seat established in accordance with the corporate articles and the actual seat of management must be in Germany.

The G-REIT must be licensed to trade on an organised stock market in Germany, the EU or the EEA. The G-REIT Act does not provide for ‘private REITs’ without stock market quotation.

At least 15% of the shares in the G-REIT must be widely spread, and from these shares no investor must hold 3% or more (‘small investor rule’). At the moment of listing, it is even required that 25% of the shares must be held widely spread.

No individual shareholder must hold 10% or more of the G-REIT shares directly. Additional indirect holdings are possible to a certain extent.

The ownership and transfer of G-REIT shares are supervised by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin). The G-REIT is subject to annual certification by its auditors as per 31 December, confirming that it has complied with the G-REIT specific rules. Failure to obtain such certification triggers penalties in different degrees of severity at the level of both the shareholders and the G-REIT, starting from penalty payments up to a potential loss of the G-REIT status.

### Investment requirements

Seventy –five per cent of the G-REIT’s assets must consist of real property that is to be let, leased, or sold. Properties that are more than 50% let to residential tenants are non-eligible assets, unless they have been erected on or after 1 January 2007. Sale-and-lease-back arrangements are permissible without restrictions.

The G-REIT may invest in real estate holding partnerships and real estate holding corporations provided that at least 90% of the corporation’s assets consist of real estate that is located abroad.

Other activities such as management, brokerage, project control and developments for third parties may be undertaken through wholly owned subsidiary corporations ('G-REIT Service Companies'). The value of such G-REIT Service Company holdings must not exceed 20% of the G-REIT's total assets.

At least 75% of the REIT's proceeds must be derived from letting and leasing and the sale of real property. The total sales revenue generated by G-REIT Service Companies may not exceed 20% of the G-REIT's total sales revenue.

The G-REIT may not trade in real estate, i.e. proceeds from the disposal of real estate held by the G-REIT and consolidated subsidiaries within the last five fiscal years must not exceed half of the value of the immovable property held during that period on average.

The G-REIT's equity must not fall below 45% of the value of the real estate as stated in the financial statement at the end of the fiscal year. For example, if the real estate held by the G-REIT amounts to 75% of its total assets, the maximum debt financing would amount to 66.25%.

### Tax aspects

The G-REIT is exempt from corporate income tax and trade tax. This applies from the start of the financial year in which the registration as a G-REIT takes place.

Fifty per cent of capital gains realised on the disposal of real estate may be transferred to a reinvestment reserve for a two-year period and rolled over to new eligible real estate.

Dividends of at least 90% of the distributable profits must be distributed every year. On these distributions, the general WHT of 25% (plus solidarity surcharge of 5.5% = 26.375%) applies.

Non-resident shareholders are subject to limited taxation in Germany on G-REIT dividends received. The WHT of 25% (plus solidarity surcharge adding up to 26.375%) is definitive for non-resident shareholders. The WHT exemption based on the EU Parent-Subsidiary Directive does not apply. However, a reduction of WHT to 15% may be available on the basis of the relevant DTT. A reduced rate of 15% (plus solidarity surcharge adding up to 15.825%) is available for non-resident corporations under further substance requirements (see explanation above). To avoid double taxation, G-REIT distributions stemming from pre-taxed income, i.e. income that has been taxed in Germany or abroad at a rate of 15% or more, are 95% tax-exempt if received by a corporate taxpayer and 40% tax-exempt if received by a private individual holding the G-REIT share as a business asset.

Individuals holding the G-REIT share as a private asset are subject to the 25% definitive WHT regime, irrespective of whether the G-REIT distributions are stemming from pre-taxed income or not.

### Further Aspects with regard to the European Union

As mentioned above, all EU Member States shall adopt and publish the laws, regulations and administrative decrees to comply with the AIFMD. It is currently under discussion and questionable, whether AIFMD applies to listed G-REIT. In that case, G-REIT and their managers should be subject to the extensive regulations.

Since neither the European Commission nor ESMA (European Securities and Markets Authority), as an independent EU Authority that contributes to safeguarding the stability of the European Union's financial system, exclude certain REIT from the scope of the AIFMD. Thus, each REIT should be analysed whether it meets the criteria of the definition of an AIF or not. Insofar, it is a by a case-by-case decision. It can be expected that the regulatory bodies of the EU Member States will develop a practical approach during 2013/2014.

## Financing the acquisition of German real property

### Capital contribution

#### Legal aspects

There are various types of companies that may be used as a vehicle for real estate investments in Germany.

With a strict limitation of liability and flexible company law, a corporate entity with limited liability in the form of a GmbH (*Gesellschaft mit beschränkter Haftung*) is advantageous and the most common form of entity, rather than the less flexible form of corporate entity – an AG (*Aktiengesellschaft*) – used by entities whose capital is subscribed after a public offering.

The GmbH is founded by drawing up notarised agreed statutes and may be set up by one shareholder. Its minimum subscribed capital is generally EUR 25,000. Newly established companies may start with a subscribed capital of less than EUR 25,000 (at least EUR 1) if certain requirements are met (*Unternehmergesellschaft, UG*). Depending on the size of the company, the annual financial statements may require certification by a certified public accountant (*Wirtschaftsprüfer*).

Notary and registration fees depend on the amount of subscribed capital. It is common practice in Germany to acquire shelf companies.

According to the German company legislation and case law, dividend distributions or any other repayments to the shareholder which result in the net equity falling below the subscribed capital are not permitted.

Companies can be flexibly funded, either with formal statutory capital, or, more easily, informal capital.

#### Tax aspects

For German tax purposes any contribution has to be accounted for on the level of the receiving corporation in a specific tax account. This so-called tax contribution account may very well differ from the equity shown in the German generally accepted accounting principles (GAAP) accounts. In case of a later distribution of funds to the shareholder, any distributable profits shown in the tax balance sheet are considered as distributed before any contribution can be repaid. This can have an effect on a WHT burden as only the distribution of tax profits is subject to a WHT.

There are no duties on capital contributions in Germany.

## Mezzanine capital

It has to be examined on a case-by-case basis, whether debt or equity is given from a German perspective.

## Jouissance rights (*Genussrechte*)

An investor may acquire jouissance rights (*Genussrechte*) in a German corporation that invests in real estate.

Jouissance rights are not defined in law, although they are frequently used by stock corporations. These rights are contractual and can be documented by bearer or registered certificates that can be listed on a stock exchange. The holder of jouissance rights has no voting rights and cannot participate in shareholder or management meetings. The profit share, expressed as a percentage of the amount of the investment, is generally higher than the prevailing interest rate. How much higher needs to be analysed carefully where the investor and the corporations are related parties, in order to avoid a hidden profit distribution under German tax law.

If the jouissance rights do not allow for participation in liquidation proceeds, the payments are fully deductible by the German entity for corporate income tax and 75% deductible for trade tax purposes. Otherwise, the treatment is similar to that of atypical silent partnerships (see below).

In some cases, traditional debt arrangements may provide a better after-tax result if the interest is not subject to WHTs under the relevant tax treaty.

## Atypical silent partnership

An investor who lends capital under the above-mentioned terms of a silent partnership agreement may undertake in co-entrepreneurial investment and then be treated as a so-called atypical silent partner in the company investing in German real estate.

In comparison to a typical silent partnership, the silent partner in an atypical silent partnership generally has extended control rights. Moreover, they participate in liquidation proceeds (and hence in hidden reserves realised in the sale).

Under German tax law and under a number of tax treaties, such investors are treated as direct investors in the same way as partners under an ordinary partnership agreement.

Therefore, such partners will often be considered as having a PE in Germany (no WHT on repatriated proceeds). If the atypical silent partner is a corporation, its profit share is taxed at a corporate tax rate of 15% (plus 5.5% solidarity surcharge = 15.825%).

In principle, the tax treatment for partnerships applies. However, the tax treatment in the foreign investor's home country needs to be carefully considered.

## Typical silent partnership

An investor may as a silent partner lend capital to a company investing in German real estate. In German civil law terms, the typical silent partnership is an undisclosed partnership between the principal (e.g. a company holding real estate) and the silent partner.

The contribution of the silent partner is recognised in Germany as legal capital under certain circumstances. Shareholders may, in principle, also be silent partners. The silent partner possesses limited control rights.

The silent partner has a P&L sharing entitlement in the principal's business. In liquidation, the silent partner does not participate in the liquidation proceeds. Under German tax law, the profit share of the silent partner is deductible for the principal, e.g. a corporation, in arriving at their income for corporate income tax purposes. However, the profit share is not deductible for trade tax purposes.

Foreign investors entering into a silent partnership may be treated as lenders or shareholders, depending on the applicable tax treaty. Special attention must be given to how the arrangement is treated in the foreign investor's home country. The income of the silent partner is generally subject to WHT at 25% (plus 5.5% solidarity surcharge), a rate that may be reduced under the relevant tax treaty.

### Profit participating loans (*partiarische Darlehen*)

Investments in real estate located in Germany can also be achieved by lending capital on the basis of a profit participating loan arrangement. A profit participating loan is similar to a traditional loan, except that the interest payments vary depending on the profits of the company. As a result, the lender may receive larger interest payments in profitable years.

The rate of return on profit participating loans is normally lower than that under a silent partnership arrangement as there is no loss-sharing provision.

## Debt

### Legal aspects

The (interim) financing of a German company can be achieved through shareholder loans or by senior loans from foreign or local banks. Local banks such as mortgage banks (*Hypothekenbanken*), building societies (*Bausparkassen*) and savings banks (*Sparkassen*) also specialise in real estate financing.

### Mortgage (or land charge)

Regarding long-term financing of real property, the loan claim of the creditor is usually secured by an instrument such as a mortgage (*Hypothek*) or a land charge (*Grundschuld*). The features of mortgages and land charges may briefly be summarised as follows:

A mortgage always relates to a specific claim, i.e. the settlement of the loan vis-à-vis the creditor, with the debtor being personally liable for securing the claim. Land charges, on the other hand, do not relate to a specific claim, but may e.g. also be used to secure a number of other obligations vis-à-vis the same creditor or, if a loan has been settled, vis-à-vis another creditor. In contrast to a mortgage, under a land charge the creditor may only take recourse to the property if the debtor is not personally liable for securing the claim. Due to their flexibility, land charges are therefore widely used in Germany.

Deeds on mortgages/land charges are usually notarised and must be entered in the land register.

### Tax aspects

#### Income tax

In general, interest paid under a loan agreement contracted for the acquisition of real estate is, for corporate income tax purposes, fully deductible provided that the investor can prove that the financing relates to the acquisition of the property. The fees paid in order to secure loans, such as notary's and court fees, are also deductible. If

the borrower generates business income, a discount (*disagio*) on the loan is not immediately deductible, but must be capitalised and written off over the period of the loan agreement.

However, there are the following significant restrictions on the general tax deductibility of interest payments.

### *Arm's length principle*

The terms of a shareholder, or related party loan must correspond with arm's length principle. Therefore, e.g. the loan to value ratio and the interest rate must be at arm's length.

Such loan agreements should be agreed in writing in advance and transfer pricing documentation can become necessary in a tax audit situation. Interest payments that do not meet the arm's length requirements are not tax-deductible and can trigger deemed dividend distributions subject to WHT.

### *Interest capping rules*

The interest capping rules (*Zinsschranke*) may restrict the tax deductibility of interest expenses. The rules do not only apply to interests paid on shareholder loans but to interests paid on all other loans, including bank loans, and not only to corporations but to any 'business', including business partnerships and sole proprietors.

The interest limitation is based on a disallowance of net interest expenses in excess of 30% of taxable income before net interest expenses, depreciation and amortisation (tax EBITDA). Interest disallowed for this reason can be carried forward and used in future financial years without time limitation, being however subject to the interest-capping restrictions in those years. This carryforward is to be mirrored with a carryforward of excess EBITDA, i.e. EBITDA exceeding net interest expenses in the current year can be used to offset interest expense in subsequent years. The EBITDA carryforward period is limited to five years. A carryforward claim does not, however, arise in years in which a company was exempt from the interest limitation (see next paragraph).

The interest capping rules do not apply if one of the following three exceptions is met.

- Net interest expense is less than EUR 3m annually.
- The German business is not part of a consolidated group of companies; and – in case of a corporation or partnership with corporate partners – interest paid to a direct or indirect shareholder of more than 25% of the share capital (or a person related to such shareholder, or a person with potential recourse to such shareholder or the related person) does not exceed 10% of the net interest expense.
- 'Equity test' – the German business is part of a consolidated group and the equity ratio (i.e. equity in relation to the balance sheet total, certain adjustments apply) of the German business is not lower than the equity ratio of the consolidated group (except for a 2% deviation allowance); and – in case of a corporation or partnership with corporate partners – interest paid by the business or another group company to a non-group shareholder holding directly or indirectly more than 25% of the share capital (or a person closely related to such a shareholder, or a person with potential recourse to such a shareholder or the related person) does not exceed 10% of the net interest expense. The relevant accounting standard for the equity test is generally IFRS. Alternatively, GAAP of any

EU Member State or US-GAAP accounts could be used where no IFRS accounts are available.

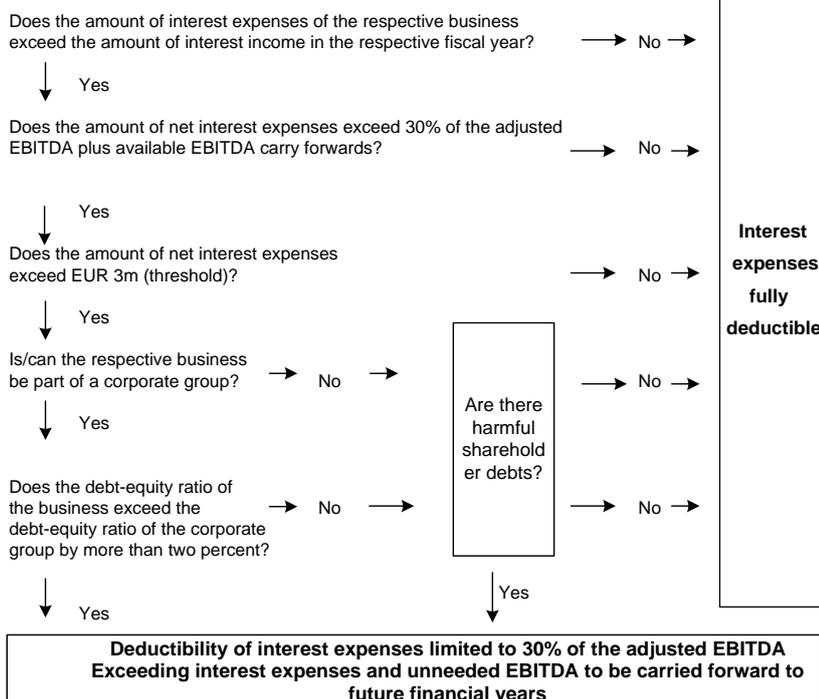
Companies forming a fiscal unity for German tax purposes are regarded as one business in the meaning of the interest-capping rules.

The following checklist illustrates the applicability of the interest capping rules.

#### Applicability of interest capping rules

Is there a business which is subject to German taxation?

#### Checklist



### *Withholding tax on interest*

Withholding tax on interest payments is imposed only in a limited number of cases such as profit participating loans, silent partnership agreements, or loans granted to banks (including interest-bearing bank accounts). It will therefore, e.g. not be levied on interest payments for loans granted by a foreign company to its German subsidiary.

In a rare case the tax authority can levy a WHT of 25% or 15% (for corporations) in its discretion, if this can secure an effective taxation of the non-resident payee. However, we have not seen such an obligation to withhold taxes on interest payments in the real estate sector. Taxpayers with limited tax liability receiving interest on loans secured by mortgage on German property are, in principle, subject to tax by assessment. However, most tax treaties provide for an exemption of all interest income from German tax.

### *Interest received*

Interest income is included in a German company's taxable profit and will, as such, be subject to tax at the normal rate.

Under most of Germany's tax treaties, interest income received by a non-resident lender is only taxable in the latter's country of residence.

Due to special regulations for the taxation of partnerships, interest payments to a partner by a German partnership are treated as appropriations of profit and are not deductible in arriving at the taxable income basis of the partnership.

### *Trade tax*

If certain limits are exceeded, 25% of any interest expenses which were deducted from the taxable income are added back to the trade tax base.

## **Managing German real estate**

Most frequently, the legal format for administering real properties will be one of the following: the mere renting of the property, the concession of rights *in rem* thereon, or the conclusion of a financial lease agreement.

### *Tenancy*

#### *Legal aspects*

Contrary to Anglo-American legal principles, leases in Germany are classified not as estates but as contracts. They are therefore not entered in the land register.

Commercial leases can be defined as leases of premises or parts of premises that are used principally by the lessee or by a sub-lessee for business purposes.

Residential leases can be defined as leases of accommodation that the lessee uses for the purpose of their principal residence.

German civil law provides special rules for lease agreements. However, contractual terms can be negotiated in many aspects.

In contrast to hereditary building rights (*Erbbaurechte*) and usufruct (*Nießbrauch*), the lease does not confer upon the lessee any right *in rem*. In fact, the lease only gives rise to personal rights, i.e. rights of claim against the lessor to enjoy the rented asset.

#### *Tax aspects*

##### *Income tax*

For private domestic investors, income derived from the letting of property is generally deemed to be 'rental income'. However, because of their legal form, resident companies are deemed to generate 'business income' from their letting activities. Rental income of foreign investors is also qualified as 'business income'. The difference is that 'rental income' is generally determined on a cash basis, whereas 'business income' is generally determined on an accounting basis.

Related expenses such as depreciation (see section above '*Direct purchase of assets*' – '*Income tax*'), maintenance and financing costs, etc. can be deducted in the amount actually incurred.

### *Value added tax*

As a general rule, the letting of immovable property is VAT-exempt, with the following exceptions:

- Letting of accommodation for short periods by an entrepreneur.
- Letting of camping areas for short periods.
- Letting of vehicle parking space.
- Letting of machinery and so-called business fixtures (*Betriebsvorrichtungen*).

However, for the first two exceptions a reduced tax rate of 7% applies.

The exemption from VAT can generally be waived by the lessor if a building is let to an entrepreneur for business purposes, unless the services of the lessee, e.g. banks, municipalities or hospitals, are VAT-exempt.

If buildings are let partly for commercial and partly for housing purposes, the VAT-option can only be applied to the commercially used space.

In case a lessee carries out both VAT-liable and VAT-exempt services, the lessor may generally only charge VAT on that portion of the rent that can be attributed to the VAT-liable turnover.

Though the VAT-option can only be exercised by the lessor, they will usually be prepared to negotiate with the lessee on its application in order to optimise recoverable input VAT for the lessor and avoid non-recoverable VAT for the lessee, resulting in lower acceptable rentals.

In case the VAT option is exercised only for part of the letting turnovers, then the input VAT may also be recovered in part only. In this connection, the relevant ratio is generally to be determined with regard to the spaces let; only if this is impossible may the ratio be determined with regard to the proceeds generated.

### *Hereditary building right and usufruct*

Rights *in rem* are quite common in the German real estate business. For the 'lessee', they usually confer more stability than a mere rent; for the 'lessor', they usually guarantee revenues over a long period of time.

In some circumstances, the acquisition of rights *in rem* can be considered as an alternative to a purchase. Rights *in rem* are, in fact, usually concluded for a long period and give extended rights to their holder.

### **Legal aspects**

#### *Hereditary building right (Erbbaurecht)*

A hereditary building right entitles its holder to erect and own, or acquire buildings, works, or plantations on land that remains in the legal ownership of the grantor. For the duration of the holder's right, the holder is the sole legal owner of such erected assets. The holder may use, enjoy, or demolish them, provided that the holder returns the land in the condition in which they obtained it.

A hereditary building right usually is granted for a period of 30 to 99 years. As there are no statutory time restrictions, it can also be granted for a shorter or longer period.

The holder may transfer the hereditary building right and pass it on by way of succession. The right can be encumbered with easements and mortgages.

For the purchase and transfer of hereditary building rights, in principle the same rules apply as on the acquisition of property.

Instead of a purchase price, the holder will usually pay an annual rent (land rent, *Erbbauzins*) to the grantor.

### *Usufruct (Nießbrauch)*

Usufruct is a restricted right *in rem*, which allows the usufructuary to temporarily use and enjoy real or personal property belonging to a third party, provided that its substance is preserved.

The usufructuary usually will assume certain costs relating to the property, such as public charges (e.g. land tax), mortgage liabilities, insurance costs and costs for small repair work. The grantor, on the other hand, bears the maintenance costs and costs for considerable repairs and depreciation. However, the parties may stipulate other contractual terms.

The right of usufruct is typically granted for a long-term period. It can neither be transferred nor pledged.

If the usufruct is granted for a let property, the lessees must be notified of its settlement. New lease contracts will usually be concluded by the usufructuary.

### *Registration duties*

The grant of rights *in rem* must be notarised and entered in the land register. The grant of a hereditary building right is entered in a special annex to the register, the building right register (*Erbbaugrundbuch*).

### *Tax aspects*

#### *Income tax*

For tax purposes, the grant of a hereditary building right or usufruct is basically treated like a 'normal' lease contract.

#### *Hereditary building right*

The holder has to capitalise the expenses connected with the transfer of the hereditary building right, such as notarial fees and real estate transfer tax, as acquisition costs of the hereditary building right. Such costs are depreciable over the term of the agreement. The land rent constitutes an immediately deductible business expense.

Advance payments for long-term transfer of use (hereditary building rights) are deductible as business expenses: if the advance payments relate to a period of up to five years, immediately; if they relate to a longer period, they are deductible only pro rata temporis over the term to which they relate.

If the hereditary building right is granted for land with buildings, the buildings must be listed at acquisition costs, i.e. the capitalised value of the land rent, in the holder's accounts.

If the holder erects a building, it is to be stated at construction costs. The usual depreciation rates for buildings are applicable (see section above *'Direct purchase of assets' – 'Income tax'*).

For the grantor, the land rent in principle constitutes (immediately) taxable income. In the case of advance payments relating to a period of more than five years, the grantor may elect to spread the respective income over the period to which it relates.

### Usufruct

Taxation mainly depends on the usufructuary being classified as user of the property or as its economic owner. Here, the contractual relationship in each individual case should be considered.

If the grantor remains the economic owner of the property, the usufruct is basically treated like a normal lease contract. For the grantor, the payment(s) received for granting the right are taxable income. They may deduct expenses relating thereto, as well as depreciation on the building.

The usufructuary, on the other hand, may depreciate the cost of the usufruct right over its lifetime. If the usufructuary sublets the property to a third party, they generate rental income. Expenses such as maintenance costs, etc. are deductible.

The conditions for the attribution of economic ownership to either the usufructuary or the grantor are regulated in a decree of the Federal Ministry of Finance and by case law. According to these rulings, economic ownership is allocated to the usufructuary if they have the control of the property over its useful life and bear all costs relating thereto, i.e. not only the public charges but also costs for maintenance and repair. As a result, they are entitled to claim the depreciation on the real estate.

Usufruct agreements may be regarded as an alternative to long-term lease agreements and may serve as a flexible instrument to achieve the desired income tax position as purchaser or lessee and sub-lessor, without being considered the legal owner of the property.

### *Real estate transfer tax*

The transfer of a hereditary building right is subject to real estate transfer tax. The tax basis is the capitalised value of the ground rent. By contrast, the grant of a usufruct is not subject to real estate transfer tax.

### *Value added tax*

The grant and transfer of rights *in rem* in real estate is exempt from VAT. The grantor may, however, opt to charge VAT if the holder is an entrepreneur who will exclusively use the property for business purposes, entitling them to recover input VAT.

### *Real estate financial leasing*

Real estate financial leasing may offer considerable cost and tax advantages in addition to the benefits of off-balance-sheet financing for the lessee if the leasing agreements are carefully drafted. Subsidiaries of German banks, in particular, have acquired expertise in these financial investments.

In the following, the structure and tax implications of real estate financial leasing are discussed with regard to the applicable economic ownership concept.

## Legal aspects

Under a real estate financial leasing agreement the landlord leases for a certain long-term period real estate to the tenant for a consideration in form of a rent. The lessor finances the erection of a building on the plot of land for the use of the tenant.

Contrary to a 'normal' lease contract, the tenant is generally liable for maintenance costs and liabilities in connection with the destruction of, or damage to, the property. When concluding the agreement, they are usually granted a purchase option for the property on termination of the lease agreement. The financial leasing may, as a result, be considered an alternative to a normal lease or the acquisition of real estate.

Contracts on real estate leases must be concluded in written form. If a purchase option in favour of the lessee is agreed, the agreement requires notarial form. The purchase option is entered in the land register as a priority notice.

## Tax aspects

Financial leasing may be advantageous for the lessee under certain conditions.

To achieve these advantages, the lease agreement should be drafted in such a way that the tax authorities consider the lessor as the economic owner of the land and building for tax purposes.

Economic owner is the person who is able to, and usually does, exclude the legal owner from the use of the asset for the remainder of its assumed useful life, i.e. for a period long enough to reduce the value of the property to a point where the legal title is economically insignificant.

A decree issued by the Federal Ministry of Finance sets out standardised procedures for the attribution of economic ownership for leased immovable property to the lessee or the lessor, respectively. In such leases, the economic ownership position must be determined separately for land and buildings, with ownership for the land following the decision on economic ownership for the buildings.

Economic ownership is vital for the decision on who is to carry the leased asset in their balance sheet and depreciate it. Whereas the legal owner is normally considered the economic owner of the building, the decree contains a number of provisions according to which economic ownership is attributed to the lessee. The allocation of the real estate to either the lessee or the lessor depends mainly on the duration of the agreement in relation to the normal useful life of the building and the material risk (cost and charges) assumed by the lessee under the agreement. As these rules are rather strict and therefore largely indisputable, this should enable the parties to stipulate contractual terms that may lead to an optimal arrangement for tax purposes.

### *Lessor as economic owner*

If the lessor is considered to be the economic owner of the land and building, leasing agreements are treated as 'normal' lease contracts for tax purposes. In practice, this is used for tailor-made off-balance-sheet financing or closed-end funds.

### Income tax/corporate income tax

The lessor must capitalise the leased property at acquisition/construction costs in their balance sheet and must depreciate it over the property's useful life. The rentals received are taxable income. Interest on loans taken up to finance the real property is

deductible, provided the interest capping rules do not apply (see section above *'Tax aspects of interest payments' – 'Interest capping rules'*).

The lessee does not need to capitalise the leased asset in their balance sheet. They must, however, disclose the leasing obligations in the notes to the accounts. The rent paid is immediately deductible.

### Trade tax

If the lessor is not exempt from trade tax on earnings, their taxable income is increased by 25% of the interest on borrowings for trade tax purposes to the extent certain amounts are exceeded. On the other hand, 1.2% of the unitary tax value of property belonging to the assets of the business can be deducted. If the lessor establishes a real estate company, they can make use of the 'extended trade tax deduction' if the conditions for its application are met (for details see section above *'Trade tax'*).

There are no disadvantageous trade tax implications on the tenant, as the long-term financing is assumed by the lessor.

### Value added tax

If the lessor is the economic owner of the real estate for VAT purposes, the lease is treated as renting (see section above *'Renting' – 'Tax aspects' – 'VAT'*) with every single rent being subject to VAT.

### *Lessee as economic owner*

In case the lessee is considered to be the economic owner of the property, leasing agreements for tax purposes are viewed as a sale of real estate by instalment.

### Income tax

The capital gain derived by a resident lessor from the 'sale' of the real estate is generally taxable at standard tax rates if it is classified as 'business income' or as 'income from capital gain'. In addition, a capital gain derived by non-residents on the sale of German real estate is, in most cases, also subject to individual or corporate income tax in Germany (for details see section below *'Tax Aspects'*).

The lessor must record the minimum lease payments in their balance sheet as a receivable.

The annual lease payments are broken down into a capital and an interest component. Whereas the capital component reduces the receivable, the interest component is taxable income.

The lessee must disclose the 'purchased' asset in their balance sheet and is entitled to depreciate the capitalised building costs. On the other hand, the corresponding liability for the future instalment payments to the lessor must be reported in the balance sheet. The interest portion contained in the instalment payments is a deductible business expense, whereas the capital portion will amortise the liability. Tax on interest will only be levied if a mortgage or land charge is provided as security for a non-resident lessor. In such a case, tax is assessed at the normal corporate income tax rate imposed on non-resident enterprises (15% plus 5.5% solidarity surcharge thereon, i.e. 15.825%) unless the applicable tax treaty provides for an exemption.

### Real estate transfer tax (RETT)

The economic ownership concept for income tax purposes is not applicable for real estate transfer tax (RETT) purposes, i.e. a change in economic ownership from an income tax viewpoint does not automatically trigger RETT.

The RETT Act provides for taxation of a transfer if the recipient has de facto reached a position similar to the entitled legal owner. In this case, the recipient is able to benefit from all substantial proceeds from the use or disposal of the real property. In practice, standard financial lease agreements should not trigger RETT, whereas agreements that transfer economic ownership to the lessee most likely will.

Whether or not a lease agreement on real estate triggers RETT therefore depends on the individual contractual terms, in particular on the rights and obligations assumed by the lessee under the agreement.

### VAT

If the lease is considered a sale for income tax purposes, it will also be viewed as a taxable supply of goods for VAT purposes, albeit exempt from VAT. The exemption may be waived under certain circumstances (see section above *'Direct purchase of assets' – Tax aspects' – VAT*). In this case, the accumulated instalment payments (without interest) plus the price for the purchase option form the tax base.

## Selling real estate

### *Legal aspects*

Regarding the legal aspects of the sale of real properties see section above *'Direct purchase of assets' – Legal aspects'*.

### *Tax aspects*

#### Income taxes

Capital gains derived from the sale of real estate are generally taxable at standard rates if they are classified as 'business income' of a German company or as 'capital gain income'.

Under certain conditions a rental activity may be classified as 'trading in real estate' and therefore as a business activity. Under German case law, this basically is the case if more than three items of real estate (including the sale of items of real estate located outside Germany) are sold within five years ('three objects rule'). Furthermore, the risk of qualifying as traders in real property, even for investments including only one property, is considerably higher for individuals professionally involved in the real estate industry (such as architects, developers and agents) than for other individuals.

In addition, a capital gain derived by a non-resident on the sale of German real estate, which does fulfil the above-mentioned conditions is, in most cases, also subject to individual or corporate income tax in Germany.

The taxable amount is the sales price less adjusted book value of the property (acquisition costs at the time of purchase less depreciation allowances).

### *Rollover relief on capital gains*

By creating a so-called 'replacement or reinvestment reserve', the taxation of capital gains realised on the sale of German land or buildings may be deferred and the tax burden effectively reduced. This requires, inter alia, that income is determined on an accruals basis. Furthermore, the building or land sold must have formed part of the business assets of a domestic PE for at least six years, and the newly acquired assets must also be business assets. For the sale of land and buildings, 100% of the capital gain may be deferred and deducted from the acquisition or construction cost of comparable assets, so resulting in a lower depreciation volume in the future. The property sold must be replaced within four years (six years if construction of a new building commences before the end of the fourth year) or released to income. The profit of the year in which the replacement reserve is released is furthermore increased by 6% of the released amount for each year the replacement reserve existed.

### **Trade tax**

Capital gains will only result in a trade tax burden if a PE is maintained in Germany and the investment fails to qualify for trade tax exemptions which also apply to passive real estate investments.

The sale of an interest in a partnership is treated for tax purposes as a proportionate asset sale. Contrary to the situation on the sale of the property by the partnership, the gain realised on the disposal of a partner's interest is generally not subject to trade tax, as such a sale does not reflect a commercial activity by the partnership.

However, as outlined in the section '*Understanding the basic principles*' – '*Trade tax*', the sale of a *part* of a partnership interest is subject to trade tax as well as the sale of a partnership interest by a corporation (or by another partner who is not an individual).

By contrast, the extended trade tax deduction is explicitly excluded, (i) for *any* capital gains realised on the sale of a partnership interest in a property-owning entity, as well as (ii) for capital gains stemming from disposal of a property which had been contributed on a tax neutral basis to the company in question within the three preceding years.

### **Real estate transfer tax and value added tax**

The same rules apply as outlined in the section '*Direct purchase of assets*'.

## **Conclusion**

As with any investment, the optimal real estate investment structure depends on the special objectives and needs of the investor.

Use of investment strategies therefore usually depends on the following:

- Status of investors (fund, individual, company, etc.).
- Goals of investors (long-term/short-term; desired income generation).
- Kind of investment (development, management, trading).
- Legal status of investment at the time of investing (fund, individual, company, etc.).

- Requirements of potential local or financing partners.
- Other requirements (preserving current legal status).
- Various issues.

Long-term investments aimed at generating a considerable rental yield and a future increase in value, resulting in capital gains, may be structured through German subsidiary companies eligible to qualify for the international participation exemption.

The German income determination rules generally allow reasonable depreciation rates and the deductibility of allocated costs. Therefore, proper structuring will most likely lead to the tax burden on rental income being relatively low or even zero. For the acquisition of real estate companies, the optimal structure in some cases can only be reached by an initial restructuring, for which the German reorganisational commercial and tax laws provide a number of instruments.

Institutional investors aiming at investments of considerable size should carefully consider the use of investment funds (see section above '*Financial investments in German real estate*').

Short-term investments aimed at the realisation of capital gains by trading in real estate or developing real estate should be structured carefully; parallel to this, all other activities of the investor in Germany must be taken into consideration in order to determine the lowest tax burden achievable.

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# *Real Estate Going Global Greece*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 15 June 2012.

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# *Real Estate Tax Summary – Greece*

## General

Currently real estate property in Greece is subject to various taxes. In that respect, the possession, the use, the purchasing, the donation or inheritance of real estate property are currently subject to tax. VAT is imposed on new buildings as from 1 January 2006 in accordance with Law 3427/2005.

Individuals or Companies (Greek and non-Greek) acquiring real estate property in Greece or receiving income from such property situated in Greece, need to obtain a Greek tax registration number and file a Greek income tax return. Furthermore, foreign companies owning real estate property in Greece must also follow certain minimum accounting requirements, regardless of whether they maintain a permanent establishment in the country, in case they undertake building construction or extension works.

A tax reform introduced in April 2010 by L. 3842/2010 has resulted in major changes in real estate taxes. Moreover, tax laws L. 3943/2011 and 3986/2011 have also amended significantly the Greek real estate taxation. The below aim to depict the position after those several amendments, but it should be noted that Greek tax environment continues to be fluid.

## Rental income

Rental income earned by individuals and companies is subject to Greek income tax. For individuals, the tax is computed according to a progressive tax scale ranging from 0% to 45%, for income earned as of 1 January 2010. The corporate income tax rate is 20% for income earned during 2011 onwards.

Certain constraints exist as to the determination of such rental income. In cases where the rental mentioned in the relevant agreement is disproportionately lower than the actual rental value of the building, the determination of such income is effected through comparative data. Such disproportion is considered to exist when the rental value is at least 15% higher than the actual rental. In particular, such income cannot be less than 3.5% of the real estate value used as a residence, as calculated according to the objective real estate property value system, where applicable.

Furthermore, a 20% income tax is imposed on any amount paid by the tenant to owner, beyond the agreed rentals, in the case of the renting of a building alone or along with any equipment or other installation that it may have credited against corporate income tax due. For individual beneficiaries, no further tax liability arises for such payment.

As of 2008, stamp duty of 3.6% on the rental of residential properties is abolished. Other rentals are still subject to 3.6% stamp duty.

Furthermore, rental income earned by companies is also subject to a supplementary income tax of 3%, whereas in the case of individuals such supplementary tax is calculated at 1.5%, and 3% for residences larger than 300 square metres.

Especially in the case of shopping centres, as of 1 January 2007 there is a possibility for the shopping centre operator to opt for charging VAT on rentals; this possibility was extended in 2011 to logistics centres as well other than this case, rentals are generally exempt from VAT.

## Thin capitalisation rules

According to the relevant thin capitalisation rules, accrued interest on loans paid to affiliated companies are deductible on the condition that the debt-to-equity ratio is 3:1.

There are certain exceptions from the application of the thin capitalisation rules, applicable to banks, factoring companies, leasing companies, investment service companies, and securitisation special purpose vehicles (SPVs). Loans assumed by third companies, and for which any kind of guarantee has been issued by the above mentioned connected companies, are added to the total amount of loans undertaken by the connected companies.

## Depreciation

The net taxable income earned by individuals from real estate property is determined after making the following deductions for depreciation:

- For buildings used as residencies, boarding houses, schools, cinemas or theatres, hotels, and clinics, a depreciation amount equal to 5% is deducted, as well as a maximum of 40% for any insurance fees, repair and maintenance expenses (which must be supported).
- For buildings used for other purposes, the respective percentages are 3% and 40%.

Companies depreciate their real estate property according to the rates mentioned in the presidential Decree 299/2003, which vary from 2% to 12%, depending on the property item. According to the applicable legislation, enterprises are entitled to use any rate within the applicable range depending on the property item, under the requirement that the rate applied will be followed until the end of the life of the depreciable item.

# *Real Estate Investments – Greece*

## *Tax Aspects*

### *Value added tax (VAT)*

From 1 January 2006, the supply before first occupation of real estate is subject to VAT at the standard rate of 23%. The taxable value is the price that the taxable person received or is deemed to receive or is anticipated to receive, increased by any additional provision connected with the abovementioned transaction.

In particular, a supply of real estate subject to VAT is considered to be the transfer for consideration of ownership or rights *in rem* of buildings or part of buildings and the land on which they stand, before their first occupation. The above transaction is taxable only when the following conditions are fulfilled:

- The person who transfers is a taxable person, or anyone who carries out, on an occasional basis, the aforementioned transaction on condition that he opts for the standard VAT regime;
- The construction licence is issued after 1 January 2006.

The tax liability arises and the VAT is due in a lump sum payment at the time of signature of the final contract.

It should be noted that the acquisition of a first residence by individuals is exempt from the VAT.

### *Real estate transfer tax*

Any transfer of real estate which is not subject to VAT is subject to Real Estate Transfer Tax. Real Estate Transfer Tax rates applicable are 8% for the part of the transfer value up to EUR 20,000 and 10% for the excess amount value.

Such real estate transfer tax is reduced to  $\frac{1}{4}$  in the following cases:

- Distribution of real estate property parts among co-owners.
- Dissolution of partnerships and limited liability companies (Ltds).

The real estate transfer tax is reduced to  $\frac{1}{2}$  in the following cases:

- Compulsory trade-off of neighbouring properties.
- Merger of *Societe Anonymes* (SAs) or takeover of one by the other.
- Takeover of real estate property by the state for public use and for the public benefit.
- Trade-off of real estate of equal value.

Certain other case-specific exceptions may also apply.

The gain realised by the sale of real estate is taxed at the standard corporate tax rate applicable, while for individuals this gain is not subject to income tax.

### *Annual real estate tax (Foros Akinitis Periousias - FAP)*

This is an annual tax imposed on the objective value of the real estate property as determined by 1 January each year.

#### **Individuals**

According to the provisions of L. 3986/2011, as of 1 January 2011 the tax exempt threshold for individuals is EUR 200,000, calculated on the total value of the real estate property of each individual.

The tax imposed on the value of the property is calculated according to a progressive tax scale ranging from 0.2% to 1% for the value exceeding EUR 800,000.

Specifically for years 2010, 2011 and 2012, the real estate tax rate is specified at a percentage of 2% for the real estate property value exceeding EUR 5,000,000.

To be noted that L. 3842/2010 introduced a provision whereby the ownership of a property may be deemed to be attributed to an individual when such property is owned by a company controlled by such individual and the use of the company is for the purposes of circumventing taxation.

#### **Legal entities**

The respective tax rate imposed on the objective value of the real estate property is 0.6%, reduced to 0.1% for buildings used for the commercial activities of the company itself. Again the tax on buildings may not in any case fall below EUR 1 per square metre except for unfinished buildings as well as agricultural and livestock buildings. The FAP due by non-profit organizations is 0.3%, while hotel enterprises benefit from beneficial provisions for self-used properties (applicable rate of 0.33% etc) for years 2010 to 2012. To be noted that the minimum threshold of EUR 1 per square metre does not apply for hotel enterprises.

For the imposition of the law, the ownership is assessed by 1 January each year while the tax is due on 15 May of the respective year and paid in three equal bimonthly instalments.

### *Real estate duty – Telos Akinitis Periousias (TAP)*

Real estate ownership is further subject to a real estate duty, currently calculated in a range of 0.025% to 0.035% on the objective value of the real estate property; such is defined according to the “area prices” and the “age coefficient” applicable on the respective property, depending on the area where the real estate property is situated.

Certain exemptions are granted from TAP in the following cases:

- Buildings under construction, for a seven-year period following the granting of the construction licence, or until they are rented or in any other way used prior to the lapse of such a seven-year period.
- The commonly-used sections of residential buildings.

- Buildings characterised as historical monuments.

TAP burdens the owner of the real estate, and is included for payment in the electricity bills, unless such bill is issued in the name of the tenant of the real estate, in which case TAP is paid by the latter and is deducted through the agreed monthly rental. This duty is a municipal duty.

### *Special tax on real estate property*

As of 1 January 2010, companies possessing ownership titles or rights of use of real estate in Greece, pay an increased 15% annual tax calculated on their value.

The following are exempt:

- Companies (SAs, Ltds and Partnerships) with registered shares all the way up to an individual, provided that the companies are resident in Greece or in another EU member state and the ultimate individual shareholders maintain a Greek tax registration number - AFM.
- Companies owned by banks and institutional investors, without having the obligation to disclose their ownership up to the individual, provided that the latter are not established in a non-cooperative state and are supervised by a recognized authority of the respective state. Non-cooperative states, as determined in article 51 A of the Greek Income Tax Code, are non EU Member States that have not concluded agreements of administrative assistance in the tax sector with Greece or with twelve other states at least and are enumerated in an annual Ministerial Decision.
- Shipping or ship owner companies that have established offices in Greece for the property they use or lease to other shipping companies exclusively as offices or warehouses. Companies with shares listed on an organised exchange Companies whose real estate related income is less than 50% of the total turnover corresponding to their business in Greece. Real estate used by the company for business activities, other than real estate exploitation, is not included in the calculation.
- Legal entities which pursue charitable, cultural, religious and educational aims, for the buildings used for such purposes, as well as for empty buildings or property they exploit, provided that any gains arising are made available for the above mentioned purposes.
- Insurance funds or social security organizations as well as companies of collective investments in real estate supervised by a competent authority of their registered seat, except for those whose registered seat is in Non-Cooperative states.
- Companies whose registered shares or parts belong to a national or foreign institution, which seeks charitable purposes in Greece, for the buildings used for such purposes.
- The person making the claim has to provide evidence in order to obtain the exemption.

Every individual or legal entity participating in any way in a legal entity having real estate ownership, or participating in another legal entity that has ownership or other rights on real estate, is wholly responsible with the liable person for the tax payment.

If the ownership or usufruct is transferred, the liability for the payment of the tax, as well as for any additional payments, rests with the new owner or user together with the liable person.

The return is filed and the tax (if any) is paid by 20 May every year to the competent tax office, calculated on the objective value of all real estate or usufruct existing on 1 January of the taxable year.

### *Capital gains on the sale of property*

Gains made by companies upon the sale of real estate property are treated as part of the company's taxable profits and taxed at the normal income tax rate. If, on the other hand, there is a transfer of shares of a company holding the real estate, the following tax implications will arise:

- Upon the transfer of Greek SA shares not listed on the Athens or any other stock exchange, a 5% tax is imposed on the real transfer price of such shares, as it is defined by a relevant Ministerial Decision, unless the provisions of a bilateral tax treaty provide otherwise.
- If the transferor is a Greek legal entity, the gain from the transfer of shares is added to the total income of the legal entity and subject to the respective corporate income tax rate. The 5% tax is in principle credited against the total income tax. The transfer of listed shares that have been initially acquired until 31 December 2012 shall be exempt from any capital gains, irrespective of the time of sale of those shares. Instead, upon the transfer of SA shares listed on the Athens or any other stock exchange a transfer tax (transaction duty) is imposed. The transfer tax rate (transaction duty) is increased from 0.15% to 0.2% for sales of shares realized from 1 April 2011 onwards. Note that the application of the 0.2% is extended to the sale of listed shares over the counter as well as through multiple parties trading platform, capital gains derived from the sale of listed shares originally acquired as of 1 January 2013 onwards, will be taxed based on the general income tax provisions. Any loss, arising within the same year from the transfer of listed shares, shall be set off with the above-mentioned capital gains
- Upon the transfer of parts of an Limited liability company (*Eteria Periorismenis Efthinis-EPE*), a capital gains tax of 20% is imposed upon any resulting capital gain, as such is calculated according to a relevant Ministerial Decision, unless the provisions of a bilateral tax treaty provide otherwise.

### *Extraordinary Special Duty on built surfaces supplied with electricity*

L. 4021/11 (art. 53) has introduced a special duty imposed on real estate property.

Liable to the Special Real Estate Duty is the legal owner of the property. However, in practical terms, liable to pay is the tenant of the property through the electricity bills in the name of the owner of the property. In the event that such person is a lessee (i.e. tenant for consideration); he can offset payment of the Duty against future or owed leases.

For the determination of the payable duty, the square metre built surface of the property is multiplied by the applicable rate of the area where said property is located

(Designated Value Zones) and further multiplied by the surcharge rate (deriving from the building age).

The Real Estate Duty will be collected by the Public Electricity Company (DEH) or alternative suppliers.

## Real Estate Investment Trust (REIT)

### *General*

The Greek REIT law was introduced in December 1999 by L. 2778/1999. The initial version of the law was poorly adapted to the needs of the market, and no REITs were established. The Greek REIT law was amended a few years later. A further second amendment to the law, which lifts a number of restrictions (e.g., increases limitations on leverage, allows investments in real estate SPVs rather than only direct ownership of properties) may result in the establishment of more REITs.

Considerable tax exemptions are the key advantage of the Greek REIT regime.

Greek REITs are special purpose entities. Their main activities consist of the investment in real estate assets prescribed by the Greek REIT law.

The Greek REIT law provides for two types of REITs:

- Those having a unit trust form (Real Estate Mutual Funds (REMFs)). REMFs are not listed vehicles;
- Those having a corporate legal form (Real Estate Investment Companies (REICs)). REICs must obtain a listing on a recognized stock exchange.

### *Real Estate Mutual Funds (REMF)*

A real estate mutual fund is managed by a fund management company, or *Anonimi Eteria Diahirisis Amiveon Kefaleon* (AEDAK), formed as an SA, which must have a minimum paid-in share capital of at least EUR 2,935,000 (art.2 para. 5a). Such a mutual fund is established following a licence granted by the Capital Market Commission (CMC). The assets under management must amount to at least EUR 29,347,028.61. (art 5 para. 2a).

Certain requirements are set by law in relation to the operation of the AEDAK and the fund itself. It is required that the fund equity is invested in real estate property located in Greece or another EU member state or in companies owning and exploiting real estate by holding at least 90% of their shares. (art. 6 para. 2) Furthermore, the fund's equity should be invested in securities with a percentage not exceeding 10% of AEDAK's share capital, and in cash, bank accounts and credit titles of equivalent liquidity with a percentage of at least 10% of the fund's assets (art. 6 para. 1). However, the fund is not allowed to invest in precious metals or titles in such.

The fund property is divided in equal units or unit ratios, and each fund unit must be priced at least EUR 14,673.51 (art. 11 para. 1).

The establishment of the fund, the sale, redemption and transfer of units, its cessation of operations as well as the transfer of real estate to the fund, are free of any tax, duty, stamp duty, contribution or other Greek state charge. Real estate property owned by real estate funds is subject to a 0.1% real estate tax, imposed on the objective value of

the property. Real estate mutual fund profits are subject to an annual tax of 10% on the intervention interest rate as determined by the European Central Bank (reference interest rate) increased by 1%. Tax is calculated on the six-month average of the fund's net assets. Neither the fund nor the investors are subject to any further tax for their relevant investment.

### *Real estate investment companies (REIC)*

A REIC is set up as an SA, exclusively engaging in the management of portfolios comprising of securities and real estate, with a minimum share capital of EUR 29,347,028.61. A REIC's reserves must be invested at least 80% in real estate located in Greece or another EU member state or in companies owning and exploiting real estate property by holding at least 90% of their shares (art. 22 para. 1a), a maximum of 10% in securities and a maximum of 10% in other movable property (art 22 para. 1c).

The L. 2778/1999 (art. 22) provides a number of restrictions on the nature of assets in which a REIT may invest, such as:

- Each individual property in which funds are invested may not exceed 25% of the total investment value of all properties.
- Investment in property under development is allowed only if it is expected that the development will be completed within a reasonable amount of time, and that the budgeted remaining costs do not exceed 25% of the value of the property after development is completed.
- The REIT may not invest more than 25% of its net equity in properties acquired under financial leasing contracts, and no individual contract individually can exceed 10% of the net equity. Furthermore, no more than 10% of the total investments in real estate property may consist of properties that the REIT does not fully own.
- Properties may not be disposed of less than twelve months from the date the properties are acquired.
- The acquisition or disposal of real estate property must be preceded by a valuation of the property by a Certified Evaluator, and the price paid may not deviate (upwards for acquisition or downwards for disposal) more than 5% from the value, as determined by the Certified Evaluator.

REICs are required to float their shares on the Athens Stock Exchange (ASE) or on another organised market within a year following their formation. REIC shares and the transfer of real estate property to such companies are exempt from any tax, duty, stamp duty, contribution or other similar Greek state charge. REIC profits are subject to an annual tax of 10% on the intervention interest rate as determined by the European Central Bank (reference interest rate), increased by 1% (art. 22 para. 2). Tax is calculated on their six-month average investments increased by their cash reserves in current prices, with no further tax obligation being imposed on the company or its shareholders. Furthermore, the transfer of REIC shares that are not listed on the Athens Stock Exchange is not subject to any income tax.

No real estate transfer tax is imposed in the case of REICs resulting from mergers or conversions. Real estate property owned by real estate investment companies is subject to a 0.1% real estate tax, imposed on the objective value of the property.

## *Withholding tax on dividends*

By virtue of the provisions of L. 3943/2011 a 25% withholding tax is imposed on profits distributed by Greek *Societe Anonymes* in the form of dividends, Board and Directors fees, profits distributed to personnel, as well as interim dividend payments made to individuals or legal entities, Greek or foreign, independent of whether the payments is made in cash or in kind (shares).

Similar taxation is further imposed on profits distributed by Greek Limited Liability Companies (and also some associations) to individuals or legal entities, Greek or foreign (application for distributed profits approved as of 1 January 2012 onwards).

Dividends distributed by REICs are not subject to the 25% withholding tax. For dividends received by REICs, the 25% withholding tax is deducted from the tax due following the submission of the tax return by the company. Any excess tax credit can be carried forward to offset the tax due with respect to future tax returns.

## *Losses carried forward*

Greek operating companies may carry forward their losses for a period of five years. Company losses cannot be carried back.

## *Special merger incentives for real estate companies*

By application of L. 2166/1993 and L.D 1297/1972, the merger between real estate companies is exempt from the real estate transfer tax.

## *Municipal tax system*

Greek tax legislation provides for a great number of taxes and duties for the benefit of local authorities. Specifically, municipalities and communities benefit from two types of taxes:

- Taxes imposed, managed and collected by the State, the revenue of which is partly or wholly distributed to the municipalities. These taxes finance the provision of public services.
- Taxes and duties paid to the local authorities directly or indirectly (e.g. through the electricity bills). These are generally established by law and imposed by virtue of a decision of the competent municipality council, which is occasionally granted a limited margin of discretion to determine the exact applicable tax rates, or even whether an optional charge will be levied.

Below is a brief description of the most important taxes and duties charged in favour of municipalities and communities in Greece.

## *Tax on the transfer of real estate*

According to article 37 of Law 3033/1954, in the case of a transfer of real estate, a tax in favour of the municipalities and communities is levied at a rate of 3% calculated on the amount of the real estate transfer tax due.

## *Real estate duty*

According to article 24 of Law 2130/1993, real estate duty is levied and collected through the electricity bill in favour of the municipalities and communities at a rate ranging between 0.025% and 0.035% on the real estate's objective value.

## *Duty for the provision of cleaning and lighting services*

A duty in compensation for the collection of garbage and waste and for the lighting of the streets, collected through the electricity bill, is due from the user of real estate. According to article 1 of law 25/1975, these duties are calculated by multiplying the real estate's square metres by a certain rate determined by the municipal council.

## *Tax on electrified spaces*

According to article 10 of Law 1080/1980, the municipal council may levy a tax on real estate connected to the grid, the collection of which is effected through the electricity bill. The tax is calculated by multiplying the real estate's square metres by a rate determined by the municipal or community council ranging between EUR 0.017 and EUR 0.073 per square metre. The said rate can be increased every year up to 20%.

## *Advertisement duties*

According to the applicable Greek tax legislation, advertisements are divided into four categories: A, B, C and D for taxation purposes.

*Category A:* Advertisements in public areas, e.g. squares, pavements, buildings under construction, train stations, airports, stadiums, shops, cinemas, theatres, kiosks. A fixed duty amount determined by the municipal or community council is imposed weekly, multiplied by the square metres of the surface covered by the advertisement.

*Category B:* Well-lit advertisements are charged with a municipal duty per square metre on an annual basis. The duty amount depends on the specifications of the advertisement and is determined by the municipal or community council.

*Category C:* Advertisements on public means of transport. The duty depends on the size of the advertisement.

*Category D:* Advertisements through gifts, diaries, handbills of any kind, stickers, or brochures in restaurants, cafes, etc., or by the use of an airplane, are taxed at a rate of 6% on the advertisement expenditure. Such rate is further reduced to 2% in case advertisements are effected through open display within stores.

Please note that TV, radio, magazines and newspaper advertisements are not subject to this duty.

## *Duties for the use of communal space*

A duty in compensation for the granting of the right to use pavements, squares and other public spaces is due by the user. The duty amount is determined annually per square metre used, by the municipal or community council.

## *Duties for the use of public land, projects or services*

Generally, the municipality or community can impose duties in compensation for the use of its land, projects or services (e.g. water supply, quarries, extraction of sand and stones from a municipal or community quarry, etc.). The specific conditions concerning the imposition of the aforementioned duties (rate, basis of assessment, etc.) are determined by the municipal or community council.

## *Duties on hotel bills*

A municipal and community duty of 0.5% is imposed on the amount paid for bed, rendered room or apartment or camping spaces in an organised hotel, including rooms to let, or a camping site. The duty is payable by the customer and is collected by the lessor, who is responsible for the payment of the duty to the competent local authority.

## *Duties on restaurant bills*

A municipal and community duty of 2% is imposed on the gross revenue of: (i) all establishments serving food, drinks, coffee, refreshment, sweets and dairy products, on condition that they, according to their operating licence, dispose of seats and tables inside or outside the facilities; (ii) bars and beer shops, irrespective of their name and category; and (iii) canteens.

In the case of entertainment clubs (nightclubs, discos, music halls, cabarets, establishments offering drinks and shows), the abovementioned municipal charge is 5%.

A similar duty may also be imposed on the gross revenue on several categories of trade shops such as those that sell tourist, sport, skiing and folk art items, souvenirs and gifts, rent-a-car establishments, schools offering classes in sea sports etc., based on the decisions of the competent local authority.

The aforementioned duty is payable by the customer and is collected by the issuer of the bill, who is responsible for the payment of the duty to the competent local authority.

## *Tax on building licences*

In favour of municipalities and communities, a tax is imposed on the issuance of any licence concerning the construction, completion, addition, extension or arrangement of buildings within the administrative limits of a municipality. The tax is calculated at a rate 1% on the estimated budget of the said operations as determined by the competent authorities.

## *Parking duties*

The duties for parking in public areas, established by L. 2218/1994, are determined by decision of the municipal or community council.

## *Tax on sales of beer*

According to Greek legislation, a tax for the benefit of municipalities is imposed on beer sold in Greece. It is calculated at a rate of 3% on the value of beer sold by the producer or his representative. The duty is payable by the purchaser and is collected by the producer, who is responsible for the payment of the tax to the tax authorities.

It should be noted that the aforementioned tax could be incompatible to the article 3 para.2 of the Directive 92/12/EEC on the general arrangements for products subject to excise duty, as interpreted by the ECJ (C-434/97, C-437/97). However, its compatibility with EC law has not been disputed until now.

### *Duty on commerce of drinkable waters*

A duty is levied on the commerce of drinkable waters, sold in their natural condition or after processing or mixing with other juices, under any name or package, from a trader having obtained the necessary licence. The duty is computed at a pecuniary rate ranging between EUR 0.88 to EUR 1.76 per 1,000 litres of water and EUR 0.88 to EUR 1.47 per 1,000 litres of water mixed with other juices. The specifications of this duty are determined by the competent municipal council.

### *Local projects and services duties*

In general, municipality councils are granted a margin of discretion to determine specific duties, in compensation for local projects and services, which contribute to the development of the area, the raising of quality of life and the better service of the citizens. The specifications and details of the aforementioned duties are determined by the competent local authorities and have to correspond to the actual cost of services or projects.

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# *Real Estate Going Global Hong Kong*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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**All information used in this content, unless otherwise stated, is up to date as of 10 April 2013.**

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# Real Estate Tax Summary – Hong Kong

## General

Foreign investors may invest in Hong Kong property through a non-resident entity or, more commonly, through a resident entity.

## Rental income

Rental income derived from Hong Kong property is taxable in Hong Kong. If the property owner is a company, whether resident or non-resident, the rental income is liable to profits tax at the rate of 16.5%. If the property owner is an individual, whether resident or non-resident, then the rental income is subject to property tax at the rate of 15%.

## Corporate investors

Interest on loans used to acquire property can be deducted against rental income if the lender is subject to tax on the interest income in Hong Kong, or if the lender is a financial institution and the loan is not secured or guaranteed by any deposit or loan, the interest from which is not subject to tax in Hong Kong.

Other costs incurred in deriving rental income, such as insurance premiums, repair and maintenance expenses, property management fees, etc., are also deductible. Capital expenditures, such as stamp duty and legal costs incurred in acquiring the property, are not deductible.

## Individual investor

Property tax is levied on the rental income received after deduction of government rates, if these are paid by the property owner. A notional deduction of 20% of the net rental income amount is also allowed to cover repairs and other recurrent expenses.

Resident individuals may opt for personal assessment, whereby the net taxable rental income is offset by the attributable mortgage interest incurred, if any. The net amount is then subject to tax, either at progressive rates with the deduction of personal allowances, or at the standard rate of 15% without the deduction of personal allowances, whichever is lower.

## Stamp duty

A lease agreement is subject to stamp duty, generally at a rate of 0.25% to 1% of the average yearly rent, depending on the length of tenancy.

The Financial Secretary announced various measures to curb short-term speculation which included changes in the *ad valorem* stamp duty rate, and the introduction

of Special Stamp Duty and Buyer's Stamp Duty on transfer of properties. The Stamp Duty Ordinance would be revised to reflect these measures or the revised rates.

### *Ad valorem stamp duty*

Unless specially exempted, the disposal of Hong Kong property (residential and non-residential) whereby the agreement is executed on or after 23 February 2013 would be subject to Hong Kong *ad valorem* stamp duty of up to 8.5% on the higher of the sales consideration or market value of the Hong Kong property. The *ad valorem* stamp duty is normally payable by the purchaser.

### *Special Stamp Duty*

Hong Kong introduced a Special Stamp Duty (SDD) with effect from 20 November 2010. Unless specifically exempted, any residential property acquired on or after 20 November 2010, either by an individual or a company (regardless of where it is incorporated), and resold or transferred within a specified period of time after acquisition, would be subject to SDD. The SDD payable is calculated by reference to the stated consideration or the market value, whichever is higher, at the following regressive rates for the different holding periods by the vendor or transferor before the disposal. The SDD rates were revised for any residential property acquired on or after 27 October 2012.

Period within which the residential property is resold or transferred after its acquisition	SSD Rates (for residential property acquired between 20 November 2010 and 26 October 2012)	SSD Rates (for residential property acquired on or after 27 October 2012)
6 months or less	15%	20%
More than 6 months but for 12 months or less	10%	15%
More than 12 months but for 24 months or less	5%	10%
More than 24 months but for 36 months or less	Not applicable	10%

All parties to a contract are liable to the SSD.

### *Buyer's Stamp Duty*

Hong Kong introduced a Buyer's Stamp Duty (BSD) with effect from 27 October 2012. Unless specifically exempted, a purchaser (any individual without Hong Kong permanent residence or any corporation irrespective of its place of incorporation) would be liable to BSD for transfer of residential property on or after 27 October 2012. BSD is charged at 15% on the higher of sales consideration or market value.

## Depreciation allowances

Corporate investors are entitled to a tax depreciation allowance on the property in computing their liability to profits tax. Accounting depreciation is capital in nature, and is not tax-deductible.

Certain components of a building, whether new or second-hand, may be considered to be plant or machinery. These are tax depreciable by way of an initial allowance of 60% of the cost in the year of acquisition, and an annual depreciation allowance ranging from 10% to 30% of the depreciated value, depending on the nature of the plant and machinery. Lift equipment or elevators, escalators, air-conditioning systems, sprinklers, etc. for example, are considered to be plant or machinery eligible for a 60% initial depreciation allowance and an annual depreciation allowance at the rate of 10%.

A building or structure, or a part thereof, other than the physical plant and equipment, may be eligible for a tax depreciation allowance on the cost of construction. If the building or structure is used by the owner, or its tenant, in a qualifying business, such as milling, manufacturing, transportation, public utilities, farming and trade of storage, etc., then an industrial building allowance is available. An initial depreciation allowance of 20% on the cost of construction is available for the first use of an industrial building, and an annual depreciation allowance at the rate of 4% on a straight-line basis is available where the building or structure remains in use in a qualifying business.

For a second-hand industrial building, the annual allowance is computed by reference to the unclaimed residual tax value and balancing adjustment (see below), divided by the remaining portion of the building's statutory deemed useful life of 26 years.

In respect of new buildings or structures other than those qualifying as industrial buildings, an annual commercial building allowance of 4% of the construction cost is available. For a second-hand commercial building, the annual allowance is computed on the same basis as an industrial building.

When the relevant interest in the building or structure is sold, or the building or structure is demolished or destroyed, there may be a balancing adjustment on the unclaimed tax residual value by reference to the sale proceeds, resulting in either a deductible balancing allowance or a taxable balancing charge.

For capital expenditure relating to the renovation or refurbishment of a building or structure (other than a domestic building or structure), corporate investors may alternatively claim an annual profits tax deduction at the rate of 20% on a straight-line basis.

No tax depreciation allowance on the building or property is available to an individual investor who is subject to property tax.

## Capital gains on the sale of real property

There is no capital gains tax in Hong Kong. A gain on disposal of real property may, however, be liable to profits tax if the owner is engaged in a venture in the nature of a trade in real property.

## Withholding tax on dividends

There is no dividend withholding tax in Hong Kong. A resident company may distribute its retained earnings to shareholders, whether resident or non-resident, tax-free.

## Loss carryforward

Operating losses may be carried forward indefinitely to offset future taxable profits. There is no loss carryback.

## Rates and Government rent

Rates are charged at the current rate of 5% on the rateable value, which is the estimated annual rental value of property. Rates are payable by either the owner or the occupier, depending on their agreement. In the absence of any agreement to the contrary, the liability to rates rests with the occupier.

Government rent applies to land held under a Government lease that expired prior to 30 June 1997, or has been granted since 27 May 1985. Government rent is calculated at 3% of the rateable value of the property. The owner is liable for Government rent, unless there is an express agreement to the contrary.

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All information used in this content, unless otherwise stated, is up to date as of 16 July 2012.

# *Real Estate Investments – Hungary*

## Legal considerations

### *Basic principles*

Certain rights (including ownership) and physical data relating to real properties and specified by the law must be registered in the Land Register, which is maintained by the Land Registry Offices. Individual properties are identified by lot numbers. The information recorded on the title deed of real properties is open for inspection by the public. Although the documents underlying the data registered in the title deeds are confidential, they can be obtained with a power of attorney from a party who proves legal interest to the documents in question. In order to be valid, the transfer of ownership or the transfer or establishment of any right over real properties must be registered with the Land Registry.

As a general rule, an entry related to a right over the real property must be based on a notarial deed, private documents with full probative force or a written document countersigned by an attorney-at-law. In most cases legal representation is compulsory in Land Registry procedures. The Land Registry Offices must decide on applications for registration in the order in which they were filed. Some specified rights over a real property (for example ownership) are constituted by their registration in the Land Register. Accordingly, these rights can only be exercised once they have been officially registered.

Bona fide third parties acquire ownership in spite of the actual legal status, if they acquired the property for consideration and with the assumption that the entries in the Land Register are correct (i.e. they purchased the property from a registered owner).

### *Ownership by a local company*

Hungarian corporate law recognises four principal corporate forms. A limited liability company (Kft.), which requires a minimum of HUF 500,000 in registered capital, is the most popular form for foreign investors. A Kft. is owned by quota-holders whose names are registered with the Court of Registration. The ownership of a company limited by shares (Rt.) is represented by transferable shares. For a private company limited by shares (Zrt.) a minimum of HUF 5m in registered capital is required. The required minimum registered capital for a public company limited by shares (Nyrt.) is HUF 20m. Other available corporate forms are limited and general partnerships (Bt. and Kkt.). The latter two are the only corporate types not vested with legal personality. All of these corporate forms may acquire the ownership of any Hungarian real property without special licence whatsoever, except for agricultural lands, which cannot be acquired by companies at all.

## *Ownership by a foreign company*

In principle, foreigners may own Hungarian real properties, except for agricultural lands. Usually, a licence from the relevant administrative office ('Government Office') is required for an acquisition by a foreigner. One exception is real properties acquired by foreign entities, if the given real property is necessary for the operation of the foreign entity's branch office in Hungary. Please be aware that, based on the current interpretation by the competent authorities, a branch involved in real estate trading may not acquire the ownership thereof without a licence. Additionally, as of Hungary's EU accession, EU citizens, corporate entities and other organisations (regardless of legal personality) registered in an EU or EEA Member State (or a third state deemed to enjoy the same status pursuant to an international treaty) do not require any licence for acquiring the ownership title over real property. As of 1 May 2009, the licence of the Administrative Office is not required for the acquisition of a 'secondary residence' either, i.e. the number of real properties (except for agricultural land) acquirable by EU citizens or entities registered in the EU or the EEA is no longer limited.

## *Tax consideration*

### *Corporate income tax*

#### *Corporate income tax rate*

From July 2010, the corporate income tax rate is 10% on the first HUF 500m (approximately EUR 1,750,000) of the positive corporate income tax (CIT) base without any further preconditions, and the tax base above this limit is subject to 19% CIT. The taxable base is calculated by adjusting the accounting profit shown in the taxpayer's financial statements by the increasing and decreasing items prescribed in the Corporate Income Tax Act.

#### *Minimum tax*

Except in the first two tax years of a company's existence, certain rules apply if the reported profit before tax or the normal CIT base (the higher of them) is below the minimum tax base. The minimum corporate tax base is calculated as 2% of total revenue with deductions for the cost of goods sold and intermediated services. In the above case, a company may decide to pay corporate tax based on the 2% base or may file a supplementary tax return. This provides additional detail based on which the Tax Authority will review and consider whether an adjustment is necessary. In this case the taxpayer is obliged to prove that the challenged economic events actually happened.

The taxable base of a property-holding company is equal to the gross income realised on operating the property and the proceeds from its sale, less allowable expenses, including repair, maintenance, depreciation, etc. Foreign exchange gains and losses realised on foreign exchange liabilities not covered with foreign currency held on account should be capitalised with the building. Taxpayers are able to choose to decrease the corporate tax base by unrealised foreign exchange (FX) gains booked as other revenues from financial transactions. This advantage only applies to unrealised FX gains that arose in the actual tax year and relate to non-hedged long-term financial assets and liabilities. In the year when the financial asset or liability is transferred from long-term assets or liabilities, the actual FX gain is crystallised for tax purposes. Correspondingly, any unrealised loss on long-term assets and liabilities should also be eliminated from the tax base, if the taxpayer opted for deferral of such gains.

## Real property holding companies

From 2010, foreign shareholders become taxable persons in case:

- They sell their shareholding in a real property holding company; or
- Withdraw their shareholding by means of capital decrease; or
- Give them as contribution in kind; or
- Transfer them without consideration.

A company and its domestic related parties qualify as real property holding companies, if:

- 75% of the market value of their assets (at the company or on domestic-related party level) is domestic real estate; and
- They have a foreign shareholder that is resident in a country that Hungary does not have a double tax treaty with (or the treaty allows the capital gain to be taxed in Hungary).

The tax base is the consideration/market value minus the purchase price and verified expenses. The applicable tax rate is the general corporate income tax rate (19%). Tax returns shall be submitted until 20 November following the tax year.

The above is not applicable to holding companies of a real property holding company.

## Controlled foreign company

CFCs are such foreign persons and foreign residents (together with foreign company), where the owner/shareholder of the foreign company is a Hungarian resident (at least 10% ownership or majority influence) is the majority of the days of its tax year and according to the Personal Income Tax Act, or a foreign company that derives the majority of its revenues from Hungary. In any case, if the effective CIT rate of the foreign company (under a group taxation arrangement, the consolidated effective corporate income tax rate) is less than 10%, or the foreign company does not have a CIT liability, due to zero or a negative CIT base – although it is profitable. This rule does not apply if the foreign company is resident in the EU, an OECD member or treaty country and has a real economic substance there.

Exemptions:

- If a shareholder or its related party has at least 25% ownership in the company and is listed on a recognised stock exchange for five years; or
- A company should be considered as one having real economic substance if it has employees, assets and more than 50% of the revenues are derived from manufacturing, processing, agricultural, commercial, investment activities, or from the supply of services.

Investment activity includes acquisitions, holding and sale of long-term investments representing ownership; securities representing borrowings; investments or business activity in any registered funds, companies or any other organisations supervised by the respective authority, and registered funds, companies and other organisations in

the respective country managed by a fund manager (as permitted by the proper authority of the same country).

Any dividend received from a CFC would not be deductible from the tax base by the taxpayer; therefore it would be subject to an effective payment of corporate tax in Hungary. Regardless of the dividend payment, the positive taxed profit of the CFC would also have to be taken into account for CIT purposes, if the taxpayer possesses 25% of the CFC's shares or voting rights, or it has a controlling influence over the company, and it does not have an owner that is a Hungarian resident private individual.

Furthermore, any cost or expenditure paid to the CFC is considered a non-business cost if the business purpose cannot be evidenced.

### Interest on loans

Interest payable on loans borrowed for the acquisition of a building or for operating a building qualifies as allowable expenses and is generally tax-deductible. An exception to this rule relates to interest due prior to the building being put into use or accounted for as inventory; such interest is capitalised with the building.

### Depreciation

Tax depreciation is established independently of the rate that is applied for accounting purposes. Tax depreciation rates for buildings in 'own use' vary between 2% and 6% (usually 2%) of the acquisition cost, depending on the construction materials used. Leased buildings may be depreciated at a preferential rate of 5% for tax purposes. Land cannot be depreciated.

### Thin capitalisation

Interest on loans – shown under expenses or recorded as part of the direct cost of an asset during the tax year – other than loans from financial institutions, and the amount of deemed interest based on which transfer pricing deduction is applied may not be deducted for tax purposes on the portion of the loan that exceeds a 3:1 debt-to-equity ratio. Liabilities mean the average daily balance of outstanding loans (including cash pool interest as well), outstanding closed securities signifying a creditor relationship, and bill of exchange payable (with the exception of bill of exchange payable on account of suppliers' debts), paid on either related party or third party debts in the tax year. The amount of liabilities may be reduced by the average daily balance of monetary claims shown in the balance sheet among financial investments, receivables or securities. Thus the net figure is relevant. Equity is the average daily balance of registered capital, capital reserve, profit reserve and tied-up reserves in the tax year. Valuation reserve and current years' profit is not included in equity when making the thin capitalisation calculation.

### Capital gain on reported shares

In the case of Hungarian resident corporate entities, capital gains on reported shares are exempt, i.e. the corporate tax base can be reduced by capital gains on reported shares, provided that the taxpayer (or the legal predecessor thereto) has held the shareholding for at least one year prior to the sale or contribution in kind.

A reported share shall be classified as a stake of at least 30%, which the owner reports to the tax authority within 60 days of acquisition. From 1 January 2010, any additional acquisition over the 30% shareholding can be qualified as reported shareholding

(provided that the requirements of a registered shareholding are met), if the purchaser previously reported the 30% stake to the tax authority.

Capital gains different from the above are taxed as part of ordinary business income at the general CIT rate of 10%/19%.

### Corporate income tax non-deductible expenses

The major non-deductible expenses for CIT purposes are as follows:

- Service fees, if the Hungarian company cannot support that the service was used in line with prudent management, i.e. the activity performed does not provide the Hungarian company with economic or commercial value to enhance its commercial position.
- The portion of a price paid for a supply or provision of service by a related party exceeding the fair market value.
- Interest on debts exceeding three times the company's net equity, as above.
- Bad debt provision/impairment.
- Debt write-offs if the measures necessary for collecting the debt have not been taken. Expired debts and debts that cannot be enforced in the courts are not deductible.
- Any depreciation applied for accounting purposes.

### Tax losses carried forward

Losses (negative taxable base according to the tax return of the company) may be carried forward and offset against future years' positive tax bases without time limit.

From 1 January 2010, the use of tax loss carried forward is no longer subject to the Tax Authority's approval. However, in the case of a Tax Authority audit, the taxpayer should demonstrate that losses are created in due course of business (which is not defined in the Act). The new legislation can be applied in case of 2009 tax losses as well. From 1 January 2012, accumulated tax losses can be utilised by maximum 50% of the tax base calculated without taking into consideration the tax loss carry forward as decreasing item. In addition, losses cannot be carried forward if direct or indirect majority control is acquired in a company by a taxpayer that was not a related party of the company in the preceding two tax years. There are two exceptions to the above in which cases losses can be carried forward, and these are as follows:

- if either the company or the acquirer is a listed company, or
- if the company continues its business activity in the two subsequent tax years following the acquisition, and
  - the nature of the company's business activity does not change significantly, and
  - the company earns revenue from its activity in both years.

There is no loss carryback.

## Local taxes

Municipalities are authorised to impose local taxes, and those that can effect a real estate business are local business tax, building tax and land tax. It is at the discretion of the particular municipality as to which of these taxes are imposed up to the maximum rates set by the Local Tax Act that applies to all municipalities.

### Local business tax

Local business tax applies to the amount of adjusted annual turnover (interest and royalty income does not have to be included in the local business tax base) reduced by the cost of goods sold, the value of intermediated services and subcontractors' activities, the value of materials costs and the direct costs of research and development (R&D) activities. Local municipalities are entitled to levy local business tax at the maximum rate of 2%. The municipality of Budapest has regularly levied local business tax at the maximum rate allowed by the Local Tax Act. Companies can reduce their tax base by 100% of the local business tax base generated by their foreign permanent establishment (PE) and taxed by a foreign local municipality in that foreign country.

Tax treaties do not apply to local business tax.

### Building tax

Residential and other buildings can be subject to building tax, which is payable by the entity owning the building on 1 January of the particular tax year. If the property is encumbered with a registered user's right, the beneficiary of that right is required to pay the tax. The local municipalities are entitled to levy this tax either on the basis of (i) the useable area of the building, or (ii) on the basis of the 'adjusted value' (approximately 50% of the fair market value) of the building, including recoverable 25% VAT. In practice, the former method is more commonly used, since establishing the adjusted value under the alternative method is usually problematic. The maximum rates are (i) HUF 1,100/sq m (however, the municipalities have the right to increase it by the annual inflation rate), or (ii) 3.6% of the market value of the building, including recoverable 27% VAT.

If a building listed as historic under separate legislation is renovated, the building and the apartments and non-residential sections will be exempt of building tax in the three consecutive tax years following the effective date of the building permit issued after 1 January 2008. From 1 January 2010, the CIT base can be decreased with the renovation costs of a historical building, if the taxpayer holds such asset as tangible asset in its books.

### Land tax

Local municipalities are entitled to levy land tax on vacant plots of land registered under certain categories in the Land Register. This tax is also payable by the person owning the land on 1 January of the year. If the property is encumbered with a registered user's right, the beneficiary of that right is required to pay the tax. The tax can be imposed either on the basis of the area of the plot of land or on the basis of the adjusted value of the land. The maximum rates are (i) HUF 200/sq m (however, the municipalities have the right to increase it by the annual inflation rate), or (ii) 3% of the market value of the land.

## *Research and development tax*

Research and development (R&D) tax should be reported and paid to the government. The tax base for R&D tax equals the tax base for local business tax. The R&D tax rate is 0.3%. Research and development tax is a deductible expense for corporate income tax purposes. Small and medium-sized companies are exempt from R&D tax.

## *Withholding tax*

From 1 January 2011 there is no WHT on interest, royalties or service fees paid to foreign companies by a domestic entity by domestic law, irrespective of the residency or ownership ratio of the recipient.

## *Value added tax (VAT)*

From 1 January 2012, the standard VAT rate is 27% for goods and services.

### *Option to charge VAT*

Under the general rule, sales of real estate, including land (except building land) are regarded as exempt sales with no option for tax deduction. (In the case of the sale of real estate, the exemption does not include the sales before putting into usage and the sales within 2 years from the date when the usage permit becomes effective.).

However, taxpayers may choose to be taxed under the general rules in connection with selling used real property that meets the above requirements. (At the same time, the sale of such real property is subject to the reverse-charge procedure, i.e. the tax liability will arise for the buyer). The deadline for mailing the statement for this option to the Tax Authority is 31 December before the year for which the companies wishes to exercise this option. If the general (non-exempt) rules were chosen, the taxpayers shall remain bound to their option for five calendar years.

Furthermore, in general rules the leasing of commercial and industrial properties is also exempt from VAT. However, landlords can also opt to be taxed on such leasing and subleasing in accordance with the general rules. From 18 March 2008, taxpayers may exercise this option solely for real estate other than residential properties. The deadline for submitting the statement for this option is also 31 December before the year for which the companies wish to exercise this option.

From 1 January 2010, taxpayers can opt for general taxation solely for selling used real estate other than residential property. The deadline for submitting the statement of this option is also 31 December before the year for which the companies wish to exercise this option.

### *VAT on the production/acquisition of tangible assets*

The input VAT incurred on investment projects involving capitalised own work can be deducted when the resulting tangible assets are brought into use in accordance with their intended purpose, if the taxpayer would not otherwise be entitled to deduct tax in full or in part. However, the putting into use is treated as a taxable event at a value equal to the amount capitalised. Taxpayers that solely perform taxable activities will not be covered by this rule and may reclaim taxes on an ongoing basis during their investment projects.

Under the rules on the retrospective adjustment of VAT incurred on the acquisition of tangible assets, the monitoring period for real property increased to 20 years

(240 months) from 1 January 2008. In addition, deductible VAT needs to be adjusted if the extent of the adjustment exceeds HUF 10,000.

### Obligation to pay VAT for services related to real estate

Many services and sales are subject to the reverse-charge mechanism and the VAT will be payable by the party acquiring the goods or services, provided that both the seller and the buyer are resident taxpayers and the buyer pays VAT according to the general rules.

This applies to the handing over of property created by building and installation work, which has to be registered in the real estate register; construction and installation services; other services requiring official licences to be performed, which are intended to develop, transform or demolish real estate; leasing or seconding staff to perform the above services; and the sale of real property and undeveloped land (if the seller has opted to be subject to VAT).

### Invoicing in a foreign currency

In connection with rent and expenses set and invoiced in EUR or another foreign currency, the amount of VAT must also be indicated in HUF in invoices made out in a foreign currency. Generally, foreign currency amounts should be converted at the selling rate of any resident (Hungarian) bank that holds a foreign exchange licence. Alternatively, taxpayers may also opt to apply the rate quoted by the National Bank of Hungary, subject to prior notice to the Tax Authority, with the provision that once this option has been chosen, no deviation is allowed until the end of the calendar year following the year in which the choice was made.

### Regular property sales

Private individuals and taxpayers without legal personality become taxable for VAT purposes if they sell building lots or new-built property on a 'regular' basis. Property sold before 2008, old built-up property and agricultural land are not taken into account for the purpose of sales.

Sales are regarded 'regular' if a person or entity has sold four building lots or new built-up properties within two years. The fourth and any subsequent such sale is subject to VAT. If the person or entity does not carry out another qualifying sale for three calendar years after the fourth sale, its taxable status will terminate on 31 December of the third calendar year, until it begins to make sales again.

If a person or entity becomes taxable for VAT purposes on the grounds of making sales of building lots or new built-up property, the tax will be assessed by the Tax Authority, taking into account deductible tax as well. The assessment will be made on the basis of information reported by the taxpayer.

Taxpayers must report their fourth sale to the relevant tax office on the appropriate form within 30 days of the tax point as per the VAT Act. Such reports are regarded as equal to tax returns in terms of legal consequences.

### VAT on residential property not deductible

VAT incurred on residential property or on equipment for building or renovating residential property is not deductible under the general rule. This restriction does not apply to, e.g. taxpayers who choose to be subject to VAT for the purposes of letting property and let the property for an average of 90% of a reasonably determined period.

## Contribution in kind, assignment of rights and transfer of building use rights

The contribution by domestic shareholders of assets to share capital in a Hungarian entity (contribution in kind against an equity share) is outside the scope of VAT, under certain conditions. The assignment of rights and the assumption of liabilities are in general subject to VAT with exceptions. The transfer of a building/land use right is subject to VAT.

## *Transfer tax*

The general rate of real property transfer tax is 4% up to HUF1bn in sales value (2% above HUF 1bn), and the total transfer tax liability may not exceed HUF 200m per real estate.

This tax is payable by the person (company) acquiring the real property and is assessed on the fair market value of the property, which is usually the transaction price including the recoverable 27% VAT. As a result, the effective transfer tax rate is 5,08% on the basis of the acquisition cost of the real property up to HUF 1bn gross purchase price. The tax is levied both on land and on completed buildings. Real Estate Transfer Tax is payable to the Tax Authority upon notification.

A transfer tax exemption may be claimed if the acquirer's principal activity at the time when the taxable event takes place is the leasing or management of own or leased property, or buy/sale of own properties.

The Land Registry reports the acquisition of a property to the Tax Authority that levies the real estate transfer tax by issuing a payment notification. The Tax Authority is entitled to reassess the base of the transfer tax, if it can support that the transaction price differs significantly from the market price of the real property. From 23 January 2009, in case the price paid for the real property is lower than 50% of the property's market value, the difference is subject to gift duty up to 40%.

A reduced rate of 2% applies if the company acquiring the property qualifies as a real estate trading company, of which at least 50% of its net income came from sales, or it deals with financial leasing, and the property is sold/leased out within two years.

Acquisition of land for the development of residential property is exempt from transfer tax if the construction of the residential property is completed within four years and the basic area of the residential property reaches 10% of the maximum built-in rate. In the case of the acquisition of residential property, the rate of the transfer tax is 2% of the purchase price up to HUF 4m and 4% of the amount in excess of that.

The transfer of certain real property-related rights (i.e. different forms of user's rights) is also subject to transfer tax. The taxable base is equal to one-twentieth of the fair market value of the property to which the right relates, multiplied by the number of years for which the right prevails.

## *Transfer tax on the acquisition of domestic real property holding company's shares*

From 15 July 2011, the acquisition of shares/quotas in a company holding domestic real property is subject to real property transfer tax, only if the main activity of the company concerned is listed in the law (which includes organisation of building project, building residential and non-residential property, lease/utilisation of own or leased real

properties or sale-purchase of real property). The main activity has to be considered on the basis of the publicly available company data held by the Court of Registry and the deed of foundation of the company concerned.

A company qualifies as a domestic real property holding company if it owns domestic real property, or owns directly or indirectly at least 75% of the shares of a company holding domestic real property.

If the transfer is subject to transfer tax on the basis of the main activity of the acquired company, the tax base is the market value of the acquired company's domestic real properties.

The applicable tax rate (is the same general transfer tax rate applicable from 2010) is 4% until HUF 1bn and 2% above, and the total transfer tax liability may not exceed HUF 200m per real estate.

Transfers between group companies (i.e. between related companies as defined in the Corporate Tax Act) are exempt from transfer tax. Also, where there is a preferential transformation or preferential exchange of shares as defined in the Corporate Tax Act, the transfer will be exempt from property transfer tax.

Where there is a preferential transfer of business as defined in the Corporate Tax Act, the transfer will be exempt from property transfer tax, subject to the following conditions: the transferor may not have applied the preferential property transfer tax rate (2%) in the year of the transfer or in the previous two years; the value of the real property may not represent from 23 January 2009 more than 50% of the total value of the transferred assets less the value of financial assets; and the transferee may not apply the preferential property transfer tax rate until the end of the second calendar year from the date of the transfer. In addition, the transferee must undertake not to dispose of the transferred assets within one year of the date of presentation of the underlying contract for the purpose of the levying of property transfer tax. The transferee has until the issuance of the payment order to report compliance with the relevant requirements to the Tax Authority. If the transferee makes an incorrect declaration or fails to comply with the requirements undertaken, the Tax Authority will levy double the difference between the preferential and the regular tax on the transferee. Furthermore, the transferee should have at least two different business units in the last 24 months before the transfer.

## Share deal or asset deal

In the Hungarian real property market, commercial real estates are usually owned by real property holding companies. Acquisitions were typically carried out by share deals, because according to the legislation effective until 31 December 2009, no transfer tax, VAT or CIT on the capital gain was levied.

From 1 January 2010, a share deal has the following tax consequences:

- A foreign shareholder may be subject to 19% CIT on the capital gain, if not properly structured.
- Real property transfer tax is levied on the acquisition of a domestic real property holding company's shares, if not properly structured.

As a result of the above listed changes, transaction costs of a share deal may decrease significantly, given careful structuring.

Consideration should be given to the following:

- The book value of real property for tax purposes is usually considerably lower than its market value, giving rise to an inherent gain in the case of a share deal. This capital gain is realised in an asset deal transaction. Increased attention therefore needs to be paid to compensation for the gain/inherent gain during price negotiations.
- Since real property holding companies may have contingent liabilities, there is a risk associated with assessing such a company's net equity recorded in its accounts. Therefore, a proper legal and financial due diligence review should be executed prior to acquiring shares. Moreover, the vendor should be requested to provide a balance guarantee, which is an indemnity if the historical risks are revealed and assessed by a fiscal authority (e.g. tax assessment and environmental penalty).

## REIT legislation in Hungary

A new type of company, similar to a real estate investment trust (REIT), was established by Act CII of 2011 on Regulated Investment Companies, which took effect on 27 July 2011. The Act also offers a preferential status for real estate companies.

A regulated investment company (RIC) is a publicly listed company limited by shares that invests directly or through its special purpose entities (SPEs) into real estate management projects. Investors may include both small investors and large institutional investors, but the participation of credit institutions and insurance companies is limited.

The advantage of this company type is that RICs and SPEs are exempted from CIT and local business tax, and their income is taxed at the shareholder level. In addition, acquisition of real property and capital shares in a company that owns domestic real estate by RICs and acquisition of real property by SPEs is subject to a preferential (2%) transfer tax rate.

The Act specifies strict requirements and obligations for companies that want to qualify for the RIC status. Accordingly, a company has to:

- register with the Tax Authority
- be a publicly listed company limited by shares with an initial capital of at least HUF 10bn
- limit its business activities to the sale, lease, operation of its own real estate, management of real estate and asset management
- pay out at least 90% of its profit to its shareholders
- have a 25% ratio of public ownership on a regulated market (25% of the entire series of shares should be owned by shareholders holding a maximum of 5% of all shares)
- comply with strict limits on asset classes

- and perform a mandatory quarterly revaluation of its real estate portfolio.

Certain conditions must be met upon foundation (e.g. activity, payment of dividends, registration, proportion of ownership controlled by credit institutions), while the complete list of requirements must be met by the last day of the financial year following the financial year in which the company was registered for the status. Until the end of the statutory deadline, the company may operate pursuant to the regulations applicable to RICs and will be granted a preliminary RIC status. The Act introduces strict sanctions, as well, among others to the case, where the Tax Authority removes the company from the registry at the end of this period without granting a final RIC status, or the SPE is terminated/alienated in this preliminary period. In this case, the company or its SPE(s), respectively, have to pay twice the amount of the corporate tax, local business tax, double the difference of the applied transfer tax, and the tax that would have otherwise been due will become payable in such a case.

The Act also sets strict rules for the SPEs. The most important requirements are the following:

- the SPE's sole owner must be an RIC
- the SPE must pay out 100% of its profit to its shareholders
- the SPE must meet the strict limits on the composition of assets and liabilities
- and perform a mandatory quarterly revaluation.

The state Tax Authority may audit compliance with the requirements. If the Tax Authority establishes – either *ex officio*, or at the request of the RIC/company with a preliminary RIC status – that the company does not meet the statutory requirements, the company will have to fulfil all the obligations within 90 days. Otherwise, it will be removed from the registry.

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# ***Real Estate Going Global India***

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 14 June 2012.**

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## *Real Estate Tax Summary – India*

A foreign investor is not permitted to invest directly in an immovable property in India. However, this restriction does not apply to non-resident Indian (NRI), Person of Indian Origin (PIO) and a foreign company acquiring immovable property (through a branch or project office or other place of business in India) for carrying out its business activities. However, a foreign investor can invest in permitted securities of an Indian company undertaking construction and development of real estate projects (subject to certain conditions provided under foreign direct investment policy of India).

### **Applicable taxes**

Under the Indian Income-tax Act, 1961 (the Act), income from immovable property can be characterised either as 'business income' or 'income from house property'. In case the income is characterised as business income, it would be taxable at the rate of 30% (plus applicable surcharge and education cess) after allowing deduction of all legitimate business expenses. In case income is characterised as income from house property, such income would be taxable at the rate of 30% (plus applicable surcharge and education cess) after allowing a standard deduction provided under the Act. The income computation mechanism under both the above heads of income would be different.

Tax incentives are available for certain projects in the real estate sector.

Capital gains earned on transfer of property taxable as either short term capital gains (if property held for 36 months) or long term capital gains (if held for more than 36 months), taxable at 30% (plus applicable surcharge and education cess) and 20% (plus applicable surcharge and education cess) respectively.

General Anti-Avoidance Rule (GAAR) recently introduced under the Act, can be invoked by Indian income-tax authorities in case the arrangements are found to be impermissible avoidance arrangements. GAAR will come into force from 1 April 2013. However, the guidelines for application of the provisions of GAAR would be prescribed in due course.

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# ***Real Estate Investments – India***

## **Regulatory framework**

### ***Direct investments in real estate property***

An NRI and PIO are permitted to acquire any immovable property in India other than agricultural land, plantation property, or farmhouse property.

A foreign company is not permitted to directly hold any immovable property in India. However, as an exception, a foreign company (through a branch or project office or other place of business in India) is permitted to acquire any immovable property in India, for carrying on its business activities.

### ***Foreign direct investments (FDI) in real estate***

Under the FDI route, a person resident outside India is allowed to invest in 'permitted securities'. Permitted securities include equity shares, compulsorily convertible preference shares and compulsorily convertible debentures issued by an Indian company.

FDI, for the purpose of construction and development projects, is permitted only in a company incorporated in India. No other form of entity like Limited Liability Partnerships (LLPs) is permitted to raise FDI for construction and development projects.

Therefore, under the FDI route, a foreign investor can directly invest in permitted securities of an Indian company engaged in construction and development of real estate projects.

As per the extant FDI Policy dated 10 April 2012 (FDI Policy)<sup>1</sup>, 100% FDI in construction and development projects is permitted under the automatic route. The investment is subject to certain investment and project-related guidelines as follows:

The minimum area to be developed for each project is:

- in case of development of serviced housing plots – minimum land area of 10 hectares;
- in case of construction-development projects – minimum built-up area of 50,000 square metres;
- In case of a combination project, any of the above two conditions.

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<sup>1</sup> FDI Policy, which provides for the regulatory framework for foreign direct investments in India consolidates all prior Press Notes/Press Releases/Circulars on FDI in India including Press Note 2 of 2005 for investment in construction development projects. This FDI Policy supersedes all the Press Notes/Press Releases/Circulars on FDI issued earlier.

Investment would be subject to the following:

- Minimum capitalisation of USD 10m for wholly owned subsidiaries and USD 5m for joint venture (JV) with Indian partners. The funds would have to be brought in within six months of commencement of business.
- The entire investment cannot be repatriated before a period of three years from completion of minimum capitalisation. The lock-in period of three years will be applied from the date of receipt of each instalment/tranche of FDI. The investor may exit earlier with prior Foreign Investment Promotion Board (FIPB) approval.

At least 50% of each project is required to be developed within five years from the date of obtaining all statutory clearances. The investor/investee company is not permitted to sell undeveloped plots.

FDI is permitted without the above conditionality's in special economic zones (SEZs), hotels and tourism, hospitals, education sector and old age homes under the automatic route.

FDI is also allowed up to 100% in industrial parks under the automatic route. The conditions specified above would not apply provided the industrial park meets the prescribed conditions in terms of minimum number of units, specified industrial use, etc. There is no minimum area requirement.

However, FDI is prohibited in an Indian company engaged in trading in land, property or transferable development rights.

Regarding the FDI policy, the government has provided guidelines for:

- calculation of total foreign investment – i.e. direct and indirect foreign investment in Indian companies;
- transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities;
- downstream investments by Indian companies (which have FDI).

### *External commercial borrowings*

Under the existing External Commercial Borrowing (ECB) policy of the Government of India Indian companies (other than financial intermediaries) are allowed to raise ECBs from any internationally recognised source such as banks, financial institutions, capital markets, export credit agencies, suppliers of equipment, foreign collaborators and foreign equity holders (holding the prescribed minimum level of equity in the Indian borrower company).

The prevailing ECB policy stipulates certain end-uses, e.g. ECBs can be availed only for import of capital goods, new projects, modernization and expansion of projects in the real sector – industrial sector and infrastructure sector – in India. Utilization of ECB proceeds is not permitted for real estate, working capital, general corporate purposes and repayment of existing loans. However, ECB is permitted for infrastructure projects including development of industrial parks and urban infrastructure projects (water supply, sanitation and sewage projects).

SEZ developers are allowed to avail ECB for providing infrastructure facilities within the SEZ under the approval route. However, ECB is not permissible for development of integrated township and commercial real estate within the SEZ.

Till December 2010, corporates engaged in the development of integrated township of size exceeding 100 acres were permitted to avail ECB. With effect from 1 January 2011, development of integrated township has been removed from the permitted end-uses under the ECB guidelines and therefore ECB is not permitted for development of integrated townships. However, low cost affordable housing projects are permitted to avail ECB. The withholding tax on such interest is 5% as compared to 20% (in case of foreign currency loans availed for other projects).

A project shall be an affordable housing project if:

- the project has prior sanction of the competent authority empowered under the Scheme of Affordable Housing in Partnership framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;
- the date of commencement of operations of the project is on or after 1 April 2011;
- the project is on a plot of land which has a minimum area of one acre;
- at least thirty per cent, of the total allocable rentable area of the project comprises of affordable housing units of Economically Weaker Section (EWS) category;
- at least 60% of the total allocable rentable area of the project comprises of affordable housing units of EWS and Lower Income Group (LIG) categories;
- at least 90% of the total allocable rentable area of the project comprises of affordable housing units of EWS, LIG and Middle Income Group (MIG) categories;
- the remaining 10% or less of the total allocable rentable area of the project comprises of other residential or commercial units;
- the layout and specifications including design of the project to be developed and built is approved by the State or Union territory Government or its designated implementing agency;
- the project to be completed within a period of five years from the end of the financial year in which the project is sanctioned.

ECBs equal to or less than USD 20m should have a minimum average maturity of three years. ECBs of higher amounts have a five-year minimum average maturity requirement. 'All-in-cost ceilings' are as given below:

- Three–five-year maturity – 350 basis points over six-month LIBOR\*
- Five years and above maturity – 500 basis points over six-month LIBOR\*

\*for the respective currency of credit or applicable benchmark.

## *Convertible instruments*

As per clarification<sup>2</sup> issued by the foreign exchange regulators, instruments that are quasi-debts like convertible debentures would be reckoned as part of equity only if in nature these are compulsorily convertible into equity, within a specified time. Hence, foreign investments in the form of compulsorily convertible debentures are considered as equity under the FDI policy.

Similarly, compulsorily convertible preference shares are also considered as 'equity' for the purpose of FDI.

The issue price for the securities should be subject to minimum price computed as per discounted cash flow<sup>3</sup> (DCF) method of valuation. The conversion of the convertible instruments into equity shares should be at such minimum price.

Optionally convertible or redeemable preference shares would be considered as ECB and not qualify as equity under the FDI policy, thereby requiring compliance with ECB norms.

## *Regulations specific to non-resident Indians (NRIs)*

An NRI is permitted to acquire any immovable property in India other than agricultural land, plantation property, or farmhouse property. A PIO resident outside India is also permitted to invest in any immovable property, other than agricultural land, plantation property, or farmhouse property, in India from the following sources:

- Funds received in India through normal banking channels by way of inward remittance from any place outside India.
- Funds held in any non-resident account maintained in accordance with the provisions of exchange control laws.

Exchange control laws permit transfer of the above properties, subject to restrictions.

Repatriation of sale proceeds on transfers of immovable property by an NRI/PIO if acquired out of foreign currency shall be permitted, provided certain conditions are satisfied, inter alia, including the following:

The amount to be repatriated does not exceed:

- the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels, or out of funds held in a Foreign Currency Non-Resident (FCNR) account; or
- the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in a Non-Resident External Account for acquisition of the property.

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<sup>2</sup> A.P. (DIR Series) Circular 74 dated 8 June 2007.

<sup>3</sup> RBI has prescribed the DCF method of valuation for computing the price of instrument at the time of issue, conversion or transfer. The valuation should be supported by a valuation report from an independent chartered accountant.

In the case of residential property, the repatriation of sale proceeds is restricted to the Indian proceeds from not more than two such properties.

NRIs/PIOs are permitted to remit up to USD 1m per financial year on account of sale proceeds of assets (including immovable property) on production of documentary evidence in support of acquisition of assets in India and discharge of appropriate Indian taxes. NRIs/PIOs can freely repatriate rental income from such properties through the banker/authorised dealer.<sup>4</sup>

NRIs are permitted to invest up to 100% in construction development projects without the requirement to comply with the conditions mentioned above under the FDI Policy. Such investment is on repatriable basis. The above investment can also be done by NRIs on a non-repatriable basis.

NRIs are freely allowed to invest in companies listed on Indian stock exchanges, engaged in construction and development of real estate projects, under the Portfolio Investment Scheme (PIS) without any prior FIPB/RBI approval subject to fulfilment of inter alia the following conditions:

- Total paid-up value of shares purchased by an NRI both on repatriation and non-repatriation basis does not exceed 5% of the paid-up value of shares of Indian company.
- The aggregate paid-up value of shares purchased by all NRIs in the Indian company does not exceed 10% of the paid-up value of the Indian company. The ceiling of 10% can be raised to 24% through a special resolution passed by the Indian company.

### *Real Estate Mutual Funds (REMFs)*

The Securities and Exchange Board of India (SEBI) has amended SEBI (Mutual Fund) Regulations, 1996 (vide notification dated 16 April 2008) to permit mutual funds (MFs) to launch REMFs. The salient features of REMFs are:

- REMF means a scheme of a mutual fund, which has the investment objective to invest directly or indirectly in Real Estate Asset.
- 'Real Estate Asset' has been defined as an immovable property that is situated in a city notified by SEBI or in an SEZ, on which construction is complete and is usable with clear title and is free from all encumbrances and litigation and freely transferable. There are specific exclusions such as vacant land, agricultural.
- Existing MFs are eligible to launch REMFs if they have adequate number of experienced key people/directors and sponsors should have a minimum five-year experience in the real estate business. Other criteria applicable for sponsoring an MF shall continue to apply.
- The REMFs shall be close-ended schemes and its units shall be listed on a stock exchange with net asset value being declared daily.

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<sup>4</sup> A.P. (Dir Series) Circular No12 dated 16 November 2006.

- At least 35% of the net assets of the scheme will be invested directly in real estate assets. Balance can be invested in specified securities and shares of companies engaged in real estate business. No more than 75% of the net assets of the scheme can be invested in real estate assets, and real estate-related securities (including mortgage-backed securities).
- The REMFs shall appoint a custodian who shall be duly registered with SEBI to keep custody of title deeds of the assets.
- Each real estate asset is required to be valued every 90 days by two valuers, accredited by a credit rating agency registered with SEBI.
- Caps are imposed on investment in a single city, single project, securities issued by sponsor/associate companies, etc.
- Transfer of real estate assets among various schemes of an MF are not allowed.
- REMFs cannot undertake lending or housing finance activities.

The amended regulations also specify accounting and valuation norms related to the scheme.

### *Real Estate Investment Trust (REIT)*

On 28 December 2007 SEBI also issued the draft SEBI (Real Estate Investment Trust) Regulations, 2008 for public comments. The REIT Regulations are still in the draft stage and are yet to be formalised or enacted. No further development has taken place on the REIT Regulations, since the draft regulations were posted for public comments in December 2007. The salient features of REITs are:

- REIT is required to be constituted as a trust.
- REIT and Real Estate Investment Management Company (REIMC) need to be registered with SEBI.
- REIT should have a net worth of INR 50m.
- 50% of the trustees of REIT/directors of REIMC, as the case may be, should be independent.
- Schemes to be floated by REIT need to be 'close-ended' and units of every scheme are required to be listed on a stock exchange as specified in the offer document.
- REITs are allowed to invest only in real estate.
- REITs are prohibited from investing in vacant land or engage in property development.
- REITs cannot take more than 15% exposure in a single real estate project.
- REITs cannot take more than 25% exposure of all the real estate projects developed, marketed, owned or financed by a group of companies.
- REIMC has restrictions on undertaking any activity other than that of managing schemes.

- Every scheme is required to appoint an independent property valuer. The scheme is required to disclose NAV annually based on property valuer's report.

Currently, there are no enabling provisions in the Indian exchange control regulations for participation by foreign investors in REITs.

## *Real Estate (Regulation and Development) Bill, 2011*

The Ministry of Housing and Urban Poverty Alleviation unveiled the Real Estate (Regulation and Development) Bill, 2011 (Real Estate Bill) which is currently in the draft stage. The Real Estate Bill proposes to promote transparency and accountability in the real estate sector. Some key highlights of the Real Estate Bill are as follows:

- Establishment of a 'Real Estate Regulatory Authority' in each State by the Appropriate Government with specified functions, powers, and responsibilities to facilitate the orderly and planned growth of the sector;
- Mandatory registration of developers/builders, who intend to develop immovable property, with the Real Estate Regulatory Authority as a system of accreditation;
- Mandatory public disclosure norms for all registered developers, including details of developer, project, land status, statutory approvals and contractual obligations;
- Obligations of promoters to adhere to approved plans and project specifications, and to refund moneys in cases of default;
- Obligation of allottee to make necessary payments and other charges agreed to under the agreement and payment of interest in case of any delay;
- Provision to compulsorily deposit a portion of funds received from the allottees in a separate bank account, to be used for that real estate project only;
- Establishment of a 'Real Estate Appellate Tribunal' by the Central Government to hear appeals from the orders of the Authority and to adjudicate on disputes.

## *Applicable taxes*

The main taxes related to transactions in real estate are summarised in the subsequent paragraphs.

### *Taxability of rental income*

The owner of a 'house property' is subject to tax under the head 'Income from House Property' under the Act at the rate of 30% (plus applicable surcharge and education cess). 'House Property' means property consisting of any buildings or lands appurtenant thereto of which the taxpayer is the owner other than such portions thereof occupied for the purposes of the owners' business or profession.

The following deductions are allowable against rental income characterised under the head 'Income from House Property':

- Municipal taxes actually paid by the owner – assessee (to be deducted while computing annual value as referred above).
- A notional sum towards repairs equal to 30% of the annual value.
- Interest payable on borrowed capital, where the borrowed capital has been used for acquisition, construction, repairs, renewal and reconstruction of the property, subject to a prescribed monetary ceiling.
- Costs that are capital in nature, such as stamp duty and legal costs incurred in relation to the acquisition of property, are not deductible in the computation of taxable income, but form part of the cost of acquisition.
- In case the rental income is characterised as income from business activities, all legitimate business expenditure is allowable as a deduction from business profits and the income would be taxable at the rate of 30% (plus applicable surcharge education cess).

There has been litigation regarding characterisation of rental income as ‘Income from House Property’ or ‘Business Income’. The litigation arises mainly on account of difference in computation mechanism under both these heads.

In August 2010, a Bill to replace the Act, known as the Direct Taxes Code Bill, 2010 (DTC) was introduced before Parliament. The DTC will replace the Act, once it is passed by Parliament.

DTC attempts to settle the above controversy on characterisation of rental income. DTC provides that any income from letting of any house property shall be characterised as ‘income from house property’ notwithstanding that the letting of the property is in nature of trade, commerce or business. However, income from house property used as a hospital, hotel or property that forms part of an SEZ shall be characterised as ‘business income’.

### *Depreciation allowance under tax laws*

Depreciation allowance at rates varying between 5% and 100%, depending upon the type of building, is allowed against business income for buildings used by a person in their own business, and not leased out. If the person is in the business of leasing and the rental income is characterised as business income, then depreciation is allowed for tax purposes.

Generally, the basis of depreciation is the written-down value, or WDV, of the building. Land is not depreciable. If the building is held as private property, no depreciation is allowable. The law prescribes the rates at which depreciation is to be calculated on block of assets (BoA). Under this method, depreciation is not allowed on any individual asset but is calculated on the BoA. On purchase of an asset belonging to a particular BoA, it is added to the BoA at cost. Similarly, the consideration received on sale of asset is reduced from the said BoA. When such consideration received exceeds WDV of the BoA, the negative BoA value is chargeable to tax as income in the year of sale.

### *Tax holiday*

There are various tax incentives available for projects in the real estate sector, some of which include:

- Deduction of whole of capital expenditure allowed to the following specified business, if the operations commence on or after 1 April 2010:
  - Business in the nature of building and operating a hotel of two stars or above.
  - Business in the nature of building and operating a hospital with at least 100 beds for patients.
  - Business in the nature of developing and building a housing project under a scheme of slum redevelopment and rehabilitation.
  - Business in the nature of developing and building a housing project under a scheme of affordable housing.
- From 1 April 2013, deduction of 150% of the capital expenditure would be allowed for the following specified business:
  - Business in the nature of building and operating a hospital with at least 100 beds for patients.
  - Business in the nature of developing and building a housing project under a scheme of affordable housing.
- Homeowners are entitled to a deduction of up to INR 150,000 for interest paid on money borrowed for acquisition or construction of self-occupied property. A further deduction of INR 100,000 can also be availed from the gross taxable income on account of principal repayment of housing loan.

### *Taxation of REMFs*

REMFs are taxed in the same manner as other mutual funds. Accordingly:

- The income of a REMF is exempt from income-tax.
- If the REMF is not regarded as an 'equity oriented' fund, Dividend Distribution Tax (DDT) at 12.5% (plus applicable surcharge and education cess) to individuals/HUF and 30% (plus applicable surcharge and education cess) in case of others is payable on distribution. DDT is not payable by an 'equity oriented fund'. Such dividend income is exempt in the hands of the unitholder.
- Gains on transfer of REMF units on the stock exchange would attract capital gains tax.

### *Gains on transfer of property*

The profit arising on sale of immovable property is taxable depending upon the character of the asset in the hands of the seller, i.e. whether the same is held as a business asset or a capital asset, with the former being taxed at normal corporate tax rates and the latter generally being subject to reduced tax rates. Typically, these would classify as business properties in the hands of a developer.

Profits arising from the transfer of capital assets are categorised as short-term or long-term, depending on the period for which the asset has been held before transfer. Land and buildings held for more than 36 months are considered as long-term assets.

Properties held for a period up to 36 months are considered as short-term assets. Long-term capital gains, i.e. capital gain on transfers of long-term capital assets, are taxed at 20% (plus applicable surcharge and education cess) Short-term capital gains are taxed at 30% (plus applicable surcharge and education cess).

For computation of capital gains, cost of acquisition, costs of improvement and expenditure incurred in connection with the transfer of capital assets are deducted from the full value of consideration received. In computing long-term capital gains on real estates, cost of acquisition and improvement are indexed to mitigate the impact of inflation. Further, under certain circumstances, long-term capital gain is exempt from tax if the consideration or capital gain, as the case may be, is reinvested in prescribed investments.

## Loss carryforward

Losses from letting out of one property can be used to offset rental income from other properties in the same year, and thereafter against other types of income, such as business, interest, capital gains, etc., in the same year. Unabsorbed losses of one year can be carried forward for the subsequent eight years and used to offset income from house property in those years.

Short-term capital loss on the transfer of one property can be used to offset gain from the transfer of another property or any other capital assets within the same year. However, long-term capital loss on transfer of one property can be used to offset only long-term capital gain on the transfer of another property or any other capital assets within the same year.

Unabsorbed short-term capital losses can be carried forward for a subsequent eight years and be used to offset capital gain in those years. However, unabsorbed long-term capital losses can be carried forward for a subsequent eight years and be used to offset only long-term capital gain on the transfer of another property or any other capital assets.

## *General Anti-Avoidance Rule (GAAR)*

The Act provides for the General Anti Avoidance Rule which may be invoked by the Indian income-tax authorities in case arrangements are found to be impermissible avoidance arrangements.

A transaction can be declared as an impermissible avoidance arrangement, if the main purpose or one of the main purposes of the arrangement is to obtain a tax benefit and it:

- creates rights or obligations which are ordinarily not created between parties dealing at arm's length;
- results in directly/indirectly misuse or abuse of the Act;
- lacks commercial substance or is deemed to lack commercial substance in whole or in part; or
- is entered into or carried out in a manner, which is not ordinarily employed for bona fide business purposes.

In such cases, the tax authorities are empowered to reallocate the income from such arrangement, or recharacterise or disregard the arrangement. Some of the illustrative powers are:

- disregarding or combining or recharacterising any step of the arrangement or party to the arrangement;
- ignoring the arrangement for the purpose of taxation law;
- relocating place of residence of a party, or location of a transaction or situs of an asset to a place other than provided in the arrangement;
- looking through the arrangement by disregarding any corporate structure; or
- recharacterising equity into debt, capital into revenue, etc.

The guidelines for application of the provisions of GAAR should be prescribed in due course.

Further, the onus to prove, that the main purpose of an arrangement was to obtain any tax benefit is on the income-tax authorities. The tax payer can approach the Authority of Advance Rulings for a ruling to determine whether an arrangement can be regarded as impermissible avoidance arrangement. Also, GAAR will come into force from 1 April 2013.

### *Direct Taxes Code Bill, 2010*

The DTC Bill introduced in August 2010, which would replace the Act, is yet to be enacted. The implementation date of DTC is currently not certain. DTC will become law once it is passed by Parliament. Tax holidays are proposed to be provided under DTC for certain construction development projects.

Investment-linked deductions<sup>5</sup> are proposed to be provided for inter alia the following businesses:

- Business in the nature of building and operating a new two star or above hotel, commencing operations from 1 April 2010.
- Business in the nature of building and operating a new hospital with at least 100 beds for patients, commencing operations from 1 April 2010.
- Business in the nature of developing and building a housing project under a scheme of slum redevelopment and rehabilitation, commencing operations from 1 April 2010.
- Business of developing an SEZ, notified post 31 March 2012.

The tax holidays made available under the Act, on a profit-linked basis, would continue to be available for the balance period of holiday under DTC, subject to certain conditions prescribed under DTC.

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<sup>5</sup> Under investment-linked deductions, operating, financial and capital expenditure is allowed as a deduction against the gross income.

DTC also provides for GAAR.

Guidelines on conditions and manner of applicability of GAAR have not been prescribed under DTC.

### *Double taxation avoidance agreements (DTAAs) between India and other countries*

India has comprehensive DTAAs with over 90 countries. DTA provisions prevail over Indian domestic law if the provisions are more beneficial to the taxpayer. In order to claim the benefit under such DTAAs, from 1 April 2013, it would be necessary for a non-resident to obtain a Tax Residency Certificate (TRC) from the Government of his country in which he is a tax resident which should contain particulars as may be prescribed by the Indian income-tax authorities. The particulars to be included are yet to be prescribed.

### *Wealth tax*

There is a charge of wealth tax on the net wealth as of 31 March each year at 1% on the value by which such net wealth exceeds INR 3m. Net wealth includes assets such as urban land, and other land and building excluding, among others, assets forming part of stock-in-trade of an assessee, let-out property and commercial establishments or complexes.

## *Other taxes/levies*

### *Stamp duty*

Stamp duty is a state levy and is payable on certain types of instruments, i.e. documents. In respect of immovable property the stamp duty is generally payable on the basis of the market value of the property at different rates, depending upon the nature of the transaction, i.e. sale, lease, release, etc. The State Government fixes market value of all properties in an area at the beginning of each calendar year and the market value so fixed is required to be accepted as the basis for calculating stamp duty in respect of an instrument, i.e. document by virtue of which property is dealt with. Different rates of stamp duty are applicable in different states. The rates generally range between 5% and 15%. Further, property transactions are also subject to registration fees.

### *Municipal tax*

Municipal corporations or other local bodies are entitled to recover property taxes from buildings constructed in cities and towns. The property taxes are levied on 'rateable values', fixed on the basis of market value of the property or the rental returns, which the property owners derive from the property.

### *Service tax*

In principle, service tax at the rate of 12.36% (with effect from 1 April 2012) is levied on the gross value of taxable services, which includes services rendered in the course of construction projects, property management and works contracts. Service tax is also levied on purchase of property under construction. The service tax is charged by the service provider and is recovered from the recipient of service. However, in certain cases, service tax is payable by service receiver.

Rent on immovable property, used for commercial purpose would also be subject to service tax.

It may be noted that there is an exemption from service tax to the developer of the SEZ and the SEZ units to carry on authorised operations in the SEZ. However, the same would be subject to fulfilment of specified conditions.

### *Value Added Tax (VAT)*

Value Added Tax is imposed on purchase of under construction property, subject to certain conditions, in some states. The tax rate varies from state to state.

### *Goods and Service Tax (GST)*

GST, which is proposed to be introduced shall subsume all the indirect taxes (VAT, Service Tax, Excise Duty, Customs Duty, etc.) both at the Central and State level. GST shall comprise of both goods tax and service tax. Central and State Government shall have the powers to levy tax on supply of goods and services.

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# *Real Estate Going Global Indonesia*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 15 August 2012.

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# Real Estate Tax Summary – Indonesia

## General

Under the current land regulations the option for a foreign citizen and/or entity to own land (and buildings, as the case may be) in Indonesia is quite limited and depending on the selected line of business (i.e. that which is open to direct foreign investment), a foreign investor may acquire limited land titles in Indonesia by forming an Indonesian direct foreign investment company or acquiring an existing Indonesian limited liability company.

## Rental income

Rental income from real estate property is subject to final income tax of 10% from the gross rental fee. The final tax on rental of land/buildings is withheld by third parties (i.e. tenants) and constitutes the final settlement of the income tax for that particular income. Consequently, any corresponding expenses (including depreciation of the relevant buildings and interest expense) will be non-deductible for tax purposes.

## Transfer of land and building

A transfer of land and building is subject to 5% final income tax from the higher of the transaction value or the tax imposition base (referred to as the “NJOP”) as determined by the tax office. For transfers of simple houses and apartments conducted by taxpayers engaged in a property development business, the tax rate is 1% final income tax.

On the transferee side, an acquisition of land and building rights will give rise to 5% duty (*Bea Perolehan Hak atas Tanah dan Bangunan* or BPHTB). The 5% duty is imposed on the higher of the transaction value or NJOP.

## Value added tax (VAT)

Real estate transactions are also subject to value added tax at a rate of 10%. For these purposes, real estate transactions include rental and sales of real estate properties. Charges for common services for office buildings and the like are also subject to VAT at 10%.

# *Real Estate Investments – Indonesia*

## *Legal aspects*

### *Investing in real estate*

Indonesian law and regulations do not specifically use the term 'real estate'. However, the reference to 'real estate' in the Indonesia's Standard Business Classification Code ("KBLI") includes land and any buildings or structures on it. Generally, buildings or structures on land are also owned by the land owner. However, Indonesian land law acknowledges the horizontal land separation principle (*asas pemisahan horizontal*), where buildings or structures on a land are not part of the land, i.e. the rights over the land do not automatically cover ownership of the buildings or structures on it.

Generally speaking, an interest in real estate can be held by foreigners through land ownership (i.e. based on a particular land title) or land lease schemes. Under the current land regulations the option for a foreign entity to own land (and buildings, as the case may be) in Indonesia is quite limited (i.e. through HGB, HGU, HP, and *Hak Sewa* – as further explained below). Depending on the selected line of business (i.e. one which is open to direct foreign investment), a foreign investor may acquire limited land titles in Indonesia by forming an Indonesian direct foreign investment company (known as "PT PMA") or acquiring an existing Indonesian limited liability company (status of which will then be converted to PT PMA upon acquisition).

### *Real estate business activities – direct foreign investment*

In terms of real estate business, Presidential Regulation No. 36 of 2010 on the List of Business Sectors Closed and Open for Investment with Conditions ("Negative List") provides that real estate brokerage is closed for foreign investors while real estate development is not regulated under the Negative List and thus arguably should be open for foreign investors through a PT PMA.

Having said that and given the current policy of foreign investment in Indonesia, we perceive that it will need to be a large-scale and significant real estate development. There is no clear definition of large scale; however noting the amount of minimum investment mentioned below presumably approval for acquiring small land holdings or houses through a PMA company is unlikely.

Foreign companies and individuals, alone or together with Indonesian limited liability companies, individuals and cooperatives, generally need to establish PT PMA in accordance with Law No.25 of 2007 on Capital Investments ("Investment Law") to engage in businesses/activities open to direct foreign investment, which will need to be approved by the Capital Investment Coordinating Board ("BKPM").

If a foreigner wants to establish a PT PMA, based on the current investment policy by BKPM, there will be a minimum investment of USD 1.2m.

## Types of land titles in Indonesia

Generally, there are five types of land title recognized in Indonesia:

- Right of Ownership (*Hak Milik* or HM)
- Right to Build (*Hak Guna Bangunan* or HGB)
- Right to Use (*Hak Pakai* or HP)
- Right to Cultivate (*Hak Guna Usaha* or HGU)
- Right to Manage (*Hak Pengelolaan* or HPL)
- Right to Lease (*Hak Sewa*)

### Hak Milik (HM)

HM is the strongest and fullest hereditary right which may be held on land. HM does not have any time limit. However, please note that all the rights to land in Indonesia (including HM) have a social function, meaning that the usage of the land has to comply with the condition and nature of the right, thereby benefiting the owner, the community and the country.

HM can only be owned by Indonesian citizens (individuals) and some corporate entities determined by the government (e.g. social and religious institutions). Other Indonesian corporate entities and foreign citizens may not own land with HM.

HM may be transferred to other parties either by sale/purchase, exchange, donation, inheritance and other acts meant for the transfer of HM. HM can also be pledged as collateral for debt, by encumbering it with a mortgage (*Hak Tanggungan*) or encumbrance right under Law No. 4 of 1996 on Mortgages (“Mortgage Law”).

### Right to build (HGB)

HGB is basically a right granted by the government to establish and construct (buildings) on land for a period of, theoretically, at the most 30 years, which may be extended for another 20 years. Nowadays we normally see HGB certificates, especially in Jakarta, with periods of 20 years. After the term of extension expires, a HGB title may theoretically be renewed for another 30 years.

HGB may be granted to (i) Indonesian citizens, (ii) Indonesian corporate entities established under Indonesian law and domiciled in Indonesia, including PT PMA.

HGB may be acquired by:

- (i) transferring the (existing) HGB from the holder to the transferor, by sale/purchase, exchange or donation;
- (ii) creating or granting the HGB title on top of land already granted HM or HPL, or on state land (*tanah negara*).

HGB may also be pledged as collateral for debts by encumbering it with a mortgage.

### Right to use (HP)

Law No. 5 of 1960 on Agrarian Affairs (“Agrarian Law”) defines HP as the right to use and/or collect the products of land directly administered by the government. The types of land on which HP title can be granted are state land, and HM and HPL land. This means that HP title can be created on top of these land titles (HM and HPL).

HP title is granted for a maximum period of 25 years and can be extended for a maximum of 20 years. Afterwards, the term can be renewed for another 25 years. HP on HM land is granted for a maximum of 25 years and cannot be extended. Theoretically, HP can also be granted for an unlimited time, to be used as government offices, international organization offices or foreign embassies.

HP may be owned by (i) Indonesian citizens; (ii) foreigners residing in Indonesia; (iii) corporate bodies established according to the Indonesian law and domiciled in Indonesia (including PT PMA); (iv) foreign corporate bodies with a representative in Indonesia; (v) departments, non-department government bodies and regional governments; (vi) foreign country representatives and international organization representatives; and (vii) religious and social institutions.

Under the relevant law, land with HP title may also be pledged as collateral.

### Right to cultivate (HGU)

HGU is the right to cultivate land which is administered by the government. This title is normally granted to land for cultivation/plantation businesses. The period of HGU title is 35 years and may be extended for another 25 years, with renewal for another 35 years at the most. The minimum size of land for HGU is five hectares (“Ha”), and the maximum is 25 Ha (for individuals). For corporate bodies, these sizes will be determined by the Land Office.

HGU may only be granted to:

- Indonesian citizens;
- Indonesia corporate entities which are domiciled in Indonesia, including PT PMA.

### Right to manage (HPL)

The title is only granted to state-owned companies and government agencies with, normally, an unlimited term. The land itself normally comes from the land administered by the government and is allocated for government agencies. Theoretically, other land titles, i.e. HGB and HP, can be granted on top of HPL land.

### Right to lease (Hak Sewa)

Article 16 of the Agrarian Law lists *Hak Sewa* or Right to Lease as one of the “titles” for land. Article 44 of the Agrarian Law further provides that *Hak Sewa* is a land title that gives its holder the right to construct a building on another person’s land, upon payment of rent.

While HP is a primary land title as it is granted by the government and constructed on state land, *Hak Sewa* is a secondary or derivative title granted by a holder of a land title. As *Hak Sewa* is a derivative title, *Hak Sewa* in practice is rarely used.

This is not a registered land title with the Land Office. It is generally a contractual right over the existing title. This could be used for example for build operate and transfer schemes (which might be the case in respect of retail business).

Unfortunately *Hak Sewa* is not a registered land title with the Indonesian Land Office (as it is generally a contractual right over the existing title). The only protection given to leases is under article 1576.1 of the Indonesian Civil Code which loosely provides that the "*Selling of a leased object does not terminate the lease on the object unless it has been agreed so upon the entry into the lease agreement*".

## *Land registration system in Indonesia*

Indonesia's land registration was initially based on a system commonly known as "registration of deeds". After the Agrarian Law was enacted in 1960, Indonesia adopted a system commonly known as "registration of title" because (i) land registrations are recorded in a land registration book at the relevant Land Office and (ii) land title certificates are issued to serve as a strong evidence of ownership to land. However, the Land Office does not provide a guarantee on the status of the land being registered as the land certificates are not construed as absolute evidence of ownership, i.e. if other parties can prove in a court of law ownership over a plot of land title that has been issued a land certificate, then such land certificate can be cancelled.

The Indonesian law concept provides that a land certificate is a proof of rights which serves as strong evidence of the physical and juridical data stated therein, as long as the physical and juridical data are in accordance with the data stated in the related measurement letter and land registration book.

Land title registration is managed by the regional Land Office with jurisdiction where the land/premise is located.

## *Brief overview of land acquisition*

The process of land acquisition in Indonesia is relatively complex and time-consuming. Generally, the procedure of acquiring land in Indonesia under the relevant land regulation is as follows:

### **Obtaining Izin Lokasi (Location Permit)**

Based on Minister of Agrarian Affairs/Head of National Land Agency Decree No. 2 of 1999 on Location Permits (Decree No. 2/1999), a company which has obtained investment approval must obtain a Location Permit to acquire land for its business activities. In practice, this requirement will also apply for every non-PT PMA that will acquire land for its business activities.

A company must apply for a Location Permit from a local government (Municipality/Regency Government/*Bupati*). Before granting the Location Permit, the *Bupati* will consider, among other things, the recommendation of the *Camat* (district head) and the *Lurah* (Head of Village), and the zoning of the area.

The Location Permit allows its holder to acquire land covered by the approval in accordance with a regional development plan and to apply for the transfer of the rights over that land. A holder of a Location Permit must acquire the land subject to those rights within one to three years depending on the size of the land (which can be extended to one year subject to the fulfilment of certain conditions, and if the holder of the Location Permit has acquired 50% of the land granted under the Location

Permit); otherwise, the holder may lose the right to acquire the land covered by the Location Permit.

However, exemptions from the requirement to obtain a Location Permit apply in the following events:

- The land derives from retribution in-kind (*inbreng*) from a shareholder of the company.
- The land is already controlled by another company, and it is being acquired for the purpose of continuing the investment plan of the other company, provided that approval from the relevant authority has been obtained.
- The land is located in an industrial complex/zone.
- The land is from a development authority of a certain region, which is in accordance with the regional development plan.
- The land is required for the expansion of an ongoing business, for which the expansion has obtained the required approval from the relevant authorities.
- The land is less than 25 Ha (for the agriculture business sector), and not more than 1 Ha (for non-agriculture industries).
- The land is already owned by the company, and the purpose of the land is in accordance with the zoning plan determined by the government.

The procedure to grant the Location Permit is essentially based on the review of the land acquisition process and technical land management data, consisting of the physical examination of the land, and the use and the conditions of the land.

Please note that as a general rule, a location permit is considered a license and therefore is not transferable. However, if a company that has obtained a location permit intends to transfer the location permit to another company, the transferee will need to submit an application to the regional government covering the same area of the location permit held by the transferor. At the same time the transferor also submits an application to revoke the location permit it currently holds and requests that a new location as permit be issued to the transferee for the same location that of the location permit held by the transferor. Accordingly, the regional government will issue a new permit under the name of the transferee.

Please note that since a location permit is issued by the local government (Municipality/Regency Government/*Bupati*), there may be local regulations that need to be considered.

### Transaction documents in real estate transactions

Generally a buyer will be the one who prepares the documentation related to the acquisition of real estate. To effect a title transfer due to sale and purchase, exchange, grant, in-kind contribution, the parties to the transaction must sign a title transfer deed in a form which is already prepared by the government and the execution of such deed must be conducted before a land deed officer (“PPAT”) who is licensed to practice in the area where the land is located.

Usually the following documents are involved in real estate transactions:

- **Conditional Sale and Purchase Agreement:** This document is suggested if the title transfer is subject to certain conditions. For example, a title transfer over a certain type of land title, e.g. HGU, is subject to government approval. This document also contains the details of commercial terms of the transaction, e.g. deposit (if any).
- **Deed of Sale and Purchase of Land (*Akta Jual Beli Hak Atas Tanah*):** Deed of Sale and Purchase of Land is the required document for the transfer of ownership over land. The Deed of Sale and Purchase of Land is prepared by a PPAT and signed by the buyer and the seller before the PPAT.

### Costs usually shouldered by the parties in real estate transactions

The buyer usually pays for:

- Buyer's agent's fees (if any);
- Legal service fees;
- Due diligence fees;
- PPAT service fees;
- Land registration fees; and
- Land acquisition duty.

The seller usually pays for:

- Listing agent's fees (if any);
- Legal service fees; and
- Income tax on the sale of the real estate.

### Granting of a land title

Once all requirements to obtain a land title (e.g. HP, HGB or HGU) have been fulfilled, the relevant Land Office will issue a Decision Letter on the Granting of a new land title. After the granting of the new land title, the new land title holder will need to register the land, and the land title certificate will be issued by the regional Land Office. Please note that the issuance of a land title certificate will occur after the company (i) pays the administrative fees in relation to the issuance of a land title (which can be substantial depending on the circumstances) and the land acquisition duty (*Bea Perolehan Tanah dan Bangunan*) at a rate of 5% of the estimated value of the land (determined by the government).

### Acquisition of a real estate developer company

Acquisition of a real estate developer company will need to take into account provisions under the Investment Law (e.g. a local PT will need to convert its status to become PT PMA once acquired by a foreign entity) and Law No. 40 of 2007 on Limited Liability Companies ("Company Law").

An acquisition resulting in the change in control of a company (whether by a transfer of shares or by way of dilution) needs to follow a strict process under articles 125 (as applicable) and 127 of the Company Law, requiring acquisition plans, a 30 day

creditor and employee notification procedure prior to the “calling” of the General Meeting of Shareholders (“GMS”) authorizing the transfer or issue of shares etc (notices for GMS require a minimum of 14 *clear* days). A transfer of a 49% interest to a shareholder that holds 51% is not considered a transfer of control.

If the acquisition is shareholder driven rather than by management of the target company and the acquirer the more complex process set out in article 125 of the Company Law (i.e. preparation of acquisition plan) need not be followed – however there remains the 30 day employee/creditor notification procedure.

Documents required include, among other things:

- an acquisition plan for the target company and purchasing entities (including draft acquisition proposal by directors and directors resolutions, approved acquisition plan by commissioners (and commissioners resolutions)),
- notices to creditors and employees, a notice calling a GMS, newspaper announcements (including an abridged acquisition plan), and
- shareholders resolutions (amendments to articles etc), and transfer deed.

## *Permit and environmental issues*

### **Government authority relating to land development**

In general, land development is controlled and monitored by the provincial and sub-provincial governments as well as the Land Office. The authorized party for the environment is the Ministry of Environmental Affairs. However, each province may have specific regulations on land development and the environment.

### **What environmental laws affect the use and occupation of real estate?**

The environmental laws must be taken into account when the use and occupation of real estate has an impact on environment. Environmental documents to manage environmental impact may need to be prepared.

### **Main permits or licenses required for building or occupying real estate**

- A building permit is required for the construction or renovation of real properties.
- A building use permit/building occupational permit is required to be obtained before occupying a building (depending on the applicable regional regulations).

The explanations above consider matters from a general point of view. Please note that local requirements/licenses may be applicable depending on the relevant regional regulations.

## **Tax aspects**

### *Rental income*

Rental income on property owned either by a corporation or an individual is subject to final income tax at a rate of 10% from the gross rental fees (excluding VAT). This is withheld by a company tenant, but for individual and foreign tenants,

the landlord is obliged to pay the 10% final tax due on the rental income through self assessment mechanism. This 10% tax constitutes the final settlement of the income tax for that particular income.

Gross rental value is the total amount paid or payable by the tenant in whatever name or form with respect to land and/or buildings rented. The gross rental value includes repair costs, maintenance expenses, security expenses and service charges, regardless of whether these exist in a separate agreement or are included in the rental agreement. As the rental income is subject to final tax, all expenses related to the property rental business are non-deductible. Other income (after allowable deductions) of a real estate company, for example property management, will be subject to the normal corporate income tax at a flat rate of 25%.

The corporate tax rate of 25% may be reduced to 20% for listed companies that satisfy all of the following conditions:

- Total shares held by the public is a minimum of 40% of the total paid in capital;
- The total shares are held by at least 300 parties with each holding less than 5% of total paid in capital;
- The above conditions must prevail for at least six months or 183 calendar days within one fiscal year.

### *Transfer of land and building*

A transfer of land and building will cause income tax on the deemed gain on the transfer/sale to be charged to the transferor (seller). The tax is set at 5% of the gross transfer value (tax base). However, for transfers of simple houses and apartments conducted by taxpayers engaged in a property development business, the tax rate is 1%. This tax must be paid by the time the rights to the land and building are transferred to the transferee. All the tax paid constitutes a final tax.

In general, the tax base is the higher of the transaction values stated in the relevant land and building right transfer deed or the NJOP.

A notary is prohibited from signing a transfer of rights deed until the income tax has been fully paid.

### *Duty on the acquisition of land and building rights*

A transfer of land and building rights will typically also give rise to BPHTB duty on the acquisition of land and building rights liability for the party receiving or obtaining the rights. Qualifying land and building rights transfers include sale-purchase and trade-in transactions, grants, inheritances, contributions to a corporation, rights separation, buyer designation in an auction, the execution of a court decision with full legal force, business mergers, consolidations, expansions, and prize deliveries. Acquisition of land and building rights in certain non-business transfers may be exempt from BPHTB.

BPHTB is based on the Tax Object Acquisition Value (*Nilai Perolehn Objek Pajak* or NPOP), which in most cases is the higher of the market (transaction) value or the NJOP of the land and building rights concerned. The tax due on a particular event is determined by applying the applicable duty rate of 5% to the relevant NPOP, minus an allowable non-taxable threshold. The non-taxable threshold amount varies

by region. The government may change the non-taxable threshold via regulation. BPHTB is typically due on the date that the relevant deed of land and building right transfer is signed before a public notary.

A notary is prohibited from signing a deed transferring rights until the BPHTB has been paid.

### *Depreciation*

For tax purposes, permanent buildings are depreciable in 20 years and non-permanent buildings are depreciable in 10 years using *straight line* method. Considered non-permanent are temporary buildings which materials are not durable. While lands, are not depreciable.

### *Other expenses and income*

Taxable business profits are calculated on the basis of normal accounting principles as modified by certain tax adjustments.

Where a final tax applies, expenses relating to rental and/or sales/transfers of property, including interest, depreciation, and other costs are not deductible for corporate income tax purposes.

### *Withholding tax on sales on luxury goods*

A corporate taxpayer who sells the following luxury must withhold/collect article 22 income tax at 5% of the selling price excluding VAT and Luxury Sales Tax:

- Houses and land priced at IDR 10bn and 500 square metres width;
- Apartments, condominiums, and similar types of building selling for more than IDR 10bn and/or having 400 square metres width.

Income tax collected is creditable for the purchasers of the goods.

### *Tax loss carryforward balance and statutory of limitation for issuing a tax assessment*

Tax losses may be carried forward for a maximum of five years.

A carryback of the tax losses is not permitted. Where a final tax applies, tax losses cannot be carried forward. A company is engaged in the property business (rental or sales of land and buildings) can no longer carry forward its tax loss.

Under the current Tax Administration Law, the DGT can issue an underpaid tax assessment letter for the years up to 2007 only within the years after the incurrence of a tax liability, the end of a tax period (month) or the end of (part of) a tax year, but no later than 2013. For years from 2008 onwards, the time spans for the issuing of underpaid tax assessment letters is reduced to five years.

### *VAT*

VAT applies to real estate transactions at a rate of 10%. For these purposes, real estate transactions include rental and sales of real estate properties. Charges for common

services for office buildings and the like are subject to VAT at 10% of the service charges.

VAT on the sale price of land and buildings, as part of a real estate or industrial estate price, is levied at the rate of 10% of the invoice value.

VAT on any self-construction work on the following buildings is levied at 4% of total costs incurred or paid, exclusive of the acquisition price of land:

- Residential house or place of business, and;
- Building space which is equal to or bigger than 300 square metres.

Excluded from the VAT is the delivery of a basic house, very basic house, basic apartment, rented cottage, student dormitory, and other housing as defined by the Minister of Finance upon hearing the consideration of the Minister of Settlement and Regional Infrastructures (e.g. religious and social buildings). In addition to the exemption, services provided by the building contractors for the construction of places which are merely intended for worship purposes are also excluded from VAT.

### *Luxury sales tax (LST)*

LST is levied at 20% on apartments, condominiums, town houses with an area of 150 square metres or more, and luxury houses (including office buildings and shop houses) with an area of 400 square metres or more.

### *Land and building tax*

Land and building tax (*Pajak Bumi dan Bangunan* or PBB) is a type of property tax chargeable on all land and/or buildings, unless exempted. PBB rate is specified at 0.5% from the taxable sale value of the object. The effective PBB at present is either 0.1% or 0.2% of the NJOP. PBB is payable annually following an official assessment issued by the DGT.

An individual or an organization that owns a right to a piece of land, and/or takes benefits there from, and/or owns, controls, and/or takes benefits from a building can by law be regarded as the PBB taxpayer for that piece of land and/or building.

### *Profit distributions*

Profit distributions in the form of dividends from an Indonesian corporation to its shareholders are subject to the following withholding tax rates:

- For corporate resident shareholders, the dividends are subject to withholding tax of 15%. This 15% withholding tax constitutes a prepayment of the corporate tax liability for the company earning the dividends. The dividends are effectively subject to the normal corporate tax rate of 25% at the level of the corporate resident shareholders. The dividends received by the corporate resident shareholders are exempt from tax if the following conditions are met:
  - The dividends are received by a limited liability company incorporated in Indonesia, a cooperative, or a state-owned company;
  - The dividends are paid out of retained earnings; and

- The company earning the dividends holds at least 25% of the paid-in capital in the company distributing the dividends.
- For individual resident shareholders, the dividends are subject to final income tax of 10%. As the withholding tax is final in nature, there is no additional tax to be borne at the level of the individual resident shareholders.
- As for non-resident shareholders, the dividends are subject to withholding tax of 20% (or the applicable reduced treaty rate).

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# *Real Estate Going Global Ireland*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 9 July 2012.

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# *Real Estate Tax Summary – Ireland*

## General

A foreign corporate investor may invest in Irish property directly, or through a local Irish subsidiary company. The selection of the appropriate structure for an Irish property investment should be heavily influenced by a consideration of the tax issues that are likely to be relevant to that investment, such as the rate of tax applying to Irish profits, the tax rules applying in the investor's home country and the investor's plans in relation to the repatriation of profits generated in Ireland.

If it is anticipated that the Irish investment will be in a loss-making position for tax purposes, or will only generate small profits in the initial years, there is probably little merit in seeking to defer taxation in the investor's home country. In these circumstances, a branch of a company that is tax resident in the investor's home country may be the most suitable structure.

Where the Irish operation is generating significant taxable profits, the structuring decision is likely to be more complex. The primary aim of the structuring decision in this situation might be to defer home country tax on Irish source profits either permanently or until such time as those profits are repatriated. However, other factors that will inform the structuring decision include the investor's future plans for utilisation of the after-tax profits earned in Ireland, and the potential application of anti-avoidance legislation such as controlled foreign corporation legislation in the investor's home country.

On a related note, Ireland is increasingly being selected as the low-taxed 'principal' company in a number of key global corporate structures. These structures provide a robust and sustainable platform to manage a group's international business and also help deliver a tax efficient result. Many of our multinational clients have successfully implemented the structures outlined in this document.

## Rental income

The rental income of an Irish tax resident company (or an Irish branch of a non-resident company) is liable to corporation tax at the passive rate, currently 25%. A non-resident company that does not operate through an Irish branch is liable to Irish income tax (as opposed to corporation tax) at the standard rate, currently 20%. The net rental income that is liable to tax is based on net profit as determined under normal accounting principles, with some small differences, particularly with regard to expenditure incurred before the letting of a property, interest expenses, and specific rules in relation to relief for capital expenditure.

A 20% corporation tax surcharge is chargeable on the net distributable rental income of a "close company" if that company does not distribute that relevant income within 18 months of the end of the accounting period in which the income was earned. A "close company" is defined as a company that is tax resident in Ireland and under the control of five or fewer participators (e.g. shareholders and holders of certain debt instruments) and their associates, or under the control of any number of participators

who are directors. A company that is not tax resident in Ireland should not be liable to this surcharge.

## Withholding tax on rents

An Irish tax resident lessee/tenant must withhold tax at the standard rate of income tax (currently 20%) from rents paid to a non-resident landlord. Any tax withheld can be offset against the non-resident landlord's ultimate Irish tax liability, and a refund can be obtained of any excess. There is no requirement for the lessee/tenant to withhold tax from rents if the rents are paid to an agent in Ireland, who is acting on behalf of the non-resident landlord.

## Capital gains tax

Capital gains tax (CGT) will apply to gains arising on the sale/realisation of any Irish property, irrespective of whether the vendor is tax-resident in Ireland. The capital gain is calculated by deducting the cost of the property (as adjusted to reflect inflationary movements to 31 December 2002, if the property was acquired before that date) from the net sales proceeds. A deduction may be available for certain costs incurred in enhancing the property, and also for incidental costs associated with the sale of the property. The rate of capital gains tax is currently 30%.

Where an Irish property (or shares in an Irish property company) is disposed of for consideration in excess of EUR 500,000, the vendor must provide a CGT clearance certificate to the purchaser, which can be obtained from the Irish Tax Authorities. In the absence of such a certificate, the purchaser is obliged to withhold tax of 15% from the gross consideration.

Relief from CGT is available for properties purchased between 7 December 2011 and 31 December 2013. The relief provides an exemption from CGT where the property is held for a minimum period of 7 years.

# *Real Estate Investments – Ireland*

## *Introduction*

The climate for investment in real estate in Ireland has changed significantly in recent years. Following a period of significant expansion of the Irish economy in the 1990's/early 200's and growth in property values generally, the intervening period has seen a very significant contraction in the economy and reductions in land and property values. The Irish property market, which would have historically been dominated by domestic investors, is now experiencing significant interest from foreign investors.

In the past, typical lease terms in Ireland were 20 to 25 years, although a practice of shorter lease terms is emerging. Recent legislation has removed landlords' rights to upwards-only rent reviews for all leases granted on or after 28 February 2010. In the current market, it is not unusual for landlords to grant incentives to new tenants in the form of rent-free periods, contribution towards fit-out costs, break clauses, rent-free parking spaces, etc.

The following is a broad outline of the taxation framework in Ireland, and the tax issues associated with property investment in Ireland. However, it should only be treated as a general guide and detailed advice should be taken when considering any property investment.

## *The taxation framework in Ireland*

For many years, Ireland has used the tax system to help attract foreign investment which is critical to the ongoing development of the economy. The main emphasis of the current tax regime for trading companies is on the 12.5% standard corporate tax rate for active business profits rather than on tax incentives or tax holidays. In addition, there have been a number of significant holding company and intellectual property-related developments in recent years including a foreign tax credit pooling system for dividends, increased and refundable research and development (R&D) tax credits, a new onshore intellectual property (IP) tax deduction regime and a participation exemption from capital gains, which make Ireland increasingly attractive for international investors.

### *Corporation tax rates*

The tax rates currently applying in Ireland are as follows:

- Trading/'Active' income: 12.5%
- Unearned/'Passive' income: 25%
- Capital gains 30%
- Certain rezoning profits/gains 80%

To avail of the 12.5% standard corporation tax rate on trading profits, some level of real presence in Ireland is required. Profits of a foreign branch of an Irish resident company

will generally be regarded as trading income of the Irish company if they arise from a trade that is at least partly undertaken in Ireland. Under the terms of Ireland's Double Taxation Agreements, any "foreign tax" suffered in another country on the profits of branch trading in that country is generally credited against the Irish tax payable on the profits of the foreign branch. The 12.5% tax rate also applies to dividends paid out of trading profits by a company resident in an EU/tax treaty country.

A 25% corporation tax rate applies to passive income of Irish resident companies. Passive income includes 'unearned' income such as interest, royalties, dividends (other than certain foreign dividends which may qualify for the 12.5% trading rate) and rents from property. Income from a trade carried on wholly abroad is also treated as passive income, as are profits from land dealing, mining and petroleum extraction operations.

### *Corporation tax system in Ireland*

Ireland operates a classical system of company taxation under which tax is payable by shareholders on dividends received with no credit available to shareholders for tax paid at the corporate level.

### *Tax residency and the scope of Irish tax*

A company resident in Ireland for tax purposes ('Irish tax resident') is subject to corporation tax on its worldwide income. A company may be Irish tax resident under either the 'incorporation' test or the 'management and control' test.

A company incorporated in Ireland is automatically considered to be Irish tax resident, with the two following exceptions:

- A company that is ultimately regarded as tax resident in another country under the terms of the Double Taxation Agreement in place between Ireland and that other country.
- A company carrying on a trade in Ireland (or a company related to such a company) where either:
  - the ultimate parent company of that company is quoted on a recognised stock exchange; or
  - that company is ultimately controlled by persons resident in another EU country or a country with which Ireland has a Double Taxation Agreement in place (a "tax treaty country").

A company would also be considered Irish tax resident if it is managed and controlled in Ireland. A company will usually be regarded as being managed and controlled in Ireland if directors' meetings are held in Ireland and all major policy decisions effecting the company are taken at those meetings. Such a company would be regarded as Irish resident regardless of its place of incorporation.

A company that is not tax resident in Ireland is liable to Irish corporation tax only on profits arising from a business conducted through an Irish branch. An Irish branch of a company that is not Irish tax resident may be liable to tax in Ireland. The following points are relevant in this regard:

- The taxable profits of a branch are determined in the same way as for resident companies.
- A deduction may be taken for a reasonable proportion of head office expenses which are directly attributable to the activities of the branch.
- No withholding tax (WHT) arises on repatriation of branch profits to the foreign head office.

A non-resident company that does not operate through an Irish branch is liable to Irish income tax (as opposed to corporation tax) at the standard rate, currently 20%, on Irish source income, subject to the provisions of a Double Taxation Agreement.

### *The tax base in Ireland*

Corporation tax is charged on the taxable profits of a company. 'Taxable profits' for this purpose includes income (i.e. trading income and passive income) and capital gains arising on the disposal of capital assets.

### *Tax return filing requirements in Ireland*

The Irish tax system incorporates a self-assessment regime under which a company is obliged to determine whether or not it is chargeable to corporation tax and, if so, to file a tax return and make an appropriate tax payment.

When a company first comes within the charge to Irish tax, the company (whether an Irish company or a foreign company through its Irish branch) is required to register for Irish corporation tax (and other taxes such as Pay As You Earn (PAYE)/Pay Related Social Insurance (PRSI) or VAT, if applicable) by filing a Form TR2 with the Irish Tax Authorities.

The Irish Tax Authorities operate an online service ([www.ros.ie](http://www.ros.ie)), an internet based system that allows taxpayers to file tax returns over the internet and view details of their tax balances, returns filed etc.

In general, a company's tax accounting period will coincide with its financial accounting period. However, a tax accounting period may not exceed a period of 12 months so that if a company prepares accounts for, say, an 18-month period, it will have two tax filings, one in respect of the first 12 months of that period and the other for the remaining 6 months.

The concept of a consolidated tax return (a single return for a group of companies) does not exist in Ireland. Each company is required to file an individual return. However, group relief may be available, enabling losses incurred by one group company to be used to shelter taxable income arising in another group company.

The corporation tax return must be filed within nine months of the company's accounting year-end. Where the return is filed after this date, a late filing surcharge is payable and interest charges will also be applied.

The Irish Tax Authorities may, within four years of the end of the accounting period in which the return was made, decide to conduct an audit of the tax return and revise a company's tax liability as they consider appropriate. It is important that a full and complete tax return is made, as there is no time limit in cases of fraud or neglect.

## *Corporation tax payments*

Preliminary corporation tax payments must be made during a company's accounting period. 'Preliminary tax' is generally payable in two instalments, as follows:

- The first instalment is payable in the sixth month of the accounting period. This instalment must be equal to the lower of either:
  - 50% of the final corporation tax liability for the preceding accounting period, or
  - 45% of the corporation tax liability for the current accounting period.
- The second instalment is payable in the eleventh month of the accounting period, and the amount payable at this time should bring the total preliminary tax paid up to 90% of the total corporation tax liability for the current period.

There are two key exceptions to the general preliminary tax rules above:

- The payment dates above do not apply to companies that have a “short” accounting period of seven months or less. In these cases a single preliminary tax payment of 90% of the total expected corporation tax liability will be payable one month before the end of the accounting period.
- A ‘small company’ is also only required to make a single preliminary tax payment not later than one month before the end of the accounting period. A small company is defined as a company whose corporation tax liability for the preceding accounting period was less than EUR 200,000 on an annualised basis. A small company has the option of making a preliminary tax payment, equal to the lower of 90% of the total corporation tax liability for the current period, or 100% of the corporation tax liability for the preceding accounting period.

Any balance of corporation tax must be paid on submission of the corporation tax return, i.e. within 9 months of the end of the accounting period. Interest is charged on the late payment or any underpayment of a company's corporation tax liability as set out above.

## *Capital gains tax*

Capital gains tax (CGT) applies to gains arising on the sale of any form of capital assets including property, stocks and shares, land and buildings, goodwill, some debts, options and any non-euro currency. The standard rate of CGT is currently 30%, but a higher rate can apply in the case of certain property disposals.

Irish resident companies are liable to corporation tax in respect of “chargeable gains” on worldwide disposals, at an effective rate equal to the standard rate of CGT, currently 30%. Companies that are not resident in Ireland are liable to tax on gains arising on disposal of “specified” assets i.e. Irish land/buildings, Irish mineral/exploration rights and unquoted shares which derive the greater part of their value from such assets.

Individuals resident or ordinarily resident in Ireland are liable to capital gains tax on gains from worldwide disposals. Individuals resident or ordinarily resident, but not domiciled, in Ireland are liable on gains arising on the disposal of assets situated in Ireland and on all foreign gains, but only to the extent that those gains are remitted

to Ireland. Individuals who are neither resident nor ordinarily resident are only liable to CGT on gains made on the disposal of “specified assets”.

Capital gains are calculated by deducting the cost of the asset (as adjusted to reflect inflationary movements to 31 December 2002, if the asset was acquired before that date) from the sales proceeds, with a deduction also available in respect of enhancement costs, and acquisition/disposal costs. Special rules apply in the case of disposals of land with development value.

Capital losses arising on the disposal of assets may be offset against capital gains arising on other disposals in the same accounting period, or they can be carried forward to be offset against future capital gains. Restrictions apply in the case of gains/losses arising on development land.

The standard rate of CGT is currently 30% although, since 2009, an 80% rate applies to “windfall gains” arising on the disposal of land that has benefitted from a rezoning decision.

### *Holding company and headquarters regime*

Ireland is increasingly being used as a regional or global headquarters for many international businesses. The benefits of placing high added value and strategically important business functions in Ireland are further enhanced by a regime that provides for a ‘participation exemption’ from CGT for Irish resident companies on the disposal of a qualifying shareholding (at least 5%) in subsidiaries tax resident in an EU/tax treaty country.

Locating international operations from Ireland also provides access to the EU tax Directives and to Ireland’s Double Taxation Agreements. The EU tax Directives reduce WHT on dividends received in Ireland and also facilitate tax efficient mergers and corporate reorganisations.

### *Capital gains and holding companies - participation exemption*

Companies are chargeable to CGT in respect of gains arising on the disposal of capital assets. The taxable gain (or allowable loss) is arrived at by deducting from the sales proceeds the cost incurred on acquiring the asset (as adjusted to reflect inflationary movements to 31 December 2002, if the asset was acquired before that date), and any resulting gain is taxable at 30%. It is not possible to offset capital losses against a company’s other taxable income, nor is it possible to surrender capital losses to another company within a tax group. However, with some advance planning, it may be possible to get the benefit of capital losses within a tax group.

A ‘participation exemption’ may also be available to exempt gains arising on the disposal of shareholdings in certain companies. A number of conditions need to be satisfied in order for the exemption to apply, including:

- The shareholding must amount to a minimum of 5% of the ordinary share capital, and must have been held for a continuous 12-month period.
- The disposal takes place during, or within two years of, the period in which the minimum 5% holding is held.

- The shareholding is held in a company that is resident in an EU Member State (including Ireland) or in a country with which Ireland has a Double Taxation Agreement in force at the time of the disposal, and
- The company carries on a qualifying trade
- The exemption may only be claimed where the shareholding is in a company whose business consists wholly or mainly of the carrying on of one or more trades. Alternatively, the exemption may also be available if the businesses of the Irish holding company and all companies in which it holds a minimum of 5% of the ordinary share capital, together with all companies in which the company which is being sold holds at least 5% of the ordinary share capital, consist wholly or mainly of the carrying on of one or more trades.

If the holding company does not hold the minimum 5% shareholding but is a member of a group (i.e. a parent company and its 51% subsidiaries), the gain arising on the disposal will nonetheless be exempt if the holding requirement can be met by including holdings of other members of the group. As a result, the Irish holding company may be exempt from CGT on a disposal of shares even if it does not directly hold a significant shareholding in the company being disposed of.

The exemption also applies to a disposal of assets related to shares, such as options and convertible debt. However, it does not apply to a sale of either shares or related assets that derive the greater part of their value from Irish property or minerals/exploration rights.

Capital losses arising on the disposal of a shareholding that could have qualified for the CGT participation exemption cannot be offset against other capital gains.

### *Group treatment of capital gains*

Irish tax legislation provides for the deferral of any CGT liability arising on an intra-group transfer of capital assets. In the absence of this provision, a tax liability would arise where a capital asset is transferred from one Irish tax resident company to another Irish tax resident company, both of whom are members of a 75% tax group.

A group for CGT purposes consists of a principal company and its 75% subsidiary companies. A 75% subsidiary is defined by reference to the beneficial ownership of ordinary share capital, owned either directly or indirectly. For the purpose of identifying the beneficial ownership interest in any company, holdings by any European Economic Area (EEA) resident company are taken into account.

It is also possible for an Irish tax resident company and an Irish branch of an EEA company in the same group to transfer capital assets without crystallising a capital gains charge, although the asset transferred must remain within the charge to Irish CGT.

Subsequent to an intra-group transfer, a charge to CGT will arise when either:

- The asset is sold outside the group, in which case the tax is calculated by reference to the original cost and acquisition date the asset was first acquired within the group;  
or

- The company to which the asset was transferred leaves the group while still owning the asset, in which case the gain on the original intra-group transfer crystallises and tax becomes payable by the company leaving the group.

## *Double Taxation Agreements*

Ireland has signed comprehensive Double Taxation Agreements with 66 countries, of which 59 are currently in effect. New agreements have been signed with Albania, Hong Kong and Montenegro and are effective from 1 January 2012. The legal procedures to bring a new agreement with Egypt, and a new agreement with Germany replacing an older Double Taxation Agreement, into force are currently in progress.

The Irish Double Taxation Agreement network continues to be expanded and updated. Ireland has completed the ratification procedures to bring new agreements with Armenia, Bosnia & Herzegovina, Kuwait, Morocco, Panama and Saudi Arabia. Negotiations for new agreements with Qatar, Thailand, Ukraine and Uzbekistan have been concluded and are expected to be signed shortly. Negotiations for new agreements with Argentina, Azerbaijan, and Tunisia are also in progress.

Irish tax resident companies may avail of Irish treaties. These treaties secure a reduction or, in some cases, a total elimination of WHT on royalties and interest.

A number of Ireland's Double Taxation Agreements contain tax sparing provisions whereby income arising to a resident of a tax treaty country from sources within Ireland will be relieved from tax on repatriation to the home country.

## *Repatriation of profits from Ireland*

Repatriation of profits from an Irish company can be achieved in a number of ways, including by way of dividend payments, interest charges, royalties, or central cost recharges.

### **Dividends**

Ireland operates a dividend withholding tax (WHT) regime. Irish resident companies must deduct WHT at the standard rate of income tax (currently 20%) on payments of dividends or other profit distributions. Many of Ireland's tax treaties provide for reduced or zero withholding on dividends paid to shareholders resident in countries with which Ireland has a Double Taxation Agreement. More importantly, domestic legislation provides for exemptions from dividend WHT for dividends paid to a broad range of shareholders, including:

- Irish resident companies, pension funds and charities
- Residents of EU Member States and countries with which Ireland has a Double Taxation Agreement (and whose companies are not under the control of Irish residents)
- Companies resident in non-EU countries, or countries with which Ireland does not have a Double Taxation Agreements, that are ultimately controlled by shareholders resident in an EU Member State or a tax treaty country.

There are a number of important administrative obligations that must be satisfied, even where an exemption from dividend WHT may be available.

## Interest

Interest WHT at the rate of 20% applies to interest payments made on loans and advances made for a minimum term of 12 months. In general, where a loan is drawn down for trading/business purposes, no WHT will apply where interest on that loan is paid to a company resident in an EU or a tax treaty country, provided that territory imposes a tax on interest receivable. The provisions of double taxation agreements, and the EU Interest and Royalties Directive may provide further relief or exemption from WHT.

## Royalties

Royalties in respect of registered patents attract WHT at the standard rate of income tax, currently 20%. A reduced rate of WHT may be available where the recipient is resident in a tax treaty country and the relevant treaty provides for a reduction or elimination of WHT. Patent royalties may also be paid free of WHT where they are paid in the course of a trade or business to residents of an EU Member State (excluding Ireland) or tax treaty territory provided that territory imposes a tax on royalties receivable.

Other forms of royalty may also attract WHT, including where the royalty constitutes an 'annual payment'. An annual payment is one that is capable of recurring and which the recipient earns without having to incur any expense. Patent royalty payments to associated companies in the EU may also be exempt from WHT in accordance with the EU Interest and Royalties Directive.

## Central cost recharges

These recharges do not generally attract WHT, provided that the underlying costs are not otherwise subject to WHT.

## *The foreign tax credit system*

Foreign taxes borne by an Irish resident company or branch, whether imposed directly or by way of withholding, may be allowed as a credit against tax arising in Ireland on the same/similar income. The calculation of the credit depends on the nature and source of the income, and the credit is limited to the Irish tax payable on the same source of income. A system of onshore pooling applies to foreign dividends from corporate shareholdings of 5% or more, and excess credits can be carried forward indefinitely for offset against corporation tax arising on foreign dividends in later periods. Any excess foreign tax credits that arise in relation to a foreign trading branch may be offset against the Irish tax arising on branch profits in other countries in the year concerned, and any unused credits can be carried forward indefinitely.

## *Transfer pricing rules in Ireland*

Formal transfer pricing legislation was introduced in Ireland in 2010. The new rules apply to domestic and international arrangements entered into between associated persons, involving the supply or acquisition of goods, services, money, or intangible assets, and relating to trading activities within the charge to Irish corporation tax at the trading rate of 12.5%.

Under the new rules, the Irish Tax Authorities have the power to recompute the taxable profit or loss of a taxpayer where income has been understated or where expenditure has been overstated as a result of non-arm's length transfer pricing practices. The new rules are effective for accounting periods commencing on or after 1 January 2011,

and apply to arrangements entered into on or after 1 July 2010. There is, however, an exemption available for small and medium sized enterprises.

### *Value added tax (VAT) – An Overview*

In common with all EU Member States, Ireland operates a consumption tax known as value added tax (VAT). VAT is charged on the supply of most goods and services. Businesses that carry on activities that are chargeable to VAT are required to register with the Irish Tax Authorities (certain registration thresholds apply) and account for VAT at the appropriate rate in respect of revenues derived from the supply of goods and services. In practice, VAT is not a cost for most businesses as it may be passed on to customers. Furthermore, ‘accountable persons’ (i.e. persons who charge VAT on the supplies of their goods and/or services) can offset the VAT incurred on the purchase of goods and services (with certain exceptions) against the VAT charged on their sales. As a result, there is generally no VAT cost to a business whose activities are fully VAT-able. For this reason, VAT is generally described as a consumption tax since the ultimate cost rests with non-business users or business users engaged in VAT-exempt activities.

Exempt businesses (such as banking and insurance) are typically not required to account for VAT on such supplies of services, and consequently are unable to recover any VAT incurred on related purchases of goods and services (subject to certain exceptions).

A reclaim of VAT incurred on the following items is specifically prohibited:

- The purchase, lease, hire, acquisition or importation of passenger motor vehicles (except where such vehicles are considered to be inventory).
- The purchase of petrol (except where the petrol is considered to be inventory).
- Entertainment, food, drink, accommodation, or other personal services.

Sales of goods from Ireland which are dispatched to VAT-registered customers in another EU Member State, or exports to persons outside of the EU, are zero-rated.

Companies predominantly involved in the export of goods will tend to be in permanent VAT refund position (i.e. VAT incurred on costs consistently exceeds VAT on sales). To eliminate this cash-flow cost, Ireland provides a unique regime for businesses whose revenues are at least 75% derived from the supply of goods to VAT-registered customers in other EU Member States, or to customers outside the EU. Such businesses may obtain authorisation from the Irish Tax Authorities to purchase most goods (including imports) and services, free of VAT. On receipt of the authorisation (known as VAT 13B Authorisation), the business gives a copy of this document to its suppliers and these suppliers are then permitted to apply 0% VAT to all supplies (with some limited exceptions), irrespective of the rate that would otherwise apply. The authorisation is available only to companies whose primary business activity is the supply of goods (as defined for VAT purposes). Companies whose primary activity is the supply of services do not qualify for this facility.

A business that is not established or registered for VAT in Ireland but which incurs Irish VAT, may recover that VAT from the Irish Tax Authorities by filing a claim with the Tax Authorities in the jurisdiction in which the business is VAT registered. This facility is known as ‘Electronic VAT Refund’ (EVR). EVR is available, via Revenue Online Services (ROS) to Irish VAT registered businesses that incur VAT in other EU

Member States (where they are not VAT registered). Non-EU established businesses may claim by way of the EU Thirteenth Directive. A refund of VAT on the specific non-deductible items, as outlined above, is prohibited.

An administrative arrangement known as a 'VAT 60B' exists to enable Irish service providers to charge Irish VAT at 0% on continuous services supplied to certain foreign business customers. The authorisation is sent to the foreign business customer and in effect the supplier charges VAT at 0% on the particular service identified on the VAT 60B. This facility is of cash-flow benefit to the foreign customer who would otherwise have to make an EVR/Thirteenth Directive reclaim. As a result of new place of supply rules for services effective since 1 January 2010, the VAT60B mechanism is likely to be used only in limited circumstances.

Details of the current VAT rates are available in the most recent edition of PricewaterhouseCoopers' publication Tax Facts (PwC 2012 Tax Facts - [click here](#)) and currently range from 0% to 23%.

## Tax issues associated with property investment in Ireland

### *Rental income*

The rental income of an Irish tax resident company (or Irish branch of a non-resident company) is liable to corporation tax at the 25% passive rate, as opposed to the 12.5% rate that applies to trading profits. A non-resident company that does not operate through an Irish branch is liable to Irish income tax (as opposed to corporation tax) at the standard rate, currently 20%.

The net rental income that is liable to corporation tax is calculated similarly to the calculation of net profit under normal accounting principles. The main deductions allowed in arriving at the net rental income are:

- Rents and rates payable on the property.
- The costs of any goods/services that the lessor is obliged to provide under the terms of the lease.
- The costs of maintenance, repairs, insurance and management of the property.
- Interest on money borrowed to purchase, improve or repair the property.

In calculating the taxable net rental income, there is generally no deduction available for expenditure incurred before the first letting of the property. In addition, no deduction is allowed for expenditure of a capital nature – there are, however, specific provisions that grant relief for certain capital expenditure, which are discussed below under 'Tax depreciation'.

It should be noted that, in the case of rented residential property, the tax deduction for interest costs is limited to 75% of the actual interest charge incurred and the deduction is also dependant on the landlord's registration with the Private Residential Tenancies Board.

Where a net rental loss is incurred in an accounting period, the loss may be offset against other Irish source rental profits arising in the same accounting period, with any

excess rental losses carried forward indefinitely for offset against rental profits arising in future accounting periods.

A further corporation tax surcharge of 20% applies to the net distributable rental and investment income of a “close company” if it does not distribute that income within 18 months of the end of the accounting period. A close company is defined as a company that is Irish tax resident and under the control of five or fewer participators (e.g. shareholders and holders of certain debt instruments) and their associates, or alternatively under the control of any number of participators who are directors.

### *Withholding tax on rents*

An Irish tax resident lessee/tenant must withhold tax at the standard rate of income tax (currently 20%) from rents paid to a non-resident landlord. Any tax withheld can be offset against the non-resident landlord’s Irish tax liability, and a refund can be obtained of any excess. There is no requirement for the lessee/tenant to withhold tax from rents if the rents are paid to an agent in Ireland, who is acting on the non-resident landlord’s behalf.

### *Tax depreciation*

In calculating profits liable to Irish corporation tax, a deduction is not allowed for depreciation of capital assets. Relief may however be available for expenditure of a capital nature under various capital allowance regimes. Capital allowances are effectively a form of ‘tax depreciation’.

Expenditure incurred on the construction/refurbishment of certain buildings may be eligible for capital allowances under the general Industrial Buildings regime. Capital allowances are calculated by reference to expenditure incurred on the construction or refurbishment of the building (excluding the cost of acquiring the land), and the rate at which the allowances can be claimed will vary depending on the use to which the building is put. For example, in the case of a building in use for the purposes of a manufacturing activity, capital allowances are generally available on a straight-line basis at an annual rate of 4% over a 25 year period.

Capital allowances are also available for capital expenditure incurred on certain items of plant and equipment. The allowances are, in general, available on a straight-line basis over an eight-year period. Accelerated allowances apply in the case of certain energy efficient equipment.

### *Capital gains tax*

Capital gains tax (CGT) will apply to gains arising on the sale of any Irish property, irrespective of whether the vendor is tax-resident in Ireland. The gain arising is calculated by deducting the cost of the property (as adjusted for inflation if the property was acquired before 31 December 2002) from the net sales proceeds.

The adjustment to take account of inflation referred to above is known as ‘indexation relief’. An indexation factor is applied to the actual base cost of an asset, determined by reference to the year in which the asset was first acquired, provided that the asset was acquired on or before 31 December 2002. It should be noted that limited indexation relief is available in the case of disposals of development land.

## *Capital gains tax clearance certificate*

If the vendor does not provide a CGT clearance certificate, the purchaser is obliged to deduct 15% from the gross purchase price, where the purchase consideration exceeds EUR 500,000. This amount must be paid to the Irish Tax Authorities by the vendor. Any tax withheld by the purchaser is available as a credit against the CGT payable by the vendor, with a refund of any excess.

A CGT clearance certificate can be obtained from the Irish Tax Authorities where:

- the person making the disposal is tax resident in Ireland
- no CGT is payable in respect of the disposal
- the CGT payable in respect of the disposal has been paid by the vendor, and the vendor has no other outstanding capital gains tax liabilities.

## *CGT exemption - property incentive*

Relief from CGT is available for gains arising on the disposal of properties purchased between 7 December 2011 and 31 December 2013. The relief is available in respect of gains arising on the disposal of properties located anywhere in the European Economic Area (“EEA”) by an Irish resident company/individual. The relief is also available in respect of gains arising on the disposal by a non-resident of properties located in Ireland.

The relief provides for a full exemption from CGT where the property is held for a minimum period of 7 years. Where the property is held for a period in excess of seven years, the relief is allowed on a time apportioned basis. No relief is available if the property is not held for the minimum 7 year period.

The relief will not be available unless it can be shown that the property is acquired for a consideration equal to its market value (or not less than 75% of the market value if acquired from a connected person).

## *Shares deriving value from land in Ireland*

A capital gain arising on the sale of shares in an unquoted company which derives the greater part of its value from land or buildings in Ireland is liable to CGT in Ireland, regardless of the tax residency of the vendor. The rate of tax applicable to capital gains is currently 30%. A CGT clearance certificate may be required in these circumstances.

The disposal of shares in a company that derives the greater part of its value from Irish land and buildings does not qualify for either the CGT ‘participation exemption’ or for the “CGT exemption -property incentive” referred to above.

## *Property dealers/developers*

An Irish tax resident company that carries on a trade of buying and selling property (a ‘property dealing’ trade) is liable to corporation tax on its profits. The profits earned by Irish tax-resident companies, or by a branch or agency of a non-resident company, in a property dealing trade are liable to corporation tax at 25% rate, rather than the normal 12.5% rate applicable to trading income. Companies that are not tax-resident in Ireland, and who do not have a branch or agency in Ireland, are liable to income tax (as opposed to corporation tax) at the standard rate, currently 20%.

An Irish tax-resident company, or the Irish branch of a non-resident company, which develops and sells fully developed land, is liable to corporation tax at the standard rate, currently 12.5%.

### *Gains arising from land rezoning*

Where a gain arises on land that is sold on or after 30 October 2009, and a part of that gain is attributable to a rezoning of the land, that portion of the gain is liable to CGT at a special 80% rate.

The 80% rate applies where a rezoning decision was made in relation to that land after 30 October 2009, and is only attributable to the portion of the overall gain on the disposal of the land which is attributable to the rezoning decision. The balance of the gain is taxable at the standard rate of CGT, currently 30%. Unlike other profits/gains, the profits/gains may not be sheltered by, for example, trading losses arising in the company.

Rezoning is widely defined and includes situations where:

- land is zoned from non-development land use to development land use,
- land is rezoned from one development land use to another, or
- a decision is made to allow a development which is a material contravention to the existing development plan for that area.

### *Irish property funds*

Ireland is renowned globally as being one of the premier locations for establishing and administering investment funds. This position is driven by the flexible, proactive regulatory environment in which Irish funds operate, the extensive industry experience and expertise in this area, and the high speed to market possible on the set-up of an Irish fund.

In recent years there has been an increased interest in Irish regulated property funds due to their tax-efficient nature. Authorised Irish funds are not subject to Irish tax on their income and gains.

Furthermore, provided the appropriate documentation is in place, income and gains can be paid to non-resident investors, without deduction of WHT, regardless of the tax residency position of the investor.

It is possible to structure a regulated real estate fund vehicle with significant flexibility in terms of investment mechanics, few investment restrictions and no borrowing or leverage limits.

The financial regulator has agreed a number of key policy changes designed to improve Ireland's attractiveness as a location for property funds, including the ability to establish multi-layered special purpose vehicle (SPV) structures. There are a variety of legal and fiscal reasons why it may be beneficial for a fund to own real estate indirectly via a wholly owned subsidiary/wholly owned SPV or multiple layers of subsidiaries/SPVs. These changes have resulted in greater opportunities for structuring regulated property funds in Ireland.

## *VAT on property*

The VAT legislation relating to immovable property underwent a significant overhaul in 2008 and ‘new’ rules have been in place since July 2008. The ‘new’ rules resulted in fundamental changes in the way VAT is applied to property transactions.

### *Sale of new property – Taxable sales*

Currently, under Irish VAT law, the sale of non-residential property (including a freehold equivalent interest whereby the person may have a right to dispose of the property as owner) is subject to VAT, provided it is the:

- first sale within five years from completion of the property, or
- second or subsequent sale within five years following completion provided the property has not been occupied for an aggregate of 24 months.

Where the sale is taxable, VAT at the reduced rate (currently 13.5%) will be charged by the vendor.

### *Exempt sales*

The following sales (freehold and freehold equivalent interest) are exempt from VAT:

- An undeveloped property.
- A property not developed within the last five years.
- A property developed within the last five years but where the development was considered ‘minor’ in nature (certain conditions must be met)
- A second or subsequent sale of the property within five years *and* where the property has been occupied for an aggregate of 24 months.

However, a vendor and purchaser can exercise a ‘joint option for taxation’ on a property that would otherwise be an exempt sale. This may be exercised to prevent a clawback under the Capital Goods Scheme (see below). If the joint option for taxation is availed of, the purchaser must account for the VAT on the consideration on a “reverse charge” basis.

The first sale of a residential property by the person who developed it in the course of business (e.g. a property developer) or by a person connected with the property developer will always be subject to VAT at the lower rate, currently 13.5%.

### *Lettings*

All lettings (except freehold equivalent interests), irrespective of their duration, are exempt from VAT. The landlord may opt to tax the letting and must notify the tenant in writing or provide for the option to tax in the letting agreement. An option may be exercised to avoid a clawback under the Capital Goods Scheme (see below).

The option to tax cannot be exercised in respect of residential property or lettings to connected parties/occupiers (except where the connected tenant/occupier has at least 90% VAT recovery).

The option to tax is specific to each letting. When the option is exercised, VAT at the higher rate (currently 23%) is levied on rents as they fall due.

### *Capital Goods Scheme (CGS)*

The Capital Goods Scheme is a mechanism for regulating deductibility over the 'VAT life' of a capital good. For VAT purposes, a capital good is a developed property or work on a previously completed property, i.e. refurbishment. The CGS ensures that the deductibility of VAT associated with a property correctly reflects the use of the property.

The VAT incurred on the acquisition or development of a property is deductible in accordance with the normal rules of deductibility. The VAT life of the property is divided into intervals – 20 intervals for new/redeveloped properties and 10 intervals for refurbishment, with each interval essentially equating to 12 months. The VAT initially deducted on the acquisition or redevelopment of a property will be subject to review and possible adjustments (time apportioned) over the VAT life of the property.

After each interval, the business must review its VAT recovery entitlement in respect of that capital good. If the recovery entitlement (taxable use) has decreased, the business must repay a proportion of the VAT previously deducted in that interval. If the recovery entitlement has increased, the business can get an additional VAT deduction (assuming all of the input VAT was not deductible at the time of purchase). In the case of a major change in use of the property, an accelerated payment may be required under the CGS or accelerated recovery may be possible under the CGS.

The CGS applies to sales of freeholds and freehold equivalent interests. If a sale is exempt, a clawback may arise under the CGS, whereas if a sale is taxable (for example, by way of a joint option for taxation), an additional VAT credit may arise for the vendor. The CGS also applies where an option to tax a letting is exercised and subsequently cancelled.

Transitional rules will apply to certain properties under construction at 1 July 2008 and to occupational leases granted prior to 1 July 2008.

As the legislation continues to be amended on a regular basis, specialist VAT advice should be obtained on all property-related transactions.

### *Stamp duty on transfers of property*

Stamp duty is payable on the transfer of most forms of property where such transfer is effected by way of a written document. In the absence of a written document, no charge will generally arise.

Duty of 1% applies on the transfer of common stock or marketable securities of an Irish company, where the value of the shares transferred exceeds EUR 1,000.

Duty of 1% applies on the transfer/purchase of residential property where the value of property does not exceed EUR 1m. Where the value of the property exceeds EUR 1m, duty of 2% applies on the excess.

Transfers of most other forms of property, including commercial property and intangible assets, attract duty at 2%.

Stamp duty relief is available for transfers arising from corporate reorganisations and reconstructions effected for bona fide commercial reasons. In addition, no duty arises on transfers between associated companies (90% direct or indirect relationships), subject to conditions. An extensive number of other exemptions are available, including for transfers of IP, a wide range of financial instruments, foreign land and foreign shares.

### *Local authority taxes on business property*

Property taxes, known as rates, are imposed by Local Authorities (city corporations, urban and county councils) on the owners or occupiers of land and buildings used for business purposes. Rates are based on the size (floor area) of the building and the level of the rates is fixed annually by reference to the budgetary requirements of the relevant Local Authority for facilities such as sanitation, public lighting, road maintenance, etc.

All commercial enterprises are charged water rates. Water usage is normally metered for larger companies and a charge made per 1,000 litres of water used. The charge varies from Local Authority to Local Authority. Some smaller users may be charged on a fixed basis rather than a metered basis. The government has recently announced that it is considering the introduction of household water charges for private residences.

### *Municipal tax system in Ireland*

Commercial rates are levied by local authorities on commercial and industrial property. The rates payable on a specific property are determined with reference to a valuation provided to the relevant local authority by the Valuations Office.

While it is the central Government that dictates the method of rate calculation, rateable properties, and persons liable for rates, etc., it is each Local Authority that publishes the valuation roll containing valuations of all properties within their jurisdiction. The Local Authority also calculates the final rates liability and arranges for collection of the rates.

The income collected from rates is used to fund the services provided by the local authorities such as housing, water supply, disposal of commercial waste, maintenance of parks and public areas, public lighting, etc.

### *Properties liable to rates*

The properties assessed for rates are limited to industrial and commercial properties including buildings, land, railways, tolls, shops, factories, etc., on the condition that the property is either:

- occupied, or
- unoccupied, but capable of being the subject of rateable occupation by the owner of the property.

### *Who pays rates?*

Generally the person in occupation of rateable property on the date the rates liability arises is liable for the rates. Exceptions to this are:

- Rates levied on the owner of property, vacant at the date of charging the rates.

- Where the person who had liability for rates defaults on payment, a subsequent occupier can be held liable for up to two years' rates arrears owed by the previous occupier.

Lease agreements typically provide that the tenant is the person liable for any rates' liability that arises on the property, although this varies depending on the actual terms of the agreement reached between the parties.

### *Calculation of the rates' liability*

The liability arising is assessed by multiplying the rateable valuation (see below) by the rateable valuation multiplier set by the local authority.

### *Rateable valuation*

The rateable valuation is based on the letting value of the property. To arrive at a valuation, the annual rent that the property could reasonably be expected to command is estimated and it is then discounted to the estimated letting value as at a prescribed date (in accordance with legislation). A percentage factor is applied to this valuation to arrive at a rateable value. The percentage factor depends on where the property is situated.

For the purpose of valuation, fixed plant should be taken into account and included in the value of the relevant property. Plant is assessed by reference to its construction/replacement cost together with an agreed formula for site value. In the case of industrial property, more complicated valuation rules apply and detailed advice would be required.

### *Rateable valuation multiplier*

The rateable valuation multiplier is fixed each year by the relevant county, city or town council. For illustrative purposes a sample of rateable valuation multipliers is set out below:

<u>City</u>	<u>Multiplier (2012)</u>
Cork	74.05
Dublin	61.19
Galway	65.46
Limerick	74.93
Waterford	66.22

Example of the calculation of a rateable valuation:

Estimated rental value	EUR 50,000
Adjust by percentage, say,	0,5%
Rateable value	EUR 250.00

If, for example, the property was situated in Cork City, the annual rates liability would be calculated as follows:

Rateable value	EUR 250.00
Multiplier applying in 2012	74.05
Annual rates liability	EUR 18,512.50

Rateable valuations are determined by the Valuation Office, which is independent of the local authorities, but is ultimately controlled by Government. Where a person is not satisfied with the valuation of their property have the right to appeal through a formal appeals process.

## *Exemptions*

Certain properties, although valued, are exempt from the payment of rates. Such properties are outlined in Schedule 4 of the Valuation Act 2001 and include properties occupied by the State, churches, hospitals and buildings used for charitable purposes.

## *Valuation Act 2001*

The Valuation Act 2001 was introduced for the purpose of simplifying the valuation system, improving both equity and transparency for ratepayers. One of the key features of the Act is the provision to base valuations on the full current open market annual rental value of the property.

The Act also provides that all commercial and industrial property should be revalued by reference to market conditions. These valuations will be published and available for public inspection. Given greatly increased property values over recent years, revaluations under the Act are likely to produce increases in the rateable valuation of most properties.

The Valuation Office has commenced the revaluation of all commercial and industrial properties throughout the country. The Valuation Office optimistically expects to revalue the entire country over a five-year period, but given the scale of this operation, it is likely to take a much longer period of time.

## *Local authority taxes on residential property*

### *Non-principal private residences*

A flat rate levy of, currently EUR 200, applies to rented residential properties, holiday homes and second homes (subject to certain exemptions). Properties that are principal private residences are excluded from the charge. The levy is payable by the owners of the property to the Local Authority in whose area the property concerned is located.

### *Household Charge*

An annual Household Charge of EUR 100 has been introduced in order to fund local services. The Government has recently restated its intention to introduce a general valuation based property tax for private residences, although we await details of the manner in which it may be introduced. The Household Charge is an interim measure and it is likely that it will be replaced in future by the valuation-based property tax.

The new charge is separate from, and in addition to, the Non-Principal Private Residence (NPPR) charge. The charge is, in general, payable by the owner of any private residence, including apartments and bedsits, certain exemptions in limited circumstances.

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# *Real Estate Going Global Israel*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 10 July 2012.

# *Real Estate Tax Summary – Israel*

## General

A foreign investor may invest in Israeli real estate directly, or through an Israeli or foreign company or partnership.

## Rental income

Rental income accrued or derived in Israel is taxable in Israel under the Israeli Income Tax Ordinance.

Rental income is recognised for tax purposes either on the accrual basis or on the cash basis, according to the status of the taxpayer and the scope of the activities. However, passive rental income, including such income received in advance, is generally taxable on a cash basis. Rental income from an active rental business operation is generally reported on an accrual basis.

In principle, expenses, but generally not of a capital nature, are deductible against rental income if they are incurred wholly and exclusively in the production of taxable income, e.g. insurance, maintenance, property management. A withholding tax (WHT) of 25% may be imposed, subject to any tax treaty reduction, in the case of certain overseas expenditures, such as interest on borrowings. Alternatively, a foreign lender who incurred proven costs in the course of its earnings of such interest income can request to pay tax at regular rates on its net margin.

## *Taxation of rental income*

Taxable rental income accrued or derived in Israel, less expenses, is subject to tax at the following rates.

For the year 2011, companies are taxed at the corporate tax rate of 24%. The rate is scheduled to be raised to 25% for year 2012 and thereafter. (Please note that for companies that are treated as 'Approved Enterprises', different corporate tax rates may apply).

Dividend distributions to a foreign resident are generally subject to a 25%-30% WHT (30% if paid to a 10% or more shareholder of a non-publicly traded company) or to a lower treaty rate where applicable. For example, currently (2012), regular profits of 100 for an Israeli company will provide a net, i.e. after tax, dividend income of 52.5 (56.25 where the 25% WHT rate applies). This is 100, less 25 company tax and 22.5 dividend WHT, assuming the absence of a reduced rate due to a treaty.

Individuals are taxed at rates of 30% to 48% for passive rental income. In addition, individuals are taxed at rates of 10% to 48% in the case of rental income from an asset that the individual has used in the production of income, derived from their self-employment or business, for at least ten years prior to the rental. Furthermore, the 10% to 48% rate applies to individuals who reached age 60 in the tax year, or are older than 60 years.

Individual landlords of residential homes are eligible, under certain conditions, to select one of the following taxation alternatives:

- Individual landlords are eligible, under certain conditions, for a complete exemption from income tax for rental income (from Israeli homes) not exceeding a prescribed amount per month (currently ILS 4,910). No special approval is needed to qualify for this exemption. If the rental income is higher than the prescribed amount, then a certain portion of the rental income will be taxed at the individual's marginal tax rate.
- Individual landlords are eligible, under certain conditions, to elect to pay tax at the rate of 10% on their gross rental income from homes (no deductions, set-off losses or tax exemptions are allowed).

There are no debt/equity limits at present in the case of regular activities in Israel. Special tax and other benefits and minimum equity rules apply to approved properties (see *Incentives* below).

## Depreciation

Depreciation is generally allowable on a straight-line basis for expenditures on buildings, but not on land, at the following annual rates.

Building owned by an industrial company or a hotel	5%
Other buildings	4%

The above rates apply to the assets of an entity that adjusts its income statement according to the inflationary tax adjustment rules, or which elects to keep books of account on a US dollar basis, where this is permissible. Accelerated rates of depreciation are available for owners of certain properties.

## Loss carryforward

Passive losses from leasing a building may only be used to offset rental income from the same building in future years, or land appreciation realised upon disposal of that building. When prepaid rental payments have been subject to tax in an earlier year, as discussed above, the related expenses incurred in subsequent years are allowed as an offset in the year in which they were incurred against income from any source. In the absence of such other income, the losses may be carried back and be used to offset the prepaid rental income.

Losses from an active property rental business operation may be used to offset other taxable income in the same year from any source, or against future active business income and certain capital gains.

## Gains from the sale of Israeli real estate

Land Appreciation Tax (LAT) is imposed on gains from the sale of Israeli real estate. LAT is also imposed on the sale of an interest in a non-traded real estate association (REA), defined as a company or partnership whose principal assets consist of Israeli real estate. However, the tax liability arising from the sale of such an association will be

determined, based on the capital gains tax provisions of the Israeli Income Tax Ordinance. For LAT purposes, a sale includes most types of dispositions, as well as the grant of a lease capable of lasting for 25 years or more.

In measuring the lease period, an option to lease is considered as if exercised. Detailed expenditure deduction rules are prescribed for LAT purposes.

The resulting taxable capital gain is divided into real and inflationary elements. The real capital gain is taxable as follows:

- Assets purchased from 7 November 2001 and thereafter:
  - The tax rate applicable to real capital gains derived from the sale of an interest in real estate (and in REAs that enjoyed this status for at least five years prior to the sale) for individuals is 20% and for corporations the rate is 25%. However, according to tax legislation published on 6 December 2011, the portion of the gain for individuals attributed to the period between 31 December 2011 and the sale date shall be taxed at the rate of 25% (30% for shareholder which holds 10% or more in Real Estate Company).
- Assets purchased prior to 7 November 2001 – for individuals:
  - Capital gains arising from the sale of an interest in real estate (and in REAs) by an individual shall be apportioned on a linear basis to the periods before and after 7 November 2001.
  - The portion of the gain attributed to the period before 7 November 2001 shall be subject to tax at the taxpayer's marginal tax rate up to 48% (2012).
  - The portion of the gain attributed to the period between 7 November 2001 and 31 December 2011 shall be taxed at the preferential rate of 20%.
  - The portion of the gain attributed to the period between 31 December 2011 and the sale date shall be taxed at the rate of 25% (30% for shareholder which holds 10% or more in Real Estate Company).
  - A special tax rate may apply with respect to real estate acquired prior to 1960. Certain rules apply.

The inflationary amount is equal to the original cost of the asset, less depreciation where applicable, multiplied by the percentage increase in the Israeli consumer price index (CPI) from the date of the acquisition of the asset to the date of its sale. This inflationary amount is exempt to the extent it accrued on or after 1 January 1994, and is subject to tax at a rate of 10% to the extent it accrued before then. When determining the inflationary amount, foreign residents who invested in foreign currency may opt to use the relevant foreign currency exchange rate instead of the CPI.

### *Capital losses*

Capital losses realized as from 1996 might be used to offset capital gains, including land appreciation, realized in the current tax year or in future years.

## Exemptions and deferrals

### *Exemption on disposal of a home in Israel*

Full or partial exemption from land appreciation tax may be available to a resident or non-resident of Israel upon the disposal of a home in Israel. This exemption is available, provided that the seller was not entitled to the tax benefits relating to approved rental buildings, or that the home constituted inventory for income tax purposes. A home is generally defined as a dwelling or part of a dwelling, the construction of which has been completed and which is owned or held by lease by an individual and which is used for residential purposes. Detailed qualifying rules apply. Among the major exemptions available are the following (which apply only to a home actually used for residential purposes for at least four years preceding the sale, or for 80% of the period for which the appreciation is calculated):

- The sale of a home in Israel by an individual, if the owner did not sell any other home in Israel in the preceding four years (and eight years for sale which will be carried out from 1 January 2013 until 1 January 2021).
- The sale of a home in Israel at least 18 months after a previous home sale by an individual, if the seller did not simultaneously own more than one home in Israel at the time of the sale and the preceding four years.
- Pursuant to tax legislation published on 24 February 2011 the sale of additional two apartments in Israel will be subject to an exemption provided that the sale value is less than ILS 2,200,000, otherwise the exemption will be reduced. This legislation is effective until 31 December 2012.

### *Deferral (rollover) of land appreciation tax*

Certain transactions may give rise to a deferral, or rollover, of liability for land appreciation tax, if the seller was not entitled to the tax benefits relating to approved rental buildings. In general, qualifying transactions include, among others, the following:

- A transfer of real estate rights without consideration by an individual to their relative, which is not an association under their control.
- A transfer of real estate rights without consideration (rather than shares) by their owners to an association that is a REA, or which becomes one as a result of the transfer.

A transfer of real estate rights within the scope of certain reorganizations. In this respect, certain transactions may be currently exempt from land appreciation tax, where the sale of one real estate right and its replacement by the purchase of a new real estate right may give rise to a deferral of liability for land appreciation tax until the future sale of the new real estate right.

## Incentives

Approved property status was granted for projects for building and leasing industrial, commercial or residential buildings or combinations thereof, subject to the fulfillment of certain conditions. According to an update in a tax legislation published

on 16 December 2009, properties receiving this status may enjoy the tax benefits, as set out below:

### *Approved rental property and approved industrial building*

Accelerated depreciation is available in respect of approved properties.

Taxable rental income derived from an approved residential building owned by a corporate entity is generally subject to corporate tax at a rate of 25% (or 11% if certain conditions are met) for an unlimited period. A company whose share capital, shareholders' loans and related rights are more than 25% owned by foreign investors, and which owns an approved rental building may qualify as a foreign investors' company, which, depending upon the level of foreign ownership, may provide for a company tax rate as low as 10%.

Dividends paid to shareholders of an Israeli incorporated company from the income of an approved residential building are subject to WHT of 15%.

For approved industrial buildings, taxable benefits include company tax rates ranging from 25% to as low as 10%, where the level of foreign investment is 90% or more. A tax holiday was allowed to be elected in certain circumstances. These beneficial tax rates are similar to those applicable to rental income of approved rental buildings.

### *2007 new law – approved rental property incentives*

In March 2007 a new law came into force, which provides significant tax benefits for Israeli companies that own residential buildings, meeting certain conditions (e.g. the building must have at least 16 rental apartments averaging not more than 100 square metres and the building must be used by the company for at least 10 years as a rental property only).

The principal benefits include the following:

- Exemption from LAT upon the sale of the building provided certain conditions are met.
- Accelerated depreciation up to 20% annually.
- Ability to offset rental losses from the buildings as business losses.

### *Land Taxation Law – amendments 70 and 71*

On 1 August 2011, a new amendment passed into the Israel Land Taxation Law (Betterment and Purchase), 1963 (hereinafter, respectively: 'the Law') to promote a reform, that was initiated as a temporary provision, for increasing the supply of residential apartments.

Key changes in the new amendment are:

- Tax benefits for the sale of 'non-qualifying residential apartments' if the sale is made up to 30 June 2013.

- Escalated tax burden on the sale of investment residential apartments after 1 January 2013.

On 7 March 2011, a new amendment passed into law, introducing, among other things, new rules for declaring property transactions, appealing assessments and tax withholding by the buyer of right in real estate as an advance payment of betterment tax liability of the seller.

The amendment applies to transactions where the date of sale/action in a land association is on 31 March 2011 or thereafter.

The most material change in the Amendment is a mandatory withholding of betterment tax (an advance payment on tax liability) – Commencing on 31 March 2011, any buyer, including foreign residents, is required to withhold 15% betterment tax from the consideration for land property whose date of purchase by the seller is before 7 November 2001 and 7.5% of the consideration for sales of right in real estate bought since 7 November 2001. The withholding will be part of the betterment/income tax liability of the seller.

The aforementioned mandatory withholding will be effective until 1 April 2013 (i.e., as of this date thereafter the tax payment liability will be solely on the seller).

### *Exemption for transfer of shares in real estate association (REA) to foreign shareholder*

A foreign company owning shares in a REA may transfer its shareholdings in the REA to its shareholders in a manner that is exempt from LAT and transfer tax. Detailed rules apply.

## Value added tax (VAT)

VAT is generally imposed on transactions conducted in Israel, as well as transactions relating to assets or activities in Israel. The standard rate of VAT in Israel is currently 16% (same as in 2011). However, no VAT is imposed on an individual's purchase of a residential unit (apartment/house) from another individual.

Residential rental transactions for a period not exceeding 25 years are exempt from VAT. However, the consequences of exemption on such output, is that input VAT relating to attributable costs, may not be recoverable. Other real estate rental and sale transactions will generally be subject to VAT, in which case the attributable input VAT should be recoverable through the normal VAT mechanism.

## Transfer fees (acquisition tax)

While the seller of real estate is generally liable to LAT, the transfer fees are generally payable by the purchaser of real estate. These fees are currently payable at the following rates:

Regular rate	5%
Apartment/house intended for residential use (first and only home) and exceeding the amount of ILS 1,421,760	0% <sup>1</sup> 3.5% to 5% <sup>2</sup>
Apartment/house intended for residential use (additional home)	5% to 7% <sup>3</sup>
New immigrants – apartment/house and business. Premises special concessionary rate subject to conditions	0.5% and 5%

Transfer fees are not imposed on the following:

- The acquisition of shares in a corporate REA which are publicly traded on the Tel-Aviv Stock Exchange
- The acquisition of units in publicly traded partnerships whose principal activity is the construction or sale of housing
- The acquisition of shares by a non-resident investor in a foreign investor's REA

A new immigrant is entitled to tax relief from transfer fees.

## Miscellaneous taxes

Municipal betterment levies and fees are imposed on the assessed increase in value resulting from the rezoning of land and on planning permit applications. There are also annual municipal taxes and license fees on buildings.

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<sup>1</sup> up to ceiling of approximately ILS 1,421,760

<sup>2</sup> these reduced rates apply where the unit is the only dwelling owned by the individual or where in the 24 months after the purchase, the individual sold another dwelling unit which had been his only dwelling unit [12 months where the unit was purchased from a building contractor – detailed rules apply].

<sup>3</sup> 5% up to ceiling of ILS 1,000,000, 6% for the part of consideration exceeds ILS 1,000,000 and up to ILS 3,000,000, 7% for the part of consideration exceeds ILS 3,000,000

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# *Real Estate Going Global Italy*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 27 August 2012.**

# Real Estate Tax Summary – Italy

## General

In the Italian tax system, real estate property is generally deemed to produce taxable income, even if not used by the owner or even if not leased out. This income is subject to taxation in the hands of the owner of the real estate, in property or by virtue of another real right, according to his nature and tax status, characteristics and use of the real estate.

Investments in real estate properties can be executed directly, with acquisition of the property right by the individual/corporate investor (resident or not resident), or indirectly, through to the acquisition of interest in Italian real estate companies.

## Direct investments

Rentals (reduced from a 15% flat reduction) are taxed following the income taxes rules applicable to the owner of the real estate without deduction of acquisition/owning costs (with a few exceptions). For real estate not leased out, the taxable base may be the cadastral (deemed) income (with relevant exceptions). Acquisition, owning and certain other costs may increase the purchase cost of the property and therefore decrease the capital gain on disposal.

However, capital gains upon disposal of real estate are tax-exempt if the sale occurs after five years from acquisition/construction (with some exceptions).

For direct investment, depending on the nature of the investor, the following matters have to be considered:

- Individuals
  - Individuals (resident and non-resident) are subject to personal income tax (IRPEF), which applies at rates increasing by brackets of income (from 23% to 43%, with the maximum rate applicable from EUR 75,000 of aggregated taxable income), and to local surcharges (up to 2.2%);
  - For residential buildings leased out, a favourable substitute tax regime (*cedolare secca*), alternative to the ordinary taxation, is provided; the substitute tax applies with rate of 21% (19% in some circumstances);
  - Local property tax (IMU) is due; it is not tax deductible, but it replaces income taxes in case of not leased properties.
- Companies
  - Non-resident entities other than individuals (the resident ones are considered in the indirect investment) are subject to corporate income tax (IRES) with a rate equal to 27.5% (the taxable base is the same ordinarily stated for individuals).
  - Local property tax (IMU) is due and it is not deductible for IRES purpose.

## Indirect investments

Indirect investments are made through the acquisition of interest in companies holding real estate properties. Generally the preferred legal form is the limited liability company (S.R.L.) which is more flexible than the company limited by shares (S.P.A.) with regard to corporate governance.

Frequently, investments are made through a two-tier structure using a foreign holding company located in EU countries (so allowing the application of EU Tax Directives) or countries which have a Tax Treaty with Italy.

As far as the Italian property company is concerned, rentals are generally taxed following the business income tax rules, with possibility to deduct related costs (some limits are stated for corporate income tax – IRES - purpose), with relevant exceptions.

Capital gains upon disposal of real estate are always subject to corporate income tax (IRES) and to regional tax on production (IRAP), with the exception of sale of an ongoing concern (always exempt from IRAP).

Indirect investment generates income having financial nature: dividends from net profits distribution and capital gains from shareholdings disposal. The taxation of such income in Italy varies according to the kind of shareholding and tax status of the beneficiary. In this respect, Tax Treaties may allow reductions or exemptions. In certain circumstances, exemption is directly provided by the Italian domestic legislation.

The following matters have to be considered:

- Limited companies are subject to corporate income tax (IRES), with rate of 27.5%, and to regional tax on production (IRAP), with ordinary rate of 3.9% (IRAP has a different taxable base than IRES: labor costs and interest expenses are not deductible for IRAP purpose - different rules and rates apply to banks, financial companies and insurance companies);
- Depreciations are always deductible for IRAP purposes while are subject to certain limits for IRES;
- Interest expenses are deductible for IRES purposes within the limits stated by the thin capitalisation rules (based on the EBITDA of the company); conversely interests are fully not deductible for IRAP;
- Tax loss carryforward is admitted for IRES purposes only with different limits depending on the period of incurrence; carry-back is not admitted in the Italian tax system;
- Local property tax (IMU) is due and it is never deductible, neither for IRES nor for IRAP purposes.
- Specific attention has to be given to the non-operative companies legislation, which aims to tax companies deemed non-operative on the basis of their assets for both IRES and IRAP purposes. The non-operative status is determined making reference to the actual proceeds and to persisting loss position.

## Indirect taxes implications

Regardless the structure of the investment, acquisition of Italian properties is generally subject to VAT and transfer taxes (i.e., registration, mortgage and cadastral taxes), with different rules, according to the nature of the property and the subjects involved. Nevertheless, the transfer of interest into Italian real estate companies does not imply transfer of the properties and indirect taxes generally fall due in nominal fixed amount.

Also lease and financing agreements may have implications in terms of VAT and indirect taxes (in principle, registration tax; also mortgage tax for loans guaranteed by mortgage).

## Further real estate investment possibilities

Alternatives to the direct acquisition of Italian real estate properties and to the acquisition of interest in real estate companies owning such properties may be the investment in Italian institutional investors operating professionally in the Italian real estate industry, such as:

- Investment into units of an Italian Real Estate Investment Fund (*Fondo Comune di Investimento Immobiliare*);
- Investment into shares of an Italian SIIQ (*Società di Investimento Immobiliare Quotata*), the Italian version of the better known REITs in force in other countries.

# ***Real Estate Investments – Italy***

## **Direct investment in Italian real estate property**

### ***Legal aspects***

#### **Introduction**

In principle, a foreign private individual/company has the faculty to purchase a real estate property in Italy. Usually, foreigners do not make real estate investments directly, but through a special purpose vehicle (SPV), especially for tax purposes. For these investments, the Italian Civil Code contains a general legal provision concerning the ‘treatment of foreigners’, pursuant to which ‘Foreigners enjoy the civil rights attributed to citizens on condition of reciprocity and subject to the provisions contained in special statutes. This provision also applies to foreign entities.

#### **Ownership in compliance with the Italian Constitution**

The Italian Constitution, issued on 27 December 1947, which came into force on 1 January 1948, expressly distinguishes between public and private ownership. Ownership has to be considered as a continuous right and not subject to prescription.

#### **Ways to acquire a real estate ownership**

In accordance with the Italian Civil Code, ownership is acquired by two different means:

##### ***Original acquisition***

###### **Accession**

Accession operates in the case of the incorporation of goods (generally, the inclusion of a secondary property into a main property), owned by different owners, due to human activity, or due to natural events. As a general principle, the owner of the soil acquires the ownership of any work, or structure performed under, or upon the mentioned soil.

###### **Adverse possession**

The ownership of real estate property – together with the other real rights of enjoyment regarding the property – is acquired through the continuous possession without interruption for: (i) 20 years (ordinary term); (ii) 10 years from the date of transcription of an instrument suitable for transferring real estate ownership when the relevant acquisition is achieved in good faith from a person who is not the real owner of the property transferred.

##### ***Derivative acquisition***

###### **Agreement**

The acquisition of real estate ownership determines the taking over of the same right of the previous owner.

*Mortis causa* succession, which is ruled by the legal provisions relating to the individuals whose inheritance is involved, at the time of the death.

### Expropriation for public interest

Compulsory sale of the debtor's goods, which may occur at the end of judicial proceedings started by creditors (the Italian Civil law, however, expressly provides for the following actions that may be exercised by the owner, in order to protect his/her ownership: (i) replevin action; (ii) *actio negatoria*; (iii) action for settlement of boundaries; (iv) action for placing of boundary markers).

### Co-ownership of real estate rights

#### *Condominium*

Considering that a subjective right may belong to different persons who are – all of them – co-holders of the same right, with reference to real estate, the most complex form of co-ownership is represented by the condominium in buildings.

In particular, the peculiarity of the condominium is represented by the circumstance that each owner of an apartment has, not only the exclusive and complete ownership of the mentioned apartment, but, additionally, the co-ownership of some parts of the building that are common property among the owners of the different floors or part of floors of the structure.

#### *Mortgage*

Mortgage is a typical right of lien, which may be created on real estate property and on real estate enjoyment rights.

The mortgage gives the creditor a right to expropriate the property made liable to secure his/her claim, even against a third-person transferee, and a preference in being paid from the proceeds of the expropriation. In any case, the owner remains the person who has the faculty to enjoy the property. A mortgage should be imposed on the debtor's property and it is established by means of the inscription in the immovable property registers of the place where it is located.

The mortgage is effective for a period of 20 years from its inscription date. The effects of the inscription cease unless it is renewed before the expiration of the mentioned time limit.

Therefore, before executing any legal documents, agreements and deeds involving Italian real estate property, the relevant public registers should always be thoroughly searched and verified to ascertain the absence of mortgages on the property.

A real estate property may be subject to further prejudicial inscriptions (i.e. seizure of attachment of property, etc.). Considering that the inscriptions are recorded in the Land Registry, it is advisable to investigate their potential occurrence prior to the execution of any agreement relating to the property and, in particular, the deed of transfer.

### *Tax aspects*

#### **Income tax – Qualification of income**

In principle, real estate registered (or which should be registered) in the Cadastral Registry is deemed to produce a taxable income (i.e., cadastral income), even if not used by the owner or even if not leased to third parties. This income is generally subject to taxation in the hands of the owner of the real estate, in property or in virtue of another real right (e.g. usufruct, use, habitation, emphyteusis, etc.). The taxation

of this income varies according to its tax qualification, nature and tax status of the owner, characteristics and destination of the real estate property.

### Income tax – Taxation of individuals

In Italy, individuals are subject to IRPEF (*Imposta sul Reddito delle Persone Fisiche*, the income tax for individuals).

#### *Resident individuals*

Italian resident individuals are subject to IRPEF (and to local surcharges) on their worldwide income. IRPEF is calculated through gradual rates by brackets of income, which presently range from 23% up to 43%. The highest rate applies on the amount of the aggregate taxable income exceeding EUR 75,000. In addition to IRPEF, a regional surcharge, with rate ranging from 0.9% to 1.4%, and a municipal surcharge, with rate up to 0.8%, have to be paid.

For income tax purposes, an individual is considered to be a resident of Italy if for the most part of the year (i.e. 183 days or more) she/he is registered in the resident population registers, or has his/her domicile or residence in the Italian territory (pursuant to the Italian Civil Code and therefore, respectively: where the main place of affairs and interests is established and where there is the usual abode).

As far as real estate income is concerned, resident individuals are subject to income tax for the income (not collected in the context of a business activity carried out) deriving from their real estate properties, even if located outside the Italian territory (with some exclusions).

Until 2011 the taxable income deriving from the ownership of real estate properties not leased to third parties was calculated on the basis of their cadastral income, corresponding to the 'ordinary' and/or 'average' income that is deemed to be produced by such properties, determined by the Cadastre in consideration of their characteristics. The cadastral income (revaluated by 5%, as provided by the law) was adjusted in relation to the ownership period incurred in the tax period (which for individuals always corresponds to the calendar year) and increased by one-third where required.

From 2012, IMU (the new local property tax) replaced ICI (the former local property tax) and also IRPEF and local surcharges with regard to the income deriving from real estate properties not leased out to third parties. Therefore, in this case, only IMU falls due.

Where the real estate properties are leased to third parties, the taxable income for income tax generally corresponds to the highest amount between: (i) the cadastral income revaluated by 5% and adjusted according to the owning period; and (ii) the rentals accrued in the relevant tax period according to the lease agreements. For this purpose rentals benefit from a 15% flat reduction, in consideration of any management and maintenance expenses incurred by the owner, regardless of whether such expenses have been actually suffered or not. As a result, related expenses actually incurred are not relevant for tax purposes.

For the lease of buildings for housing purposes, an alternative (and more favourable) tax regime is available. Such tax regime, called '*cedolare secca*' and applicable upon option of the lessor, provides for the application of a substitute tax, which replaces income taxes (IRPEF and local surcharges), registration tax and stamp duty on the lease agreement. The substitute tax applies at the rate of 21% (19% in particular circumstances) on the gross annual rental (no costs deduction is allowed). Various

conditions should be met in order to opt for the ‘*cedolare secca*’ regime, and in particular:

- the lease agreement should not be concluded within the framework of a business, art or profession by both the lessor and the lessee, if any;
- the real estate should be classified as housing residence in the Cadastral Registry and should be effectively used in this way (appurtenances also can benefit from this regime).

### *Non-resident individuals*

Foreign individuals are considered non-resident in Italy for tax purposes if they have no domicile or residence in the Italian territory for the most part of the year.

However, they may be subject to tax in Italy (at the same rates provided for Italian residents) in respect of income deemed to be sourced inside the Italian territory, such as the case of income deriving from real estate properties located therein.

In this respect, the tax rules provided for Italian residents also apply to non-residents.

### **Income tax – Taxation of corporate entities**

From an income tax perspective, entities other than individuals have to be divided into the following categories, which generally apply different income tax regimes:

- Resident partnerships (including also other resident associations without legal personality and assimilated entities).
- Resident companies (including companies limited by shares and limited liability companies).
- Resident commercial entities (carrying on business activities as sole or prevalent purpose).
- Resident non-commercial entities (not carrying on business activities as sole or prevalent purpose).
- Foreign companies and entities of any kind (with or without legal personality) with permanent establishment (PE) in the Italian territory (it has to be considered that, unless the contrary is proven, foreign companies controlling Italian companies or commercial entities are deemed to be Italian tax-resident if, alternatively, they are controlled by Italian resident subjects or are administrated by a body predominantly composed of Italian resident individuals).
- Foreign companies and entities of any kind without PE in the Italian territory.

The above entities, excluding the resident partnerships that are tax transparent (except for IRAP) and whose income is taxed directly in the hands of the partners proportionally to their participation, are subject to corporate income tax (IRES) and to regional tax on production (IRAP).

Tax rules concerning the determination of the taxable real estate income apply almost similarly to both partnerships and assimilated entities, as well as to companies and other commercial entities. Hereinafter, reference is made mainly to resident companies (i.e. companies limited by shares, S.P.A., and limited liability companies, S.R.L. –

to which PEs of foreign companies are assimilated for tax purposes), which are the most commonly used vehicles for real estate investments.

### *Resident companies*

#### **Corporate income tax (IRES)**

Resident companies (i.e. companies which have legal seat, place of effective management, or main business object in Italy for the most part of the tax period) are subject to corporate income tax (IRES), levied at the rate of 27.5%.

The taxable business income is computed by adding to the net civil result of the profit and loss (P&L) account of each tax period, any increasing or decreasing adjustment provided for by the business income tax rules.

Pursuant to the ‘worldwide principle’ on which the Italian tax system is based, as for resident individuals, the taxable income of resident corporate entities includes their worldwide income, i.e. the income also sourced outside the Italian territory (tax credit in Italy for income taxes paid abroad is provided).

Income from lands and ‘instrumental’ buildings (i.e. buildings directly used solely to perform the business activity and buildings whose destination cannot be changed without a complete transformation – i.e. commercial or industrial buildings, offices, etc. – even if not directly used or leased to third parties) are generally determined according to the tax rules applicable to business income, that’s in general revenues less pertaining costs.

The income deriving from ‘non-instrumental’ buildings (i.e. residential buildings not directly used solely for the purpose of the business activity carried out and not representing available stock) forms part of the taxable business income as follows:

- The cadastral income, revaluated by 5% and adjusted in consideration of the owning period incurred in the tax period, increased by one-third for buildings not leased to third parties.
- The highest amount between: (i) the cadastral income, revaluated by 5% and adjusted according to the owning period; and (ii) the rentals referring to the relevant tax period according to the lease agreements, reduced by a maximum 15% amount of the rentals for maintenance expenses actually incurred (other related expenses exceeding 15% of rentals are not deductible from income tax), for buildings leased to third parties.

Therefore, expenses and other items concerning ‘non-instrumental’ buildings are generally not deductible with exclusion of interest expenses on financing for the acquisition of the buildings. The local property tax (IMU) is always not deductible.

The IRES taxable base can be reduced through deduction of 10% of the IRAP (the regional tax on production) paid out during the year and, from the tax period current on 31 December 2012, through the full deduction of IRAP referable to the taxable portion of the labour costs (i.e., net of allowances deductions). For entities that cannot deduct labour costs and interest expenses for IRAP purposes, these provisions aim to reduce the tax burden associated to IRAP non-deductibility of these items.

The Allowance for Corporate Equity (ACE, ‘*Aiuto alla Crescita Economica*’) is another new tax relief (applicable from tax period 2011) which allows an additional deduction

for IRES purposes, corresponding to the notional return on capital, that's equal to the equity increases (not exceeding the amount of the net equity in each fiscal year) occurred during the relevant tax period, multiplied by 3% (this is the notional return rate applicable for the first three years; the rate for the following years will be determined at a later stage). The notional amount exceeding the taxable income of a year can be carried forward to increase the amount deductible from taxable income of the following tax periods.

### Thin capitalisation rule

For IRES purposes: (i) interests and similar expenses (i.e. the interest derived from loans, financial leasing contracts, bonds and any other contract of a financial nature) are deductible in each tax period up to the amount of interest receivables and similar revenues; any excess is deductible up to 30% of the 'rectified' EBITDA; (ii) interest expenses exceeding the 'rectified' EBITDA and unused 'rectified' EBITDA may be carried forward indefinitely in the following tax periods. Therefore, non-deducted interest expenses can be deducted in future years if, and to the extent, the interest expenses of such years do not exceed the interest receivables and 30% EBITDA of the same years.

Through a temporary rule applicable until the enactment of the reform of direct and indirect taxation of the real estate industry (originally announced for mid-2008, but to date not yet finalised), interest expense on facilities guaranteed with mortgage on properties addressed to the lease business are presently not subject to the 30% EBITDA limitation (and so are entirely deductible). According to the view expressed by the tax authorities, the full deductibility should be applicable only to companies not investing prevalently in real estate held as stock inventory.

With regard to the determination of the EBITDA, reference should be made to the income statement of the company (taking into consideration that rentals paid in respect of financial leasing contracts concerning instrumental assets are excluded, as for depreciations).

Mitigation of the interest expenses non-deductibility is possible under the domestic tax group regime, if and to the extent that other companies participating to the tax group have unused EBITDA against which the excess of interest expense may be deducted.

This interest deductibility limitation applies also to 'industrial holding companies' but it does not apply to banks, other financial institutions, insurance companies and to parents of banking/insurance groups for which the deduction of interest expenses is equal to 96% of their amount (both for IRES and IRAP purposes). However, for IRAP purposes, the 96% deductibility limit applies also to 'industrial holding companies', since for these entities interest income and expense are relevant for the purpose of this tax.

Since this provision regulates interest expense deduction for IRES purposes, it does not apply to partnerships (which are transparent for income tax purpose).

### Depreciation

As a general rule, land cannot be depreciated. Therefore, in order to determine tax-deductible depreciation, the cost of instrumental buildings has to be considered net of the cost of the areas (land) on which such buildings are built/located and/or of those areas representing their pertinences. The cost of such areas, if not autonomously bought, is quantified as the greater of: (i) the balance-sheet value of the year of purchase (if any); and (ii) 20% of the total buildings' cost, increased to 30%

for industrial buildings, defined as those used for the production and transformation of goods.

The above summarised non-deductibility regime applies also to instrumental buildings owned under financial leasing contracts, with regard to the amount of the periodical rentals corresponding to the value of the lands on which the leased buildings are built/located or representing their pertinences.

Regarding to instrumental buildings, they are usually depreciated at an annual ordinary rate of 3% (reduced to one-half – i.e. 1.5% – for the first year). This is applied to the purchase cost, increased by some ancillary expenses incurred for the property purchase (e.g. eventual indirect taxes, notary's fee, intermediation fee, etc.), certain interest costs, extraordinary maintenance and other capitalised costs, tax-relevant step-ups, etc. For shopping centres, an annual depreciation rate of 6% is applicable.

### Tax losses carryforward

For corporate income tax (IRES), the tax loss carryforward is admitted. Conversely, the regional tax on production (IRAP) system does not allow loss carryforward.

IRES tax losses can be carried forward without any time limit to offset a positive IRES taxable base. More precisely, tax losses incurred in the first three periods of activity (provided that such losses refer to a new business activity) can be used to entirely offset positive IRES taxable bases without any limit. Instead, tax losses incurred in subsequent years can be used to offset up to 80% of a positive IRES taxable base of any given year. The remaining 20% of the positive taxable base, in case tax losses of the first three years are not available, must be taxed at the ordinary IRES rate.

The loss carryforward is forbidden in case of transfer of shares representing the majority of voting rights in the company's general meetings, together with a change of the business activity from which the loss derived (see also section '*Decrease of capital*').

### Non-operative companies regulation

Real estate companies have to take into consideration the 'non-operative companies regulation' (or '*dummy companies legislation*').

A company is deemed to be non-operative if its average actual proceeds over the last three years (excluding the extraordinary ones) are lower than its expected proceeds. The latter are calculated by applying certain coefficients to the average value over the last three years of determined categories of assets (i.e. (i) financial stakes, securities and financial credits; (ii) buildings and certain other registered assets; (iii) other tangible and intangible assets). For these categories of assets the currently used coefficients, which signify the minimum profitability assumed for each category of assets, are the following: 2%, 6% (reductions are provided in particular circumstances) and 15%.

In the event that the company is deemed non-operative, and any of the causes of exclusion provided apply, the main consequences are the following:

- computation of minimum taxable base for income taxes purposes (both IRES and IRAP) by applying stated coefficients on the value for the year of the three above-mentioned asset categories (respectively: 1.5%, 4.75%, 12%, but reduced rates are provided in particular circumstances), regardless of the actual P&L account result for the year (as far as the minimum IRAP taxable base is concerned, some further

rules have to be taken into consideration). Tax losses of previous years cannot be used to reduce the minimum IRES taxable base;

- irrelevance of tax losses occurred in the years when the entity is deemed to be non-operative;
- limitations in recovering the VAT credit resulting from the annual VAT return.

The non-operative companies regulation is automatically inapplicable in specific cases provided by law (just for example: subjects which, due to the business performed, are obliged by law to be incorporated in the form of joint-stock company; subjects that are in the first tax period, subjects controlling listed companies or entities, or being themselves listed, or directly or indirectly controlled by listed companies or entities, etc.). The tax authorities can identify further cases of exclusion.

Furthermore, from the tax period current on 31 December 2012, a real estate company may be deemed non-operative, regardless if its actual proceeds are higher than the expected ones, if the same is in a 'systematic tax loss' position. Such condition is verified if the company generated tax losses for three consecutive tax periods (as resulting from its tax returns), or if in the same 3-year period it generates tax losses for 2 years and for the remaining year it earns proceeds lower than the expected ones. Also in this case, the same causes of exclusion stated above can be applied.

If none of the 'automatic' cases of exclusion can be invoked, the non-application of the 'non-operative' and 'systematic tax loss' companies regulations may be claimed, describing and documenting objective circumstances and situations which caused the non-operative status or the persisting loss position. Rulings are decided by the tax authorities within 90 days on a case-by-case basis, considering motivations pointed out by taxpayers. The petitions to obtain a ruling have to be filed 'pre-emptively' (i.e. at least 90 days before the deadline for filing tax returns).

### Regional tax on production (IRAP)

Business activities (with some exceptions) are subject to the regional tax on production ('*Imposta Regionale sulle Attività Produttive*', IRAP). This tax is levied on the net value of the production deriving from the business activity carried out.

The ordinary tax rate is 3.9%, but the IRAP ordinary rate for banks and other financial institutions is increased to 4.65%. Each Italian Region may increase or decrease up to 0.92% the ordinary IRAP rate (also applying different rates according to the business activity performed). In addition, the IRAP rate is increased (e.g. a further 0.15%) in those Regions that have the health service system in deficit.

The IRAP taxable base is different from the IRES one and it varies according to the kind of business activity carried out.

For entities performing industrial/commercial activities (including real estate property/management companies), other than banking and financial businesses, the IRAP taxable base is the result of the following calculation:

- + gross proceeds from sales and services
- +/- variations in inventory and work in progress
- + other non-financial incomes

- cost of raw and other materials
- cost of services (administrative costs)
- depreciation of tangible and intangible assets
- other operating expenses
- = value of production

The value of production also includes gains/losses deriving from disposal of real estate properties (even if non-instrumental or not directly used only for business purposes, and not representing stock inventory), unless the disposal intervenes in the context of a business or ongoing concern transfer which generates income not subject to IRAP.

Interest expenses (also those implicitly included in financial leasing rentals) and income are not included in the IRAP taxable base (in practice, they are, respectively, not deductible and not taxable). An exception is represented by the so-called industrial holding companies (i.e. in general, companies with the majority of balance-sheet assets related to stakes in non-banking/non-financial entities): for these companies interest income and expenses (the latest up to 96%) form part of the IRAP taxable base.

Provisions for bad debt and devaluation on assets and on receivables do not have to be considered in computing the IRAP taxable base.

For personnel costs, 'historically' not deductible for IRAP purposes, a partial deduction is available: EUR 4,600 for each employee (from 2012 increased to EUR 10,600 for men under 35 years old and for women, and to EUR 15,200 for the same subjects working in disadvantaged areas) plus relevant social contributions are deductible.

The local property tax (ICI, now replaced by IMU) is not deductible (as for IRES purposes).

Non-resident entities (i.e. individuals or corporate bodies) are subject to IRAP only when they perform commercial activities in Italy for at least three months through a PE or fixed place of business.

### *Non-resident companies*

Non-resident entities (i.e. entities that do not have legal seat, place of effective management, or main business object in Italy for the most part of the tax period), without a PE within the Italian territory, are subject to taxation in Italy only for income deemed to be produced therein. In this case, non-resident entities are subject to corporate income tax (IRES), levied at a rate of 27.5%, with exclusion of tax-exempt income and income subject either to a definitive withholding tax (WHT) at source or to a substitute tax.

The taxable income, if any, shall be determined in accordance with the rules provided for the tax category to which the taxable income pertains.

As far as income deriving from real estate properties located in Italy is concerned, the taxable income is determined as follows:

- For properties not leased to third parties, the taxable income is the cadastral income, revaluated by 5% and adjusted in consideration of the owning period incurred in the tax period, increased by one-third for residential buildings.
- For leased properties, the highest amount between: (i) the cadastral income, revaluated and adjusted as above and (ii) 85% of the rentals relating to the relevant tax period according to the lease agreements. In fact, for leased buildings the law admits a 15% flat reduction of rentals (a higher flat reduction is provided in some specific cases), in consideration of eventual management and maintenance expenses incurred by the owner. The flat reduction is recognised, regardless of whether expenses have been actually suffered or not. As a result, related expenses actually incurred are not relevant for tax purposes.

## Indirect taxes

### *Value added tax (VAT)*

#### *Transfer of property*

The transfer of a real estate property represents ‘transfer of goods’ for VAT purposes (unless it is included in an on-going business concern) and it falls in the scope of VAT (with the exception of non-buildable lands, never subject to VAT) if the vendor is a business undertaker or a professional taxpayer and the real estate is included among the assets concerning the business or professional activity carried out.

The Italian VAT system provides a general VAT-exemption regime to real estate transfers and leases with some exceptions. In this respect, once a real estate transaction falls in the scope of VAT, it has to be determined if it is subject to proportional tax or if the general VAT-exemption regime applies.

As far as lands are concerned, transfers of agricultural lands are always out of the scope of VAT. Transfers of other kinds of land are subject to proportional VAT.

With reference to buildings, different rules are provided for:

- Buildings for housing purpose.
- Instrumental buildings (i.e. buildings whose destination, because of their characteristics, cannot be changed without a complete transformation, i.e. commercial or industrial buildings, offices, etc.).

Transfers of buildings for housing purposes are VAT-exempt, with the following exceptions:

- Transfers executed, within five years from the end of construction or restructuring works, by builders or subjects that have performed building restructuring works.
- After five years, upon builder’s/restructuringer’s option to apply VAT (to be expressed in the transfer deed).

In these two cases, VAT applies according to the ordinary rules. In case of seller’s option the VAT is applied by the buyer (if it qualifies as a VAT entity) according to the reverse charge mechanism.

Transfers of instrumental buildings are VAT-exempt, with the following exceptions:

- Transfers executed by builders or subjects that have performed building restructuring, within five years from the end of construction or restructuring works.
- Upon seller's option (to be expressed in the transfer deed).

In case of seller's option the VAT is applied by the buyer (if it qualifies as a VAT entity) according to the reverse charge mechanism.

It is important to note that the execution of VAT-exempt operations generally reduces the recoverability of input VAT on purchases, since these transactions effect the VAT recoverability pro rata.

For real estate transfers subject to VAT, the tax generally applies with the following rates:

- the 21% ordinary rate (which, from October 2012, could be increased to 23%);
- the 4% and 10% soft rates (the latter, from October 2012, could be increased to 12%), applicable in particular cases (e.g. residential buildings having certain requirements; buildings, even under construction, sold by builders, certain restructuring works, etc.).

### Lease of property

The lease (including financial leasing) of real estate property falls in the scope of VAT when it is carried out by a company, or another VAT entity, since it is treated as supply of services. The VAT regime applicable to lease (and financial leasing) contracts concerning real estate property, provides for a general VAT-exemption regime, with some exceptions.

As far as lands are concerned, the lease of agricultural lands (other than those used as parking) falls in the scope of VAT as VAT-exempt transaction. The lease of parking areas and buildable lands is, instead, subject to proportional VAT.

With reference to buildings, there are different rules for:

- Buildings for housing purposes.
- Instrumental buildings (as defined).

Lease contracts (including the financial leasing ones) concerning buildings for housing purposes are generally VAT-exempt, apart from leases made by builders or subjects that have performed building restructuring works which can be subjected to VAT upon option to be expressed in the contract.

Lease contracts (including the financial leasing ones) concerning instrumental buildings are VAT-exempt, apart the case of lessor's option to be expressed in the contract.

It is important to note that the execution of VAT-exempt operations generally reduces the recoverability of input VAT on purchases, since these transactions effect the VAT recoverability pro rata.

For transactions subject to VAT, the applicable rate is generally 21% (which, from October 2012, could be increased to 23%). Different rates are provided in specific cases.

## *Registration tax*

### *Transfer of property*

The transfer of real estate properties is subject to registration tax, which may fall due in fixed or proportional amount.

In general, according to the principle of alternation between registration tax and VAT, for transactions subject to VAT (even under the VAT-exemption regime, but some exceptions are provided) registration tax is generally due at a fixed amount. Conversely, transactions out of the VAT scope are subject to proportional registration tax, with different rates according to the transaction's object and the parties involved.

As far as the real estate industry is concerned, some exceptions to the general principle of alternation are provided. As a result, the following rules generally apply.

Transfers of buildings for housing purposes are subject to registration tax at the fixed amount of EUR 168 if they are subject to proportional VAT. This is the case of:

- Buildings sold, within five years from the end of construction or restructuring works, by builders or subjects which have performed building restructuring;
- Upon option of the builder (or of the restrucurer) for sale after five years from the end of construction (or restructuring works).

For transfers of buildings for housing purposes VAT-exempt or out of VAT scope (such as, e.g. transfers performed by non-VAT entities), registration tax falls due in proportional amount. The rates generally applied are the following:

- 1% if the purchaser is a real estate trading company that commits itself, in the purchase deed, to sell the building within three years.
- 3% if the purchaser is a private individual using the building as his/her main residence ('first home').
- 7% in the other cases.

For transfers of real estate properties of historical, artistic and archaeological interest, the proportional registration tax rate (when applicable) is reduced to 3%, provided that the purchasing company complies with the related preservation and protection obligations.

For transfers of instrumental buildings (i.e. buildings whose destination, because of their characteristics, cannot be changed without a complete transformation), registration tax is due in the fixed amount of EUR 168, regardless of whether they are subject to VAT or VAT-exempt.

The registration tax rate for transfers of agricultural lands is 8% or 15%, depending on the nature of the purchaser. With reference to the transfer of buildable lands, registration tax is generally due, if the seller is not a VAT subject, at the proportional rate of 8%.

The taxable base is the commercial value of the real estate property at the date of the transfer (with some exceptions for certain residential buildings). The commercial value is the exchange value inferable from the market. As a consequence, the tax

authorities can amend the value declared by the parties should it be lower than the commercial value.

The tax authorities' assessment capacity is reduced in the case of residential building transfers to individuals (acting out of the business activity eventually carried out) where the taxable value is the cadastral value of the building, i.e. that determined by multiplying the cadastral income by specific revaluation coefficients (that vary according to the cadastral category of the building), regardless the actual purchase price and provided that specific requirements are fulfilled (so called '*prezzo-valore*' mechanism).

Both parties are jointly and severally liable for the payment of the registration tax.

### Lease of property

Lease contracts concerning real estate properties are generally subject to registration tax, regardless of whether or not the rentals are subject to VAT. Registration tax also applies to financial leasing contracts.

For the lease of buildings for housing purposes, registration tax is due annually at the rate of 2%, applied on contractual rentals pertaining to the relevant year. The rate is reduced to 1% for the lease of instrumental buildings, also in case the rental is subject to VAT (even upon landlord's option).

As far as long leases are concerned, registration tax may be paid in a sole instalment, upon contract registration, for the entire tenancy term, benefiting from a tax discount calculated based on the legal interest rate.

In case of lease of buildings for housing made by individuals, the substitute tax regime provided for the lessor for income tax purposes replaces also registration tax on rentals (see section '*Income tax – Taxation of individuals*').

With reference to lands, the lease of agricultural lands is generally subject to 0.5% registration tax; the lease of other kinds of land is subject to 2% registration tax if leased by a non-VAT subject, or to a fixed amount if leased by a VAT entity (so subject to VAT).

For financial leasing contracts, starting from the 1 January 2011:

- for contracts drawn up by a public deed or by an authenticated/notarised private deed, registration tax is due in fixed amount of EUR 168 (as consequence of the alternation VAT-registration tax);
- for contracts drawn up by a private deed (non-notarised) registration tax is due (in fixed amount of EUR 168) only in case of voluntary registration, or '*caso d'uso*' (i.e., filing, not required by the law, of the deed for the purpose of administrative activities/proceedings), or if it is mentioned in another document between the same parties which is subject to registration.

According to these new rules, the other indirect taxes (i.e. mortgage and cadastral taxes) apply in proportional amount upon the purchase of the leased building made by the financial leasing company; the same apply in fixed amount on the asset purchase made by the lessee after purchase option exercise upon redemption or expiration of the financial leasing contract (see also section '*Managing property in Italy*').

### *Cadastral and mortgage taxes*

The transfer of real estate properties is subject to specific formalities accomplished by special public offices that keep and preserve public real estate registers.

Each deed implying the transfer of real estate properties must be registered in these registers. These registrations are subject to cadastral and mortgage taxes at the following rates:

- mortgage tax: 2%, increased to 3% for instrumental buildings;
- cadastral tax: 1%.

Generally, the taxable base of these taxes is the same used for registration tax purposes.

The cadastral and mortgage taxes shall be applied at the fixed amount of EUR 168 each (i.e. for a total amount of EUR 336) if the transfer concerns a residential building representing the purchaser's 'first home'.

As well, cadastral and mortgage taxes are due in fixed amounts for transfers of buildings for housing purposes subject to proportional VAT.

Mortgage and cadastral taxes are generally levied upon the purchaser of the real estate. However, as for registration tax, purchaser and seller are both jointly and severally liable for these taxes.

### *Inheritance and gift taxes*

Inheritance tax and gift tax affect free transfers and transfers due to death (*mortis causa*).

The gift tax applies also to assets tied up for a specific purpose (*vincolo di destinazione*) and for assets assigned to a trust.

For inheritance tax and gift tax purposes, the same rates apply.

The applicable tax rates vary according to the specific relationship between the transferor subject (i.e. the *de cuius* in the case of inheritance; the donor in the case of gift) and the transferee subject (i.e. the heir, for inheritance; the donee for gift), regardless of the nature of the transferred assets.

In particular, the following rules apply:

- Transfers in favour of the spouse and relatives in direct line are subject to 4% tax, with an exempt amount of EUR 1m (i.e. the tax applies on the exceeding amount).
- Transfers in favour of brothers and sisters are subject to 6% tax, with an exempt amount of EUR 100,000 (i.e. the tax applies on the exceeding amount).
- Transfers in favour of other relatives until the fourth degree and relative-in-law in direct and collateral line until the third degree are subject to 6% tax (with no exemption).
- Other transfers are subject to 8% tax (with no exemption).

If the transferred object is a real estate property, proportional mortgage and cadastral taxes may be due. However, in the case of buildings for housing purposes, these taxes may be applied in a fixed amount (EUR 168 each) to the extent that the beneficiary subject (i.e. heir or assignee) is entitled to apply the tax relief provided for the purchase of the 'first home'.

### Local property tax: IMU

From 2012 the ownership of real estate properties (i.e. buildings, building areas and agricultural lands) is subject to a new municipality tax: the IMU (*Imposta Municipale Propria*). This tax replaces ICI (*Imposta Comunale sugli Immobili*) and also supersedes IRPEF (income tax for individuals) and local surcharges due for income from lands and buildings not leased.

The taxable person, regardless of his/her residence, is:

- the owner of the property right;
- the owner of a real estate right allowing the availability and the use of the property (i.e. usufruct, use, habitation, perpetual lease, right of common on the building);
- the lessee, in case of financial leasing contracts (*locazione finanziaria*).

The tax base is calculated by (i) taking the cadastral income resulting in the Cadastral Register at the beginning of the year, (ii) revalued by 5% and then (iii) multiplied by specific multipliers, varying according to the nature of the property (ranging from 160, provided for residential buildings, to 60 for industrial/commercial properties – 55 in particular cases).

The IMU ordinary rate is 0.76%, which can be increased/decreased by 0.3% by the competent municipality, or reduced to 0.4% for leased properties.

The rate that applies to individual's 'first home' and its appurtenances (with a maximum of 3, one for each of the 3 different cadastral categories provided for appurtenances) is set at 0.4%, but it can be increased/decreased by 0.2% by the competent municipality.

IMU is generally paid in two instalments: the account, equal to the 50% of the tax due, is paid by 16 June of the relevant year; the remaining balance is paid by the following 16 December.

IMU is not deductible for the purpose of income taxes (IRPEF, for individuals, and IRES/IRAP, for corporate bodies).

## Buying real estate property through an Italian company

### *Legal aspects*

Notwithstanding the possibility to purchase a real estate property by means of a direct investment, foreign investors also have the opportunity to benefit from greater flexibility and protection when structuring investments in Italian companies.

## *Tax aspects*

An alternative to the direct acquisition of real estate properties may be the purchase of interest in companies owning such properties. From the investors' perspective, this route has specific features, different from those associated with the direct investment in real estate.

In general, the investment through a real estate company generates income having a financial nature: dividends from net profit distributions and capital gains from shareholding disposals.

### *Income tax – Taxation of individuals*

For personal income tax (IRPEF) purposes, the tax regime of dividends and capital gains varies according to whether they are related to 'qualified' participations or 'non-qualified' participations.

Participation is defined as qualified if it exceeds 5% of the capital, or 2% of the voting rights, of a company listed in a regulated stock market. In the case of non-listed companies (including partnerships), the respective thresholds are 25% of the capital and 20% of the voting rights. Participations not exceeding the above percentages are non-qualified. These thresholds are tested over a 12-month period.

#### *Resident individuals*

Dividends collected by resident individuals with regard to non-qualified participations are subject to a 20% definitive WHT/substitute tax.

Conversely, dividends collected in respect of qualified participations are subject to ordinary IRPEF on 49.72% of the same, so they are exempt at 50.28%.

Where dividends refer to participations held in relation to business activities performed, they form part of the business income for 49.72% of the same (thereby exempt at 50.28%) and are taxed accordingly.

Capital gains realised by resident individuals on disposal of non-qualified participations into companies, partnerships and other bodies, are subject to a substitute tax at a rate of 20%; capital losses, other than those concerning qualified participations, can reduce the taxable base, under terms and limits stated by the law.

Capital gains realised on disposal of qualified participations are subject to ordinary IRPEF on 49.72% (therefore exempt at 50.28%) of their amount, net of 49.72% of capital losses having the same nature.

Capital gains referring to participations held in relation to business activities carried out, form part of the taxable business income. In this context, under the participation exemption regime, the capital gain may be 50.28% exempt from taxation, provided that subjective and objective requirements are met; in this case, only 49.72% of the capital gain is taxable. It should be noted that the participation exemption is not applicable to participations in real estate companies, with the exception of real estate building/trading companies.

#### *Non-resident individuals*

Dividends deriving from ordinary shares or quotas collected by non-resident individuals are subject to a 20% domestic WHT, levied at source as definitive payment. However, according to domestic rules, non-resident subjects can claim a refund for part

of the Italian WHT suffered, for the amount of taxes they have paid abroad on the same income, but up to one-fourth of such Italian WHT (i.e. max 5%). The payment of the foreign taxes has to be certified by the competent foreign tax authority. Reimbursement should be not provided for dividends collected on savings shares.

Furthermore, the Italian WHT may be reduced by means of application of bilateral treaties against double taxation entered into by Italy, if any, and provided that all requirements are met.

With reference to capital gains, the tax treatment provided for resident individuals applies also to non-resident individuals.

In this respect, however, two specific exceptions are provided for non-residents. Capital gains are not taxable in Italy in the following cases:

- If deriving from the sale, against consideration, of non-qualified participations in resident companies listed in regulated markets.
- If deriving from the sale, against consideration, of non-qualified participations in resident companies not listed in regulated markets, provided that the foreign subject is resident of a White List country (this list includes countries which have entered with Italy agreements allowing the exchange of tax information).

In the other cases the exemption in Italy may be obtained by application of bilateral treaties against double taxation and provided that all requirements are met.

## Income tax – Taxation of corporate entities

### *Resident companies*

For corporate income tax (IRES) purposes, as far as dividends are concerned, the dividend exemption regime applies; therefore, dividends collected are excluded from the taxable business income up to 95% of their amount. This regime is not applicable to: (i) foreign dividends sourced in countries not included in the White List for which a positive ruling is not obtained; (ii) foreign source dividends related to profits that have been already taxed according to the Controlled Foreign Companies' rules, which are fully exempt; (iii) dividends collected on shares held for trading for entities drawing up their financial statements in accordance with IAS/IFRS.

With reference to capital gains, if certain conditions are met, the corporate income tax rules provide a participation exemption regime for 95% of the gain realised on disposal of certain participations held as investment for at least 12 months. On the other hand, capital losses on same participations are not deductible. However, the participation exemption regime is generally not applicable to participations in real estate companies, with the exception of real estate building/trading companies.

If the participation exemption regime cannot be applied, capital gains are entirely included in the taxable business income of the tax period of realisation and taxed accordingly. However, if participations are held as fixed assets and booked as such over the last three financial statements, capital gain may be taxed in equal instalments in the tax period of realisation and in the following four years.

A specific anti-abuse provision (not applicable to entities drawing up the financial statement according to IAS/IFRS) is in force from 2006 to contrast the tax abusive utilization of the dividend exemption regime. In particular, capital losses on shares, quotas and financial instruments similar to shares, acquired in the 36 months prior to

their disposal, not having the requirements to benefit from the participation exemption regime, are not deductible up to the non-taxed amount of dividends collected in the 36 months prior to the realisation of the capital loss.

For shares potentially falling in the scope of participation exemption (thus out of scope of the above mentioned anti-abuse rule), but held for less than 12 months, exempt dividends collected during the holding period reduce the purchase cost of the shares (therefore increasing the taxable capital gain or reducing the deductible capital loss). As far as the regional tax on production (IRAP) is concerned, for commercial and industrial companies both dividends and capital gains deriving from participations are not subject to tax, being excluded from the IRAP taxable base (see also section *'Direct investment in Italian real estate property'*).

### *Non-resident companies*

For non-resident companies without a PE in Italy, Italian source dividends are subject to a 20% domestic WHT, levied at source as definitive payment. However, according to domestic rules, non-resident entities can claim for a refund of part of the Italian WHT suffered, for the amount of taxes they have paid abroad on the same income, up to one-fourth of such Italian WHT (i.e. max 5%). The payment of the foreign taxes has to be certified by the competent foreign tax authority. Reimbursement should be not provided for dividends collected on savings shares.

The Italian WHT may be reduced pursuant to the application of the treaties against double taxation entered into by Italy, if any, and provided that all requirements are met, or set to zero according to the EEC Directive no. 90/435, the Parent-Subsidiary Directive, to the extent that all conditions are met.

For dividends paid out to corporations and other entities subject to income tax and resident in an EU Member State or in a state belonging to the European Economic Area (EEA), the domestic WHT rate is 1.375%.

Regarding the tax treatment of capital gains, rules outlined in respect of non-resident individuals also apply in the case of foreign companies (nevertheless, the applicable tax rate is the 27.5% IRES rate).

### *Indirect taxes*

Transfers of shares or quotas of Italian companies are VAT-exempt transactions (i.e. falling in the scope of VAT, but zero-rated) and are subject to registration tax at a fixed amount (EUR 168) if the transfer is executed through a public deed (i.e. a deed drawn up by a public notary) or a private deed with authenticated signatures (i.e. with only signature(s) authenticated by a public officer, generally a public notary). In case of private deed, registration tax is due, at a fixed amount (EUR 168), only in case of voluntary registration, or *'caso d'uso'* (i.e., filing, not required by the law, of the deed for the purpose of administrative activities/proceedings), or if it is mentioned in another document between the same parties which is subject to registration.

# Financing the indirect real estate property acquisition

## *Equity financing*

### Legal aspects concerning joint stock companies/limited liability companies

The Italian Civil Code expressly provides the faculty to increase the share/quota capital through the issuing of new shares/quotas.

In this regard, the legal provisions set forth with reference to S.p.A. and S.r.l. state that no corporate capital increase may take place until the shares/quotas previously issued are not completely paid up.

At the time of the subscription, the underwriters of newly issued shares/quotas are obliged to pay to the company at least 25% of the nominal value of the subscribed shares/quotas. In the event that a share/quota-premium is expressly provided, the premium itself must be paid fully at the time of subscription.

If the capital increase is subscribed by the sole quota holder, the contribution has to be completely paid up at the time of the subscription.

The increase of the share/quota capital may also take place by means of contributions in kind and of credits, provided that they are performed in compliance with the law.

Concerning the law provisions with reference to S.p.A., it is advisable to consider that the newly issued shares and bonds convertible into shares have to be offered, first, in option to the shareholders proportionally to the number of shares already owned by them.

No option right is given in the case of newly issued shares, which, according to the resolution for the share capital increase, must be paid by contributions in kind.

### Tax aspects

A company's capital increase is subject to registration tax.

If it is made through the contribution of cash or assets other than immovable properties, registration tax is due in the fixed amount of EUR 168.

Conversely, a company's capital increase made through contribution of immovable properties (i.e. commercial/housing buildings, lands, real enjoyment rights on immovable properties, etc.) is subject to proportional registration tax, with rates ranging from 3% to 15% according to the nature of the contributed property.

## *Debt financing*

### Legal aspects

The Italian Civil Code expressly provides, with reference to S.r.l., the quota holders' financing to the company, defined, for this purpose, as the financings that are granted at a time when – also taking into consideration the type of the business carried out – there is an excessive imbalance of the debt position compared to the net equity, or when the company's financial condition requires a capital contribution. The purpose

of the mentioned financings has to be found in the aim to provide the company – usually lowly capitalised companies characterised by a few number of members or family companies – with the instruments necessary for supporting the company activity, without the need to increase the corporate capital.

As for the S.p.A., it must be pointed out that the Italian Civil Code does not expressly regulate such an issue. In this regard, although the analogical application of the provision applicable to S.r.l. also to S.p.A. is disputed, Italian authors appear in favour of its extension.

According to the resolution of the Interdepartmental Committee for Credit and Savings (CICR), issued on 3 March 1994, amended by the resolution of the same body, dated 19 July 2005, no. 1058, shareholders are allowed to finance the company, only if expressly provided for in the memorandum of association and only when the members have been registered in the shareholders/quota holders' book for at least three months and hold a participation at least equal to 2% of the corporate capital.

## Tax aspects

### *Indirect taxes*

In general, loan agreements may fall in the scope of indirect taxes (i.e. registration tax, mortgage tax, stamp duty). However, for loan agreements entered into by exchange of correspondence, indirect taxes are due only in case of voluntary registration, or '*caso d'uso*' (i.e., filing, not required by the law, of the deed for the purpose of administrative activities/proceedings), or if it is mentioned in another document between the same parties which is subject to registration.

Mortgage loans are subject to mortgage tax, with a rate of 2% for the mortgage raising, 1% for its renewal and 0.5% for its cancellation.

Nevertheless, medium to long-term loans (i.e. at least 18 months) granted by banks and other authorised financial institutions are subject to a substitute tax (with a rate of 0.25% or 2%, according to the nature of the borrower and of the related real estate property). This replaces the other indirect taxes (in particular – registration tax, mortgage tax, cadastral tax and stamp tax).

### *Personal income tax*

For IRPEF purposes, a particular relief is provided for individuals in respect of interest payable on mortgage loans obtained for the acquisition of the residential building used as main residence if particular conditions are met. This relief (which is a reduction of the gross income tax) is allowed for 19% of interest paid during the tax year, up to a maximum amount of EUR 4,000 (i.e. the tax relief is not computed on the exceeding amount of interest paid).

### *Corporate income tax*

For corporate taxes, as a general rule, interest payable on debt financing is deductible for corporate income tax (IRES) purposes, but not for the purpose of the regional tax on production (IRAP – in this respect, different rules apply to banks and other financial entities).

For financing operations performed with foreign-related parties, the interest rate shall comply with the arm's length principle.

Nevertheless, the deduction of interest costs, as well as other expenses, derived from transactions performed with entities resident in countries different from those included in the White List (as defined), is allowed provided that the Italian borrower can prove that the foreign lender actually performs a business activity in its country of residence, or that the transaction has been actually executed and for sound business reasons.

### *Withholding tax on interest*

In principle, interest paid to business operators is included in the taxable business income. If such interest is subject to WHT at source, the latest is generally levied as an advance payment of income tax (IRES or IRPEF).

On the contrary, the WHT represents a definitive taxation when interest is paid to individuals (and not related to a business activity eventually carried out) or to non-resident subjects. In this case, the subject collecting the interest has no further tax obligations to fulfil.

From 2012, the WHT rate provided for interest is 20%.

For interest paid to non-resident subjects (other than those resident in the so-called 'Black List' countries, or tax havens), the above rate may be reduced or set to zero in accordance with the treaties against double taxation executed with Italy.

Moreover, according to the Interest-Royalties EU Directive (i.e. Directive no. 2003/49/EU) interest payments are not subject to the Italian WHT at source if certain conditions are met.

The exemption from Italian WHT at source also applies to interest (and royalties) paid to PEs, located in other EU member states, of foreign EU companies meeting the above requirements.

## *Decrease of capital*

### *Legal aspects concerning joint stock companies/limited liability companies*

The decrease of the share/quota capital can be effected on a voluntary basis either by releasing shareholders/quota holders from the duty of making payments still owing, or by reimbursing capital to the shareholders/quota holders. The reduction of the share/quota capital may also occur in the following cases:

- Decrease of share/quota capital pursuant to losses;
- Decrease of share/quota capital below the legal minimum amount.

### *Tax aspects*

IRES tax losses can be carried forward indefinitely to offset positive IRES taxable bases, although within specific limits (see also section *'Tax losses carryforward'*).

No loss carry-back is allowed in the Italian tax system.

## *Managing property in Italy*

### *Leases*

#### *Legal aspects*

According to the relevant provision of the Italian Civil Code, the lease is an agreement by which one party binds themselves to let the other party enjoy a movable or immovable good during a fixed period of time and for a defined consideration.

The lease agreements have to be divided into two categories:

- Lease for private purpose (expressly provided by Law 392/78).
- Lease for commercial purpose (provided by Law 392/78).

Both types of agreements are also regulated by the Italian Civil Code, which sets forth the general provisions concerning the lease contract.

#### *Lease for private purpose*

According to Law 431/98, the minimum term of lease agreement concerning immovable for private purpose cannot be lower than four years. The lease agreement is automatically renewed every four-year period, save for the cases in which the landlord intends to change the destination of use of the property.

At the expiry of the second term, each of the parties may decide to ask for the renewal of the agreement in accordance with new T&C, or, alternatively, to renounce to such faculty, by means of sending a prior written notice to be sent, by registered letter, at least six months before the expiry of the term of the agreement.

In addition, Law 431/98 provides for a second type of lease agreement for private purpose, to be drawn up in compliance with the conditions and the criteria for quantification of the rent, as set forth by the associations of builders and tenants. The term of this type of agreement cannot be less than three years and renewable for two further years.

#### *Lease for commercial purpose*

Lease agreements for commercial purposes are expressly regulated by Law 392/78. The main contractual clauses, suitable to be applied in compliance with Italian legislation, are the following:

##### *Term*

Not lower than six years (in the case when the destination of use is industrial, commercial, handcraft work, tourist interest) or nine years (in the case of hotel management) and, in any case, not higher than 30 years.

##### *Right of withdrawal*

The parties have the faculty to allow contractually the possibility for the tenant to withdraw from the agreement, at any time, upon prior written notice to be sent to the landlord by means of registered letter, return receipt requested, at least six months before the date in which the withdrawal must be effective. Independent from the contractual provisions agreed by the parties, should serious reasons occur, the tenant is entitled to withdraw from the agreement, at any time, upon prior written notice of six months to be sent to the landlord.

### *Renewal*

According to Section 28 of Law 392/78, lease agreement for commercial purposes is automatically renewed every six-year period, in the case when the destination of use is for industrial purposes, and every nine years in the case of hotel management, unless a prior written notice is sent by one party to the other party by means of registered letter, at least, respectively, 12 or 18 months before the expiry of the term of the agreement.

### *Denial of renewal*

According to Section 29 of Law 392/78, the landlord has the right to deny the renewal of the agreement at the expiry of the first term if one of the hypotheses listed in the above-mentioned section occurs. (By way of example and without limitation, in case the landlord intends to: (i) modify the destination of use of the building, using the immovable as a private house; or (ii) destroy the building in order to rebuild or reconstruct it.) However, it is possible to provide within the lease agreement the landlord's waive to exercise the right set forth by Section 29 at the expiry of the first term.

### *Adjustment of the rent*

The parties may agree to yearly adjust the rent, upon request of the landlord, according to the variations of the Italian consumer price index published by the *Istituto Nazionale di Statistica* (ISTAT), for a maximum percentage of 75%.

### *Maintenance*

Generally, the ordinary maintenance of the building is performed by the tenant; the extraordinary one by the landlord.

### *Sublease*

It is usually negotiated by the parties the possibility for the tenant to sublease the building, in full or in part, as well as to assign the rent agreement to third parties. The tenant, in any situation, is entitled to sublease the building, or to assign the relevant agreement, even without authorisation of the landlord, provided that it is jointly leased, or assigned the business, or the branch of business as a going concern.

### *Pre-emption right*

According to Section 38 of Law 392/78, in the case where the landlord intends to transfer the property of the building against payment, it must give to the tenant the possibility to exercise the pre-emption right set forth by the law. In particular, the landlord has to send a communication to the tenant containing the purchase price of the building, the selling T&C and the invitation to exercise the pre-emption right. The tenant has the faculty to exercise such right within 60 days from the receipt of the landlord's communication.

### *Redemption right*

According to Section 39 of Law 392/78, in case the landlord does not grant the tenant the right to exercise the pre-emption right or perform the transfer against a consideration lower than the one communicated to the tenant, the latter has the faculty to exercise the redemption right, within six months from the transcription of the deed of transfer.

### *Indemnity for loss of goodwill*

In the case of termination of the lease agreement, not determined by the non-fulfilment or notice of withdrawal of the tenant, such party has the right to obtain an indemnity

equal to 18 monthly instalments of the last rent paid. In the case of hotel management, the indemnity is equal to 21 monthly instalments.

#### *Energetic certification*

Legislative Decree no. 28/2011 (published on the Official Gazette no. 71/2011, entered into force on 28 March 2011), implementing the Directive 2009/28/EC of the European Parliament and of the Council, dated 23 April 2009, on the promotion of the use of energy from renewal, has introduced several amendments to Legislative Decree no. 192/2005. In particular, according to Legislative Decree no. 28/2011, it is now mandatory to insert in the rental agreements of immovables (or individual property units), a clause by which the tenant shall acknowledge the receipt of the information and documentation regarding the energetic certification of the buildings; such provision applies only to the buildings or to the property units already provided by an energy performance certificate, pursuant to Section 6, paragraph 1, 1-*bis*, 1-*ter* and 1-*quater* of Legislative Decree no. 192/2005.

#### *Tax aspects*

##### *Income tax*

See specific sections of '*Direct investment in Italian real estate property*'.

##### *Indirect taxes*

See specific sections of '*Direct investment in Italian real estate property*'.

#### *Financial leasing contract*

##### *Legal aspects*

The financial leasing agreement is a contract that is not ruled by the law and in force of which a party (lessor) grants another party the right to use an asset for a certain period of time, versus the payment of a rent. At the expiration of the lease, the lessee may choose to return the asset to the lessor, or to purchase it for an amount of money that has been established in advance.

Notwithstanding the lack of an acknowledgement by the Italian regulations of an autonomous identity to the leasing agreement, it is worth noting that its development and wide use in recent years has generated a lot of interest from the Italian authors and case law, which have tried, on the one side, to treat it similarly to one of the contractual schemes expressly provided by the Italian Civil Code (lease, sale with reserved ownership or loan) and, on the other side, to qualify it as an 'atypical' agreement.

Subject to the above, the financial leasing agreement must be drawn up in written form. It is also necessary that the transcription of the term of the agreement is longer than nine years (in compliance with the provision of Section 2643, no.8, of the Italian Civil Code regarding the 'transcription of acts concerning immovable'). As for the main obligations of the parties, the lessee has to: (i) pay the rent, (ii) receive the immovable, (iii) use the immovable in compliance with its destination of use, (iv) perform the ordinary and extraordinary maintenance of the building.

On the other side, the principal duties of the lessor are: (i) sign the sale and purchase agreement with the vendor of the building chosen by the lessee, (ii) identify with the lessee the delivery T&C of the building, (iii) grant an option right to the lessee for the final purchase of the building.

The main contractual clauses, suitable to be applied in conformity with Italian legislation are the following:

#### *Term*

It is usually calculated based on the nature of the good chosen by the lessee and the relevant financial treatment. In the case of real estate, the minimum term generally adopted is equal to eight years.

#### *Amount of the rent*

The amount of the leasing rent is calculated on the basis of the value of the leased building, the length of the lease and the applicable interest rate. The rent is generally composed of a principal amount '*quota capitale*' plus interest payments, which are calculated by applying the rate chosen by the leasing company, or negotiated by the parties.

#### *Payment of the rent*

Usually the lessee has to pay a huge amount (a so-called '*maxi-canone*') at the time of entering into the agreement and, afterwards, monthly instalments.

It is also possible to provide for a different periodicity (quarterly, six-monthly, etc.).

#### *Redemption price*

At the end of the agreement, the lessee has the faculty to purchase the building through the payment of a minimum amount, usually equal to 1% of the original value of the immovable. In general, the lessee also has to pay the expenses and fees concerning the transfer and the registration of the purchase deed. Alternatively, the lessee may generally decide to ask for a postponement of the expiry date of the agreement or to return the building to the leasing company.

#### *Costs*

Generally the lessee has to bear the daily expenses (electric power, gas, consumptions, etc.) regarding the services used for the activity connected with the immovable.

#### *Additions or innovations*

The lessee is not entitled to perform any addition or innovation on the building without the lessor's approval.

#### *Damages to the immovable*

Generally, in the event of damage or destruction of the building, the lessee is obliged to restore or rebuild the immovable, otherwise the agreement is considered terminated.

#### *Insurance of the immovable*

The lessee is generally obliged to enter into an insurance agreement at the lessor's favour in order to cover the risks for civil responsibility and for the detriment of the immovable.

#### *Sale and lease back agreement*

The sale and lease back is a kind of lease agreement in force of which an entity sells to a lease company an immovable (or movable) asset, which is used in the course of its business. Simultaneously, the lease company, after having paid the consideration to the selling entity, leases the same asset to the entity itself (lessee), with the provision that the lessee has the possibility to obtain the ownership back of the asset at the end of the lease, by paying a small amount of money.

The sale and lease back is aimed at providing the companies with cash in hand, while they do not lose the availability of an asset that is used in order to carry out their business.

This kind of lease is not ruled by specific legal provisions in Italy, but it is widely used and has been considered by the most recent case law as lawful, subject to certain conditions. More in detail, this kind of agreement has been deemed as unlawful (and void) when the transfer of the ownership is merely aimed at constituting a guarantee for a loan granted to the lessee (as infringement of the prohibition to enter into *'patto commissorio'* agreements).

### *Tax aspects*

#### **Income tax**

Real estate financial leasing agreements are executed by financial intermediaries, which are regulated entities, duly authorised by supervisory authorities.

Pursuant to the rules concerning the tax deductibility of financial leasing rentals, applicable to entities drawing up the financial statements in compliance with Italian generally accepted accounting principles (GAAP), the business lessee can deduct the rentals if the duration of the financial leasing contract exceeds two-thirds of the tax depreciation period of the leased asset (determined by the tax depreciation rates stated by the law for different categories of assets).

With specific reference to financial leasing contracts having as object real estate properties, if the two-thirds of the tax depreciation period is lower than 11 years or longer than 18 years, the tax deduction of the financial leasing rentals is allowed only if the duration of the contract is at least, respectively, 11 years or 18 years.

As far as IRAP is concerned, the amount of the rentals corresponding to interest paid to the lessor is not deductible in the hands of industrial or commercial lessees, due to the irrelevance of interest costs and income for the purpose of the regional tax.

Pursuant to the income tax rules introduced in 2006 in respect of depreciation of lands on which buildings are built/located, the partial non-deductibility regime provided for the depreciation of instrumental buildings owned in property has also been extended to those owned under financial leasing contracts. This is with regard to the amount of the *'quota capital'* of the periodical rentals corresponding to the value of the lands on which the leased buildings are built/located or representing their appurtenances, determined according to the method stated for instrumental buildings in property (see section *'Direct investment in Italian real estate property'*).

The price paid by the lessee to exercise the purchase option, during, or at the expiration of, the financial leasing contract, may be integrally deducted in one year, only if not exceeding EUR 516.46. Otherwise, it will be depreciated over the time provided for by the law (buildings are generally depreciated at an annual ordinary rate of 3%; lands cannot be depreciated).

The lessor is empowered to depreciate the leased real estate property according to the amortisation plan agreed in the contract (so-called *'financial depreciation plan'*).

#### **VAT**

For lease contracts concerning real estate properties (including the financial leasing ones), the Italian VAT system provides a general VAT-exemption regime, with some exceptions (see section *'Direct investment in Italian real estate property'*).

## Registration tax

From 1 January 2011, real estate financial leasing contracts drawn up in the form of public deed or authenticated private deed are always subject to EUR 168 fixed registration tax (as consequence of the alternation VAT-registration tax); contracts drawn up in the form of non-authenticated private deed are subject to registration only in case of voluntary registration, or '*caso d'uso*' (i.e. filing, not required by the law, of the deed for the purpose of administrative activities/proceedings), or if it is mentioned in another document between the same parties which is subject to registration; in these cases, registration tax is levied in fixed amount (EUR 168). Furthermore, proportional mortgage and cadastral taxes are levied at the time of purchase of the building by the leasing company; conversely, the purchase made by the lessee after exercise of the purchase option upon redemption, or expiration of the leasing contract is subject to mortgage and cadastral taxes in fixed amount (EUR 168 each).

More specifically, mortgage tax and cadastral tax, respectively apply on purchases made by the leasing company as follows:

- Instrumental building: 3% and 1%, if the operation is subject to VAT.
- Instrumental building: 2% and 1%, if the operation is not subject to VAT.
- Residential buildings: 2% and 1%.

## Usufruct

### *Legal aspects*

See section 'Real estate enjoyment rights'.

### *Tax aspects*

#### Income tax

For income taxes purposes, the usufruct owner is deemed to be the owner of the real estate property (see section '*Direct investment in Italian real estate property*').

#### Indirect taxes

The real right of usufruct is subject to registration tax (at the same rates provided for the transfer of properties to which it refers) at the time when the property and the usufruct are separated. No registration tax is due when they are reconciled (due to the termination of the contract or to the death of the usufruct owner).

The usufruct value is determined by multiplying the 'annual revenue' (which is obtained by multiplying the value of the full ownership of the property by the legal tax rate, which from 1 January 2012, has increased from 1.5% to 2.5%) by special coefficients, which depend on the number of usufruct years, or on the age of the usufruct owner for life usufruct.

## Transfer of real estate property in Italy

### *Legal aspects*

The Italian legal system requires compulsorily the involvement of public notaries in the drafting of sale and purchase agreements of land or buildings, being this activity expressly reserved to them.

### Real estate sale and purchase agreement

In accordance with the Italian legal provisions, the sale and purchase agreement is aimed to transfer the ownership of the property in exchange for a defined price. In particular, the immediate effect of the execution of a sale and purchase agreement is the transfer of the title on a specific property from the seller to the purchaser. The transfer of the possession of the sold property does not necessarily occur simultaneously with the transfer of title, as it is possible to postpone it to a following moment.

The main obligations of the seller are: (i) to deliver the property to the buyer, (ii) to cause the buyer to acquire the ownership or other right in the property, if the mentioned acquisition is not an immediate consequence of the agreement, (iii) to guarantee the buyer against eviction and defects of the property.

On the other side, the purchaser is bound to pay the price within the term and in the place expressly fixed by the agreement. Otherwise, the payment has to be made at the time when, and in the place where, the delivery is made. Should the price not be paid on delivery, the payment has to be made at the seller's domicile.

Usually, the purchaser, in order to obtain the necessary funds for paying the price of the property to the seller, enters into a loan agreement with a bank guaranteeing the repayment of the loan raising a mortgage on the property purchased in favour of the bank itself. In these cases, the public notary takes care not only to draft the sale and purchase agreement but also the mortgage deed.

From a general point of view, it is worth noting that the purchaser should ask the seller for the delivery of all the documents and information that give evidence of the compliance and fulfilment of construction and planning permits, safeness certificate and environmental obligation set forth by the Italian legal provisions in connection with the relevant business activity.

Regarding the construction and planning permits and the safeness certificate, contents and release conditions are expressly set forth by the Presidential Decree issued on 6 June 2001, no. 380, and its further amendments (i.e. Law Decree no. 70/2011), concerning the legal provisions and regulations related to constructions (known as '*Testo Unico Edilizia*').

The construction and planning permits should be obtained by the municipality of the place where the property is located in accordance with the specific provisions contained in the regulations of each municipality, district, or region. In particular, such permits are expressly requested not only in the case of new building construction but also in the case of changes to be carried out in order to improve an existing property (by way of example: restorations, change of destination of the property, demolition of old property in order to build a new construction, etc.).

As for the safeness certificate, the municipality of the place where the property is located should release a document attesting the safeness of the property. In particular, the safeness certificate is released by an expert, after having carried out adequate inspection activities, and it attests the existence of the conditions listed below, necessary in order to use and inhabit the real estate property (i.e. safety, hygiene, healthiness, energy savings of the buildings and installed equipment).

From a general point of view, it is worth noting that it is advisable to request the delivery of these documents before the completion of a real estate investment

in order to check if the property meets the requirements and the expectations of the investing company. To this regard, please note that the Italian Civil Code expressly provides for the seller's obligation to deliver all the documents and certificates pertaining to the ownership and use of the real estate property at the time of the execution of the deed of transfer.

Therefore, prior to the execution of a real estate sale and purchase agreement, it is generally advisable to perform an environmental due diligence in relation to the property and to the business activity, if any.

This due diligence process should provide the purchaser with a detailed assessment of the historic, current and potential future environmental risks that may arise, by way of example and without limitation, from existing contamination caused by past operations, planned operations and third-party claims for environmental damages.

Pursuant to Italian Civil Code, the real estate share and purchase agreement may provide a sort of 'call option right' in favour of the seller, according to which such party has the faculty to repurchase the title of the sold property upon restitution of the price and reimbursement pursuant to the criteria set forth by law. This faculty may be exercised within a time limit agreed by the parties, which cannot be greater than five years in the sales of immovable. The redemption agreement must be registered in public registers and it is effective against third parties.

At the time of transfer of a property's ownership, the parties are bound to provide the notary with the following documents and/or information: (i) T&C of payment of the agreed consideration for the sale and purchase of the real estate, (ii) mediation (if applicable) of a real estate agent (mentioning the relevant data of the individual or entity involved) and the amount of the commission paid, (iii) energetic certification (where requested by regional laws or regulations).

With reference to the energetic certification, the Legislative Decree issued on 19 August 2005, no. 192, as modified by Legislative Decree no. 311 issued on 29 December 2006, concerning the energetic efficiency of real estate properties, sets forth that it is compulsory to attach to real estate deeds of transfer and lease agreements, the energetic certification.

In the case of new-built real estate properties, please consider that, pursuant to the Italian legal provisions, the energy certificate shall be released, at the end of the works, by the builder and duly approved by the director of the works. Such certificate should be filed with the competent municipality jointly with the declaration attesting the end of the works.

### The preliminary agreement

The preliminary agreement is a binding contract whereby the parties agree in writing to enter into a future final real estate property sale and purchase agreement. In general, by means of entering into a preliminary agreement, both parties mutually agree to purchase and sell a specified property, reserving the faculty to further negotiate the exact T&C of the sale.

According to the provisions of the Italian Civil Code, the preliminary agreement must be drawn up in the same form required by the law for the definitive one and therefore it should be executed by a notary deed or certified private deed. Subject to the above, it is a common practice to sign a preliminary agreement without the involvement

of the public notary, in order to identify the main T&C of the sale, agreeing to have only the definitive text executed in compliance with the provisions of the law.

Considering that the preliminary agreement has to be deemed as a commitment to buy the property and to pay the corresponding price (in addition, a security deposit, defined '*caparra confirmatoria*' is usually paid at the time of the execution), it is advisable for the buyer, before the execution of the preliminary agreement, to obtain all the necessary documentation regarding the property.

Generally, the security deposit is qualified by the parties as a down-payment of the purchase price and, as a consequence, treated accordingly at the time of execution of the definitive real estate sale and purchase agreement.

Should the buyer refuse to enter into the definitive agreement, the seller has the right to withdraw from the preliminary agreement, keeping the security deposit. Conversely, in the event of the seller's default, the purchaser has the similar right to withdraw from the preliminary agreement, asking for the payment of an amount equal to two times the security deposit, originally paid to the seller.

Alternatively, the party who is not in default may decide to demand performance, or termination of the preliminary agreement, asking for the compensation of damages.

From a practical point of view, the preliminary agreement should always: (i) define the property (through the property deed, cadastral documents, etc.); (ii) provide the identification details of the buyer and seller; (iii) state the agreed-upon final price of the property, the total amount of the security deposit and the modalities of the payment for the relating instalments; (iv) Acknowledge the respect of planning and building regulations, administrative permits and licences, tax provisions, etc; (v) provide the closing date in which the deed of sale will be executed; (vi) guarantee the absence of existing mortgages, restrictions, limitations, third-party's rights, etc.

### The definitive sale and purchase agreement (*Rogito*)

The last step in acquiring a property is the signing of a definitive sale and purchase agreement. This deed is signed before a public notary and it has to be considered the legal instrument that determines the concrete transfer of the property from the seller to the purchaser.

Prior to the signature of the deed, the notary has the obligation to verify – in the local property register and cadastral offices – that the property is transferred to the buyer in the same legal status declared by the seller in the preliminary agreement (free of mortgages, etc.).

During the execution of the definitive sale and purchase deed, the notary usually reads and explains to the parties the clauses of the deed, providing the buyer and the seller with impartial advice as to all legal aspects arising from the transaction.

The payment due by the buyer typically includes the purchase price, as agreed between the parties, the notary's fees (calculated as a percentage of the cadastral value of the property as declared in the *rogito*) and taxes arising from the transaction.

The formalities for registering the change of ownership of the property at the Registry of Immovable are performed by the notary, who has followed the transaction within 20 days from the date of execution of the definitive sale and purchase agreement.

## *Tax aspects*

### *Income taxes*

#### *Individuals*

Capital gain deriving from disposal of a real estate property realised by an individual not carrying out a business activity (or, however, not connected to such activity) is subject to Italian taxation (IRPEF) only if the real estate property was purchased or built less than five years before its disposal, with the exception of capital gain realised on building land disposal which is always taxable.

In case of resale of gifted properties, the five-year minimum owning period is computed from the date of acquisition by the donor.

Capital gain deriving from the disposal of the residential building used, by either the owner or his/her relatives, as the main residence for the most part of the owning period is not subject to tax, regardless of the duration of the owning period.

In addition, the capital gain deriving from the resale of an inherited property is not taxable.

Upon seller's option (to be expressed in the sale and purchase deed) the taxable capital gain may be subject to a 20% substitute tax instead of taxation in the annual income tax return (from 2007, this option is no longer admitted for capital gains on disposal of building lands).

Non-resident individuals are liable to Italian taxation for capital gains deriving from the disposal of real estate properties located in the Italian territory, on the basis of the tax rules provided for Italian resident individuals.

#### *Corporate entities*

Regarding resident companies (and Italian PEs of foreign entities), the sale of a real estate property generates capital gain if the property has been held as a fixed asset, or revenue if the property has been held as inventory.

In both cases, the related income forms part of the business income and is subject to IRES, at the rate of 27.5% and to IRAP, at the ordinary rate of 3.9%. Capital gain realised upon the disposal of real estate not representing 'stock' (i.e. not booked in the financial statement as inventory) and owned for at least three years, can be fully taxed in the tax period of realisation or, upon taxpayer's option (from 2008 this applies only for IRES purpose), up to five tax periods in equal instalments. The capital gain generally consists of the difference between the consideration received (net of directly attributable expenses) and the net asset value (i.e. purchase cost, increased by capitalised costs and tax-relevant step-ups, net of depreciation deducted).

When a real estate property is part of a transferred business (*azienda*), or an ongoing concern (*ramo d'azienda*), the capital gain on the transfer is subject to IRES only.

A capital gain deriving from the sale of a real estate property located in Italy, realised by a non-resident company having no PE in Italy is subject to Italian taxation (IRES at a rate of 27.5%) in the tax period of realisation only if the sale occurs within the fifth year following that of acquisition (with the exception of capital gains realised upon disposal of building lands, which are always taxable, despite the duration of the owning period).

Upon seller's option (to be expressed in the sale and purchase deed) the taxable capital gain may be subject to a 20% substitute tax instead of taxation in the annual income tax return (from 2007, this option is no longer admitted for capital gains on disposal of building lands).

### Indirect taxes

See section *'Direct investment in Italian real estate property'*.

## Real estate investment funds in Italy

### *Investment funds – General overview*

Investment funds are 'instruments' for collective portfolio management. Pursuant to Legislative Decree 24 February 1998, no. 58 (the Consolidated Law on Financial Intermediation), as lastly amended by Law Decree 31 May 2010, no. 78, the term 'investment fund' (*fondo comune di investimento*) identifies: the autonomous wealth collected from a plurality of investors, through one or more issuances of units, with the purpose of investing the same according to a pre-defined investment plan; divided into units pertaining to a plurality of investors; collectively managed by an SGR [an authorised regulated management company] in the interest of the participants, but autonomously from them.

In respect of previous definitions, the following requirements have been introduced/emphasized:

- collection of wealth from a plurality of investors;
- existence of investment programs defined in advance;
- management of the fund independent from participants.

An Italian collective investment fund, which has contractual origin, may be set up in the form of:

- open-ended fund, in which the participants can redeem at any time their units, according to the rules provided by the fund's regulations;
- closed-end fund, in which the participants' redemption right may be exercised only at predetermined maturities.

The management of investment funds represents a 'collective portfolio management' activity, which is an investment service that is exercised on a public basis by professional intermediaries duly authorised by the supervisory authorities. The manager is the asset management company (SGR, *Società di Gestione del Risparmio*), generally the one that set it up, or even another SGR acting upon specific mandate.

Each fund, and each sub-fund, constitutes an independent pool of assets, separated for all intents and purposes from the assets of the SGR, from those of other funds and sub-funds managed by the same SGR and from those of each unit-holder. The fund is solely liable, with its own assets, for the obligations incurred on its behalf by the SGR.

## *Real estate investment funds*

The Real Estate Investment Fund (REIF) is an independent pool of real estate-related assets, divided into units and pertaining to multiple participants. The REIF invests, exclusively or prevalently, in real estate properties, real estate rights and shareholdings in real estate companies. Real estate investments shall not be lower than two-thirds of the total value of the fund (a lower measure is provided in specific circumstances).

The REIF is set up as a closed-end fund. It is established by a resolution of the SGR, which also approves the rules of the fund. It may be created through cash contributions or contributions in kind.

The REIF's pool of assets needs to follow a number of limitations and rules guaranteeing consistency with the fund classification (i.e. the primary investment must be in real estate properties) and diversification of risks (i.e. limits to investments). For instance, investing in a single real estate asset with a single zoning classification is generally limited to one-third of the total fund's assets (exceptions to this limit exist). The specifics of these limitations may also vary based on the type of fund, potentially more flexible for reserved and speculative funds.

## *Tax regime of Italian real estate investment funds*

The tax regime of Italian real estate investment funds (REIFs) is provided for by Law Decree 25 September 2001, no. 351 (converted with modifications by Law 23 November 2001, no. 410, as amended and integrated by several subsequent measures and lastly by Law Decree 13 May 2011, no. 70, converted with modifications by Law 12 July 2011, no. 106).

The Italian REIF is not subject to income taxes (e.g., Corporate Income Tax - IRES, with ordinary rate of 27.5% - and Regional Tax on Production - IRAP, with ordinary rate of 3.9%), with the exception of non-institutional REIFs subject to a special liquidation procedure (see section '*Liquidation of REIFs*').

For income generally subject to WHT, for REIFs WHTs are levied as definitive taxation, a part cases in which the law expressly excludes REIFs from WHT (this is the case, for example, of several kinds of interest and income from capital deriving from investments in foreign funds).

REIFs have no access to EU Tax Directives for lack of subjective and objective requirements. However, because included among subjects liable to income tax (since 2012), they should benefit from Treaties application (provided that the reciprocity condition with the relevant foreign Country is respected).

Law Decree no. 70/2011 has divided REIFs into two categories, each one with different tax regimes applicable to investors:

- Institutional REIFs;
- Non-institutional REIFs.

Institutional REIFs are those entirely owned by any (or a combination) of the following subjects (defined as 'institutional' investors):

- a) States or public entities/bodies;

- b) Undertakings for collective investment of savings (i.e., Italian OICR, '*Organismi d'Investimento Collettivo del Risparmio*');
- c) Pension funds;
- d) Insurance companies (only regarding investments made to cover 'technical reserves');
- e) Banks and financial intermediaries subject to 'prudential supervision';
- f) Entities indicated in letters a) through e), established in Countries included in the Italian 'White List' (this list includes Countries with specific agreements with Italy for the exchange of tax information – EU member States are generally included) also allowing the identification of the beneficial owners of income;
- g) Non-profits/charities (i.e. private bodies and companies resident in Italy, which pursue specific mutuality purposes);
- h) Corporate and contractual SPVs owned for more than 50% by any of the entities listed under the previous letters a) to g).

Foreign institutional investors under letter f) include: foreign States, foreign public bodies and foreign subjects corresponding to the listed Italian entities which are subject to 'prudential supervision'. This last requirement is met if the execution of the foreign subject's activity requires prior authorisation and is subject to compulsory continuous controls according to the laws in force in the foreign State of residence. The execution of this prudential supervision must be certified by the home country's competent authority.

The SPVs under letter h) can be established in Italy or abroad, but limited to countries included in the White List. The control on such SPV can also be indirect (in this case, the percentage of interest must be properly adjusted - e.g. an indirect control on 60% of a Luxembourg SPV through 90% of a US corporation, equates to 54% actual control on the Lux SPV).

Non-institutional REIFs are those also owned by other kinds of subjects.

### **Institutional REIFs – Taxation of investors**

REIF profits are taxed upon distribution, by way of a 20% withholding tax at source (as account payment for investors generating business income; as final payment for all the others).

Italian pension funds and undertakings for collective investment of savings (OICRs) are exempt from the 20% withholding tax.

For profit distributions made upon redemption, the withholding tax should apply with rate of 12.5% for profits accrued before 25 June 2008 (as showed in the last REIF's financial statements approved before this date).

Regarding REIF profits distributed to investors resident in Countries where a treaty against double taxation exists, the more favourable treaty regime can be claimed (in general, reference is made to provisions concerning 'interest') if subjective, objective and documentary requirements are met (e.g., 'beneficial owner' status; tax certificate

issued by the foreign tax authority which, for this purpose, is valid until 31 March of the subsequent year).

In addition, the following non-resident investors are exempt from the 20% withholding tax on REIF profit distributions:

- a) Foreign pension funds and foreign undertakings for collective investment of savings (OICRs) established in countries included in the White List;
- b) International bodies established on the basis of International treaties that are valid in Italy;
- c) Central banks or entities that manage the State's official reserves.

Investors under letter a) are identified making reference to the home country legislation. In particular, the exemption applies to entities, regardless of their legal form, which pursue the same purposes of Italian pension funds and OICRs. Conversely, formal and not substantial similarity is not sufficient for entitlement to the exemption. The foreign fund, or the competent management entity, must be subject to 'prudential supervision'.

In any case, the exemption does not apply in case of indirect investment.

### Non-institutional REIFs – Taxation of investors

Investors may be classified in the following three categories:

- Institutional investors, regardless of their interest in the REIF (see previous section);
- Other investors with no more than 5% of the REIF units;
- Other investors with more than 5% of the REIF units.

For this purpose, REIF units are computed at the end of the REIF's FY (or management period, if shorter), including also units owned indirectly, by means of controlled companies/entities/bodies.

For institutional investors and other investors with no more than 5% of the units, REIF profits are taxed upon distribution or are tax exempt, according to the same rules applicable to institutional REIFs.

For other investors with more than 5% of the units, the profit accrued by the REIF in its annual report is attributed to the investor (according to the ownership percentage), regardless of its actual distribution:

- For resident investors, this share of REIF profit must be included in the annual taxable income which is subject to tax according to their tax regime/status. The distribution of the REIF profit already attributed to the investors (and taxed in their hands) is consequently not subject to withholding tax. REIF's accrued income (loss) attributed to the investors increases (decreases) the REIF units' tax cost; REIF profit distribution decreases such tax cost.
- For non-resident investors, instead, REIF profit remains taxable upon distribution by way of withholding tax, according to the same rules applicable to institutional REIFs (treaty reliefs are applicable as well).

The transfer of REIF units is assimilated to disposal of Italian partnerships interest.

As far as VAT is concerned, transactions carried out by the REIF generally follow the same rules applicable to other VAT subjects. The VAT obligations related to the REIF's transactions are administered by the SGR which, according to the law, is the 'taxable person' for goods (assets) and services that are acquired/provided on behalf of the REIFs managed (albeit separately from the SGR's own VAT obligations).

Acquisitions of real estate properties, carried out by the SGR on behalf of the REIF, as well as maintenance expenses on such properties, entitle the SGR to deduct the input-VAT incurred, if any. This implies that the SGR could be in a large VAT credit position. With specific reference to real estate acquisitions/maintenance expenses performed on behalf of the REIF, the law provides a special refund procedure, generally faster than the ordinary one.

A particular VAT regime is provided for contributions in kind to real estate investment funds of lots of buildings, leased for their majority: they are treated as on-going business concern contributions, so falling out of the scope of VAT, and transfer taxes are due in fixed nominal amount.

With regard to instrumental building transfers, the 4% aggregated mortgage-cadastral tax is reduced to 2% for transactions involving REIFs (either as purchasers, or as sellers).

Capital gains realised upon contribution to REIFs of real estate properties and real estate rights, can be subject to a 20% substitute tax in the hands of the contributing entity (in place of the ordinary taxation which, for corporate entities, is expected to apply with an aggregate ordinary rate of 31.4%), if the aforesaid assets are held by the REIF for at least three years. The substitute tax is payable also in five annual instalments (from the second instalment interest are computed at the European Central Bank's reference rate increased by 1%).

### One-off substitute tax

Law Decree no. 70/2011 introduced a one-off substitute tax for 'qualified' investors of non-institutional REIFs (residents and non-residents). In particular, non-institutional investors with (directly or indirectly) more than 5% of the REIF units on 31 December 2010, had to pay a one-off substitute tax of 5% of the average value of the REIF units held during FY 2010.

The substitute tax could be paid either by:

- the investor, within the deadline for income tax payments for FY 2011 (ordinarily, 16 June 2012);
- the REIF management company (or custodian bank, when provided), upon request and on behalf of the investor, in 2 equal installments: 16 December 2011 (or 16 January 2012 with surcharge of interest) and 16 June 2012.

Due to the application of this substitute tax:

- the tax value of REIF units becomes the amount subjected to tax, if higher of their buying or underwriting cost;
- any losses incurred upon sale or disposal is irrelevant for tax purposes;

- distributions, to investors liable to this tax, of REIF profits accrued until 31 December 2010 are not taxable up to the amount subjected to tax.

### Liquidation of REIFs

As alternative to the application of the new tax regime (described above), non-institutional REIFs with 'qualified' non-institutional investors (i.e., those subject to the new transparency taxation system) could be put into liquidation by 31 December 2011. The liquidation had to be resolved by the REIF's management company upon resolution of the REIF unit-holders' meeting. The liquidation had to be completed within 5 years.

The REIF management company had to account for a 7% substitute tax on the REIF's NAV as of 31 December 2010, payable in three annual instalments (40% by March 2012, 30% by March 2013 and 30% by March 2014).

Due to the application of this substitute tax:

- the tax value of REIF units becomes the amount subjected to tax, if higher of their buying or underwriting cost;
- any loss incurred upon sale or disposal is irrelevant for tax purposes;
- distributions, to investors liable to this tax, of REIF profits accrued until 31 December 2010 are not taxable up to the amount subjected to tax.

The REIF management company must also account for a further substitute tax of 7% on annual profits accrued from January 2011 to the end of the liquidation, payable on 16 February of the following year. In this case, REIF profit distributions are not subject to withholding tax up to the amount that is subject to this substitute tax.

In order to facilitate the liquidation, some tax reliefs are provided regarding indirect/transfer taxes.

### *The Italian REIT: the SIIQ*

The SIIQ (*Società di Investimento Immobiliare Quotata*: Listed Real Estate Investment Company), the Italian version of the better-known REITs in force in other countries, is a further vehicle available for investment in real estate effective from 2008.

The SIIQ consists of a special civil and tax regime applicable, upon irrevocable option (before the tax period from which the SIIQ status is intended to be applied), by companies limited by shares, which are considered Italian tax residents, provided that the following conditions be met:

- The shares of the company shall be listed on regulated stock exchanges of the EU or EEA Member States which are included in the Italian White List (as defined).
- The company's 'prevalent' business shall be the real estate lease.
- No shareholder shall hold, directly or indirectly, more than 51% of the voting rights in the general meetings and 51% of participation to the company's profit.

- At least 35% of the shares shall be held by shareholders, each one not holding, directly or indirectly, more than 2% of the voting rights and 2% of participation to the company's profit.

The special regime may also be applied by non-listed companies limited by shares that are considered Italian tax residents (commonly identified as SIINQs, *Società di Investimento Immobiliare Non Quotata*: Non-Listed Real Estate Investment Company), carrying out the real estate lease as a prevalent business, if they are controlled by one or more SIIQs for at least 95% of the voting rights and 95% of participation to the profit, and provided that the option for the domestic tax consolidation regime along with the controlling SIIQ has been exercised.

Starting from 2010 this special regime can also be applied by Italian PEs of companies resident in the countries of the EU or the EEA included in the Italian White List (as defined), to the extent that such PEs carry on real estate lease activity as their prevalent business.

For the purpose of the SIIQ regime, the real estate lease business is deemed prevalent when both the following conditions are fulfilled:

- At least 80% of the balance-sheet assets are represented by real estate properties (held in property or under another real right) used for such lease business, or shareholdings in other SIIQs and SIINQs held as investment (asset test).
- At least 80% of the annual turnover is derived from leases or dividends distributed by related SIIQs and SIINQs with profit raised from the real estate lease business (income test).

In addition to other circumstances provided by the law, the SIIQ status is lost in the tax period in which both the prevalence requirements are not observed.

The SIIQ (and the SIINQ) is required to distribute annually, as a dividend, at least 85% of the net profit deriving from the real estate lease business carried out and from the investments in other SIIQs and SIINQs (and sourced from the same business).

From an income tax standpoint, the SIIQ (and the SIINQ) appears to be designed as a transparent entity (even if different from partnerships): income derived from the lease business and from the investments in related SIIQs (and SIINQs) is exempt from the corporate income taxes in the hands of the SIIQ (and of the SIINQ). This income is then taxed in the hands of the shareholders, upon distribution.

Indeed, dividends distributed by the SIIQ (or SIINQ) with profit derived from the exempt business are subject to WHT at source at a rate of 20%. The net profit related to particular residential building lease contracts may benefit from a reduced WHT rate of 15%.

The WHT is applied as advance payment in the case of resident individual entrepreneurs and resident entities subject to the business income corporate tax rules (including limited liability companies and Italian PEs of foreign entities). In the other circumstances, such as the case of non-resident shareholders, the WHT is applied as a definitive payment. For foreign investors resident in countries that have entered into a treaty with Italy against double taxation, the WHT rate should be reduced under the T&C of the relevant treaty (this possibility, however, has been not yet officially confirmed).

The WHT is not applied for distributions to: SIIQs, Italian pension funds, Italian undertakings for collective investments, private wealth management subject to substitute tax regime.

In case the SIIQ regime is applied by an Italian PE of a foreign eligible company, the PE's annual profit derived from the lease business is subject to a 20% substitute tax.

Conversely, dividends distributed out of the profit from the taxable business are subject to the ordinary rules.

The switch to the SIIQ regime implies the realisation, at fair market value, of the real estate properties owned and used for the lease business. The net capital gain may be subject to a 20% substitute tax – payable over a period of five years (from the second instalment, interest for delayed payment are due) – rather than the ordinary corporate income taxes (which ordinarily apply at an aggregate rate of 31.4%).

Costs incurred in tax periods prior the switch to the SIIQ regime and carried forward according to tax rules, are split in equal amounts between the exempt and the taxable businesses if not referable to specific activities/assets.

Tax losses deriving from the exempt business cannot be used to offset the income of the taxable business, and are deemed to be 'virtually' offset with the exempt income of the following years (within the time limits provided by ordinary rules). In the case of withdrawal from the regime, the carried forward tax losses of the exempt business can be used, in accordance with ordinary tax losses carryforward rules, to offset taxable income raised in the tax periods after the withdrawal from the regime.

A tax credit for foreign taxes suffered in respect of real estate properties held abroad and related to the exempt business is recognised under conditions and within limits applicable as in absence of the special regime.

Investment rules, limits to risks concentration, maximum admitted leverage and other aspects have to be regulated in the SIIQ's bylaws.

The SIIQ is supervised by the Bank of Italy and by the CONSOB (the Italian National Commission for Listed Companies and the Stock Exchange).

Several facilities are provided for contributions of real estate properties to SIIQs. In particular, the net capital gains deriving from contribution of real estate properties to the SIIQ may be taxed through a 20% substitute tax, in lieu of the ordinary income taxes.

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# *Real Estate Going Global Japan*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 1 April 2012.

# Real Estate Tax Summary – Japan

## General

In general, foreign corporate investors may invest in Japanese property directly or through a Japanese local corporation including special purpose entities (e.g., *kabushiki kaisha* (KK), *goudo kaisha* (GK), *tokutei mokuteki kaisha* (TMK), Japan Real Estate Investment Corporations (J-REIT)).

It is common for the foreign investors to invest in Japanese real estate properties via a Japanese entity whereby the Japanese entity would hold the Japanese real estate property, if it may be in the form of trust beneficiary interest or fee simple, and the entity itself would be held by a foreign holding entity.

## Corporate tax

For Japanese corporations and foreign corporations having a permanent establishment (“PE”) in Japan, rental income and capital gains arising from the sale of real properties or shares in a Japanese corporation are subject to corporate tax in Japan at a rate of 30%. In addition, local enterprise tax and inhabitant's tax are also imposed on the rental income and capital gains.

The corporate tax rate of 30% is reduced to 25.5% (for ordinary corporation) from the fiscal years beginning on or after 1 April 2012. On the other hand, to help pay for post-earthquake reconstruction, corporation surtax is imposed on corporate tax at the rate of 10% for three years period from the first fiscal year which begins during the period between 1 April 2012 and 31 March 2015. As a result, the corporate tax rate will be 28.05% for the three years period from the first fiscal year which begins during the period between 1 April 2012 and 31 March 2015 and 25.5% thereafter.

Once local taxes are taken in account, effective tax for the three years period from the fiscal year which begins during 1 April 2012 and 31 March 2015 is 39.43% and 37.12% thereafter.

For foreign corporations without a PE in Japan, only corporate tax is imposed on rental income and capital gains arising from the sale of real properties in Japan and certain shares in a Japanese corporation and no enterprise tax and inhabitant's tax should be imposed.

## Loss carryforward

For Japanese corporate tax purposes, tax losses can be carried forward to offset against future taxable income. Under the 2011 tax reform, the carryforward period is extended from seven years and nine years and the use of tax loss carried-forward is limited to 80% of current year taxable income, rather than 100% with certain exceptions described further below.

## Withholding tax

Foreign corporations are generally subject to withholding tax on rent received and sales proceeds from real properties in Japan.

In order to help pay for post-earthquake reconstruction, withholding income surtax will be imposed on withholding tax at the rate of 2.1% for the period from 1 January 2013 through 31 December 2037.

If a foreign corporation is a resident of a tax treaty country with Japan, dividend, interest and royalties will not be subject to the withholding income surtax to the extent that the applicable rate agreed in the tax treaty is lower than the aggregate domestic rate.

## Other taxes relating to real property

When purchasing real properties, registration tax and real property acquisition tax are imposed. For TMKs and J-REITs, special reduced tax rates may apply under certain conditions.

For real properties owned as of 1 January of each year, fixed assets tax and city planning tax are imposed.

# *Real Estate Investments – Japan*

## General

Foreign corporate investors may invest in Japanese property directly or through a Japanese corporation.

## Rental income

### *Japanese corporation and foreign corporation with PE in Japan*

Japanese corporate investors and non-resident corporate investors having PEs in Japan are subject to tax on their net rental income, i.e. gross rent after the deduction of management expenses, depreciation, interest and other expenses, determined on an accrual basis. Rental income is combined with other taxable income and the total is subject to Japanese corporate tax at a rate of 30%<sup>1</sup>, as well as local enterprise and inhabitants' taxes. The current aggregate effective tax rate is approximately 42.05%<sup>2</sup> for companies with paid-in capital of JPY 100m or less (approximately 40.69%<sup>3</sup> for companies subject to the 'size'-based enterprise tax described below).

In addition to the tax imposed on taxable income, a 'size'-based enterprise tax is also imposed if the corporation's paid-in capital is more than JPY 100m. Under this rule, factors such as personnel costs, rent costs, interest and capital are taken into account to determine the amount of enterprise tax payable.

### *Special rule for special purpose entities*

Special purpose entities established under special laws may deduct their dividends distributed to their investors under certain conditions. These special entities include TMK incorporated under the Asset Securitisation Law and J-REIT established under the Investment Trust and Investment Corporation Law. The 'size'-based enterprise tax does not apply to TMK and J-REIT.

### *Foreign corporation without PE in Japan*

A foreign corporation having no PE in Japan is also subject to corporate tax of 30%<sup>1</sup> on net income.

### *Withholding tax on rent*

In general, rent paid to a foreign corporation is subject to withholding tax of 20% (plus a surtax on withholding tax of 0.42% that applies rental income paid on or after

<sup>1</sup> 28.05% for the three years period from the first fiscal year which begins during the period between 1 April 2012 and 31 March 2015, 25.5% thereafter

<sup>2</sup> 39.43% for the three years period from the first fiscal year which begins during the period between 1 April 2012 and 31 March 2015, 37.12% thereafter

<sup>3</sup> 38.01% for the three years period from the first fiscal year which begins during the period between 1 April 2012 and 31 March 2015, 35.64% thereafter

1 January 2013). The withholding tax would normally be credited against its corporate tax liability when filing its Japanese corporate tax return.

A foreign corporation having PEs in Japan would be exempt from the withholding tax on rent if it shows a certificate for exemption issued by the tax authorities in advance.

## Depreciation

Buildings should be depreciated using the straight-line<sup>4</sup> method, while either the declining balance<sup>5</sup> or the straight-line method may be used for fixtures, plant and equipment for Japanese corporate tax purposes. Depreciation rates are prescribed by ministerial ordinance.

For fixed assets acquired on or after 1 April 2007, due to the removal of the residual value rule, assets may be fully depreciated, based on their useful life until their remainder value is the equivalent of JPY 1.

For fixed assets acquired on or before 31 March 2007, the old depreciation rules will apply until the asset has been depreciated down to the residual value (5% of the original cost), at which time such residual value may be depreciated using the straight-line method for an additional fiscal period of five years.

It should be noted that depreciation is deductible for tax purposes only up to the amount of depreciation claimed for accounting purposes.

## Capital gains on the sale of real property

### *Japanese corporation and foreign corporation with PE in Japan*

For a Japanese corporation, or a foreign corporation having a PE in Japan, capital gains derived from the sale of real property is aggregated with rental income and other business income and taxed at the normal corporate national and local tax rates.

### *Foreign corporation without PE in Japan*

If a foreign corporate investor does not have a PE in Japan, capital gains derived from the sale of real property located in Japan is only subject to corporate tax at the rate of 30%<sup>1</sup>.

### *Special tax on capital gains from sale of land*

An additional special tax is imposed on capital gains realised from the sale of land, land rights and shares in Japanese landholding companies. The tax rate is 10% for property held for five years or less, and 5% for more than five years. The holding period is calculated from the following day after its acquisition date to 1 January of the year in which the transfer takes place, rather than to the actual disposition date. Application

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<sup>4</sup> If acquired on or before 31 March 2007, using old straight-line method.

<sup>5</sup> If acquired on or before 31 March 2007, using old declining balance method.

of this additional special tax is suspended for land sold between 1 January 1998 and 31 December 2013.

### *Withholding tax on sales proceeds*

Foreign corporations that sell Japanese real property are subject to a 10% (plus a surtax on withholding tax of 0.21% that applies sales proceeds paid on or after 1 January 2013) withholding tax on sales proceeds. This withholding tax does not apply to a sale of a residence to an individual for their personal use or use of their relatives, if the purchase price is less than or equal to JPY 100m. The withholding tax may be credited against the 30%<sup>1</sup> normal corporate tax by filing its Japanese corporate tax return.

## Capital gains from the disposal of certain real estate interests

Capital gains derived by foreign corporations having no PE in Japan from the transfer of shares in a corporation<sup>6</sup> that predominantly holds real estate in Japan is subject to Japanese taxation if, as of the last day of the fiscal year prior to the year of transfer, the above non-resident investor (and special related persons and investment vehicles such as partnerships in which the investor holds an interest) owned more than 5% of the shares in such corporation, or, if the corporation is non-public, more than 2% of the shares.

A corporation will be treated as predominantly holding real estate if 50% or more of the assets of the corporation consist of real estate in Japan, such as land and buildings, and shares in other corporations that hold real estate.

If the foreign corporation without a PE meets the requirements above, it will be subject to corporation tax at the rate of 30%<sup>1</sup>, and will need to file a tax return in Japan.

## Loss carryforward

Before the 2011 tax reform, losses could be carried forward for the subsequent seven years for corporate tax purposes, provided that a taxpayer applied and has received permission to file a blue form tax return, and files blue form tax returns in the year the loss was incurred and continuously files tax returns in the subsequent years.

Under the 2011 tax reform, the period within which tax losses can be carried forward is extended from seven years to nine years, which applies to the tax losses incurred in fiscal years ending on or after 1 April 2008. Also, the use of tax loss carried-forward is limited to 80% of current year taxable income for the fiscal years beginning on or after 1 April 2012.

The tax loss limitation does not apply to:

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<sup>6</sup> Transfer of beneficiary interests in certain trusts predominantly holding real estate in Japan is deemed as transfer of shares in corporation.

- Corporations with capital not exceeding JPY 100m and not wholly owned by a corporation with capital of JPY 500m or more;
- TMKs, J-REITs, certain Special Purpose Trusts and Specified Investment Trusts to which the dividend deduction tax regime is applied; or
- Corporations using tax loss carried forward to offset debt forgiveness income under the Corporate Rehabilitation Law.

## Withholding tax on dividends

Dividends paid by a Japanese corporation are generally subject to withholding tax of 20% (plus a surtax on withholding tax of 0.42% that applies dividends paid on or after 1 January 2013).

The withholding tax rate on dividends from certain listed companies is currently reduced. For Japan-resident individuals, the rate is reduced to 10% (the sum of national tax of 7% and local tax of 3%), 10.147% for dividends paid on or after 1 January 2013 (the sum of national tax including a surtax on withholding tax of 7.147% and local tax of 3%). This rate applies to dividends paid prior to 31 December 2013.

For corporate shareholders, domestic or foreign, and non-resident individuals, the rate is 7% (plus a surtax on withholding tax of 0.147% that applies dividends paid on or after 1 January 2013), as no local withholding tax is imposed. This rate applies to dividends paid prior to 31 December 2013.

## Other taxes

### *Other taxes on the purchase of real property*

#### Registration tax

Registration tax on the acquisition of real property is levied at the rate of 2% based on the assessed value of real property when a change of the ownership is registered with the registry office. The tax rate for land is currently reduced to 1.5% for registration until 31 March 2013 if the ownership change occurs in a purchase of the land.

Further reduction of registration tax rate to 1.3% is applicable for TMKs and J-REITs under certain conditions, i.e. where 75% or more of the assets of the TMK and J-REIT are real properties, where the properties except for warehouse and land for warehouse are acquired until 31 March 2013 and registered within one year after the acquisition date. To be eligible for reduced rate, certain administrative procedures must be followed. The application of the reduced rate for warehouse and land for warehouse has been abolished.

#### Real property acquisition tax

When real property is acquired, real property acquisition tax is imposed at the rate of 4% on the assessed value of the real property acquired. The tax rate for land and residential buildings is reduced to 3% for real property acquired on or before 31 March 2015. The tax base of land is reduced to half where the land acquired is classified as land for building (*Takuchi*), and the acquisition is made on or before 31 March 2015. In addition, the tax base is further reduced to two-fifths for TMKs and

J-REITs where properties are acquired on or before 31 March 2013 (again, to be eligible for the reduced rate, certain administrative procedures must be followed).

### Stamp duty

Stamp duty is payable on the preparation of certain documents. An agreement to transfer real property is subject to stamp duty ranging from JPY 200 to JPY 600,000 (currently JPY 540,000 until 31 March 2013), depending on the transfer price stated in the agreement.

### Special land holding and acquisition tax

A 3% special landholding and acquisition tax is generally levied on the purchase price of land if it is larger than a specified size. The special landholding and acquisition tax is currently suspended and the resumption of the taxation is not yet scheduled.

### Consumption tax

Consumption tax is imposed at the rate of 5% on the transfer and lease of a commercial building, but not normally on land. All or part of input consumption tax paid is creditable against output consumption tax received from customers, generally to the extent of the ratio of taxable sale amount over total sales amount, provided that the purchaser has taxpayer status for consumption tax purposes. The lease of a residential building is treated as a non-taxable transaction for consumption tax purposes.

## *Other taxes on the holding of real property*

### Land value tax

A land value tax is levied at a rate of 0.3% on the assessed value of land, after certain deductions such as JPY 1.5bn for an individual under certain conditions. The amount of the deduction varies, depending on the size of the corporation holding the land and the value of the land, as well as other factors. This tax is currently suspended and resumption of the taxation is not yet scheduled.

### Fixed assets tax and city planning tax

A fixed assets tax and a city planning tax, with standard rates of 1.4% and 0.3% respectively, are levied every year on a tax base assessed by the local tax authority.

### Special land holding and acquisition tax

A special landholding and acquisition tax is annually levied at a rate of 1.4% on the purchase price. The special landholding and acquisition tax is currently suspended and resumption of the taxation is not yet scheduled.

### Business office tax

A business office tax is imposed annually at a rate of JPY 600 per square metre of floor space used for business purposes and 0.25% of the annual payroll, if the floor space is over 1,000 square metres, or if the number of the employees is more than 100.

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# *Real Estate Going Global Kazakhstan*

*Tax and legal aspects of  
real estate investments  
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*2012*

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All information used in this content, unless otherwise stated, is up to date as of 12 June 2012.

# *Real Estate Tax Summary – Kazakhstan*

## *Corporate Income Tax*

### *Rental income*

Rental income from land and property, less tax-deductible expenses, is subject to corporate income tax at the standard corporate tax rate of 20%. Permanent establishments of foreign legal entities are subject to virtually the same taxation regime as resident entities. The difference is that branches are subject to a tax on the net income of a branch at a rate of 15% ('branch profit tax') of the after-tax profit (i.e. the effective tax rate will be 32%), while the profits derived through the local company would be subject only to tax at the level of legal entity at the rate of 20%. These profits will be subject to a 15% withholding tax on the distributed dividend paid to non-residents (unless exempt under domestic law). Tax will be levied at the moment of distribution of dividend, rather than at the moment when the profit was made. At the same time, these tax rates are reducible to 5% or 10% under most double tax treaties. Please note that most of the double tax treaties provide an opportunity to reduce the rate of the branch profit tax mentioned above. As of 1 June 2012, Kazakhstan has 42 double tax treaties in force.

Usually, all expenses incurred by legal entities and entrepreneurs in connection with the earning of aggregate annual income are deductible, with certain exceptions and limitations.

### *Repair and maintenance costs*

The cost of repairing depreciable buildings, structures and facilities may be deducted as expenses for corporate income tax purposes in that particular asset group in full, unless such expenses increase the value of assets in financial accounting. These repair costs, increasing the value of assets in accounting, may be capitalised and added to the value of the asset group to which they relate and are subject to deduction through depreciation expenses.

### *Thin capitalisation rules*

For Kazakhstan tax purposes the deductibility of interest expense paid/payable to related parties, independent parties for loans under a secured guarantee from related party, or 'offshore' companies is limited based on thin-capitalisation rules, introducing a 4:1 debt-to-equity ratio for non-financial companies (and a 7:1 ratio for financial institutions).

Amount of interest on loans from such companies above the limits is not deductible.

### *Depreciation*

For Kazakhstan tax purposes, the depreciation of fixed assets is calculated according to the declining balance method. Buildings are depreciated at a maximum annual rate of 10%.

Once the net tax value (after accumulated tax depreciation) of an individual building falls to 300 monthly calculation indices (approximately USD 3,100), the balance is written off as a deductible expense.

Land cannot be depreciated.

### *Revaluation*

Amounts of an increase in the revaluation of fixed assets, which were carried out for business accounting purposes are not included in aggregate annual income of the legal entities for corporate income tax purposes. Similarly, such an increase in the value may not be depreciated for corporate income tax deductions purposes.

### *Loss carryforward*

Losses from entrepreneurial activities, including losses from sales of buildings and constructions (installations) that were used in entrepreneurial activities (i.e. rental) may be carried forward for ten years following the year in which the loss arises.

### *Capital gains/losses on the sale of immovable property*

Capital gains on the disposal of immovable property are included in the entity's aggregate income for the reporting period, and are subject to income tax at the standard rate of 20%.

Please note that structuring opportunities exist, which could allow for elimination of the capital gain tax.

## Taxation of foreign entities without a permanent establishment

### *Kazakhstan withholding tax*

In general, any Kazakhstan source income of non-residents that do not have a PE in Kazakhstan is subject to Kazakhstan withholding taxes. The following withholding tax rates apply to Kazakhstan source income of non-residents, unless otherwise provided by a double tax treaty:

Interest	15%
Dividends	15%
Capital gains, royalties	15%
Service income, management fees	20%
Any income paid to 'offshore' jurisdictions	20%

## Value added tax (VAT)

### *VAT on the sale or lease of property*

The sale or lease (sublease) of land is generally VAT-exempt, except for payments:

- for the provision of land for transport vehicle parking and storage

- for the provision of land occupied with a residential building (part of the residential building) that is used for rendering hotel services.

The VAT treatment of buildings depends on the type (purpose) of the property as well as other conditions. Under the Kazakhstan Tax Code, there are two types of buildings for VAT purposes: residential and non-residential.

Sale and lease (sublease) of residential buildings are generally VAT-exempt, except for buildings used for the purpose of rendering hotel services and hotel services themselves.

Under the Kazakhstan Tax Code, the sale or lease of non-residential buildings (e.g. commercial, industrial, recreational, etc.) is considered VAT-able turnover and attracts VAT. The current VAT rate in Kazakhstan is 12%.

### *VAT recovery mechanism*

The VAT recovery mechanism also differs for residential and non-residential buildings.

Under the general provisions of the Kazakhstan Tax Code, VAT incurred on non-residential buildings is considered normal input VAT available for offset.

The Kazakhstan Tax Code disallows the offset of VAT paid on the purchase of residential buildings except for buildings used for hotel services. This VAT (if any) should be included in the capitalised basis of the building (increasing the net book value) and is subject to deduction through tax depreciation, where applicable.

Input VAT associated with VAT-exempt turnover (e.g. sales of land or residential buildings) is not eligible for offset, but should be allowed for corporate income tax deductions.

## *Other taxes*

### *Land tax*

There is a separate tax rate for each type of land, which is also a function of the quality and size of the land lot in possession. Local authorities may increase or decrease the tax rates set forth by Kazakhstan legislation by as much as 50%.

The Kazakhstan tax code sets the same land tax rates for both individuals and legal entities. The tax authorities calculate the annual tax payments due by individuals by 1 August, and individuals are liable to pay the tax by 1 October of the year. Legal entities are required to calculate land tax payments on their own and make quarterly payments on 25 February, 25 May, 25 August and 25 November, and make a final payment of any balance of land tax due (if necessary) within ten calendar days from the deadline for submission of tax returns (which is 31 March of the year following the reporting one).

### *Property tax*

The property tax rate for legal entities is 1.5% of the annual average residual value of taxable items (buildings, structures, residential buildings, premises, and other constructions per state classifier of main assets). Vehicles and land are taxed separately. Non-profit organisations are taxed at a reduced rate of 0.1%. The tax rate for individual entrepreneurs is 0.5%. Legal entities pay property tax through current

payments on 25 February, 25 May, 25 August and 25 November of the respective tax year. Final payment of the actual tax should be made within ten calendar days from the deadline for submission of tax returns (which is 31 March of the year following the reporting one).

For individuals, property tax is based on a progressive schedule with rates varying from 0.05% on property valued up to KZT 1m (approximately USD 6,800) to a maximum of 1% on property with a value of more than KZT 120m (approximately USD 820,000). The annual tax on individual property is calculated by the tax authorities before 1 August, and should be paid not later than 1 October of the same year. Individual property tax applies to houses, garages and other buildings.

## Group taxation

Branches and representative offices of foreign legal entities are considered as separate taxpayers for tax purposes. Income received by each partner in consortia and entities operating under general partnership agreements are assessed for taxation separately with respect to the individual participant's share.

There are no tax rules permitting the consolidation of profits and losses within a corporate group of separate legal entities for Kazakhstan tax purposes.

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## ***Real Estate Investments – Kazakhstan***

### **Investing through a local entity versus direct investment**

#### ***General***

Foreign individuals and corporate investors may invest into the property located in Kazakhstan, including land and buildings. Based on the Land Code, foreign individuals and companies have the right to own certain categories of land, including the following:

- Land occupied with industrial and residential buildings.
- Land intended for construction of industrial and residential buildings.
- Land lots used for buildings services.

Generally, foreign individuals and corporate investors may invest in buildings and land (except for land intended for the maintenance of commercial agricultural production and forestry), either directly or through a local entity. In practice, most investments take place through a local legal entity. In the case of a direct investment, the tax treatment of a foreign investor depends on whether or not its activities in Kazakhstan constitute a permanent establishment (PE).

In case of a PE, foreign legal entity will generally be taxed in the same way as a local entity, except for a special branch tax, mentioned before. In the absence of a PE, the rental income to a foreign company is subject to withholding tax at a rate of 20%.

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All information used in this content, unless otherwise stated, is up to date as of 8 August 2012.

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# *Real Estate Tax Summary – Korea*

## General

Foreign investment in real estate in Korea has significantly increased since limitations on foreign investors' acquisition of land were removed under the revised Aliens Land Acquisition Law in 1998 and the transparency of the Korean real estate market has been improved. Real estate investment in Korea may be structured in a tax efficient manner by using tax efficient investment vehicles such as an Asset Backed Securities Special Purpose Company (ABS-SPC), Real Estate Trust Fund (RETF), or Real Estate Investment Trust (REIT).

However, usage of the ABS-SPC structure is diminishing significantly, while RETFs and REITs have been widely used in recent years for the acquisition of real estate.

This summary has been prepared to help foreign investors who intend to invest in real estate in Korea by providing a discussion of major tax issues related to real estate investment. As tax incentives for real estate investment are complicatedly enumerated in various tax laws, regulation and tax-exemption ordinances set forth by local governments, this summary does not cover these issues. As noted above, there are various issues to be carefully reviewed regarding real estate investment in Korea. In this regard, it is highly recommended that you consult with a tax adviser in Korea before making any decision on investment in real estate in Korea.

# *Real Estate Investments – Korea*

## Real Estate Taxes

### *Taxes on the acquisition of real estate*

#### Acquisition Tax

A person acquiring real estate must pay an acquisition tax, which is normally equivalent to 4.6% of the acquisition value including surtax, within 60 days from the acquisition date. If the purchaser fails to report the acquisition, a 20% penalty tax for failure to file is imposed. Further, a penalty tax for no tax payment calculated using the following formula is imposed on the failure to pay taxes: the amount of unpaid taxes x 0.03% x delayed days for payment.

Certain types of structures and fixtures, e.g. an escalator, are subject to the acquisition tax.

#### National housing bond

A person registering an acquisition of real estate with a court must purchase a national housing bond (NHB), issued by the government, in an amount equivalent to 1.6% to 4% of the standard market value of the real estate acquired. The standard market value is determined annually by the government. However, foreign investment enterprises under the Foreign Investment Promotion Act are partially or fully exempt from the NHB purchase requirements when the acquired real estate is registered to be used for business purposes.

#### Value added tax (VAT)

A person who acquires a building (land is exempted from VAT) from another person who supplies it independently in the course of business, must pay VAT equivalent to 10% of the actual acquisition value to a seller. In turn, the seller has to pay the output VAT to the relevant tax office. If the person is a VAT-taxable entity, the person may deduct the input VAT paid upon purchasing a building from the output VAT.

### *Taxes on possession and operation of real estate*

#### Property tax on a building

A person who owns a building shall pay property tax on an annual basis by 31 July at 0.3%, including a surtax of the statutory standard market price of the building.

#### Property tax on land

A person who owns land shall pay property tax on an annual basis by 30 September, ranging from 0.24% to 0.48%, including surtax, depending on the statutory standard market value of land in case of commercial use.

#### Composite Real Estate Tax (CRET)

The CRET was enacted, as of 5 January 2005. The owner of land attached to a commercial building should report and pay the CRET. If the statutory standard price of land is more than KRW8bn, the owner should pay the CRET at 0.6% to 0.84% including surtax, depending on the value of land. The tax base is obtained by applying

80% of the statutory standard price deducted by KRW 8bn. The CRET payable is calculated by deducting the amount of the property tax on land that would be applied to land of which the statutory standard price exceeds KRW 8bn. The ceiling amount for the CRET including property tax on land is 150% of the previous year.

### **Income tax on rental income**

An individual having income from real estate rentals shall pay individual income tax on such income at rates ranging from 6.6% to 41.8% including surtax, depending on the tax base. Various deductions are available. The tax rate applicable to a corporation is 11% on income up to KRW 200m, 22% on income between KRW 200m and KRW 20bn, and 24.2% on income above KRW 20bn including surtax.

### **Depreciation**

A taxpayer may claim depreciation expenses as business expenses to the extent that the expenses are recorded in the financial statements. Depreciation expenses over the limit set by the tax laws are not deductible for tax purposes. In addition, a taxpayer is required to report its depreciation method and useful lives of depreciable assets to a tax office. For corporate income tax purposes, buildings are required to be depreciated by using the straight-line method. Under the current corporate income tax law, a taxpayer may select useful lives of depreciable assets within a range from 75% to 125% of the standard useful lives prescribed in the law. Generally, the standard useful lives of steel-frame buildings and structures are 40 years.

## ***Taxes on transfer of real estate***

### **Income tax on gains from transfer of real estate**

The tax rates for an individual normally range from 6.6% to 41.8% including surtax, depending on the amount of the tax base and how long the real estate was owned by the transferor. The tax rates for a corporation range from 11% on income up to KRW 200m, 22% on income between KRW 200m and KRW 20bn, and 24.2% on income above KRW 20bn including a surtax, depending on the amount of the tax base which is the regular corporate income tax.

### **VAT on transfer of building**

A person transferring a building must collect VAT amounting to 10% of the transfer value from the acquirer and make a payment to the relevant tax office.

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# *Real Estate Tax Summary – Lithuania*

## General

Real estate, as defined by the Lithuanian Civil Code, consists of land and assets related thereto that cannot be moved from one place to another without changing their purpose and essentially reducing their value, and also the assets that are defined as such in the relevant laws.

The constitutional law provides that non-agricultural and non-forestry land may be acquired and owned by foreign legal entities and individuals who comply with the criteria of the European and transatlantic integration, under the same procedure and conditions as applied to Lithuanian citizens and legal persons.

A transitional period applies to the acquisition of agricultural and forestry land by foreign legal entities and individuals who comply with the criteria of European and transatlantic integration, which was applicable since the entrance of Lithuania into the EU in 2004 is extended until 30 April 2014. Only foreign individuals who have been permanently residing and engaged in agricultural activities in Lithuania for at least three years, and foreign legal persons and other organisations that have established their representative offices or branches in Lithuania, are entitled to acquire ownership of agricultural and forestry land during this period.

Foreign legal entities and individuals who do not comply with the criteria of European and transatlantic integration are not permitted to acquire ownership of land, inland waters and forests in Lithuania. However, they may possess or use land, interior waters, forests and parks, only by way of lease or any other agreement that confers the use of the land, but not the title thereto.

Both domestic and foreign individuals and legal entities may be parties to lease contracts. The term of a land lease may be fixed by the parties and though such term for state land may not exceed 99 years, an expired lease can be renewed by the parties to the land lease contract. The terms and conditions for the lease of state land are determined by the government. In respect of state land, the lease contract is concluded by the authorities following a standard contract format. When private land is leased, the terms of the lease will be mutually agreed upon by the private owner and the lessee.

In respect of the acquisition and lease of other immovable property, such as buildings, there are no specific requirements or restrictions stipulated by national legislation for foreign investors. In most cases, the general provisions of the Lithuanian Civil Code will apply.

# *Real Estate Investments – Lithuania*

## Acquisition and sale of real estate

### *Tax implications*

In Lithuania real estate can be acquired either directly (asset deal) or by acquiring shares in a company holding real estate (share deal).

In case of an asset deal the transfer of real estate is subject to notary and registration fees in Lithuania:

- notary fees vary from 0.2% to 0.6% on the value of real estate; however, the fees shall not exceed LTL 20,000 (approximately EUR 5,800) for one transaction;
- state duties imposed upon the registration of a transfer of real estate are typically not material and vary depending on the real estate value (up to LTL 5,000 (EUR 1,450)).

In case of a share deal the transfer of shares in a real estate holding entity is not subject to any notary or registration fees (as the direct legal owner of real estate remains the same).

### *Capital gains*

Disposal of real estate in Lithuania can also be effected either by selling the property (asset deal) or by selling shares in a company holding real estate (share deal).

Capital gains derived by local companies are considered business profits and are liable to the standard corporate income tax of 15%. Income derived by a foreign company from the sale of real estate registered in Lithuania is taxed as indicated in the section '*Withholding taxes*'.

Sale of shares of a Lithuanian company holding real estate is subject to general taxation rules for sale of shares (i.e. there are no specific taxation due to the real estate being the main assets of the company). The actual taxation, however, depends on a number of various criteria and circumstances, e.g. the seller (i.e. corporate or individual and local or foreign tax resident), shareholding proportion (i.e. percentage of total shares held and shares to be sold), holding period, etc.

Capital gains on the transfer of shares are exempt from corporate income tax provided that the following conditions are met:

- The company is transferring shares of an entity that is subject to corporate income tax or similar tax, and is registered or otherwise organised in an EEA member state or in other countries with which Lithuania has a double tax treaty.
- The transferring company holds over 25% of shares of that entity for more than two years (in case of reorganisation as defined in the Lithuanian Law on Corporate Income Tax – for more than three years).

## Withholding taxes

Generally, income of a foreign entity in Lithuania not derived through a PE is deemed to be Lithuanian-source income and is subject to WHT at the following rates:

- Interest on any type of debt obligations, including securities: 10%
- Proceeds from the sale, transfer (with title), or lease of immovable property located in Lithuania: 15%
- Income derived from sports activities or performers' activities: 15%
- Income from distributed profits: 15%
- Royalties: 10%
- Annual payments (*tantiems*) to the members of the board or supervisory board: 15%
- Indemnities received for the infringement of copyrights or neighbouring rights: 10%

## Dividends

Dividends distributed by a resident company to another resident company are subject to a 15% CIT, which is withheld by a distributing company.

The dividends distributed by a resident company are exempt from WHT if the recipient company has held not less than 10% of the voting shares in the distributing company for at least a 12-month period and the distributing entity is subject to 5% or 15% Lithuanian CIT rate. However, this relief is not applied if the foreign entity (recipient) is registered or otherwise organised in a target territory (offshore), which is included in the specific list approved by the Ministry of Finance of the Republic of Lithuania. Please note that the requirement of the 12-month holding period does not necessarily have to be fulfilled on the day of dividend distribution.

Dividends distributed by a foreign company are subject to a 15% WHT which is to be paid by the receiving Lithuanian entity.

Dividends distributed by a foreign company to a Lithuanian company are exempt from WHT if the distributing foreign entity is established in the EEA and related profit is properly taxed in the domiciled country.

The dividends are also exempt from WHT if the recipient company has held not less than 10% of the voting shares in the distributing company for at least a 12-month period and the receiving entity is subject to 5% or 15% Lithuanian CIT rate. This participation exemption satisfies the requirements of the EC Parent-Subsidiary Directive. The exemption also applies to dividends paid by non-EU foreign companies, except those registered or organised in blacklisted territories.

## Interest and royalties

Generally, interest paid by a Lithuanian company to a foreign company is subject to withholding tax at a rate of 10%. However, withholding tax is not applicable to loan interest received by entities established in the EEA or in countries having signed a double taxation treaty with Lithuania. Further requirements are outlined in the Law on Corporate Income Tax.

As of 1 July 2011, the WHT rate on royalties paid to related parties meeting requirements of the EC Interest and Royalty Directive was reduced from 10% to 0%.

### Value added tax (VAT)

The sale of a new building is subject to VAT at the rate of 21%. A new building is defined for VAT purposes as an unfinished building or structure as well as a finished building or structure for a period of 24 months following its completion or following its substantial improvement.

Sale of real estate used for more than 24 months is VAT-exempt. Exemption from VAT is also granted on the sale or any other transfer of land (except for land transferred together with a new building that has been used for less than two years, and land for construction) where, under the contract conditions, the person to whom land is transferred, or a third party, acquires the right to land at their disposal as an owner.

However, a Lithuanian VAT payer has an option to tax generally VAT-exempt sale of real estate, including land, if the real estate is sold to another Lithuanian VAT payer being a taxable person, which performs business activities or to legal persons established under diplomatic and consular arrangements or to institutions of the European Union, the European Investment Bank, the European Central Bank, even if these legal persons are neither VAT-registered nor do they perform economic activities. This option is valid for not less than 24 months for all transactions concluded by a taxable person and related to the sale of immovable property. The taxable person shall declare this option in the manner prescribed by the central tax administrator.

The transfer of shares in a real estate holding company is not taxed with any VAT.

### Personal Income tax

For local and foreign individuals sale of real estate located in Lithuania is subject to 15% PIT. Tax is levied on the capital gains, i.e. sales proceeds less acquisition costs (however, a foreign individual can achieve this only by submitting an additional request for re-calculation of tax to the Lithuanian Tax Authority, since initially the tax is calculated on the gross proceeds).

### Collective investment undertakings

Lithuanian legislation allows establishing special collective investment undertakings for investment in real estate. Investment income received by these undertakings are not subject to corporate profit tax, however, quite strict requirements has to be met. Furthermore, undertakings in the form of investment fund may register for VAT purposes; however, a management company managing the investment fund will be liable for their VAT obligations.

## Legal implications

### Formalities

Acquisition of real estate can be exercised if real estate is formed as a real estate object and registered in the Real Estate Register.

Any real estate acquisitions must be concluded in written form. When real estate is acquired directly (asset deal), such agreement must be certified by notary public.

There is no obligatory requirement to register transfer of ownership in the Real Estate Register. Although in case the agreement is not registered, it may not be invoked against third parties.

In case an acquisition object is only a building without land occupied by the building, the owner's rights to land plot occupied by the building must be settled in the agreement. Otherwise, the agreement shall be void.

### Moment of acquisition

The acquirer of the real estate acquires the ownership right to the property as of the moment it is transferred to him. The moment of acquisition is documented by a transfer and acceptance deed. The deed of transfer and acceptance may be concluded as a separate document or included as an addition to sale and purchase agreement.

### Restrictions

Object of real estate sale and purchase agreement may be restricted with various types of limitations like servitudes, usufructs, mortgages, lease rights, pre-emptive rights and other limitations. Only these restrictions, which are registered in Real Estate Register, are binding to the acquirer. However, in case it is proven that acquirer was duly informed about disclosed restrictions, such restrictions may also be imposed on him.

### Pre-emptive rights

In case where a real estate object belongs to several owners, co-owners shall enjoy the pre-emptive right to buy the parts of real estate sold by co-owner at a price at which it is sold to third party. If this rule is violated, the co-owner has a right to claim for transfer of the buyer's rights and obligations pursuant to the sale and purchase agreement on him. The only exception of this rule is when sale takes in the form of the public auction. Furthermore, when land plot on sale is located in certain protected territories (for example, regional and national parks or reservations), state has the pre-emptive right to acquire such land plots. Price for such land plot is limited to its average market value. The pre-emptive right to buy a land plot is guaranteed to a person who owns a building on such land plot.

### Concentration

Competition Council shall be notified and permission is required when the general income of enterprises concerned is more than LTL 50,000,000 (EUR 14,481,000) for the financial year before concentration and the general income of each of at least two enterprises concerned is more than LTL 5,000,000 (EUR 1,448,100) for the financial year before concentration.

### Preliminary negotiations and contracts

During the pre-contractual relationships, negotiations can be conducted freely, although parties are obligated to negotiate in good faith. A party who begins negotiations or negotiates in bad faith shall be liable for the damages caused to the other party.

Parties usually conclude a preliminary contract before the actual sale and purchase agreement. Provisions of the preliminary contract are compulsory to the parties. If the party does not agree to conclude an agreement as settled in the preliminary contract, that party takes a risk of other party being entitled to claim damages for violation of the preliminary contract. It is recommended to negotiate liquidated damages in the preliminary contract. In case preliminary contract is registered in the Real Estate Register, third parties shall be prevented from acquiring such real estate.

In the preliminary contract, the parties are obliged to establish a time-limit within which the main agreement must be concluded. If such time-limit is not established, the main agreement must be concluded within one year from the date of the conclusion of the preliminary contract.

### Asset transfer, share transfer and business transfer

There are three ways to conclude a real estate transfer: asset transfer, share transfer and business transfer. The latter is not commonly used in practice. If parties choose on asset deal, following issues should be considered: firstly, lessee will have a statutory right to cancel lease due to the change of ownership. This may be important when transferring such property as shopping centre or offices. In practice it is usual to waive this right. However, it is not clear if such waiver would be enforceable. Secondly, asset transfer is more expensive due to taxes for notary public and other public services. Though, due diligence of asset transfer is usually less expensive than share transfer.

When exercising share transfer, following issues should be considered: firstly, share transfer does not include notary and other state fees. Secondly, due diligence is much wider as it involves transfer of the whole enterprise, including all risks they may arise after the change of ownership. Transfer of shares is substantially more risky compared to transfer of assets only, as it involves all potential risks, obligations and claims from third parties.

### Collective investment undertakings

Only a private (UAB) or public (AB) limited liability shall have the right to engage in the management of investment companies. License from the Bank of Lithuania (central regulatory body for financial transactions) is required to pursue aforesaid activities.

The real estate investment company, whose assets' management has not been delegated to the management company, must ensure that the objects of real estate, comprising the investment portfolio of the collective investment undertaking are evaluated by at least two independent qualified property appraisers. In case when all investors are professionals, one appraiser is enough.

Investment portfolio of real estate property has to be diversified according to the Law on Collective Investment Undertakings. For example, no more than 30% of the assets of a real estate property collective investment undertaking may be invested in one object of real estate and/or real estate company.

### Mortgage

Mortgage is the pledge of real estate to secure the performance of contractual obligations. The mortgage is created by perfecting mortgage bond. Only in the Mortgage Register registered mortgage may be invoked against honest third party. However, from 1 July 2012 for the parties the mortgage takes effect as of the date of conclusion the notarized mortgage agreement. According to the amendments of the Civil Code (valid as of 1 July 2012), perfection of mortgage has been simplified – courts are no longer involved in mortgage procedure. All formalities are carried out by notary public (including issue of the receiving order for recovery proceedings performed by the bailiff). Moreover, the new amendments allow enterprise mortgage. The enterprise may be pledged as a real estate (pool of assets). The main idea of this new regulation is that the pledge is not tied to a particular property at the particular time. The company will be able to dispose its own property despite the mortgage, unless the mortgage agreement specifies the disposal restrictions.

## Lease of real estate

### *Tax aspects*

#### Rental income

For local Lithuanian entities income from rent of real estate is considered as taxable income which is in general subject to 15% CIT under regular taxation rules of company business activities (i.e. companies' profit is taxed).

For foreign entities income from rent of real estate located in Lithuania is subject to 15% WHT. WHT is levied on the total proceeds of rent. The risk of constituting a taxable presence (i.e. the so-called permanent establishment) in Lithuania due to business activities within the country should be considered.

A foreign company that owns real estate in Lithuania should not be considered to constitute a permanent establishment (PE) if it does not use the real estate in commercial activities. It should be noted, however, that where there is a double tax treaty in force between Lithuania and the foreign country, the provisions of that treaty should be considered.

Where a PE is deemed to exist, the foreign company is subject to apply the same taxation regime as a Lithuanian resident entity.

#### Personal Income Tax

For local and foreign individuals income from rent of real estate located in Lithuania is subject to 15% PIT on gross income. If rental income is received from registered individual activity, PIT is levied on the profits (income less expenses). Upon certain conditions, individuals can opt to pay a fixed amount of tax on rent of privately owned real estate once a year.

#### Value added tax (VAT)

In general, letting of real estate is VAT-exempt, with some exceptions provided below:

- Provision of accommodation services in hotels, motels, camping sites or in sectors with a similar function.
- Letting of other residential premises for a term not exceeding two months.
- Letting of premises, sites, garages for parking or keeping of any means of transport (including aircraft, ships, rolling stock), or other property with a similar function, immovable by its nature.
- Letting of any permanently installed equipment (including safes) falling within the concept of property immovable by their nature.

Whereas rent is VAT-exempt according to the general rule, a VAT payer is entitled to opt for taxation, i.e. VAT can be charged on rent of the property if the customer is registered for VAT purposes and performs economic activities. From 2012, VAT may be charged on rent of real estate to legal persons established under diplomatic and consular arrangement or to institutions of the European Union, the EIB, the EIC, even if these legal persons are neither VAT-registered nor do they perform economic

activities. If a company exercises this right in respect of one rent transaction, the same VAT treatment will automatically apply to all analogous transactions for the following 24 months.

## *Legal aspects*

Lease of real estate property has to be concluded in written form. Such lease may be invoked against third parties only if it is registered in Real Estate Register. The rights to use the land plot which is occupied by the buildings shall pass to the lessee simultaneously with the transfer of buildings. The parties may freely agree on lease terms, but in all circumstances it cannot exceed 100 years. Fixed-term lease shall be considered to become indefinite if lessee continues to use the property for more than ten days after the expiry of the lease contract without any opposition from the landlord.

The lessee who has duly performed his obligations under the contract will have a preferential right to renew the contract on the same conditions it is offered to third parties. Landlord must inform lessee about his right to renew the contract. In case landlord violates his duty to renew the contract, lessee may either request the transfer of the rights of the lessee under the new contract or claim for compensation of damages incurred. The parties may freely agree on terms and conditions of payment of lease and other expenses. Payment for the leased property from the State is calculated on fixed tariffs. Commercial rent also may be evaluated as a percentage of the lessee's turnover (for example, lease of space in shopping centres). In such cases minimum fixed payment should also be established. Lease payment may also be established by certain services to the landlord or by the duty of lessee to improve leased property on his own expense.

When transferring the rights of ownership, leased contracts, registered in the Real Estate Register, shall preserve validity to the new owner. It is important to note, that transfer of the right of ownership gives a right to the lessee to terminate the lease contract.

If landlord seeks to evict lessee from the leased property, he should apply to the court.

## *Constructions*

Before the constructions, it is required to have a detailed plan of the construction site. Such detailed plan determines: maximum allowed height of buildings, land boundaries, land management and operating modes and other aspects.

In certain cases it may be required to perform environmental impact assessment e.g. if the construction will be near protected territories.

In order to obtain a construction permit, a set of design conditions for constructions works have to be obtained. The set of design conditions includes conditions on connection to networks supplying water, gas, electricity, heating and telecommunications. After approval of the set of design conditions, design of building in accordance with the design conditions has to be prepared.

Construction permit shall be issued in about 10-45 business days, depending on the complexity of the building. Issued construction permit is valid indefinitely.

Works to destroy a building require a demolition permit unless are covered by construction permit.

## Operating real estate

### *Tax depreciation*

The depreciation of buildings and other structures is calculated separately for each asset. Generally, buildings may be depreciated over periods from 8 to 20 years. New buildings may be depreciated using either a straight-line or double declining balance method. All other buildings may be depreciated using only the straight-line method. The method selected should be applied consistently: the same depreciation method selected by the entity shall be applied to every class of fixed assets and each item of assets within that class over the total depreciation or amortisation period for fixed assets.

If an entity acquires fixed assets and places them in service during the first half of the year, depreciation of such assets is commenced during the same year. If an entity acquires fixed assets and places them in service during the second half of the year, depreciation is commenced during the year immediately following that year in which the assets had been acquired and were placed in service. An entity also may choose to calculate the depreciation of all fixed assets from the first day of the next month after such assets were put into use by using the straight-line method.

### *Losses carried forward*

Operating tax losses can be carried forward for an unlimited period of time as long as activities from which the losses were accumulated are continued. The losses incurred on the disposal of securities or derivative financial instruments can be carried forward for a period of five years starting from the year after such losses were incurred, and can only be offset against income of the same nature.

Upon the merger the tax losses of the merged companies can be carried forward provided that the same activities are continued to be carried on for at least three years after the merger.

Tax losses incurred after 1 January 2010 can be transferred from one company to another within the same group of companies if certain conditions are met.

### *Real estate tax*

Most real estate owned by a local or foreign company is subject to tax on real estate. In 2012 the tax rate ranges from 0.3% to 1% of the taxable value (which is set as market value periodically) of real estate, and the actual rate is established for each municipality by the relevant municipal council.

As of 2013 the above mentioned tax rate will range from 0.3% to 3%.

The Vilnius City municipality confirmed that for real estate based in the Vilnius City, a rate of 0.5%, 0.8% or 1% (depending on real estate type) will apply for 2012-2013 period.

Real estate owned by individuals and used for commercial purposes is also subject to tax on real estate at the rate applicable in a particular municipality. Legal entities are obliged to calculate and pay tax on real estate rented from individuals.

As of 1 January 2012 the value of non-commercial immovable property owned by individuals and their family members exceeding the threshold of LTL 1m (EUR 290,000) is subject to a fixed RET rate of 1%.

The taxable value is deemed to be the average market value determined by mass valuation (performed every 5 years) according to the main purpose and location of the property, or the replacement value in respect of some specific types of real estate. Taxpayers may request for application of a value obtained from an independent valuator if the value under this approach differs from the average market value or the replacement value by more than 20%.

### *Land tax*

Private landowners (Lithuanian and foreign entities and individuals) are subject to land tax, which is collected by the municipalities for the land they own in Lithuania. Roads for general use and forestland are exempt. The annual tax rate is 1.5% of the taxable value, which is determined according to the rules established by the government. The assessment and payment terms are set forth by the municipalities, which are also entitled to grant land tax incentives.

Land Tax applies on land owned by companies and individuals, except for the forest land. Currently the tax rate is 1.5% and it is applied on the land value determined by the State Enterprise Centre of Registers (i.e. typically, the value is much lower than the actual market price of land).

As from 2013 the Land Tax will be calculated on the average market value of land assessed by mass valuation method and the tax rates will vary between 0.01% and 4%, depending on each municipality. There is a transitional period set for 2013-2016 in case the new taxable value rises in these periods.

### *State-owned land lease tax*

Lithuanian and foreign companies which use state-owned land for their economic activities are subject to land lease tax. The minimum tax rate is 0.1% and the maximum rate is 4% of the value of the land. The actual rate is established by the relevant municipality council.

## **Financing the property**

Lithuanian thin capitalisation rules apply with respect to Lithuanian entities with debt to either Lithuanian or foreign controlling parties (hereinafter 'the controlled debt').

A controlling party is a controlling taxable person or resident (Lithuanian or foreign) who controls a Lithuanian entity on the last day of a tax period and directly or indirectly owns more than 50% of shares (or together with other related parties own more than 50% of shares of the Lithuanian entity, whereas not less than 10% of shares are controlled by the controlling party).

Controlled debt is the debt which a Lithuanian entity borrows from controlling parties, including debt from third parties if those debts are guaranteed by the controlling party, and debts guaranteed by the third parties to a Lithuanian entity if the controlling party guaranteed such debt for those parties.

If the controlled debt-to-equity ratio of a Lithuanian entity exceeds 4:1, the interest expenses on the controlled debt exceeding the ratio are deemed to be non-deductible for profits tax purposes.

This provision will not apply if a company can substantiate that the same loan would be provided under the same terms and conditions between independent (not related) persons.

The 4:1 ratio is calculated on the last day of the tax period.

According to the Lithuanian thin capitalisation rules, interest expenses on profit participating loans and profit related rental expenses are recognised as not related to earning of income, therefore, cannot be recognised as deductible expenses for profit tax purposes.

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# *Real Estate Going Global Luxembourg*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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All information used in this content, unless otherwise stated, is up to date as of 31 May 2013.

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# *Real Estate Tax Summary – Luxembourg*

## General Overview

Luxembourg has been a favoured place for real estate ownership structuring for nearly two decades. The main principles of Luxembourg tax law are an important factor in allowing investors to structure real estate investments or reorganisations in the most efficient way.

The purpose of this summary is not to give an exhaustive description of the Luxembourg tax system as it applies to real estate, but to give an overview of the main Luxembourg tax aspects of investing in real estate in or through Luxembourg.

## Taxation of individuals

Luxembourg resident taxpayers are subject to personal income tax on their worldwide income. Non-resident taxpayers are taxed only on their Luxembourg-sourced income, notably on income derived from real estate located in Luxembourg. In general, international tax treaties concluded by Luxembourg also give the right to tax income derived from Luxembourg real estate property to Luxembourg (in line with article 6 of the OECD Model Convention). The personal income tax rates are progressive and for 2013, range from 0% up to 40%. A 7% or 9% surcharge for contribution to the unemployment fund applies on the income tax due.

## Taxation of business undertakings

In Luxembourg, some business undertakings (i.e. operated through partnerships) are subject to personal income tax on profits. However, the majority of businesses are operated through joint-stock companies, and are subject to corporate income tax. However, the corporate income tax rules will be different depending on the tax residency of the company.

### *Taxation of business undertakings realised by a resident company*

#### **Corporate income tax**

Corporate income tax is levied annually, based on the profit and loss account of the company, at a rate of 22.47% since January 2013 (i.e. including the surcharge for the contribution to the unemployment fund). The Luxembourg tax law however provides that certain types of income (notably dividends, capital gains and liquidation proceeds) may be exempt from taxation under certain conditions.

With effect from 1 January 2013, Luxembourg has imposed two types of minimum charge to corporate income tax.

A minimum corporate income tax of EUR 3,000 (i.e. EUR 3,210 taking into account the solidarity surcharge), is applicable to all fully resident taxable corporate entities whose activity does not require a business licence, and for which the sum of financial assets, transferable securities and cash at bank exceeds 90% of the total balance sheet.

A new minimum corporate income tax, ranging from EUR 500 to EUR 20,000 (increased by solidarity surcharge) depending on a company's total assets, is applicable to all other corporations having their statutory seat or central administration in Luxembourg.

The Luxembourg tax authorities have confirmed that directly owned real estate assets, whether located in Luxembourg or abroad, should not be taken into account in the determination of the balance sheet value.

### Municipal business tax

The municipal business tax is a tax (collected for municipalities) which is assessed annually at the rate of 6.75% (for Luxembourg City) on the operating profit, and is generally calculated on the taxable income as computed under the corporate income tax rules. Consequently, any exemption under the corporate income tax rules will generally result in a *de facto* exemption under the municipal business tax rules. Moreover, a flat allowance of EUR 17,500 is available if applicable.

### Net wealth tax

Luxembourg companies are subject to net wealth tax. The basis for this annual tax is the market value of the net operating assets, set by the unitary value of the company. Under the net wealth tax regime, the date at which the net operating assets are assessed is 1 January of each financial year. The current net wealth tax rate is 0.5%. The Luxembourg tax law provides that certain shareholdings may be excluded from the net operating assets under certain conditions.

### Withholding tax

Under the current domestic law, there is no withholding tax levied on interest payments (unless exceptionally the EU Savings Directive applies), and on liquidation proceeds distributions.

On 1 July 2005, the EU Savings Directive as implemented in Luxembourg entered into force. The aim of the EU Savings Directive is to ensure that interest income paid cross-border within the EU to individuals is taxed in the country of residence of the individuals. The EU Savings Directive provides, as a general rule, for an automatic exchange of information between paying agent and tax authorities. However, Luxembourg applies a withholding tax of 35% since 1 July 2011, unless the recipient has opted to allow information to be exchanged. It should be noted that the Luxembourg Government announced officially its intention to apply, as of 1 January 2015, the automatic exchange of information as the general rule.

A domestic rate of 15% generally applies to dividend distributions. This rate can however be reduced/eliminated by exemption given under domestic legislation, by the application of a double tax treaty, or by application of the EU Parent-Subsidiary Directive as transposed into the Luxembourg domestic tax law.

Under the Luxembourg law, dividend distributions are exempt from withholding tax in Luxembourg if all the following conditions are fulfilled:

- The distributing company is a fully taxable Luxembourg joint-stock company.
- The company receiving the dividends is:
  - another fully taxable Luxembourg joint-stock company, or
  - a company resident in a member state of the European Union and falling under article 2 of the Council Directive 2011/96/UE dated 30 November 2011, on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states ('Parent/Subsidiary Directive'), or
  - a Luxembourg permanent establishment of a company resident in a member state of the European Union and falling under article 2 of the foregoing Directive, or
  - a Luxembourg permanent establishment of a joint-stock company resident in a state with which Luxembourg has concluded a double tax treaty; or
  - a collective entity subject to a tax corresponding to the Luxembourg corporate income tax (i.e. a tax rate of minimum 10.5% assessed on a similar basis as in Luxembourg) and is a resident in a state with which Luxembourg has concluded a double tax treaty.
- At the date on which the income is made available, the beneficiary has been holding or undertakes to hold, directly, for an uninterrupted period of at least 12 months, a participation of at least 10% or with an acquisition price of at least EUR 1.2m in the share capital of the payer. If the participation is held through a Luxembourg tax-transparent entity, this will be regarded as a direct participation, proportionally to the interest held in the tax-transparent entity.

### Transfer pricing

On 28 January 2011 and 8 April 2011, the Luxembourg tax authorities issued two Circulars concerning the tax treatment of Luxembourg entities that are mainly engaged in intra-group lending activities financed by borrowings. These guidelines are aimed at assisting the tax authorities and companies dealing with intra-group financing to determine their taxable result in Luxembourg in accordance with OECD transfer pricing principles. The Circular expressly requires that a Luxembourg entity engaged in financial intermediation activity should maintain an adequate level of equity and real operational substance, with regard to the functions performed, if it wishes to secure a confirmation from the Luxembourg tax authorities that its arrangements would be seen as satisfying the 'arm's length' principles.

### Sustainability

In the current economic context, sustainability is becoming a key element when developing business strategies and improving companies' competitive advantage. The Luxembourg Government has developed and offered different types of aid schemes and tax incentives to encourage Luxembourg based companies to be more sustainable.

### *Taxation of business undertakings realised by a non-resident company*

A foreign company may be subject to tax in Luxembourg if it conducts commercial activities in Luxembourg through a permanent establishment, or (in the absence of such a permanent establishment) on income which has a strong attachment

to Luxembourg (e.g. income from immovable property located in Luxembourg). It should be noted that under certain conditions speculative capital gains resulting from the sale of shares in a Luxembourg company by a non-resident company may be taxable in Luxembourg, although this taxation is relatively limited in scope. In addition, there may be double tax treaties concluded between the state of residence of the foreign shareholder and Luxembourg that preclude this capital gains tax charge.

## Indirect taxes

### *Value added tax (VAT)*

#### General principles

The normal VAT rate in Luxembourg is 15%. However, under some conditions, the ‘super-reduced rate’ of 3% can apply to the building and renovation of housing when the housing is used as a main residence either in the hands of the owner or in the hands of the tenant. The application of this super-reduced rate is limited to certain types of works.

#### Supplies of services – place of taxation

As a general rule, the place of taxation of supplies of services depends on the VAT status of the recipient. Services rendered to non-taxable persons (B2C) are generally deemed to be taxable in the country of the supplier, with some exceptions. Services rendered to taxable persons and assimilated persons (B2B) are generally deemed to be taxable in the country where the customer/recipient has established his business, with some exceptions.

The main exception in the real estate sector concerns services connected with immovable property. Such services are deemed to be taxable in the country where the immovable property concerned is located, regardless of the VAT status of the service recipient.

#### Supplies of goods – place of taxation

The rules for determining the place of taxation of supplies of goods depends on several factors, such as whether the goods are transported or not and whether the supply of the goods occurs with installation. As a result, the supply of an item of real estate is deemed to be taxable in the country where such immovable property is located.

#### VAT exemption

According to the Luxembourg VAT Law, the sale, letting and leasing of immovable property is generally exempt from VAT. This exemption is not applicable to the transfer of ownership of a not yet existing building, work on existing buildings (renovations), the provision of accommodation in hotels and camping areas, the letting of equipped sites for the off road parking of vehicles, the letting of machines, tools, and business installations, and the hire of safes.

In case of the supply of a building which is partially built, it is necessary to distinguish between the part already built and the part still to be built, because different VAT treatments apply (i.e. partially exempt and partially subject to VAT).

#### Option to VAT

Under certain conditions, the parties to a sale, letting or leasing of immovable property located in Luxembourg may opt for VAT.

The advantage of an option to tax resides in the fact that it preserves VAT neutrality. A seller/landlord undertaking a real estate based transaction subject to VAT is allowed to deduct input VAT it incurs in relation with that transaction (e.g. VAT on the construction, the acquisition or the refurbishing of the building).

### **Input VAT recovery right**

VAT-able persons performing VAT-able operations can recover input VAT incurred on the purchase of goods and services which are in direct and immediate link with such operations.

### ***Registration duty (droit d'enregistrement)***

Transactions involving the transfer of immovable property are subject to registration duty in Luxembourg. This is levied on the value of the land and of the parts that are already built.

Registration duties are also levied on the registered rent of immovable property located in Luxembourg. The rates of registration duties are either fixed or proportional and can be significant. Further details are set out below.

A fixed registration duty of EUR 75 is due upon incorporation (and on any capital increase or amendment to the article of association) of any Luxembourg resident company (including an SCI), or Luxembourg Fund vehicles (including SIFs, SICARs and securitisation vehicles).

# *Real Estate Investments – Luxembourg*

## *Preface*

The real estate industry is currently facing a multitude of challenges and transformations while being in a period of uncertainty. Nevertheless, Luxembourg remains an attractive location for real estate investment or real estate ownership structuring.

Although Luxembourg has been affected by the crisis, along with its European partners, its political, social, legal and fiscal stability has enabled Luxembourg to remain competitive.

The popularity of Luxembourg for real estate investments has also been enhanced by the possibility to invest via less heavily regulated funds vehicles, such as the Specialised Investment Fund (SIF) regime introduced in 2007.

There is also a draft bill to implement in Luxembourg, a specific type of partnership that is very similar to the well-known English Limited Partnership. The draft bill also provides the flexibility to have this Luxembourg Limited Partnership being regulated or not.

This summary comprises general background information on legal and taxation aspects of the most common real estate types of investment made in or through Luxembourg.

## *Direct investment in Luxembourg real estate*

### *Legal aspects*

#### *The right of ownership*

Under Luxembourg law, the right of ownership is defined as the right to enjoy and dispose of assets in the most absolute way, provided that no use is made thereof that is prohibited, or which might jeopardise the rights of third parties.

Attached to the right of ownership is the right of accession. On one hand, by virtue of the right of ownership, the owner of property is presumed to be the owner of the ground and of the subsoil, unless otherwise stated to the contrary. On the other hand, the right of accession is also regarded as being a way to acquire ownership of things related to the land. Thus, ownership of the land includes ownership of all the proceeds and income deriving therefrom as well as ownership of all that is attached to it.

By agreement, rights *in rem* can be granted to persons other than the owner of the land, by concluding a long lease, constituting a building right, or granting a usufruct.

## Sales agreement, pre-contractual agreement, notarial deed and registration

The purchase of property is made by concluding a sales agreement governed by both the law of contract in general and the specific rules applicable to sales.

A sales agreement is concluded at the moment that there is mutual consent between vendor and purchaser as to the identity of the asset to be sold, even if that asset does not yet exist (the transfer of ownership then being deferred) and as to the price. The price must be either already fixed, or determinable by reference to factors that are independent of the will of the parties. Oral sales contracts are possible, as a written contract is not necessary for the sale to bind the parties.

However, a sale of real estate must be registered, an act which triggers the payment of registration taxes, and recorded in the mortgage registry in order to be enforceable *vis-à-vis* third parties. As only duly certified deeds may be entered in the register, the sale must be recorded in a notarial deed. It is the notary public who will present the notarial deed for recording in the register.

## Long leases, building rights and usufruct

Long leases, building rights and usufruct are rights *in rem* that derive from the ownership of property. For the lessee, these rights normally confer more stability than a mere rental agreement as well as more extensive rights, and the lessor is guaranteed income over a longer period.

### *Long leases (droit d'emphytéose)*

A long lease allows the holder to use and enjoy property belonging to a third party in consideration for a yearly payment made in cash or in kind. The long lease must be granted for a fixed period of time varying between 27 and 99 years, a term which is renewable. The minimum period of the lease is increased to 50 years in the case of housing property.

By virtue of such a lease, the holder may exercise all the rights attaching to the property, but is not permitted to reduce the value of the property. The leaseholder must, however, be able to freely transfer his right to any third party, without the prior consent of the owner. The leaseholder may also grant a mortgage over the lease, the duration of which may not be longer than the term of the lease itself.

The leaseholder has to pay all expenses and taxes relating to the buildings and plantings, whether or not erected by the leaseholder, that are located on the property.

At the expiration of the long lease, the lessor becomes the owner of all buildings and plantings located on the land. Unless otherwise provided for under the lease, the holder will not be entitled to compensation for buildings the holder has erected or any plantings the holder has made.

The parties can also freely determine their respective obligations by agreement, except for the duration of the long lease right.

A long lease is constituted and transferred like a right of ownership, by a deed signed before a notary public that is subsequently recorded and entered in the mortgages register.

The leaseholder also has a right of first refusal to purchase the property.

### *Building rights (droit de superficie)*

A building right is a right *in rem* granted for a fixed duration of a maximum of 99 years, a term which is renewable, which allows the holder to own and erect buildings, works or plantings on a property belonging to another. The holder may grant securities or rights of usufruct over the building right or transfer it to third parties.

For the duration of the contract, ownership of the land and ownership of the buildings thereon are distinct. Upon the expiration of the building right, the owner of the land becomes the owner of all the buildings and plantings located thereon by virtue of the right of accession. However, the owner of the land has to pay compensation to the holder of the building rights for all buildings constructed and plantings done.

Under certain circumstances, this compensation is not payable to the right-holder for constructions that already existed when the building right was constituted.

In the capacity as the owner, the holder has to bear all expenses and taxes relating to the buildings and plantings located on the land.

The parties can also freely determine their respective obligations by agreement, except for the duration of the building right. Building rights are constituted and transferred as in the case of rights of ownership by a deed signed before a notary, which is subsequently registered, and entered in the mortgages register.

The holder of the building right also has a right of first refusal to purchase the property.

### *Usufruct*

Usufruct allows a renter temporary enjoyment of a property belonging to another. If granted to an individual, the usufruct generally can only be terminated upon the occurrence of a certain event and its term may not exceed the lifetime of the renter. If granted to a corporate body an usufruct is limited to 30 years.

Unless expressly forbidden by law or by the deed constituting the usufruct, the renter may transfer its right to a third party. Even if transferred, the usufruct will terminate upon the death of the initial renter. The renter may also grant a mortgage over its right, the duration of which cannot exceed the lifetime of the initial renter.

The main obligation of the renter is to take good care of the property. The renter has to insure and maintain the property in good order, and is responsible only for minor repairs. The remainderman has to pay for all major repairs, for instance, roof repairs. Except if expressly discharged by the remainderman, the renter has to put up a guarantee for the performance of the renter's obligations.

The renter is entitled to receive all proceeds and income deriving from the subjects of the usufruct but, against this, has to bear all annual expenses incurred in connection with such proceeds and income.

At the end of the usufruct, the renter is not entitled to compensation for any improvements the renter has carried out.

A property usufruct is constituted by notarial deed, which is subsequently registered and entered in the mortgages register.

## *Tax aspects*

### **Direct investment in Luxembourg property by individuals**

Whatever the status of an owner of a property located in Luxembourg, i.e. private individual resident or non-resident taxpayer, the taxable basis of income derived from the property will be determined in accordance with Luxembourg law.

For individual resident taxpayers in Luxembourg, an additional contribution called '*assurance dépendance*' (1.4%) is due on income derived from property.

### *Resident individuals*

#### **Rental income**

Any individual registered as tax resident in Luxembourg and investing in Luxembourg property is subject to personal income tax on income attributable to property located in Luxembourg.

Under Luxembourg tax law, rental income that is taxable includes either the income from the actual rental of a building, or the rental value (*valeur locative*) of a building occupied by an owner-occupier.

However, only the net amount of rental income derived from the property investment is subject to Luxembourg income tax.

#### *Determination of the net rental income derived from the actual rental*

The net income is equal to the gross rental income less deductible expenses. Deductible expenses for rental income include *inter alia* the maintenance costs for the building, interest and charges linked to the financing of the property, property taxes, insurance premiums, and depreciation of buildings.

Property is depreciable, with the exception of land. Regarding depreciation, if no split is made in the deed of sale between the price paid for the land and the price of the buildings, it is assumed that 20% represents the value of the land. The only method of depreciation for buildings is the straight-line method. The acquisition cost, including related expenses such as registration duties, the notary's and architect's fees, but excluding subsidies, forms the basis for depreciation. Depreciation rates are based on the useful life of the assets and vary between 2% and 6% per year.

Finally, the taxpayer can deduct a lump-sum amount for certain expenses (not including the debt interest on a loan used to acquire the property) in relation to the building, this amount being the lesser of 35% of the gross annual rentals or EUR 2,700.

#### *Determination of the net rental income derived from the owner-occupier*

A fictitious rental income is calculated on the basis of the real estate assessed unitary value as determined and communicated by the Luxembourg tax authorities.

The fictitious rental income equals to 4% of the assessed unitary value not exceeding EUR 3,800 and to 6% of the assessed unitary value above EUR 3,800.

The rental value of the occupier's principal dwelling can only be reduced by interest paid on loan financing the acquisition of the property or the construction of an extension to the property. The maximum amount of interest that can be deducted is set by grand-ducal regulation. For 2013, ceilings are fixed at EUR 1,500 per annum per family member for the first year of occupation and the five following years. This

amount falls to EUR 1,125 for the next five years of occupation, then to EUR 750 for the following years.

However, given that the unitary value of the building is generally very low, the fictitious rental income is usually negative and creates a loss which can be offset against other taxable income.

The tax rate for rental income is the recipient's marginal tax rate, which varies between 0% and 40% for 2013 (to which the surcharge for the unemployment fund contribution is added), depending on the taxpayer's overall level of income.

### Capital gains

Capital gains from the sale of the taxpayer's principal residence may generally be exempt from Luxembourg tax, subject to certain conditions.

Capital gains from the disposal of property, other than a principal residence, acquired less than two years prior to the sale of land and buildings, are taxable as miscellaneous income, or '*bénéfice de spéculation*'. The gain corresponds to the difference between the disposal proceeds and the acquisition price, without taking into account any deductions.

Capital gains on the disposal of property, other than the principal residence, held for more than two years are also taxable as miscellaneous income, but as '*bénéfice de cession*' ('long-term capital gain'). Such capital gains correspond to the difference between the re-valued acquisition price according to a revaluation factor determined annually, and the disposal proceeds, without taking into account any deduction. The acquisition price is the price paid by the previous buyer in case of transfer of real estate upon death. Moreover, in relation to long-term capital gains the taxpayer may benefit from a lump-sum deduction of EUR 50,000 for a single person or EUR 100,000 for married couple/partners taxable jointly. This allowance is available every 10 years. To this deduction can be added a specific allowance of EUR 75,000 for sale of a main residence inherited from direct forbears. This specific allowance is available only once. For long-term capital gains, the personal income tax rate is 50% of the marginal tax rate (maximum 21.8% for 2013).

Under specific conditions, taxation of the capital gains resulting from the disposal of property can be deferred to the extent that these gains are used to fund the acquisition of a new property located in Luxembourg, which the owner intends to put up for rent.

### *Non-resident individuals*

#### Rental income

Non-residents are taxable in Luxembourg on income arising from the rental of assets located in Luxembourg. The principles governing the taxation of rental income earned by residents are applicable to non-residents. If available, double tax treaties may avoid double taxation.

#### Capital gains

The same principles apply as for the taxation of capital gains realised by resident taxpayers. It should be noted that the lump-sum deduction of EUR 50,000 cannot be doubled in the hands of non-resident individuals who do not opt for a joint taxation.

## Direct investment in Luxembourg property by a company

### *Resident companies*

Companies resident in Luxembourg are subject to corporate income tax and municipal business tax on their worldwide income. Taxable income of a company investing in a Luxembourg property comprises the total income realised on the property (that is rents plus capital gains on disposal), less allocable expenses. Allocable expenses include *inter alia* property tax, depreciation, maintenance, repair costs and interest on loans incurred in order to acquire the property.

The net income derived will be subject to corporate income tax and municipal business tax at the aggregate rate of 29.22% (for Luxembourg City) for 2013.

Property is depreciable, with the exception of land. Regarding depreciation, if no split is made in the deed of sale between the price paid for the land and the price of the buildings, it is assumed that 20% represents the value of the land. The only method of depreciation for buildings is the straight-line method. The acquisition cost, including related expenses such as registration duties, the notary's and architect's fees, but excluding subsidies, forms the basis for depreciation. Depreciation rates are based on the useful life of the assets and vary between 2% and 4% for a new building, or even more for older buildings. Industrial buildings are generally depreciated at 4%. Moreover, separate depreciation at a higher rate may be applicable for certain components of the property (i.e. lifts or elevators, air-conditioning installations, etc).

The taxation of the capital gain resulting from the sale of property can be postponed provided the following conditions are satisfied:

- The asset transferred was in the balance sheet of the company for at least five years preceding the alienation.
- The new qualifying asset in which the company would reinvest is used in Luxembourg so as to ensure that any taxes due on the asset's final disposal are paid.
- The company keeps regular accounts.
- The reinvestment in a qualifying asset takes place before the end of the second year following the year of the sale. If the reinvestment does not take place in the year of sale, the tax charge may still be postponed provided that the company expresses its intention to reinvest the proceeds and the gain is entered as a special reserve in the balance sheet. If the conditions are not met, the gain must be added to taxable income.

Conversely to many other tax regimes, losses relating to the property can be used to offset any other taxable income. Tax losses incurred by a Luxembourg corporate taxpayer are available for offset against taxable profits arising in subsequent years. This carry-forward is for an unlimited period of time.

### *Non-resident companies*

The taxation will vary depending on whether the non-resident company has a permanent establishment in Luxembourg.

### Investment through a permanent establishment

Under the Luxembourg tax law, a permanent establishment is defined as any fixed piece of equipment, or any place that serves for the operation of an established business. Under domestic tax law, an independent commission agent would not cause a taxable presence, even if the activities fall under the definition of a permanent establishment. As a result, only a non-resident company that builds real estate in Luxembourg with the sole purpose of sale is taxable in Luxembourg on commercial revenue. Its revenue derived from the real estate property (rent and gains less allocable expenses) will be subject to corporate income tax and municipal business tax at the aggregate rate of 29.22% (for Luxembourg City) for 2013.

### Investment by a foreign company

In all other cases (i.e. income earned by a non-resident company having no commercial activity in Luxembourg through a permanent establishment), the foreign company does not have a commercial activity, but will be subject to the Luxembourg taxation regime applicable to the nature of the Luxembourg-sourced income it receives.

In practice, the income from renting out a Luxembourg property is taxable as rental income under the same conditions as those for non-resident individuals. (Please refer to the above section *'Direct investment in Luxembourg property by individuals'*) Consequently, any tax losses incurred are not available for offset against taxable profits arising during subsequent years. However, as mentioned above, some expenses may be deducted from the gross rental income to establish the net income.

The capital gains on the real estate are taxable as miscellaneous income. The gain corresponds to the difference between the disposal proceeds and the acquisition price, without taking into account any deduction. For gains on assets owned for more than two years (i.e. long-term gains), the acquisition cost may be re-valued using coefficients that are intended to account for the effect of inflation.

As outlined above, income from renting out a Luxembourg property and capital gains resulting from the sale of a Luxembourg property derived by foreign companies are subject only to Luxembourg corporate income tax (including the surcharge for the unemployment fund) at the rate of 22.47% for 2013. It should be noted that the scope of this may also be affected by any applicable double tax treaty.

### Indirect taxes

#### VAT

As a general rule, the sale of an existing property located in Luxembourg is exempt from Luxembourg VAT. Accordingly, the transferor is not entitled to recover input VAT incurred on related expenses.

The seller may however opt to VAT to the extent that the option conditions are met. In consequences, input VAT incurred on related costs is recoverable.

#### Registration duties

The transfer (either by way of sale or capital contribution) of immovable property located in Luxembourg is subject to registration duties.

The registration duty is 6%, plus a 1% transcription tax. A municipal surcharge of 50% on the value of the registration duties is also due where the property is located within the Luxembourg City municipality (i.e. combined rate of 10%).

These duties are normally computed on the higher of the sales price or the market value. If the sale is subject to VAT, the taxable amount includes the VAT.

The Luxembourg law provides for a reduced rate where immovable property is contributed to a company in exchange for shares. In such case, the registration of the deed is subject to proportional registration duties at the rate 0.6% and the related transcription duty of 0.5% (i.e. combined rate of 1.1%) plus a municipal surcharge of 0.3% where the immovable property is located in the municipality of Luxembourg City (i.e. combined rate of 1.4%).

A contribution of immovable property, remunerated by other means than issue of shares, is subject to the same registration duties as for a sale (i.e. 6%, plus transcription tax of 1% plus municipal surcharge of 3% in Luxembourg City).

A fixed registration duty (relatively low – EUR 75 plus the related stamp duty and other duties applied by the Administration) applies in case a contribution of immovable property to a company is performed in the framework of a ‘restructuring transaction’. A ‘restructuring transaction’ is defined as being the contribution, by one or several companies, of all their assets and liabilities or one or several lines of business, to one or several companies, as long as such contribution is mainly made in exchange for shares issued by the acquiring company(ies) and representing its/their capital.

## Investment in a property company

### *Legal framework*

Although the Companies Act provides for several types of companies, in practice it seems that the types of companies most commonly adopted are the private limited liability company (i.e. *société à responsabilité limitée* or S.à r.l.) and the public limited liability company (i.e. *société anonyme* or S.A.). One of the main features of these forms of companies is that the shareholders are liable only up to the nominal value of the shares they own.

The minimum capital is EUR 12,500 for an S.à r.l. and EUR 31,000 for an S.A.

It has to be noted that a statutory auditor must be appointed by the shareholders of an S.A. to check the financial statements of the company (no statutory auditor is required for an S.à r.l.). An external auditor will be required for an S.A. and an S.à r.l. only if the company exceeds certain criteria set out in the law. In the event of a contribution in kind, an external valuation report is required for an S.A. (not required in case of S.à r.l. where a valuation statement prepared by the founders or the board of managers, as the case may be, is sufficient).

### *Tax aspects*

#### *Investment in a property company by individuals*

##### *Resident individuals*

##### *Dividends*

Dividends paid by a resident company are subject to a withholding tax at 15%.

Dividend income forms part of the worldwide income of a resident taxpayer subject to progressive income tax rates. An exemption of EUR 1,500 (doubled for taxpayers

taxable jointly) applies on total investment income (interest, dividends, income from portfolio investments, etc.) received during the tax year.

Finally, if dividends are paid by a Luxembourg resident company that is fully liable to corporate income tax, or an EU company listed in the EU Parent-Subsidiary directive, or a capital company fully liable to a tax corresponding to Luxembourg corporate income tax and that is resident in a country with which Luxembourg has signed a tax treaty, 50% of the dividend income is exempt from Luxembourg taxation.

### Capital gains

Capital gains arising from the disposal of shares occurring less than six months subsequent to the acquisition date are taxable as miscellaneous income, and consequently added to the other income of the taxpayer for determining the taxable basis. The amount is taxed at normal personal income tax rates.

Capital gains subject to tax also include gains arising from the disposal of a substantial shareholding (i.e. more than 10% of the shares held alone or together with spouse and minor children, directly or indirectly, at any time during the five years prior to the day of disposal) in a limited liability or co-operative company to the extent that the disposal takes place more than six months after the date of acquisition. In such a case, the taxpayer may benefit from a lump-sum deduction of EUR 50,000 for a single person or EUR 100,000 for married couple/partners taxable jointly. The personal income tax rate is 50% of the marginal tax rate (maximum 21.8% for 2013).

### *Non-resident individuals*

#### Dividends

Dividends paid by a Luxembourg resident company to a non-resident individual shareholder are subject to a withholding tax of 15%, with the possibility of reduced rates under double tax treaties.

For non-residents, this withholding tax is a final tax charge in Luxembourg.

#### Capital gains

Non-resident taxpayers are only taxable on capital gains realised on the sale of shares in the following situations:

- Disposal of a major shareholding (i.e. more than 10% of the shares held alone or together with spouse and minor children, directly or indirectly, at any time during the five years prior to the day of disposal) in a company having its registered office or principal establishment in Luxembourg, within six months of the acquisition of the shareholding. In this case, the capital gain will be subject to tax on income at the normal rates (i.e. according to progressive income tax rates with a maximum to 43.60% for 2013);
- Disposal of a major shareholding in a Luxembourg company by a person who has been resident in Luxembourg for more than 15 years and has subsequently become a non-resident less than five years before the realisation of the capital gains on the shares. In this case, the purchase price can be re-valued to account for inflation. Moreover, the personal income tax rate corresponds to 50% of the marginal tax rate (maximum 21.8% for 2013).

Double tax treaties concluded between the state of residence and Luxembourg may provide for an exemption from capital gains taxation.

## Investment in a property through a Luxembourg *Société Civile Immobilière*

### *Legal aspects*

The SCI form is governed by the Luxembourg Civil Code. It constitutes a pooling of professional property in a legal structure distinct from an operating business. It may be referred to as a *Société Civile Immobilière de Gestion* when its objective is to manage property that it owns and that it leases to an operator. The net income that may be generated under such leasing is distributed between the partners.

In such kind of structure, the act of will of the partners is fundamental. As a consequence, each partner's liability is unlimited, and the liability is proportional to the number of partners and does not depend on the share capital held by each of them.

The SCI may be established by at least two or more partners, either under a notarial deed or under private contract to be published in the Luxembourg Trade and Companies Register. There is no minimal capital requirement for an SCI.

### *Tax aspects*

From a Luxembourg tax perspective, the SCI is considered a transparent vehicle and thus is taxed only at the level of its partners. Depending on the partners the taxation will follow the rules of personal tax or of corporate taxes.

#### **Personal income tax**

Any individual (resident or non-resident) partner of an SCI will be taxed on income arising in the SCI (rental income and capital gains realised on the sale by the SCI of the property), as if this income had been directly realised by him, in accordance with the rules described in the section '*Direct investment in Luxembourg property by individuals*'.

#### **Corporate income tax**

Any company (resident or non-resident) partner of an SCI will be taxed on income arising in the SCI, as if the company had directly realised this income, in accordance with the rules described in the section '*Direct investment in Luxembourg property by a holding company*'.

#### **Municipal business tax**

SCIs are liable to municipal business tax if they carry out a commercial activity in Luxembourg.

#### **Capital gains**

Profits resulting from the disposal of the SCI's shares will be considered as a sale of the building itself and will follow the taxation principles applicable to its partners.

#### **Registration duty**

Real estate transactions performed by an SCI are subject to the same rules as outlined in the section '*Direct investment in real estate*'. However, a transfer of shares in an SCI is assimilated to a direct transfer of the real estate property held by the SCI from a registration duty perspective.

#### **VAT**

The transfer of shares in an SCI is usually VAT-exempt.

A Luxembourg company merely holding shares in an SCI should not be considered as a VAT-able person unless it carries out other economic activities.

An SCI investing in real estate is subject to the same rules as other companies (see the section '*Direct investment in real estate*').

## Investment in a property company by a holding company

### *Resident company*

#### Dividend income

Dividends received by a Luxembourg resident company are in principle subject to corporate income tax and municipal business tax at the aggregate rate of 29.22% for 2013 (for Luxembourg City).

However, these dividends received may be exempt from corporate income tax and municipal business tax provided the following conditions to benefit from the Luxembourg participation exemption regime are satisfied:

- The distributing company is:
  - a fully taxable Luxembourg joint-stock company, or
  - a non-resident joint-stock company that is fully liable in its state of residence to a tax corresponding to the Luxembourg corporate income tax. Regarding this condition, the Luxembourg tax authorities have set the rule that the foreign tax must be assessed at a minimum rate of 10.5% on a taxable basis determined similarly to that in Luxembourg, or
  - a company that is resident in a member state of the European Union and covered by article 2 of the Parent-Subsidiary Directive.
- The beneficiary company is:
  - a fully taxable Luxembourg joint-stock company, or
  - a Luxembourg permanent establishment of a company that is resident in a member state of the European Union and falling under article 2 of the Parent-Subsidiary Directive, or
  - a Luxembourg permanent establishment of a joint-stock company that is resident in a state with which Luxembourg has concluded a double tax treaty.
- At the date on which the income is made available, the beneficiary has held or undertakes to hold, directly, for an uninterrupted period of at least 12 months, a participation in the share capital of the subsidiary of at least 10% or with an acquisition price of at least EUR 1.2m. If the participation is held through a Luxembourg tax transparent entity, this will be regarded as direct participation proportionally to the interest held by the Luxembourg holding company in the tax-transparent entity.

However, according to the general principle in Luxembourg income tax law which denies the deductibility of expenses connected to exempt income, any charges incurred during the year in which the dividend is received and which are connected to the exempt participation are not deductible. Additionally, if a write-down

in the value of the participation has been booked either as a consequence of the distribution of dividends or otherwise, this write-down will not be deductible up to the amount of the exempt dividend.

### Capital gains

Capital gains resulting from the sale of a shareholding are in principle subject to corporate income tax and municipal business tax at the aggregate rate of 29.22% for 2013 (for Luxembourg City).

However, such capital gains can often be exempt from corporate income tax and municipal business tax, provided that the following conditions for benefitting from the participation exemption regime are satisfied:

- The participation is in:
  - a fully taxable Luxembourg joint-stock company, or
  - a non-resident joint-stock company that is fully liable to a tax corresponding to the Luxembourg corporate tax. Regarding this condition, the Luxembourg tax authorities have set the rule that the foreign tax must be assessed at a minimum rate of 10.5% on a taxable basis determined similarly to that in the Luxembourg, or a company that is resident in a member state of the European Union and falling under article 2 of the Parent-Subsidiary Directive.
- The beneficiary is:
  - a fully taxable Luxembourg joint-stock company, or
  - a local permanent establishment of a company that is resident in a member state of the European Union and falling under article 2 of the Parent-Subsidiary Directive, or
  - a local permanent establishment of a joint-stock company that is resident in a state with which Luxembourg has concluded a double tax treaty.
- At the date on which the alienation takes place, the beneficiary has held or undertakes to hold the respective participation for an uninterrupted period of at least 12 months, and during this period the participation held does not fall below 10% or an acquisition price of less than EUR 6m. If the shares are held through a Luxembourg tax-transparent entity, this requirement must be fulfilled not by the tax transparent entity itself, but by the beneficiary, proportional to the interest held by the latter in the tax-transparent entity.

A recapture system exists, under which the exempt amount of the gain is reduced by the algebraic sum of any expenses principally connected with the participation (such as financing costs and write-downs in the value of the participation), to the extent that they have reduced the taxable base of that year or previous years. Basically, an effect of this rule is that the capital gain realised will become taxable up to the amount of the aggregate expenses and write-downs deducted during the respective and previous years in relation to the participation.

## Financing arrangements

Financing arrangements entered into by Luxembourg holding companies that invest into property companies are frequently structured so that debt type financing is predominant. The main driver for this is often a need to maximise the flow of profits being repatriating to investors which takes the form of interest, and hence which does not attract withholding taxes, irrespective of the territory of residence and other tax attributes of the investors. Tax characterisation as debt is usually readily possible for a broad range of financing instruments.

In situations where a Luxembourg resident company is used to borrow and then provide finance in the form of loans to property companies, as well as to hold shares in such companies, it may need to fulfil the requirements laid down by the Luxembourg transfer pricing Circulars.

## *Non-resident company*

### Dividend income

Dividends paid by a Luxembourg company to a non-resident company that are not attributable to its Luxembourg permanent establishment are subject to a withholding tax of 15%, but with the possibility to benefit from reduced rates or exemption, through application of either the Luxembourg participation exemption regime or double tax treaties.

### Capital gains

Luxembourg taxation of capital gains resulting from the sale of shares by a non-resident company is relatively limited in scope.

The capital gain is only taxable in the following situations:

- Disposal of a major shareholding (i.e. more than 10%) held in a company having its registered office or its principal establishment in Luxembourg, within six months of the acquisition of the shareholding.
- Disposal of a major shareholding in a Luxembourg company by a company who has been resident in Luxembourg for more than 15 years within five years of the company becoming non-resident.

In the first situation, the taxation will be levied on the net capital gain received. If, however, the gain is taxable because the company had previously been resident in Luxembourg for more than 15 years, the company will be able to re-value the purchase price to account for inflation.

In practice, this taxation does not frequently happen as most of the double taxation treaty signed by Luxembourg will prevent from that taxation.

## Indirect taxes

The transfer of shares is usually VAT-exempt.

A Luxembourg company merely holding shares in a property company should not be considered as a VAT-able person unless it carries out an economic activity beyond its passive holding activity.

## Investment in a foreign property by a Luxembourg company

Luxembourg companies are also frequently used to invest directly into real estate located abroad (e.g. in the United Kingdom or in Germany). In this situation, the use of a Luxembourg company to invest directly into the real estate may to some extent reduce the local tax burden on the property.

Luxembourg companies are in principle subject to corporate income tax and municipal business tax on their worldwide income at the aggregate rate of 29.22% for 2013 (for Luxembourg City). However, generally, double tax treaties to which Luxembourg is party give the right to tax income (that is rents plus capital gains on disposal) derived from real estate property to the State in which the property is located (in line with article 6 of the OECD Model Convention). In such a situation, the income received by the Luxembourg company from real estate located abroad is generally 'exempt with progression' from Luxembourg taxation in accordance with the clause within the treaty dealing with the elimination of double taxation or under the Luxembourg domestic legislation. However, provided that charges in economic relation to this exempt income, such as financing costs, are not deductible from the corporate income tax and municipal business tax bases. The overall effect is usually to leave a tax base in Luxembourg arising solely from income and expenses not directly connected to the real estate. For example, interest income for surplus rental income would be taxable.

If a Luxembourg company is financed with debt denominated in foreign currency, any foreign exchange differences arising on such financing would normally be subject to Luxembourg taxation since a Luxembourg company must in principle file its Luxembourg annual tax return in EUR (It should be noted that the foreign exchange differences booked will generally not be regarded as exempt under the real estate article of the applicable double tax treaty).

To avoid taxable 'forex' exposure, a 'functional currency' treatment may be applied, subject to confirmation from the Luxembourg tax authorities, to allow a Luxembourg company to file its tax returns in the relevant foreign currency and to convert its taxable result into EUR using the year-end exchange rate, so that any foreign exchange result in Luxembourg may be mitigated.

Real estate located in a country with which Luxembourg has a double tax treaty is generally exempt from net wealth tax in Luxembourg. Conversely, any debt financing this real estate is considered non tax deductible from the net wealth tax basis.

The most common exit scenario for this type of structure is the disposal of the shares in the Luxembourg company owning the foreign real estate. While the transfer of Luxembourg properties is usually subject to transfer taxes ranging from 7% to 10% (computed on the higher of the sales price and the market value), the transfer of shares in a company holding Luxembourg properties is generally not subject to any Luxembourg transfer taxes.

## Substance considerations

One growing issue in international taxation is the requirement by foreign tax administrations for genuine substance for real estate vehicles (and more generally

in international tax structures as well) in order to benefit from desired tax attributes (i.e. tax treaty eligibility, application of Parent-Subsidiary Directive, avoidance of CFC rules, etc.). A lack of substance may thus lead a foreign tax administration to conclude that a specific entity is purely artificial and should be disregarded from a fiscal point of view.

Luxembourg entities may hence need to be provided with sufficient ‘business substance’ in terms of purpose of the business, and sufficient ‘material substance’ (i.e. office premises, equipment, staff, etc).

The requirements for substance for these entities are determined primarily by the tax rules of the country where the property owning entity is incorporated or where the asset is located. These requirements vary from country to country and should therefore be considered on a case-by-case basis.

It is important to point out that these requirements impact not only Luxembourg, but all locations playing a role in the real estate sector (and in the international tax structuring arena). In this respect, it should be stressed that Luxembourg services providers have been accustomed to assisting in the provision of such a level of substance for many years now. Notably, the pool of suitably qualified resources available in Luxembourg and in neighbouring countries within commuting distance to Luxembourg make it easier for Luxembourg than for some other jurisdictions to satisfy the substance requirement for, especially, staffing.

## Real estate investment vehicles

Luxembourg offers a wide range of regulated and non-regulated fund vehicles that can usually readily meet the different requirements of real estate fund promoters and managers.

Choosing one real estate fund vehicle over another will mainly depend on the type of funding that needs to be raised, the type of investors targeted, the flexibility sought in terms of running the fund, and specific investor tax considerations. In particular, the Luxembourg tax regime is a key factor when considering the choice of an unregulated or a regulated real estate investment vehicle for international investors.

The tax regime applicable to unregulated holding companies owning real estate owning subsidiaries has already been described in the section *‘Investment in a property company by a holding company’*. It is however noted that this type of holding and financing company is extremely popular with fund managers and promoters globally, who are seeking a tax regime that has attributes that favour a ‘platform’ for managing investments into a geographic region rather than a single territory for investment. Luxembourg is for this reason, the holding and financing location of choice, in particular for pan-European and Asian real estate funds, even when the fund vehicle itself is not set up in Luxembourg.

The Alternative Investment Fund Manager Directive (‘AIFMD’) adopted in May 2011 by the European Council and Parliament and transposed in the Luxembourg law with transitory measures until 22 July 2013 should be considered in the set up a Luxembourg real estate investment fund vehicles as the AIFMD scope is wide capturing almost all collective investment vehicles that are not UCITS. It captures not just EU alternative investment fund managers (‘AIFMs’) (whether they manage

alternative investment funds ('AIFs') established inside or outside the EU) but also non-EU AIFMs that market AIFs in the EU.

The main purposes of the AIFMD are providing greater investors protection, mitigating systemic risks and providing for a global European regulation framework and market for alternative funds similar to the one implemented for UCITS. The AIFMD regulates AIFMs and not the products themselves. The AIFMD however defines AIFMs as any legal person whose regular business is managing one or more AIF that are in scope of the AIFMD.

It also should be noted that the Luxembourg draft Bill implementing the AIFM Directive aims at widening the scope of the VAT exemption applicable to management services rendered to regulated funds. It is foreseen that this VAT exemption will also apply to the management of non-regulated vehicles that meet the conditions to qualify as Alternative Investment Funds ('AIF').

### *Regulated real estate investment fund vehicles*

Most regulated real estate investment fund vehicles established in Luxembourg are undertakings for collective investment (UCIs), falling within the scope of either the Luxembourg law of 17 December 2010 on Undertakings for Collective Investment (the 2010 Law), or the law of 13 February 2007 relating to Specialised Investment Funds, as amended (the SIF Law).

In addition, the law of 15 June 2004, as amended, created the investment company in risk capital (*Société d'Investissement en Capital à Risque* or SICAR) as a dedicated vehicle for qualified investors investing in venture capital and private equity. Under certain conditions, the SICAR can also be used as a vehicle for real estate investments.

### **Real Estate investment funds**

#### *Regulatory aspects*

Luxembourg regulated investment funds in general and real estate investment funds in particular have the principal legal features as outlined below.

#### **Corporate versus contractual legal form**

Luxembourg investment funds can be set up in either the corporate form or the contractual form. The key factor in selecting one or the other form is often the tax treatment applicable to investors.

The two corporate forms of investment funds are:

- The *Société d'Investissement à Capital Variable* (SICAV) which is an investment company with a variable share capital that at all times equals the net asset value (NAV) of the fund. The share capital of the SICAV is automatically increased or reduced upon issue or redemption of shares. The SICAV is the most commonly chosen form.
- The *Société d'Investissement à Capital Fixe* (SICAF) which is an investment company with fixed capital. Fixed capital in this context means that the par or nominal value of the issued capital does not change and the share capital may only vary in accordance with legal requirements.

The Fonds Commun de Placement (FCP) is an unincorporated co-proprietorship of assets, broadly equivalent to a unit trust in the United Kingdom. Having no separate legal

status, the FCP must be managed by a management company. The FCP is, however, not liable for the obligations of the management company. Luxembourg FCPs are frequently used as fund vehicles for real estate funds and are well known by the wider European market.

As part of the bill dealing with the implementation of the AIFMD the limited partnership legislation is modernised. In particular the law introduces a new ‘special partnership’ (Société en Comandite Spéciale, SCSp) without legal personality and modernises the legal framework of the existing Luxembourg limited partnership (Société en commandite simple, SCS) which has legal personality. Under the bill, both Investment Company in Risk Capital (SICAR) and Specialised Investment Funds (SIF) may adopt the form of a SCS/SCSp.

### Open-ended versus closed-ended investment funds

FCPs, SICAFs and SICAVs may operate as open-ended or closed-ended funds:

- Open-ended investment funds have rules that allow investors to request that the fund repurchases their units each time redemptions are possible according to the prospectus;
- By contrast, closed-ended investment funds may not, at the request of investors, repurchase their shares or units; the fund governing bodies decide when redemptions are possible.

### Sub-funds and classes of shares

Investment funds can have various sub-funds (the terminology used is that of ‘umbrella fund’), each with a different investment policy or restricted to certain investors. The principle of segregation applies, meaning that each sub-fund is treated as a separate entity where the assets of one sub-fund cannot be used to settle the liabilities of another sub-fund.

Investment funds can further issue several classes of shares (however with no segregation between the classes of shares) with different fee levels, different minimum subscription amounts, different investor profiles (institutional/retail), different income policy (distributing or capitalising shares), different currencies, etc.

### Regulatory aspects for the UCIs

The main features of Part II UCIs (being UCIs subject to Part II of the 2010 Law) are summarised as follows:

#### Common rules applicable to all Part II UCIs

Legal forms available	Investment company with variable capital (SICAV) to be incorporated as a public limited company (S.A.)
	Investment company with fixed capital (SICAF)
	Contractual fund (FCP)
Eligible investors	No restriction on the type of investors authorised to invest in a Part II UCI

<b>Licensing requirements</b>	<p>Part II UCIs must receive the CSSF's prior authorisation before it can start its activities. The CSSF will pay particular attention to:</p> <ul style="list-style-type: none"> <li>• The fund's draft constitutional documents, notably the prospectus</li> <li>• The identity of the promoter of the fund, which must be a professional in the financial sector and must have sufficient financial surface</li> <li>• The identity of the investment manager of the fund which must be duly licensed for that function in its country of domicile</li> <li>• The identity of the persons in charge of conducting the business of the fund; they must show good reputation and adequate experience for acting in such capacity</li> <li>• The identity of the Luxembourg central administration, the Luxembourg depository and the Luxembourg external auditors.</li> </ul>
<b>Compulsory service providers in Luxembourg</b>	<p>Depository: responsible for safekeeping of the UCI assets and certain other supervisory duties – must be a Luxembourg bank or Luxembourg branch of a foreign bank</p> <p>Central administration: responsible for accounting, NAV calculation, keeping of the register of the shareholders/unit holders, handling subscriptions and redemptions, communication with investors and preparation of financial statements – which must be a Luxembourg bank or a branch of a foreign bank or a professional of the financial sector with a proper license</p> <p>A Chapter 16 or Chapter 15 Management Company if the fund is set up as an FCP</p> <p>External auditors</p>
<b>Subscription/Redemption</b>	<p>Subscription at NAV plus subscription fees; can also be closed to subscriptions.</p> <p>Redemption price must in practice be made at NAV minus redemption fees; can also be closed to redemptions.</p>
<b>Minimum capital requirement</b>	<p>EUR 1.25m, to be reached within six months following approval.</p>

Documents to be established according to laws and regulations	<p>Prospectus;</p> <p>Articles of association (in case of a SICAV/SICAF);</p> <p>Management regulations (in case of an FCP);</p> <p>Agreements with the service providers ;</p> <p>Annual audited financial statements (annually within four months of period end);</p> <p>Semi-annual non audited financial statements (annually within two months of period end);</p> <p>Long form report describing the organisation of the fund (annually within four months of period end).</p>
Valuation principles	Valuation is made based on the realisable value of the real estate assets, estimated in good faith (unless differently provided for in the constitutional documents of the fund).

In addition, the CSSF has set up separate rules for investment in real estate, as set out in Chapter I of the CSSF Circular 91/75 of 21 January 1991. As these specific rules come from the CSSF Circular rather than the law itself, they may in certain cases be derogated subject to proper justification *vis-à-vis* the CSSF.

The main specific rules applicable to Part II real estate funds can be summarised as follows:

#### Specific requirements applicable to Part II Real Estate Funds only

Definition of eligible real estate assets	<p>Land and/or buildings registered in the name of the UCI</p> <p>Shareholdings in real estate companies (including debt securities of such companies), i.e., companies whose exclusive object and purpose is the acquisition, promotion and sale, as well as the letting and agricultural lease of property, provided that these shareholdings must be at least as liquid as the property rights held directly by the UCI;</p> <p>Property-related long term interests, e.g., surface ownership, lease-holds, and option rights on real estate.</p>
Maximum investment in one property	<p>Maximum 20% of fund/sub-fund's net assets in a single property;</p> <p>Property whose economic viability is linked to another property is not considered a separate item of property;</p> <p>This restriction (i) is not applicable during the start-up phase of the fund, which may not extend beyond a four-year period following the closing date of the initial offer</p>

	period and (ii) is to be considered at the date of acquisition of the real estate property.
Maximum leverage	Borrowings may not exceed 50% of the valuation of all properties in the fund.
Minimum liquid assets in the fund	No minimum foreseen by regulation but the fund's liquidity features must be in line with sections dealing with investors' ability to redeem as per the prospectus.
Minimum frequency of NAV calculation	Once a year and each time shares or units are issued to, or redeemed from, investors.
	Management may use the valuation established at the year-end throughout the following year unless there is a change in the general economic situation or in the condition of the properties which requires new valuations to be carried out under the same methods as those used for the annual valuation.
Requirement for independent valuation of the properties	Yes, at least annually and each time properties are bought or sold. Valuation to be performed by recognised professionals in the Real Estate sector.
Borrowings	May not exceed on average 50% of the assets

## Regulatory aspects for SIFs

### SIF

Legal forms available	Investment company with variable capital (SICAV) to be incorporated as a public limited company (S.A.), a private limited company (S.à r.l.), a cooperative company organised as a public limited company (SCoopSA), as a corporate partnership limited by shares (SCA), as limited partnership (SCS) or as special limited partnership (SCSp).  Investment company with fixed capital (SICAF)  Contractual fund (FCP)
Eligible investors	Well-informed investors only, i.e. institutional investors, professional investors and other investors provided that they formally declare themselves as well-informed investors and either invest a minimum of EUR 125,000 or obtain a certificate from a regulated entity confirming their understanding of the risks associated to the investment in a SIF;  The SIF must put in place arrangements to ensure compliance with this requirement.
Licensing requirements	A SIF must receive CSSF prior authorisation before it can start its activities. The CSSF will pay particular attention to: <ul style="list-style-type: none"> <li>• The fund's draft constitutional and offering</li> </ul>

documents;

- The identity of the investment manager of the fund which must be duly licensed for that function in its country of domicile;
- The identity of the persons in charge of conducting the business of the fund; they must show good reputation and adequate experience for acting in such capacity;
- The identity of the Luxembourg central administration, the Luxembourg depositary and the Luxembourg external auditors.

In preparation for the transposition into Luxembourg law of the EU Alternative Investment Fund Managers Directive (AIFMD), the law of 26 March 2012 introduced stricter rules for SIFs, such as rules on the delegation of functions and notably with respect to the delegation of the investment management function. Moreover, a SIF must implement an appropriate system of risk management and must be structured and organised in a manner to reduce to a minimum the conflicts of interest.

Existing SIFs have until 30 June 2013 to comply with the obligations pertaining to the delegation of tasks.

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#### Compulsory service providers in Luxembourg

Depositary: responsible for safekeeping the SIF assets – must be a Luxembourg bank or Luxembourg branch of a foreign bank

Central administration: responsible for accounting, NAV calculation, keeping of the register of the shareholders/unit holders, handling subscriptions and redemptions, communication with investors and preparation of financial statements – which must be a Luxembourg bank or a branch of a foreign bank or a professional of the financial sector with a proper license

A Chapter 15 or a Chapter 16 Management Company if the fund is set up as an FCP

External auditors

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#### Subscription/Redemption

Subscription price can be freely determined in the offering document; it can also be closed to subscriptions.

Redemption price can be freely determined

in the offering document; it can also be closed to redemptions.

Minimum capital requirement	EUR 1.25m to be reached within 12 months following approval.
Documents to be established according to laws and regulations	Offering document; Articles of association (in case of a SICAV/ SICAF); Management regulations (in case of an FCP); Agreements with the service providers; Annual audited financial statements (annually within Six months of period end).
Valuation principles	Fair value unless derogated in the fund constitutional and offering documents.
Maximum investment in one property	Maximum 30% of fund/sub-fund's gross assets in a single property.
Maximum leverage	No maximum foreseen by regulation, but the CSSF checks that the maximum leverage indicated in the prospectus is acceptable.
Minimum liquid assets in the fund	No minimum foreseen by regulation but the fund's liquidity features must be in line with sections dealing with investors' ability to redeem as per the prospectus.
Minimum frequency of NAV calculation	Once a year.
Requirement for independent valuation of the properties	Yes, at least annually and each time properties are bought or sold. Valuation to be performed by recognised professionals in the Real Estate sector.

### *Particular tax implications*

#### **Taxation of the fund entity**

Luxembourg real estate funds (UCIs and SIFs), whether they invest directly into real estate properties or into securities (shares and loans in/to real estate property companies) are not subject to corporate income tax, municipal business tax and net wealth tax in Luxembourg.

However, fund entities are subject to an annual subscription (*'droit d'abonnement'*) tax of five basis points (i.e. 0.05%), which is payable and calculated quarterly, based on the fund's Net Asset Value at the end of each quarter. A reduced rate of one basis point annually (i.e. 0.01%) is applicable to real estate funds subject to the SIF Law, as well as to compartments and share classes of real estate funds subject to 2010 Law that are dedicated to institutional investors. Holdings in other Luxembourg funds, which have

already been subject to subscription tax, are excluded from the subscription tax in any case. Pension funds are exempt from subscription tax.

### Withholding taxes

Distributions by Luxembourg real estate investment funds, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax. Some payments may however be subject to withholding tax as a result of application of the EU Savings Directive (as implemented into Luxembourg domestic law).

Due to their tax-exempt status, withholding tax levied at source on income received by Luxembourg real estate funds, either directly from real estate or from intermediate holding companies is technically not refundable.

Luxembourg real estate funds formed as investment companies may benefit from certain double taxation treaties signed by Luxembourg, and as a consequence from reduced withholding tax rates.

Luxembourg real estate funds formed as FCPs will generally not benefit from double taxation treaties unless the unit-holders themselves are able to claim the reduced rate under the applicable double tax treaty. The latter implies significant administrative burdens and is therefore rare in practice.

### VAT

Based on established Luxembourg VAT administrative practice, Luxembourg regulated funds are considered as VAT-able persons carrying out VAT exempt operations without being entitled to recover input VAT incurred on expenses. They are released from the obligation to be VAT registered in Luxembourg, unless they are liable to declare and pay Luxembourg VAT on services received from foreign suppliers.

A notable exception applies in this general practice to regulated vehicles owning and letting immovable property subject to Luxembourg VAT (option to tax). The normal VAT regime described above applies to this type of vehicles.

The service of management of CSSF-regulated investment vehicles is explicitly exempt from VAT.

### Taxation of investors

#### *Resident private investors*

Luxembourg resident private investors are taxed on distributions (including interest and dividends if any) by a Luxembourg real estate SICAV or FCP, at a rate that depends on both their total taxable income and their family status.

Capital gains realised at the time of the sale of SICAV shares or FCP units by such Luxembourg residents should be tax exempt where the shares/units have been held for a period exceeding six months, and the holding does not qualify as substantial (i.e. more than 10% of the fund) for tax purposes. Where these conditions are not met, capital gains are taxable at a rate that depends on the taxpayer's situation.

#### *Resident corporate investors*

Distributions and capital gains derived by resident corporate investors from their investments in a SICAV or through their investments in FCP units are subject to corporate income tax and municipal business tax in Luxembourg, as they are deemed to be part of the commercial profit of the investor.

### *Non-resident private/corporate investors*

Dividends received by non-resident investors are not taxed in Luxembourg, and the capital gains earned by non-resident investors are only taxed in Luxembourg in the situations previously described. (See section '*Investment in a property company by an individual*' or '*Investment in a property company by a holding company*'). Since 1 July 2011, a 35% withholding tax may be levied on certain investment fund distributions/redemptions (qualifying as interest payments) made by a Luxembourg paying agent to an individual or a residual entity established in another EU country, according to the EU Savings Directive (as implemented into Luxembourg domestic law). It should be noted that the Luxembourg Government announced officially its intention to apply, as of 1 January 2015, the automatic exchange of information as the general rule.

Furthermore, the recipient of the income may be liable for tax in the recipient's state of residence.

As mentioned above, a SICAV or FCP does not generally benefit from the provisions of double tax treaties, but tax planning is possible in some cases.

## **Real Estate venture capital companies (SICAR)**

### *Regulatory aspects of the SICAR*

The law of 15 June 2004 (the SICAR Law), as amended, introduced the SICAR as a specific form of investment vehicle exclusively dedicated to investments in risk capital and reserved to well-informed investors (defined in the same way as under the SIF Law).

By definition SICARs do not have to comply with any kind of risk diversification requirements and may, in principle, invest 100% of their assets in only one target investment.

The SICAR Law specifies that investment in risk capital refers to the capital provided directly or indirectly to entities in view of their launch, development or listing on a stock exchange and with the aim of offsetting the high level of risks taken by the investors with higher returns.

CSSF Circular 06/241 dated 5 April 2006 gives a general description of the concept of risk capital, and specifies, *inter alia*, the conditions under which SICARs can be used for real estate structures:

- The real estate investments need to have risk capital characteristics to be classified as eligible assets;
- The SICAR cannot invest directly in real estate, but can do so indirectly through entities holding eligible real estate assets;
- The purpose of the SICAR as a real estate investment vehicle is to buy real estate investments with a view to selling them at a profit.

A key element that needs to be demonstrated in order to qualify for the SICAR regime is the 'development' intention (value creation) of the acquired real estate. The mere fact that real estate assets can present a particularly high risk or are located in countries with a certain political risk does not in itself suffice to prove the characteristic of risk capital.

Whether the real estate investment qualifies as risk capital depends on the type of investment and its expected yield. So-called opportunistic investment strategies are acceptable in principle, while core-plus investments will be analysed on a case by case basis. Core investments are, in principle, not eligible.

The creation of a SICAR whose policy would, for example, be limited to the holding or the management, through a SICAR, of family, corporate or group properties, is not eligible.

The type of structure which could be considered eligible might include the following characteristics:

- The objective of developing the target asset (for example value creation through investment in renovating a property or restructuring of a portfolio of properties);
- A specific element of risk associated with the property which is beyond the common level of a real estate risk (i.e., the location of the property in a distressed area or an emerging market or country or a property with significant tenant or void risk);
- The objective of acquiring the property in order to sell at a capital gain.

The main regulatory criteria which apply to a real estate SICAR are listed below.

#### Main regulatory features SICAR

Eligible investors	Well-informed investors
Legal forms available	Public limited company (S.A.);  Private limited company (S.à r.l.);  Corporate partnership limited by shares (SCA);  Limited partnership (SCS);  Special limited partnership (SCSp);  Cooperative company organised as a public limited company (SCoopSA).
Licensing requirements	SICARs must receive the CSSF's prior authorisation before they can start their activities.  The managers, the auditor and the custodian are also subject to the CSSF's pre-approval, but there is no such requirement for the promoter and the investment manager of the SICAR.  In addition, the CSSF requires a business plan with a risk analysis, as well as a description of the governance structure.
Minimum capital requirement	EUR 1m to be reached within 12 months following approval

<b>Compulsory service providers in Luxembourg</b>	Depository: responsible for safekeeping the SICAR assets, must be a Luxembourg bank or a Luxembourg branch of a EU bank
	Central administration: must be a Luxembourg bank or a Luxembourg branch of a EU bank or a professional of the financial sector with a proper license
	External auditors
<b>Minimum frequency of NAV calculation</b>	Once a year

A key element of a SICAR is that it can create multiple investment compartments and can issue different classes of shares, in the same way as investment funds.

### *Particular tax implications*

#### **Taxation of the SICAR entity**

The applicable taxation regime depends on the legal form of the SICAR. The SICAR in the form of a limited partnership (S.C.S.) is deemed to be transparent for corporate income tax purposes and exempt from municipal business tax. Taxation will consequently be levied at the level of partners according to the rules applicable in their country of residence.

A SICAR, which has adopted a corporate form, is fully liable to taxation in Luxembourg. However, income and capital gains derived from ‘securities’ are excluded from the taxable basis. This treatment additionally applies to temporary investments in liquid assets held for a period of maximum 12 months before investment in capital risk.

The preliminary works on the SICAR Law provide a definition of ‘securities’ in the sense of the SICAR Law. This definition is broad and includes bonds, loans and any other trade able securities as well as interests in underlying real estate funds or other entities owning real estate directly or indirectly.

Any other income is included in the taxable basis of the SICAR (e.g. interest income on undistributed funds, royalties) and thus subject to the general provisions of the Luxembourg Income Tax Law.

The SICAR is not liable to net wealth tax.

#### **Withholding taxes**

Distributions by a SICAR, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax. Some payments may however be subject to withholding tax in application of the EU Savings Directive.

The Luxembourg tax authorities have confirmed that they consider the SICAR as being a Luxembourg tax resident for double tax treaty purposes. Income paid by foreign entities to the SICAR should therefore benefit from reduced withholding rates according to the appropriate double tax treaty in place between Luxembourg and the source country. This equally applies to the Parent-Subsidiary Directive benefits.

However, the SICAR also needs to be recognised as a Luxembourg resident by the tax authorities of the source country. One may expect some questions to be raised by these foreign tax administrations regarding the application of the double tax treaty, due to the specific regime (i.e. exemption of certain income) applied to a Luxembourg SICAR.

Withholding tax levied at source (at a reduced rate or at the normal rate) on exempt income received by a Luxembourg SICAR is normally not refundable. According to Luxembourg tax credit rules, the creditable amount is limited to the amount of Luxembourg tax that would have been levied on this income. Income from securities being tax exempt in the hands of the Luxembourg SICAR, any related foreign withholding tax will generally not offset any Luxembourg tax.

Dividends paid by a Luxembourg taxable company to a SICAR benefit from the withholding tax exemption under the general conditions of the Luxembourg tax regime. This applies accordingly to the income tax exemption on income paid by a SICAR to another Luxembourg company.

It is open to question whether other EU Member states will accept to grant their income tax exemptions under local provisions for dividends paid by a SICAR to a company established in that other EU member state.

## VAT

Based on established Luxembourg VAT administrative practice, Luxembourg SICARs are considered as VAT-able persons carrying out VAT exempt operations without being entitled to recover input VAT incurred on expenses. They are released from the obligation to be VAT registered in Luxembourg, unless they are liable to declare and pay Luxembourg VAT on services received from foreign suppliers.

In practice, SICARs which have their own human and technical means to perform independently an economic activity subject to VAT may however be derogated from the above general rule.

The service of management of SICARs is explicitly exempt from VAT in Luxembourg.

## Real Estate securitisation structures

### *Regulatory aspects of securitisation structures*

Compared to the common definition of securitisation as a financing process wherein an originator transfers one or more assets or risks to a securitisation vehicle (which, in turn, is financed by the issuance of securities backed by assets or collateral transferred and income generated by those assets in exchange for cash), the definition of 'securitisation' given by the Luxembourg Law of 22 March 2004 on Securitisation (the 'Securitisation Law') is very broad. It encompasses all transactions wherein a securitisation vehicle acquires or assumes (directly or indirectly), any risk related to claims, other assets, or obligations assumed by third parties, or inherent to all or part of the activities of third parties and issues transferable securities (shares, bonds or other securities) whose value or yield depends on such risks.

To qualify as a Luxembourg securitisation vehicle governed by the Securitisation Law, entities must specifically state in their articles of incorporation or management regulations (for securitisation funds) that they are subject to the provisions of the Securitisation Law.

Modelled on the Luxembourg investment fund regime, the Securitisation Law introduced securitisation vehicles in the form of corporate entities, as well as in the form of securitisation funds managed by a management company and governed by management regulations.

Securitisation companies may take the legal form of an S.A., an S.à r.l., an S.C.A. or a cooperative company organised as an S.A. One of the main advantages offered by the securitisation vehicle regime is the possibility of creating several compartments within one single entity, just as with an umbrella-fund vehicle. The articles of incorporation of the securitisation company must simply authorise the Board of Directors to create separate compartments. The compartments allow for the separate management of a pool of assets and corresponding liabilities, so that the result of each pool is not influenced by the risks and liabilities of other compartments. Each compartment can be liquidated separately.

A securitisation vehicle can also be organised in a purely contractual form as a securitisation fund. In the absence of legal personality, the securitisation fund will be managed by a management company, which will be a commercial company with legal personality. The securitisation fund may also be split into sub-funds, which may be liquidated separately.

A securitisation vehicle is subject to mandatory CSSF supervision only if it issues securities to the public on a continuous basis. Broadly speaking, issues to professional investors and private placements are not considered as issues to the public. Regarding the notion ‘on a continuous basis’, the CSSF considers it to be fulfilled from the moment the securitisation undertaking makes more than three issues per calendar year to the public. Nevertheless, a securitisation vehicle that makes at least four issues on an annual basis is not subject to CSSF supervision if it issues denominations exceeding EUR 125,000.

Authorisation by the CSSF means that the CSSF would have to approve the articles of incorporation or management regulations of the securitisation vehicle and, if necessary, authorise the management company.

Other regulatory obligations would include:

- Securitisation companies and management companies of securitisation funds must have an adequate organisation and adequate resources to exercise their activities.
- The directors (at least three directors) of the securitisation company or the management company of a securitisation fund must be of good repute and have adequate experience and means required for the performance of their duties.
- Structuring and management of the assets may be delegated to other professionals in Luxembourg or abroad; however, in such a case, an appropriate information exchange mechanism between the delegated functions and the Luxembourg based administrative body must be established and in particular the external auditor and the CSSF must be allowed to exercise their supervisory tasks.
- The CSSF supervises regulated securitisation vehicles on a continuous basis.

However, today’s most common types of real estate securitisation vehicles are unregulated.

The Securitisation Law allows a wide range of assets, such as tangible or intangible assets or activities with a reasonably ascertainable value or predictable future stream of revenue to be securitised, which creates a lot of possibilities for real estate structuring. The transactions can be arranged by transferring the legal ownership of the assets ('true sale') or by transferring credit risks linked to the assets ('synthetic').

The Securitisation Law offers an attractive regulatory framework for setting up workable real estate securitisation structures in Luxembourg at reasonable costs. Securitisation vehicles are in particular interesting for infrastructure investments or for any not actively managed portfolio, i.e. certain illiquid investments in timber.

Depending on the investor's needs, each property could be represented by a separate compartment, a solution which is not possible using another regulated real estate vehicle. Furthermore, compartment segregation prevents insolvency contamination, which is one of the most important aspects of the Securitisation Law. The principle of bankruptcy remoteness separates the securitised assets from any insolvency risks of the securitisation vehicle or of the originator, the service provider or collateral. In addition, the Securitisation Law provides for the assets to be exclusively available to satisfy the claims of the investors who funded them and of the creditors whose claims are linked to their assets.

### *Particular tax implications*

#### **Taxation of the securitisation vehicles**

Securitisation vehicles organised as corporate entities are fully liable to corporate income tax and municipal business tax.

According to the Securitisation Law however, the commitments of a securitisation company to remunerate investors for issued bonds or shares and other creditors qualify as interest on debt even if paid as return on equity. Hence they are fully tax-deductible. The resulting tax neutrality is one of the key success factors of Luxembourg securitisation structures.

Regarding withholding taxes, comments made in relation to the SICAR apply, as the regime is similar.

#### **VAT**

Based on established Luxembourg VAT administrative practice, Luxembourg securitisation vehicles are considered as VAT-able persons carrying out VAT exempt operations without being entitled to recover input VAT incurred on expenses. They are released from the obligation to be VAT registered in Luxembourg, unless they are liable to declare and pay Luxembourg VAT on services received from foreign suppliers.

The service of management of Luxembourg securitisation vehicles is exempt from VAT in Luxembourg.

## **Real Estate leasing contracts**

### *General aspects*

Leasing companies are not considered as credit institutions, insofar as they do not collect deposits or funds from the public.

Consequently, leasing companies in principle do not need a licence from the Luxembourg Central Bank (LCB) for carrying out their activity, nor do they fall under the supervision of the LCB. However, they will have to file a specific request to exercise this activity with the Ministry of Small Businesses (*Ministère des Classes Moyennes*). Some exceptions may apply within the framework of intra-group transactions.

## *Legal framework*

The law does not contain a definition of a lease contract. All lease contracts are basically treated as rental agreements under article 1710 of the Civil Code. The lessor conveys to the lessee, in return for rent, the right to use an item of property for an agreed period of time. At the expiration of the period, the contract may offer the lessee the opportunity to acquire the leased asset.

This is confirmed by several Luxembourg Supreme Court decisions. A decision of the Court in 1977 provided the following analysis of the legal nature of a leasing contract under commercial and civil law.

It is important to stress that, from an economic and financial point of view, a leasing/credit operation can be described as follows: a specialised financing company acts on behalf of entrepreneurs who are looking for equipment without the necessity of having to bear the initial price of acquisition. The entrepreneur makes the choice of the equipment needed; the leasing company substitutes itself for him in buying the equipment and renting it to the entrepreneur. The leasing agreement is concluded for a term sufficient for the lessor-owner to recover the value of the leased asset. The leasing agreement distinguishes two periods: the primary period, called the irrevocable period, which has a duration close to the tax depreciation period; and the second period, the residual period, which continues until the extinction of the economic life of the equipment.

At the expiration of the first period, the entrepreneur-lessee is granted an option either to return the equipment to the lessor-owner or to acquire the asset at its minimum residual value or to go on with the leasing at reduced rentals in respect of the residual value.

## *Categories of leasing contracts*

### *Financial leasing contracts*

A financial leasing is a full-payout leasing contract, i.e., the lease payments payable to the lessor during the irrevocable term cover the acquisition and manufacturing costs of the asset and all incidental expenses, including the lessor's financing costs.

### *Operating leasing contracts*

An operating leasing is considered as an ordinary rental agreement, with the following characteristics:

- In general, the agreement may be cancelled at any time.
- The risk of an increase or decrease in value for economic or technical reasons, insurance premiums, and the repair and maintenance costs of the asset are mainly borne by the lessor.

### *Non-full-payout leasing contract*

A non-full-payout contract can be cancelled after a predetermined period. The leasing payments made during the lease term only cover a part of the purchase price and all incidental expenses and the lessor's financing costs.

### *Attributes of the leased assets*

#### *Legal ownership*

The law does not provide a definition of a lease contract. All lease contracts are basically treated as rental agreements under article 1710 of the Civil Law, i.e., the lessor conveys to the lessee the right to use an item of property for an agreed period of time in return for rent

#### *Economic ownership*

The economic ownership of the asset is attributed to the lessor or the lessee depending on the terms of the contract. From an accounting and tax viewpoint, economic ownership is the relevant element in determining whether the real estate is attributed to the lessee or the lessor. The attribution of economic ownership is based on German case law.

### *Particular tax implications*

One of the key principles of Luxembourg tax law is that it follows the accounting rules, unless tax law provides for other rules. Regarding leasing contracts, as no specific accounting rules exist in Luxembourg, tax law is usually followed for accounting purposes, and therefore the attribution of the subjects of the leasing as referred to above is of prime importance.

### *Corporate income tax*

#### *Asset attributed to the lessor*

The lessor capitalises the leased asset as a fixed asset in its balance sheet and depreciates it according to its economic lifetime. The annual lease payments are treated as taxable profit to be booked in its profit and loss account.

The leasing payments are treated as operating expenses, which are tax deductible, in the lessee's profit and loss account.

#### *Asset attributed to the lessee*

##### *From the lessor's point of view*

The lessor records the minimum leasing payments in its balance sheet as a receivable (i.e. the payments over the leasing term that the lessee is or can be required to make, without the costs for services and taxes to be paid by and reimbursable to the lessor). The annual leasing payments are broken down into a refund of capital and an interest component. The interest will be treated as taxable profit in the lessee's profit and loss account.

##### *From the lessee's point of view*

First, the lessee capitalises and depreciates the leased asset in its balance sheet. Then, it records a corresponding liability for the future leasing payments. The leasing payments have to be apportioned into an interest and a capital portion. The interest portion is treated as an operational expense in the profit and loss account of the lessee. The capital portion will reduce the liability.

## Municipal business tax

There is no particular tax treatment for municipal business tax.

## Net wealth tax

### *Asset attributed to the lessor*

The lessor has to add the unitary value of the leased building to its net wealth taxable basis. Until the lessee exercises any call option stipulated in the leasing contract, the lessor has to report the unitary value of the leased building in its net wealth taxable basis.

### *Asset attributed to the lessee*

The lessee has to add the unitary value of the leased building to its net wealth taxable basis. It can deduct from this taxable basis the lease payments not yet paid at the time the unitary value is fixed. This deduction includes the amount related to any call option to be exercised at the end of the primary leasing period.

The lessor has to include in its own net wealth taxable basis an amount corresponding to the leasing payments not yet paid.

## VAT

As a general rule, the leasing of an existing property located in Luxembourg is exempt from Luxembourg VAT. Accordingly, the landlord is not entitled to recover input VAT incurred on related expenses.

The landlord may however opt to VAT to the extent that the option conditions are met. In consequence, input VAT incurred on related expenses is recoverable.

## Registration duty

In case a lease is registered in Luxembourg, the following registration duties are levied.

The letting of property is subject to a registration duty of EUR 12 if VAT applies on the rent (i.e. if a valid option is obtained).

Leases not subject to VAT are in principle subject to a registration duty of 0.6%. The taxable amount is the aggregate amount of the rental fees over the term of the lease.

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# *Real Estate Going Global Malaysia*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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All information used in this content, unless otherwise stated, is up to date as of 16 April 2013.

# Real Estate Tax Summary – Malaysia

## General

The coordination and regulation of the acquisitions of assets, including real property, by foreign interests, is undertaken by the Foreign Investment Committee (FIC) in the Prime Minister's department through the issuance of guidelines. Compliance with the guidelines is expected. Non-residents may invest in Malaysian property by direct ownership, or through Malaysian incorporated companies or property trusts.

During the Invest Malaysia Conference on 30 June 2009, the Malaysian government announced further liberalisation measures to facilitate greater property transactions and investments made by foreign interests.

Based on the relaxed FIC guidelines, effective from 1 January 2011, a foreign interest is not allowed to acquire:

- properties valued less than MYR 500,000 per unit
- residential units under the category of low and medium low cost as determined by the State Authority
- properties built on Malay reserve land
- properties allocated to *Bumiputera* interest in any property development project as determined by the State Authority.

The government had announced that the FIC approval will only be required for the following situations:

- Direct acquisitions of property valued at MYR 20m and above, resulting in the dilution of *Bumiputera* interests in the property.
- Direct acquisitions of property valued at MYR 20m and above, resulting in the dilution of government agency in the property.
- Indirect acquisitions of property by other than *Bumiputera* interest through the acquisition of shares, resulting in a change of control of a company owned by *Bumiputera* interest and/or government agency. This is on the basis that the property held by the company is 50% of its total assets and the property is valued at more than MYR 20m.

The following property transactions will no longer require FIC approval, but fall under the purview of the relevant ministries or government departments:

- Foreigners are allowed to purchase residential units valued at more than MYR 500,000 but falls under the purview of the State Authorities. No conditions will be imposed on the usage of the properties or number of units owned.

- Foreign interests are only allowed to acquire agricultural land valued at more than MYR 500,000 or at least five acres in area for the following purposes and must be registered under a locally incorporated company and subject to prescribed conditions:
  - to undertake agricultural activities on a commercial scale using modern or high technology; or
  - to undertake agro-tourism projects; or
  - to undertake agricultural or agro-based industrial activities for the production of goods for export.
- Foreign interests are allowed to purchase industrial land or commercial units valued at more than MYR 500,000 and must be registered under a locally incorporated company and subject to prescribed conditions.
- Transfer of property to a foreigner based on family ties is only allowed among immediate family members.

Acquisitions of properties by licensed manufacturing companies are exempted from requiring the approval of FIC.

Acquisitions of land for property development projects, such as housing or commercial property projects, must be made by a Malaysian-incorporated company, among other prescribed conditions. In general, where an acquisition of assets by foreign interests is made through a locally incorporated company, the permitted foreign equity in the local company is up to a maximum of 70%.

## Real estate investment trust (REIT)/Property trust fund (PTF)

The SC issued new guidelines on REITs on 21 August 2008 (which was subsequently updated on 13 July 2011) to accelerate growth and establish a vibrant and competitive real estate investment trust industry in Malaysia. The new guidelines supersede the earlier Guidelines on Real Estate Investment Trusts issued on 3 January 2005, Guidelines on Property Trust Funds issued on 13 November 2002, and all guidance notes and circulars issued following those guidelines.

In addition, the Inland Revenue Board of Malaysia (MIRB) has issued three new Public Rulings in relation to REIT/PFTs in October and November 2012 to replace the Guidelines on Real Estate Investment Trusts or Property Trust Funds (REITs/PTF) dated 29 June 2005. They are:

- Public Ruling No.7/2012 ‘Taxation of Unit Holders of Real Estate Investment Trusts/Property Trust Funds’
- Public Ruling No.8/2012 ‘Real Estate Investment Trusts/Property Trust Funds – An Overview’
- Public Ruling No.9/2012 ‘Taxation of Real Estate Investment Trusts/Property Trust Funds’

Malaysian REIT/PTFs are trusts governed by general trust law. A trust is not a separate legal entity or person. It is a set of obligations accepted by a person (the trustee) in relation to the property (the trust property), in which such obligations are exercised for the benefit of another person (the beneficiary). The obligations of the trustee and the rights of the beneficiaries are typically set out in writing in the trust deed. In addition, the trustee has a legal duty to act in the best interests of beneficiaries, to act honestly and to exercise the same prudence and diligence as an ordinary person would exercise in carrying on their own business.

Malaysian REIT/PTFs are similar to that of a unit trust; that is, all income and capital entitlements of the trust are fixed in accordance with the trust deed, and those entitlements are unitized. Income and capital entitlements of a beneficiary (or unitholder) are determined by reference to the number of units they hold, and the rights attached to those units per the trust deed. Similar to a shareholder's liability in a company, a unitholder's liability is also limited, although the law is not explicit on this.

The trustee of a Malaysian REIT holds the real estate or properties in a REIT portfolio in trust for the REIT investors. Malaysian REITs are managed by management companies that have to be approved by the SC.

Under the guidelines, only a management company approved by the SC can act as a management company to a REIT/PTF. The management company must:

- be an entity incorporated in Malaysia
- (except where the management company is licensed by the SC), be a subsidiary of:
  - a company involved in the financial services industry in Malaysia
  - a property development company
  - a property investment holding company
  - any other institution which the SC may permit.
- have a minimum of 30% local equity
- have minimum shareholders' funds of MYR 1m at all times.

The initial minimum size of a REIT/PTF should be at least MYR 100m. A REIT/PTF is required, as part of its listing scheme, to undertake an offering to the general public. Any expenses incurred relating to an offer for sale of units shall be borne by the offeror.

A REIT/PTF may only invest in real estate, single-purpose companies, real estate-related assets, non-real estate-related assets, cash, deposits and money market instruments. At least 50% of the fund's total asset value must be invested in real estate and/or single-purpose companies at all times. The fund's investment in non-real estate-related assets and/or cash, deposits and money market instruments must not exceed 25% of the fund's total asset value.

## Exchange control rules

Subject to the FIC guidelines, a non-resident (other than stockbroking companies and banks) is free to obtain any amount of Ringgit borrowings from licensed onshore banks or resident non-bank companies to finance activities in the real estate sector in Malaysia, or finance/refinance the purchase of residential and commercial properties in the Malaysia, except for the purchase of land only.

Effective 1 June 2011, the following relaxations have also been accorded to resident companies wishing to obtain financing:

### *Foreign currency borrowings*

- A resident company is free to borrow any amount in foreign currency from:
  - its non-resident non-bank related company<sup>1</sup>
  - resident related<sup>1</sup> companies
  - licensed onshore banks<sup>2</sup> and licensed International Islamic Banks.

However, where the non-resident non-bank-related company is set up solely to obtain foreign currency loans from a non-resident financial institution, the amount of borrowing from the non-resident non-bank-related company continues to be subject to the prevailing aggregate limit of MYR 100m equivalent from non-residents.

- A resident company is free to refinance outstanding approved foreign currency borrowing, including principal and accrued interest.

The thresholds for foreign currency borrowing of MYR 100m in aggregate by a resident company on a corporate group basis is no longer applicable to financing obtained in the above manner. The threshold however still applies to financing outside the above situations and approval will be required from *Bank Negara Malaysia* (Malaysia's Central Bank).

### *Ringgit borrowings*

A resident company is allowed to borrow in ringgit, including the issuance of ringgit-denominated debt securities:

- of any amount from its non-resident non-bank-related<sup>1</sup> company to finance activities in the real sector<sup>3</sup> in Malaysia

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<sup>1</sup> Related company includes the ultimate holding, parent/head office, subsidiary/branch, associate or sister (common shareholder) company.

<sup>2</sup> Licensed onshore banks refer to licensed commercial banks, licensed Islamic banks and licensed investment banks.

<sup>3</sup> Real sector is the sector where there is production of goods and services, which includes all industries except for financial services.

- up to MYR 1m in aggregate from other non-resident non-bank companies or individuals for use in Malaysia.

However, borrowings in ringgit from the non-resident-related company, which is solely set up to obtain foreign currency loans from a non-resident financial institution, continues to be subject to the prevailing MYR 1m limit on ringgit borrowings by residents from non-residents.

Previously, borrowing in ringgit of any amount from non-residents required prior permission of the Controller of Foreign Exchange (the Controller).

## Rental income

### *General*

In general, income accruing in or derived from Malaysia (net of tax deductible expenses and capital allowances) is taxed at the current prevailing corporate tax rate of 25% unless specific exemptions apply.

Rental income derived from properties situated in Malaysia is subject to income tax, and may be taxed as business income or investment income, depending on the circumstances in each case.

The MIRB issued a revised public ruling on 10 March 2011 setting out the criteria for rental income to be treated as business income.

Letting of real property is deemed as a business source if maintenance services or support services are comprehensively and actively provided in relation to the real property.

Maintenance services or support services comprehensively provided refers to services including:

- doing generally all things necessary (e.g., cleaning services or repairs) for the maintenance and management of the real property such as the structural elements of the building, stairways, fire escapes, entrances and exits, lobbies, corridors, lifts/escalators, compounds, drains, water tanks, sewers, pipes, wires, cables or other fixtures and fittings; and
- doing generally all things necessary for the maintenance and management of the exterior parts of the real property such as playing fields, recreational areas, driveways, car parks, open spaces, landscape areas, walls and fences, exterior lighting or other external fixtures and fittings; or

If a person only provides security services or other facilities, that person is not providing maintenance services or support services comprehensively. Such services may be provided by the person himself who owns or lets out the real property or by another person or firm hired by him. Hence, rental income is treated as business income.

Expenses which are allowed a deduction is the direct expenses that is wholly and exclusively incurred in the production of income such as assessment and quit rent,

interest on loan (taken to finance purchase of real property rented out), fire insurance premium, expense on rent collection and rent renewal, and repairs.

Capital allowances can also be claimed on qualifying expenditure incurred on certain types of buildings as well as plant and machinery used in the business.

Costs that are capital in nature, such as stamp duty and legal costs incurred on the acquisition of property, are not tax-deductible, but would be regarded as forming part of the acquisition price of the property for real property gains tax purposes.

Notwithstanding the above, there's a special treatment provided for letting of a building to an approved Multimedia Super Corridor (MSC)<sup>4</sup> status company, which are regarded as carrying on a business and the income received therefrom is considered as a business income.

Without the comprehensive and active provision of maintenance services or support services, the letting of real property is deemed as a non-business source where rental income is treated as investment income and the rules provide for different types of deductions.

### *REIT/PTF*

With effect from year of assessment 2005, rental income from the letting of real property received by REIT/PTF is to be treated as business income. The undistributed income of the REIT/PTF will be subject to normal corporate income tax, currently at 25%. Due to new tax transparency legislation, distributed income by REIT/PTF will not be taxed at REIT/PTF level, provided that the REIT/PTF distributes 90% of its income. Instead, the unitholders will be taxed on such distributions received.

Tax-deductible expenses are those revenue expenses wholly and exclusively incurred in the production of income and normally includes the REIT/PTF manager's remuneration. However, a trustee fee does not qualify for tax deduction, since it is not wholly and exclusively incurred in the production of gross income.

Effective year of assessment 2006, fees for consultancy, legal and valuation services incurred in the establishment of REIT/PTF will also be allowed as a tax deduction.

Where the property has not commenced to produce rental income, no deductions will be allowed.

Pursuant to the Public Ruling No.9/2012 'Taxation of Real Estate Investment Trusts/Property Trust Funds', if a building has not been rented out, a rental source is not considered as having been commenced. Hence any related expenses incurred prior to the commencement of that source of income are not deductible against other existing rental income, which is not consistent with the tax legislation. As to-date the MIRB has not issued any formal position on this issue.

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<sup>4</sup> MSC or MSC Malaysia encompasses an integrated environment that encourages innovation, helps local and international companies to reach new technological frontiers, promotes partnership with global IT players and provides opportunities for mutual enrichment and success.

## Depreciation and capital allowance for industrial buildings

Depreciation of land and buildings does not qualify for tax deduction against rental income, and capital allowances are not available for residential and commercial buildings.

Where a building can be classified as an industrial building, e.g. factory, warehouse, certain hotel buildings, etc., and it is used for business or leased to a tenant who uses the premise as an industrial building, a capital allowance known as an industrial building allowance (IBA) can be claimed against the business or rental income of the owner of the building. The initial allowance is 10%, and the annual allowance is 3% of the building cost. Apart from this, buildings constructed under an agreement with the government on a build-lease-transfer basis, approved by the Minister of Finance, qualify for annual allowance of 6%. In addition, the following types of buildings qualify for allowances of 10% per annum:

- Buildings used as living accommodation for employees by a person engaged in a manufacturing business, hotel or tourism business and approved service project
- Buildings used as a school or an educational institution approved by the minister of education, or any relevant authority, or for the purposes of industrial, technical or vocational training approved by the minister
- Buildings used as a warehouse for storage of goods for export, or for storage of imported goods to be processed and distributed or re-exported
- Buildings used for the provision of child-care facilities
- Building (self-constructed or purchased) used as old folks care centre approved by the Social Welfare Department.

Pursuant to the Public Ruling No.9/2012 'Taxation of Real Estate Investment Trusts/Property Trust Funds', the IBA for building used in a hotel business can be claimed if the REIT/PTF is the owner and operates the hotel business, which is not consistent with the tax legislation. As to-date the MIRB has not issued any formal position on this issue.

Capital allowances may be claimed on qualifying capital expenditures incurred on plant and equipment used in a business of letting property. The initial allowance is 20%, and the annual allowance varies depending on the type of plant and equipment used. The rates of annual allowance are as follows:

- |                                      |     |
|--------------------------------------|-----|
| • Office equipment                   | 10% |
| • Furniture and fittings             | 10% |
| • General plant and machinery        | 14% |
| • Heavy machinery and motor vehicles | 20% |
| • Environmental protection equipment | 20% |

- Computer and information technology assets<sup>5</sup> 80%
- Motor Vehicle (private passenger car type)<sup>6</sup> 20%

Accelerated capital allowances are eligible for certain plant and equipment or promoted industries.

Expenditure on assets with life span of not more than 2 years is allowed on a replacement basis.

In general, capital allowances on qualifying plant expenditure can only be claimable against business income and not investment income. As such, only rental income treated as business income will be entitled to the relief of capital allowances.

In relation to a REIT/PTF, where there is insufficient adjusted income to absorb the capital allowances for that year of assessment, the unused capital allowances shall be disregarded and will be permanently lost.

## Costs of obtaining finance

Costs of obtaining finance (other than interest), including legal costs and stamp duty on new loan transactions, are generally not deductible. However, specific tax deduction is given for financing costs incurred in relation to the issuance of certain Islamic securities/bonds up to year of assessment 2010. This incentive has been extended for another five years, until year of assessment 2015.

## Capital gains on sale of real property

Any gains on disposal of real properties (chargeable asset), or shares in real property companies (chargeable asset) would be subject to the following RPGT rates with effect from 1 January 2013:

Holding period	RPGT rate
Disposal within 2 years of acquisition	15%
Disposal after 2 years and within 5 years of acquisition	10%
Disposal after 5 years of acquisition	Exempt

A real property company is a controlled company that owns or acquires real property or shares in real property companies with a market value of not less than 75% of its total

<sup>5</sup> The accelerated capital allowance for computer and information technology assets are not available to a company which has been granted incentives under the Promotion of Investments Act 1986 (PIA), i.e., Pioneer Status and Investment Tax Allowance; or reinvestment allowance. These rules are effective for Year of Assessment (YA) 2009 to YA 2013.

<sup>6</sup> Motor vehicles excluding motor vehicles licensed for commercial transportation of goods or passengers are subject to a restriction on the maximum qualifying expenditure:

- New vehicles purchased on or after 28 October 2000 where on-the-road price is MYR 150,000 or less subject to a maximum qualifying expenditure of MYR 100,000; and
- Vehicles other than the above is subject to a maximum qualifying expenditure of MYR 50,000

tangible assets. A controlled company is a company that does not have more than 50 members and is controlled by not more than five persons.

Where the disposal of property is by a property owner to a REIT/PTF approved by the SC, exemptions from RPGT and stamp duty have been provided for. This exemption applies only to acquisitions of properties by an approved REIT/PTF. Where the approved REIT/PTF subsequently sells properties, the RPGT and stamp duty exemption would not apply.

## Dividends

When a company resident in Malaysia pays a dividend, tax is deducted, or is deemed to be deducted, from the gross dividend at the current rate of 25%.

With effect from the year 2004, a two-tier tax rate applied to Malaysian resident companies which, among other requirements, have a paid-up capital of MYR 2.5m and less. They are taxed at the rate of 20% on the first MYR 500,000 of chargeable income, while any income in excess of MYR 500,000 will be taxed at the normal rate of 25%.

However, with effect from year of assessment 2010, the reduced rate of 20% shall not apply if more than:

- 50% of the paid-up capital in respect of ordinary shares of the company is directly or indirectly owned by a related company<sup>7</sup>
- 50% of the paid-up capital in respect of ordinary shares of the related company<sup>7</sup> is directly or indirectly owned by the first mentioned company
- 50% of the paid-up capital in respect of ordinary shares of the first mentioned company and the related company<sup>5</sup> is directly or indirectly owned by another company.

Dividends distributed by such companies are deemed to be franked at the rate of 25%.

A new single-tier system was introduced effective year of assessment 2008 to replace the previous tax imputation system whereby tax is levied on the profits of the company as a final tax. Dividends subsequently received by the shareholders are exempted from tax.

A transitional period has also been introduced, whereby companies under the tax imputation system which has unutilised Section 108 balances as of 31 December 2007, are given a six-year period (from 1 January 2008 to 31 December 2013) to use the Section 108 credits for payment of franked dividends. The savings and transitional provisions also prohibit the claiming of tax credits by shareholders during the transitional period in the following circumstances:

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<sup>7</sup> Section 107C(4C) ITA defined 'Related company' means a company that has a paid-up capital in respect of ordinary shares of more than 2.5 million at the beginning of the basis period for a year of assessment.

- The receipt of dividends from shares that are not held continuously for 90 days or more from the date of purchase of shares (exclude shares in public listed companies); or
- The receipt of non-cash dividend; or
- The receipt of dividends that relate to non-ordinary shares<sup>8</sup>

## Taxation of REIT/PTF

The income of a REIT/PTF, consisting of rental, interest (other than interest which is exempt from income tax) and other investment income derived from or accruing in Malaysia (after deducting tax allowable expenses), will be taxable at the normal corporate tax rate (currently at 25%).

The tax transparency system however, exempts the REIT/PTF from such taxes in a year of assessment if the REIT/PTF distributes at least 90% of its total taxable income in the same year of assessment.

If less than 90% of its total taxable income is distributed in a year of assessment, then the tax transparency system would not apply and total taxable income of the REIT/PTF would continue to be taxed, currently at the prevailing rate of 25%. Income which has been taxed at the REIT/PTF level will have tax credits attached when subsequently distributed to unitholders.

Dividends received by the REIT/PTF, if any, may have tax credits attached, representing tax deduction at source at the prevailing tax rate of 25%. Such tax credits will be available for set off either wholly or partly against the tax liability of the REIT/PTF. Any excess of the tax credits over the tax liability will be refundable to the REIT/PTF.

### *Exempt Income*

Since the REIT/PTF are considered to be unit trusts, certain income is exempt from tax, including interest or discount from the following investments:

- securities or bonds issued or guaranteed by the Government;
- debentures or Islamic securities, other than convertible loan stocks, approved by the Securities Commission;
- *Bon Simpanan Malaysia* issued by *Bank Negara Malaysia*;
- interest income from Islamic securities originating in Malaysia, other than convertible loan stock issued in a foreign currency and approved by the Securities Commission and Labuan Financial Services Authority; and

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<sup>8</sup>. Section 40(3) ITA: Ordinary shareholding means holding of shares other than shares that carry only a right to any dividend that is of a fixed amount or at a fixed rate per cent of nominal value of the shares, or a fixed rate per cent of the profits of the company.

- bonds and securities issued by *Pengurusan Danaharta Nasional Berhad*.

Interest paid or credited by any bank or financial institution licensed under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983 is tax exempt. Income received by the REIT/PTF from overseas investment is also tax exempt. The income exempted at the REIT/PTF level is also exempt from tax upon distribution to unitholders.

Foreign sourced income earned by the REIT/PTF is generally not taxable in Malaysia. Foreign source income is only taxed in Malaysia where the recipient is a financial institution or seen to be dealing in investments. Foreign sourced income earned by the REIT/PTF will retain its character when distributed to its unitholders so that no withholding tax will apply.

### *Taxation of REIT/PTF unitholders*

The taxation of unitholders will depend on whether the unitholders are Malaysian residents or non-residents.

#### **Tax treatment of unitholders**

The tax treatment is dependent on whether the REIT/PTF has distributed 90% or more of its total taxable income.

#### *The REIT/PTF distributes 90% or more of taxable income*

Where 90% or more of the REIT/PTF's total taxable income is distributed by the REIT/PTF, distributions to unitholders will be subject to tax based on a withholding tax mechanism at the following rates:

Unitholders	Withholding tax rate
Individuals and all other non-corporate investors such as institutional investors <sup>9</sup> (resident and non-resident)	10% <sup>10</sup>
Non-resident corporate investors <sup>11</sup>	25%
Resident corporate investors	0% <sup>12</sup>

The withholding tax is a final tax and resident individuals and non-corporate investors will not be required to declare the income received from the REIT/PTF in their Malaysian tax returns.

No withholding tax is applicable on distributions to resident corporate investors. Resident corporate investors are required to report the distributions from the REIT/PTFs in their normal corporate tax return and bring the taxable REIT/PTF distributions at the normal corporate tax rate, currently at 25%.

<sup>9</sup> Institutional investor means a pension fund, collective investment scheme or such other person approved by the Minister of Finance.

<sup>10</sup> This reduced rate of withholding tax is effective from 1 January 2012 to 31 December 2016.

<sup>11</sup> Company means an incorporated body.

<sup>12</sup> Corporate unitholders who are tax resident in Malaysia would have to file tax returns and declare such REIT/PTF income which is taxed at 25%.

### *The REIT/PTF distributes less than 90% of taxable income*

Where less than 90% of the total taxable income is distributed, the REIT/PTF is not entitled to the exemption. The REIT/PTF would have paid taxes on the taxable income for the year. The distributions made by the REIT/PTF of such taxed income will have tax credits attached. The tax treatment for unitholders would be as follows:

#### **Resident individuals**

Resident individuals will be subject to tax at their own marginal rates on the distributions and be entitled to tax credits representing tax already paid by the REIT/PTF.

#### **Resident corporate investors**

Resident corporate investors are required to report the distributions from REIT/PTFs in their normal corporate tax return and bring such income to tax at the normal corporate tax rate, currently 25%. Where tax has been levied at the REIT/PTF level, the resident corporate investors are entitled to tax credits.

#### **Foreign unitholders**

No further taxes or withholding tax would be applicable to foreign unitholders. Foreign unitholders may be subject to tax in their respective jurisdictions depending on the provisions of their country's tax legislation and the entitlement to any tax credits would be dependent on their home country's tax legislation.

Distributions representing specific exempt income or gains on disposal of investments at the REIT/PTF level will not be subject to further income tax when distributed to all unitholders.

#### **Disposals by unitholders**

Malaysia does not impose tax on capital gains. Therefore, gains on the disposal of the units by unitholders which are considered to be capital in nature will not be subject to income tax.

If a unitholder has held the Units for long-term investment purposes, any gains arising from the disposal of the Units should be considered capital gains and hence, not subject to Malaysian income tax.

However, if the Units have been held as trading assets of a trade or business carried on in Malaysia, the gains arising from the sale of Units will be seen to be part of business income and subject to normal income tax. Dealers in securities and financial institutions in Malaysia (e.g. insurance companies and banks) will normally be subject to income tax since such gains will be seen to be part of their business income. Foreign dealers and financial institutions with no business presence or permanent establishment in Malaysia will not be subject to Malaysian income tax on such gains. Such gains may still be subject to tax in each foreign investors' respective jurisdictions.

In the event of a winding up of REIT/PTF, the taxation of gains received in the form of cash or residual distribution will depend on whether the gains are seen to be capital gains or normal business income.

Unitholders electing to receive their income distribution by way of investment in the form of new units will be regarded as having purchased the new units out of their income distribution.

Unit splits issued by REIT/PTF are not taxable in the hands of unitholders.

## Loss carryforward

### *Income tax*

Losses can only be carried forward for offset against future business income if the losses had been incurred in the course of carrying on a business. As a result, if the leasing of properties qualifies as a business activity for income tax purposes, losses incurred would be available for carryforward.

However, effective year of assessment 2006, accumulated tax losses and unabsorbed capital allowances of a dormant company shall be disregarded in the event there is a change of more than 50% in the company's direct/immediate shareholdings.

Any losses incurred by a REIT/PTF or an investment holding company from the letting of properties cannot be deducted against income from other sources of income in a basis period. In addition, the losses cannot be carried forward to offset against future business income.

## Related party transactions and thin capitalisation rules

The tax authorities have issued the Transfer Pricing Guidelines since 2003 wherein all transactions between related parties are required to be conducted on an arm's length basis. Under this principle, the conditions made or imposed between two related parties in their commercial or financial transactions must not differ from those that would be made between independent parties engaging in similar transactions under similar circumstances.

Section 140A of the Act came into effect from 1 January 2009. The salient point of Section 140A is that transactions with associated persons for acquisition or supply of property or services must be at an arm's length price. If the Director General has reason to believe that the transaction price is too low or too excessive, the Director General is empowered to make adjustments on transactions of goods, services or financial assistance carried out between related companies based on the arm's length principle as well as prescribe thin capitalisation rules which seek to restrict tax deduction on excessive interest, finance charges, other consideration paid or payable or losses suffered on financial assistance granted by associated person. However, the implementation of the thin capitalisation provision has been deferred until 31 December 2015. It is expected that the safe harbour debt-equity ratio for thin capitalisation rules is 3:1. Hence, due care should be exercised in related party debt situations to ensure that the debts do not exceed the safe harbour ratio to avoid any unnecessary disallowance of the interest expenses.

In addition to this, the Income Tax (Transfer Pricing) Rules 2012 (in relation to Section 140A of the Act) and Income Tax (Advance Pricing Arrangement) Rules 2012 (in relation to Section 138C of the Act) were introduced on 11 May 2012, with

retrospective effect from 1 January 2009. One of the key features in the new Transfer Pricing Rules is the requirement for taxpayers to prepare contemporaneous Transfer Pricing Documentation, i.e. either at the point of developing the inter-company transaction or prior to the submission of the company's tax return. The Detailed Transfer Pricing Rules 2012 and Advanced Pricing Arrangement Guidelines 2012 have been issued on 20 July 2012.

In view of the above, any payment made to a related entity will need to take into consideration the abovementioned requirements and compliance with the arm's length standard.

## Other relevant taxes

### *Stamp Duty*

Stamp duty is imposed on a wide range of documents. The rates vary with the type of document and amount involved. The stamp duty payable for transfer instruments for real property is 1% to 3% of the market value of the property. The stamp duty payable for transfer instruments for shares is 0.3% of the consideration.

Effective 13 September 2003, instruments of transfer of real property by any person to a REIT/PTF approved by the SC will be exempted from stamp duty. The sale of property by the REIT/PTF is not exempt, and the purchaser has to pay the stamp duty.

### *Assessment and Quit rent*

A property tax called assessment rates is levied on the gross annual value of property, and is payable to the city or town council. Quit rent is a form of land tax, and a nominal amount is payable to the state land office.

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# ***Real Estate Going Global Malta***

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 30 June 2012.**

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# *Real Estate Tax Summary – Malta*

## General

Malta's full imputation system of taxation, the refund mechanism and the participation exemption are among the main characteristics of Maltese tax legislation, which may be used efficiently by entrepreneurs who wish to invest in non-Maltese real estate through a Maltese holding company.

Moreover, it is also possible to have a foreign entity with Maltese tax residence holding real estate outside Malta, which will tax any income derived from the non-Maltese real estate on a remittance basis of taxation. This means that any rental income derived from real estate situated outside Malta is not taxed in Malta if it is not received in Malta and any capital gains deriving from the disposal of the non-Maltese real estate is not taxed in Malta even if such gains are received in Malta.

## Income tax

Under the Maltese Income Tax Act ('ITA') chargeability to Malta tax on a worldwide basis is attracted if a person (whether a company or otherwise) is both domiciled and ordinarily resident in Malta. For income tax purposes, a company is considered domiciled in the country of incorporation. The normal corporate tax rate applicable in Malta in respect of any rental income or capital gains derived from real estate is 35% but due to Malta's full imputation system of taxation, in certain circumstances the effective tax burden can be significantly reduced on profits distributed to the shareholder.

A non-domiciled Maltese resident company may be taxed on rental income derived from real estate situated outside Malta to the extent that this is received in Malta. No income tax in Malta is paid on such income if this is not received in Malta. In addition, to the extent that the income derived from the disposal of the real estate by the said company is of a capital nature, such gains are not taxed, even if they are received in Malta.

As a general rule, transfers of real estate are taxed by the imposition of a final withholding tax ('WHT') of 12% on the transfer value. In a limited number of instances the transferor is also given the possibility to opt out of the final WHT of 12% and instead be taxed on the gain arising at the applicable income tax rates on the difference between the consideration received and the cost of acquisition of the real estate (subject to a number of conditions being satisfied). Various exemptions and reliefs are granted under the ITA in relation to transfers of real estate.

## Stamp duty

The standard rate of stamp duty is 5% (EUR 5 for every EUR 100 or part thereof) of the amount or value of the consideration paid for the real estate, whichever is the higher. However, in the case of individuals a reduced rate may be applicable on a portion of the consideration payable for the acquisition of property subject to the satisfaction of a number of conditions.

## Value added tax (VAT)

Subject to certain exceptions, the letting of real estate is exempt without credit i.e. no VAT is charged by the lessor and such lessor has no right to claim back/deduct any input tax incurred. A transfer of real estate is also an exempt without credit supply.

## ***Real Estate Investments – Malta***

### **Malta as a holding company location for acquiring non-Maltese real estate**

#### ***Income derived by a Maltese company from real estate situated outside Malta***

Under the ITA chargeability to Malta tax on a worldwide basis is attracted if a person (whether a company or otherwise) is both domiciled and ordinarily resident in Malta. For income tax purposes, a company is considered domiciled in the country of incorporation. The corporate income tax rate is 35%, but due to Malta's full imputation system of taxation, in certain circumstances the effective tax burden can be significantly reduced on profits distributed to the shareholder.

The normal corporate tax rate applicable in Malta in respect of any rental income or capital gains derived from real estate is 35%, subject to any applicable double taxation relief. On a distribution of dividends by MaltaCo (being a Maltese company owning non-Maltese real estate) to its shareholders, the existence of a full imputation system of taxation (where the highest rate of shareholder tax is 35%) and of a number of tax refunds which are available in certain circumstances can result in an effective tax burden of between 0% to 10% on profits distributed.

In terms of Maltese tax law, distributable profits are allocated to different tax accounts, i.e., the Final Tax Account (FTA), the Immovable Property Account (IPA), the Foreign Income Account (FIA), the Maltese Taxed Account (MTA) and the Untaxed Account. Tax refunds are only available on distributions effected from the MTA and FIA.

On the basis that the real estate is situated outside Malta, any foreign rental income or capital gains derived by MaltaCo should be allocated to the company's FIA as they represent capital gains and rents derived from investments situated outside Malta. Such profits should be charged to Maltese tax at the standard corporate rate of 35%, subject to any relief of foreign tax.

However, apart from the possibility of MaltaCo qualifying for double taxation relief on such income, and subject to certain other conditions, upon distribution of the relevant profits by MaltaCo to its shareholders, the latter should also be entitled to a tax refund of part of the tax suffered by MaltaCo. The extent of tax refund depends primarily on whether or not MaltaCo will be claiming any double taxation relief on the income.

If no double taxation relief is claimed (and subject to the satisfaction of all statutory requirements for the claim of a refund, e.g. registration for refund purposes by the shareholder claiming the refund), the refund should amount to six-sevenths of the tax suffered by MaltaCo, hence potentially reducing the effective Maltese tax leakage to around 5% (one-seventh of 35%).

The net Malta tax leakage of around 5% after a distribution of dividends to shareholders should apply on the basis of certain assumptions, e.g. that MaltaCo does not have non-deductible expenses (that would create a mismatch between the accounting and tax profits in the sense that there would not be sufficient distributable

profits to cover all the profits that were subject to tax), and that the company actually distributes all of its taxed profits.

In the case that double taxation relief is claimed by MaltaCo (and the income is allocated to the company's FIA), the refund should amount to two-thirds of the Malta tax (before any credit for actual foreign tax suffered) in respect of those distributed profits.

On the basis that income would be allocated to the FIA, an alternative combined with the two-thirds refund may be for MaltaCo to claim the Flat Rate Foreign Tax Credit (FRFTC) – the FRFTC is a system of unilateral double taxation relief which assumes a deemed foreign tax of 25%. As long as all taxed profits are distributed, the combination of the FRFTC and the two-thirds refund (in this case the refund would be calculated on the tax after the FRFTC) should produce (subject to certain conditions) a net Malta tax burden after a distribution of dividends to shareholders of between 6.25% and 2.5% of the net foreign income, with the actual tax leakage depending on the level of deductible expenses. In this case, the Malta tax leakage can never be below 2.5% on net foreign income due to the specific mechanics of the FRFTC. Therefore, on the basis of the assumptions set out above, the post-refund tax leakage in respect of such income could be reduced even to around 2.5%–6.25% (possibly in the region of around 5%).

### *Income derived by a non-domiciled Maltese resident company from real estate situated outside Malta*

A non-domiciled Maltese resident company may be taxed on rental income derived from real estate situated outside Malta to the extent that this is received in Malta. No income tax in Malta is paid on such income if this is not received in Malta. In addition, to the extent that the income derived from the disposal of the real estate by the said company is of a capital nature, such gains are not taxed, even if they are received in Malta. To the extent that income derived from the disposal of the non-Maltese real estate is deemed to be of a trading nature and that any rental income is received in Malta, such income is charged to income tax in Malta at the standard corporate rate of 35%. The effective Maltese tax burden may then be substantially reduced by the application of the refunds as explained above.

### *Income derived by MaltaCo from shares in a foreign entity holding real estate outside Malta*

If a company registered in Malta (MaltaCo) holds shares in foreign entities that qualify as a 'participating holding' ('PH') under Maltese tax law, any dividends derived therefrom may (at the company's option) qualify for either (i) the participation exemption, which results in a straight exemption at corporate level on such dividends, or (ii) taxation under Maltese tax law, but on a distribution of this income, the shareholders should be entitled to a refund of 100% of the Malta tax suffered on the distributed profits, provided that certain other conditions are also satisfied (see below).

Any capital gains derived by MaltaCo also qualifies (at the company's option) for either (i) the participation exemption that results in a straight exemption at corporate level on such gains, or (ii) taxation under Maltese tax law and a refund of 100% of the tax suffered on a distribution of this income, provided in each case that the holding by MaltaCo in the foreign entity constitutes a PH.

Unless the participation exemption is opted for (see below), dividends and capital gains received by MaltaCo from its participation in the subsidiaries are subject to tax at the normal Maltese corporate rate of 35% and should be allocated to the company's FIA.

In terms of article 48(4)(b) of the Income Tax Management Act ('ITMA'), upon a distribution by a Maltese company of profits allocated to the FIA, which are derived from a PH, or from its disposal, to non-resident shareholders, which are not owned and controlled by, nor act on behalf of a person who is ordinarily resident and domiciled in Malta, such non-resident shareholders are entitled to a 100% refund of the Malta tax paid on the distributed profits.

In terms of article 2 of the ITA, a holding constitutes a PH in any of the following situations:

- The company holds directly at least 10% of the equity shares, which holding confers an entitlement to at least 10% of any two of the following: right to vote, profits available for distribution and assets available for distribution on a winding up.
- The company is an equity shareholder in a company and it is entitled at its option to call for and acquire the entire balance of the equity shares.
- The company is an equity shareholder in a company and it has the right of first refusal in the event of any proposed disposal, redemption, or cancellation of all of the equity shares not held by it.
- The company is an equity shareholder in a company and is entitled to sit on the board of directors or appoint a person to sit on the board.
- The company is an equity shareholder in a company with an investment in equity shares of at least of EUR 1,164,000, or equivalent in a foreign currency and such investment is held for an uninterrupted period of not less than 183 days.
- The company is an equity shareholder in a non-resident company where such shareholding is for the furtherance of its own business and the holding is not held as trading stock for the purposes of a trade.

For the purposes of each of the situations constituting a PH, an 'equity holding' is a holding of the share capital in a company, which is not a property company, which entitles the shareholder to at least two of the equity holding rights: right to vote, profits available for distribution and assets available for distribution on a winding-up.

A property company is a company which owns immovable property situated in Malta or any real rights thereon or a company that holds, directly or indirectly, shares or other interests in any entity or person, which owns immovable property situated in Malta or any real rights thereon where 5% or more of the total value of the said shares or other interests so held is attributable to such immovable property or rights.

Furthermore, it is possible for the holding by MaltaCo to qualify as an 'equity holding', even where MaltaCo does not have a holding in the share capital of the foreign entity or it does not consist solely of such a holding of share capital if in substance it holds an entitlement to at least two of the equity holding rights referred to above.

For the purposes of the PH situations set out above, qualifying holdings also include non-resident partnerships similar to Maltese partnerships *en commandite* where the capital is not divided into shares.

In order for the dividends received from a PH to qualify for the participation exemption or 100% refund, the body of persons in which the PH is held must also satisfy the following additional conditions:

- it must be resident in the European Union ('EU'), or
- it must be subject to foreign tax at a rate of at least 15%, or
- it does not have more than 50% of its income derived from passive interest/royalties

If none of the above are satisfied, then the holding by MaltaCo must not be a 'portfolio investment' or its passive income must have been subject to any foreign tax at a rate of not less than 5%.

### Participation exemption

As an alternative to the 100% tax refund, article 12(1)(u) of the ITA exempts 'any income or gains derived by a company registered in Malta from a PH, or from the disposal of such holding, where the taxpayer has not shown such income or gain as part of his chargeable income ...'

This article operates a direct exemption, which would be claimed directly at the level of the Maltese company and it operates to exempt the above-mentioned dividends and capital gains.

Indeed, operating a straight exemption could facilitate the tax treatment in a number of instances, e.g. it would not create cash-flow considerations arising from the payment of the tax and subsequent distribution and claim of the refund, it does not require the level of planning to ensure that the extent of distributable profits is not less than the company's taxable profits (the refund referred to in (a) above only applies to the tax suffered on the distributed profits), and it does not require the distribution of a dividend in order to obtain the relative refund.

The refund/participation exemption provisions outlined above can be particularly useful in tax planning considerations, including those involving foreign real estate transactions when such real estate is owned through a foreign subsidiary of a Maltese company.

### *Income derived by non-domiciled Maltese resident company from shares in a foreign entity holding real estate outside Malta*

A non-domiciled Maltese resident company may be taxed on dividend income derived from the holding of shares in the foreign entity only to the extent that this is received in Malta. No income tax in Malta is paid on such income if this is not received in Malta.

In addition, any capital gains arising as a result of the disposal by the said company of its shares in the foreign entity are not taxed even if they are received in Malta. To the extent that dividend income is received in Malta, such income may benefit from the participation exemption or the refund mechanism outlined above, provided the applicable conditions are satisfied. Maltese tax residence is acquired by the transfer of the effective management and control of the company to Malta.

## Acquiring real estate in Malta

The acquisition of real estate in Malta is carried out by means of a public deed, entered into in front of a notary public. Stamp duty and any legal expenses are paid upon the signing of the contract when the purchaser acquires real estate.

The standard rate of stamp duty is 5% (EUR 5 for every EUR 100 or part thereof) of the amount or value of the consideration paid for the real estate, whichever is the higher. However, in the case of individuals who acquire real estate to establish therein their sole ordinary residence, stamp duty is reduced to 3.5% (EUR 3.50 for every EUR 100 or part thereof) on the first EUR 116,468.67 of the consideration paid for the acquisition of the real estate.

Maltese and EU citizens may acquire property in Malta without the necessity of obtaining a permit in Malta to the extent that this property is acquired to serve as their primary residence irrespective of the length of their stay in Malta.

Maltese and EU citizens who have resided continuously in Malta for a minimum period of five years can acquire more than one real estate in Malta without the necessity of obtaining a permit. However they would require a permit in order to acquire real estate to serve as a secondary residence to the extent that they would not have resided continuously in Malta for a minimum period of five years (unless the property is situated in a Special Designated Area ('SDA')).

Non-EU citizens may only acquire real estate in Malta after a permit is issued by the Ministry of Finance, unless the property is situated in a SDA categorised as such by the relevant legislation.

There are no limitations or permit requirements when heirs, whatever their citizenship, inherit real estate in Malta from a person – whatever citizenship the deceased has – as long as the real estate was acquired legally in the first place.

### *Acquisition of real estate by a body of persons*

A body of persons (including a company), other than a commercial partnership, established in and operating from a EU member state may freely acquire immovable property in Malta as long as this is required for the purpose for which such body of persons has been set up and subject to the condition that it is directly controlled by citizens of a EU member state who have resided in Malta continuously for five years.

A commercial partnership established in and operating from a EU member state (including Malta) may freely acquire immovable property in Malta that is required for the purpose for which it has been set up as long as such partnership is controlled by and at least 75% of its share capital is held by a person (or persons) who is a EU member state citizen and has resided in Malta continuously for five years.

Any other body of persons will require a permit, which is only granted if the property is required for an industrial or touristic project or as a contributor to the development of the economy of Malta. Permission may be refused for the purchasing of a property, which is considered to be of historical interest.

## Letting of real estate

Owners of real estate may rent their real estate. A permit is required for any rentals to tourists.

Income derived from the letting of real estate is typically categorised under two headings: investment income and income of a trading nature. The difference between the two is distinguished by whether the rental agreement is for short periods (usually for furnished premises and not exceeding three months) or for longer periods.

The tax deductions taken against these two types of rental income are different. Any expense incurred in the production of income derived from trading rental income is an allowable tax deduction under the general deductibility rules in the ITA.

In the case of rental income derived from long lets where the rental activity is not a trade, the allowable deductions are (i) the MTA licence fees if any, (ii) rents and ground rents payable, (iii) any interest incurred on a loan specifically taken to finance the purchase of the real estate from which rental income is derived, and (iv) a further deduction equal to 20% of the rental income received less rents and ground rents payable and less the MTA licence fees.

## VAT

Subject to certain exceptions, the letting of real estate is also exempt without credit. These exceptions include:

- The letting of real estate for the purposes of providing accommodation in any premises, and which letting is required to be licensed by the Malta Tourism Authority, is subject to VAT at the reduced rate of 7%. In general, this applies to hotel accommodation and short lets and holiday flats, as well as to letting of premises for the purpose of accommodation to persons who have been in Malta for less than one year.
- The rental of real estate for commercial or business purposes by a limited liability company to a person registered for Maltese VAT purposes is subject to VAT at the standard rate of 18%.
- The letting of designated premises and sites for parking. The parking sites have to be designated by the Commissioner of VAT; such parking premises, however, do not include any public property that serves as a car park.
- The letting of permanently installed equipment and machinery that is subject to VAT at the standard rate of 18%.

In the case of the above exceptions, the normal VAT rules in connection with the recovery/deduction of input tax apply and therefore the owner/operator/lessor should be in a position to claim/deduct input tax incurred in connection with the real estate letting activity.

## Selling real estate in Malta

As a general rule, transfers of real estate are taxed by the imposition of a final withholding tax ('WHT') of 12% on the transfer value. In this respect, the ITA defines the transfer value of the real estate as being the higher of the market value of that real estate and the consideration paid or payable for the transfer. Should the transferor incur any brokerage fees, tax will be calculated at 12% of the transfer value net of qualifying brokerage fees.

In a limited number of instances the transferor is also given the possibility to opt out of the final WHT of 12% and instead be taxed on the gain arising at the applicable income tax rates on the difference between the consideration received and the cost of acquisition of the real estate (subject to a number of conditions being satisfied).

These instances include:

- Where the real estate is sold within seven years from date of acquisition, the vendor has the option to choose to be taxed on the capital gain rather than at 12% of the selling price.
- Transfers by non-Maltese-resident persons who will be taxed again in their country of residence on any gain made on the sale of the Maltese real estate and who wish to claim the tax payable in Malta as a credit against their home tax. This opt-out is subject to a special procedure and a number of specific conditions.
- In the case of transfers of real estate situated in a SDA, the election is only applicable to the first owner and it may be exercised only on the occasion of the first transfer of real estate within that particular designated area. Hence, if the option is taken, it will apply to all subsequent transfers within that designated area. Subsequent owners will therefore only qualify for the opt-out if they transfer within seven years.

In the cases mentioned above, the said choice must be indicated on the deed of transfer. Tax is imposed on the difference between the consideration received by the transferor and the cost of acquisition of the asset plus any expenses, allowances and other deductions available in terms of law.

The deductions may include:

- cost of acquisition declared in the deed
- stamp duty paid on acquisition
- other expenses related directly to deed of acquisition, e.g. notarial fees
- proved costs of development and improvements
- inflation
- maintenance at 0.4% per year
- selling expenses relating directly to the transfer (typically brokerage) not exceeding 5% of sale price.

Capital gains are brought to charge as follows:

- A 7% provisional tax (calculated on the consideration) is payable upon the deed.
- The capital gain is calculated at the self-assessment (i.e. tax return) stage and this is taxed at progressive rates varying between 0% to 35% for individuals and at the statutory rate of 35% for companies. Any tax resulting as payable over and above the 7% paid provisionally is due to be paid with the submission of the tax return. Any excessive provisional tax paid is refundable.

A gain from a transfer (where the 12% final tax is not applicable) may be relieved by capital losses, bad debts from previous transfers and trading losses.

## *Transfers of real estate by a company*

The sale of real estate by a company is subject to the rules outlined above as applicable. Profits subject to tax at 12% are allocated to the FTA and such profits are not subject to any further tax in the company's hands and neither will they attract tax if distributed by way of dividend.

The transfer of real estate between two companies forming part of a group of companies is exempt from tax on capital gains. This applies where the individual direct or indirect beneficial owners of the companies are the same and each such individual holds, directly or indirectly, substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies. An individual is deemed to hold substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies where the difference between the percentage interest held in each company does not exceed 20%. Where an individual holds, directly or indirectly, less than 20% of the nominal share capital and voting rights in only one of the said companies, such individual is not taken into account in determining whether the individual, direct or indirect, beneficial owners of the said companies are the same.

Whereas such transfers are deemed not to result in a gain or loss for tax purposes, the tax 'saved' is actually deferred to the point in time where the relative real estate is transferred outside the group or de-grouping is deemed to have taken place as outlined in the next paragraph.

If the company acquiring the real estate ceases to be a member of the group before the lapse of six years from the date of the said acquisition, it is treated as if immediately after the acquisition of the real estate, it had transferred and immediately reacquired the property at that time and the transfer value to be taken into account is the value at which the company had acquired the said property from the group company. Such transfer shall be charged to tax at the rate of 12% of the transfer value.

Where a trader is transferring real estate that has been used in a business for a period of at least three years and, within one year, replaces the real estate by another used solely for a similar purpose in the business, the capital gains arising from the sale of the old real estate may be offset against the cost of a newly acquired premises, rather than being subject to tax. This applies for all traders and the objective is to give a cash-flow advantage to the transferor, where business premises are being replaced. Such rollover relief in practice results in a deferment of tax rather than an exemption.

Stamp duty is payable upon transfers of real estate at the rate of 5% of the amount or value of the consideration, or of the value of such real estate, whichever is the higher.

However, no duty is payable if the real estate is transferred from one company to another company forming part of the same group of companies, which requires that the individual, direct or indirect, beneficial owners of the companies are the same and each such individual holds, directly or indirectly, substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies. An individual is deemed to hold substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies where the difference between the percentage interest held in each company does not exceed 20%. Where an individual holds, directly or indirectly, less than 20% of the nominal share capital and voting rights in only one of the companies, such individual is not taken into account in determining whether the individual, direct or indirect, beneficial owners of the companies are the same.

Furthermore, no duty is chargeable on a transfer of real estate by a company to its shareholder in the course of winding up or in the course of a distribution of assets pursuant to a scheme of distribution, where the said shareholder is an individual or his/her spouse who owns or own, directly or indirectly, not less than 95% of the share capital and voting rights of the said company transferring the property and the Commissioner issues a certificate attesting that s/he is satisfied that the relative requirements and conditions are fulfilled.

### *Transfers of securities held in a property company*

A transfer of shares in a Maltese company is also subject to tax on capital gains.

Notwithstanding this, the transfer of shares in a property company between two companies forming part of a group of companies is exempt from tax on capital gains. This applies where the individual, direct or indirect, beneficial owners of the companies are the same and each such individual holds, directly or indirectly, substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies. An individual is deemed to hold substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies where the difference between the percentage interest held in each company does not exceed 20%. Where an individual holds, directly or indirectly, less than 20% of the nominal share capital and voting rights in only one of the said companies, such individual is not to be taken into account in determining whether the individual, direct or indirect, beneficial owners of the said companies are the same.

If the company acquiring the shares in a property company ceases to be a member of the group before the lapse of six years from the date of the said acquisition, it is treated as if immediately after the acquisition of the real estate, it had transferred and immediately reacquired the shares in the property company at that time. The base cost and the date of acquisition of the shares that are taken into account for the purpose of determining any gain or loss shall be the original cost and the date when the shares had previously last been acquired by a company by means of a transfer that did not qualify for an exemption, or by means of an allotment, whichever is the later.

Stamp duty is payable on transfers, whether executed in Malta or outside Malta, of foreign marketable securities held in a property company made to, or by any person resident in Malta and on every document whereby any foreign marketable security is transferred *inter vivos* to, or by any person resident in Malta.

Stamp duty is furthermore payable on every document whereby securities not referred to above are transferred to, or by any person in Malta.

Transfers of marketable securities are subject to stamp duty at the rate of 2%. However, where it results that 75% or more of the assets, excluding all current assets other than immovable property, of the company whose marketable securities are transferred *inter vivos*, consists of real estate, the duty is increased to 5%.

Stamp duty is payable on the higher of the consideration or the real value of the securities transferred. The real value of shares in a company is a percentage of the real value of the company corresponding to the higher of the percentage of the issued share capital represented by the nominal value of those shares and the percentage of the total voting rights in the company represented by the total voting rights attached to those shares.

Although the law provides for exemptions from the payment of stamp duty on the transfer of shares in companies including transfers of shares by or in entities involved in international operations, these exemptions do not apply where the marketable securities in question are held in a property company.

Furthermore, no stamp duty is payable upon the transfer of shares from one company to another, where such companies form part of the same group of companies, provided that where any such company is a property company, the said intra-group exemption only applies where the individual, direct or indirect, beneficial owners of the companies are the same and each such individual holds, directly or indirectly, substantially the same percentage interest in the nominal share capital and voting rights in each of the said companies both before and after the transfer.

### *Inherited real estate in Malta*

Capital gains on real estate acquired through inheritance after the 25 November 1992 are chargeable to tax at the rate of 12% on the difference between the transfer value and the value of the real estate as declared in the deed of transmission *causa mortis*. There is no provision for further reduction of the gain through any inflation or maintenance allowances in this respect. If the real estate was inherited before the 25 November 1992, the rate of tax is reduced to 7% of the transfer value.

### *Exempt transfers*

Various exemptions and reliefs are granted under the ITA and these include:

- No tax on capital gain is charged when the real estate being transferred has been the owner's own residence (owned and occupied) for at least 3 consecutive years immediately preceding the date of transfer and has been disposed of within 12 months of vacating the real estate.
- No tax is payable where the donation (which is considered a transfer for Maltese income tax purposes) is made by a person to:
  - his/her spouse, descendants and ascendants in the direct line and their relative spouses, or in the absence of descendants to his/her brothers or sisters and their descendants,
  - philanthropic institutions.
- If a real estate acquired by donation is subsequently transferred after the lapse of five years, from the date of donation, the tax is calculated at 12% of the difference between the transfer value and the acquisition value. Acquisition value is the value declared in deed of donation if the deed was made within six months of the donation and if notice thereof is given to the tax authorities in Malta within 15 working days of publication (or the six-month period whichever is the later);
- Settlement of real estate on trust or a distribution by a trust when it is deemed to be a donation referred to above or when it is not deemed to constitute a transfer (e.g. where the settlor and beneficiaries of the trust are the same person or persons);
- Assignments of real estate between spouses following the dissolution of the community of ownership;
- Assignments of real estate that had been co-owned by the spouses made either between the spouses or, following the death of one of the spouses, between the surviving spouse and the heirs of the deceased spouse;

- The transfer of property upon incorporation of a business or partnership into a company;
- The transfer of property by a company to its shareholder or to an individual related to its shareholder in the course of winding up or in the course of a distribution of assets pursuant to a scheme of distribution, where the said shareholder is an individual or his/her spouse, who owns or own, directly or indirectly, not less than 95% of the share capital and voting rights of the said company transferring the property as aforesaid provided that the applicable conditions are satisfied. An individual is related to the said shareholder if such individual is his/her spouse, his/her descendant or ascendant in the direct line, or the spouse of any such descendant or ascendant, or, in the absence of any descendants in the direct line, his/her brother or sister or a descendant of his/her brother or sister.

## VAT

A transfer of real estate is an exempt without credit supply, i.e. no VAT is charged by the seller and such seller has no right to claim back/deduct any input tax incurred, including input tax incurred in the construction of that real estate.

## Taking up residence in Malta

### *High Net Worth Individual (HNWI) scheme*

Any person who is not domiciled in Malta (even if resident in Malta) is taxable in Malta only on Malta source chargeable income and capital gains and on foreign source income which is received in Malta (foreign source capital gains are not chargeable to Maltese income tax even if received in Malta) – the remittance basis of taxation.

Individuals who have been granted HNWI status are taxable at the rate of 15% on receipt of foreign source income in Malta and also have the possibility of claiming double tax relief on such income.

The HNWI Rules have replaced the Residence Scheme Regulations.

To apply under the HNWI Rules an individual must primarily not be domiciled in Malta and must have no intention of establishing his domicile in Malta within 5 years from the date of the application for this tax status.

Furthermore, the individual must also satisfy certain criteria which are applicable to all applicants irrespective of their nationality, i.e.:

- The applicant must hold a 'Qualifying Property Holding' in Malta (minimum value of EUR 400,000 or EUR 20,000 rental per annum);
- The Qualifying Property must not be shared with other individuals, apart from his/her family members (the beneficiary's ascendants and descendants, brothers, sisters and spouses with whom the beneficiary is in a stable and durable relationship);
- The applicant must be in possession of health insurance which covers himself and his dependants in respect of all risks across the EU as are normally covered for Maltese nationals;

- The applicant must be a fit and proper person (an international due diligence exercise is carried out by the Inland Revenue Department prior to granting the special tax status);
- A non-refundable one-off registration fee of EUR 6,000 must be paid.

### Tax treatment

Once HNWI status has been acquired the person is deemed to be resident for tax purposes in Malta and is chargeable to tax on his/her income as follows:

- Foreign source income, which is received in Malta is taxable at the rate of 15% with the possibility of claiming double tax relief on such income subject to the minimum annual tax liability referred below;
- The applicant must pay a minimum tax of EUR 20,000 (EU/EEA/Swiss) or EUR 25,000 (others) and an additional amount of EUR 2,500 per annum (EU/EEA/Swiss) or EUR 5,000 (others) per dependent;
- A beneficiary and his spouse cannot opt for a separate tax computation; and
- Other chargeable income of the beneficiary is charged at the rate of 35%.

### *Current holders of a permanent resident (PR) scheme certificate*

An individual who has acquired rights under the PR Regulations prior to 1 January 2011 is required to satisfy the above conditions but may continue to benefit from the previous beneficial tax regime provided he continues to satisfy the previous conditions as well as satisfy the following current conditions:

- The holder of the certificate must be in receipt of stable and regular resources sufficient to maintain himself and his dependents (as defined);
- The PR holder must be in possession of a health insurance in respect of all risks normally covered by Maltese nationals for himself and his family members; and
- The property being declared as the holder's place of residence cannot be occupied by any person other than holder of the certificate family members.
- However, if the individual sells the property to which the certificate refers then the applicant must adhere to the new HNWI Rules, i.e., the new conditions relating to the property will start to apply.

### Tax treatment

Income and capital gains arising in Malta and income arising outside Malta, which is remitted to Malta, is taxed at a flat rate of 15%. Residence certificate holders may not be engaged in gainful occupation in Malta.

### *Highly qualified persons regulations*

Expatriates in receipt of income in terms of a 'qualifying contract of employment' in respect of activities carried out in Malta may opt to be subject to tax on such income at a flat rate of 15%.

For an individual to be eligible to benefit from the 15% rate of tax, such individual must qualify as a beneficiary in terms of the rules, derive income from a qualifying contract of employment and be engaged in employment activity constituting an eligible office.

A beneficiary is a person who:

- is an individual who is not domiciled in Malta
- derives employment income subject to tax and received in respect of work, or duties carried out in Malta (or in respect of any period spent outside Malta in connection with such work or duties)
- is protected as an employee under Maltese law
- has proved to the satisfaction of the MFSA that s/he is in possession of the required specific competence and professional qualifications or professional experience
- is in receipt of stable and regular resources, which are sufficient to maintain him/herself and the members of his/her family
- resides in accommodation regarded as normal for a comparable family in Malta
- is in possession of a valid travel document
- is in possession of sickness insurance.

A qualifying contract of employment is such if it gives rise to a minimum income of EUR 75,000 (excluding the annual value of any fringe benefits) in respect of a year of assessment. The 15% flat rate is imposed up to a maximum income of EUR 5,000,000 whereby the excess is exempt from tax.

An eligible office is where the employment is with companies licensed and/or recognised by the Malta Financial Services Authority or the Lotteries and Gaming Authority and consists of specified senior positions, including: CEO, CFO, Chief Investment Officer, Actuarial Professional, Odds Compiler Specialist, etc.

An individual must apply to one of the Authorities afore-mentioned to obtain a formal determination of eligibility. The 15% tax rate applies for a consecutive period of five years for EEA/Swiss nationals and for a consecutive period of four years for third country nationals.

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# *Real Estate Going Global Mexico*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 8 August 2012.

# *Real Estate Investments – Mexico*

## Introduction

Investment in real estate developments has increased in recent years. Regulations regarding accounting, tax and environmental matters should be considered for these investments. Real estate developers must comply with several regulations that may vary depending on the municipality or state where the real estate is located.

## General

Domestic and foreign investors may invest in property in Mexico through a Mexican company, branch, business trust, a Mexican REIT, or through a non-resident entity. This report describes, in general, the tax and legal issues that a typical Mexican real estate investment has.

## Legal issues of Mexican Real Estate Investments

### *Types of ownership in Mexico*

In Mexico individuals and/or entities may hold ownership of a real estate property in diverse degrees:

#### Property

A full degree of property over the real estate. As a “real right” (in terms of Continental law system) persons or entities that have a property right over buildings and/or land may use and dispose of such goods. Property entitles the owner the right to use such goods according to their nature and to receive the products (e.g., revenues) that derive from such goods. Property right is considered the paramount right in Mexican Law and it never becomes extinct. Property rights are permanent and can be transferred upon the death of the right holder to his or her inheritors.

#### Co-Ownership

Co-ownership is another modality of property rights, through which it is possible to be a holder of a property. Co-ownership is when the ownership of the property is exercised at the same time by two or more persons which right percentage may be identical or unequal for each participant, but the sum of these fractions comprises the entire right. Although co-ownership is recognized by law, the trend is not to use this modality because the great inconveniences that it has, such as maintenance, use, decision making by the partners, etc. on the same object (i.e., property or real estate).

Co-ownership rights impose limitations to co-owners when one of them intends to transfer its right: when a co-owner wants to dispose his share, the other owner has a preference right (“*derecho de tanto*”) to acquire the right before any third party. The *derecho de tanto* is so strong, that it might even make the intended transfer null.

## Condominium

Condominium is a form of ownership whereby the owner has the exclusive ownership of a house, apartment, warehouse, etc., as a private unit of a building and also the co-ownership of common areas of the property in proportion to the value of the owned unit. Condominium is usually found to be convenient in Mexico because:

- no co-owners rights are granted, and therefore there are no limitations if a condominium right owner wants to alienate or burden the private unit.
- the owner of each private unit has his own public deed, confirming a property title.
- state or municipal services are individualized, such as electricity, water supply service, etc.

Condominium regime in Mexico is subject to its own regulations; for example, a person must meet certain requirements to hold a property in this scenario. Regulations may vary from state to state, since the condominium legislation in Mexico is local. However, in any case, the condominium should be constituted by public deed and it requires registration in the Public Registry of Property of the state where the condominium is built.

Please note that the registration before the public registry is essential to make effective the transfer of property for third parties. Any acquisition deed needs to be recorded before the local state-administered public registry.

The condominium scheme is not constrained only to apartments or houses for residential purposes, but can also be held on warehouses, offices, etc.

## Lease

The leasing market is quite well developed in Mexico. As in many countries, lease allows a non-proprietor to use of a property but does not grant ownership. Lease agreements are governed by local laws of each state of Mexico; while general terms do not vary dramatically, local rules and exceptions should be expected. Leasing may be held on buildings for residential purposes or for commercial or industrial use.

Lease contracts must be evidenced in writing. For this agreement, there is no need for a public deed signed before a notary public. Also, registration in the Public Registry of Property is not usually necessary, although local laws may provide such a requirement be met, and may even limit these contracts to a certain time according to the activity that should be performed at the property.

## Other types of ownership (Common Land “*ejidos*”; national goods and lands)

In Mexico, not all property can be acquired by private parties; some lands are attached to certain regimes and its acquisition may be subject to restrictions. Indeed, some lands may not even be subject to private ownership.

Common Lands known as “*ejidos*” are a good example of these properties. *Ejidos* are a form of collective property. An *Ejido*, is a group of individuals, Mexican citizens, who are collectively organized in a sort of entity which has its own assets and legal capacity. Such assets may consist of land, forests and waters and might have been endowed to the *Ejido* or acquired by it (under any property title).

Use, operate and disposal of such assets are subject to a special regime with specific rules. Organization and internal management is based on economic democracy.

Its main objective is to satisfy the demands of its members through the use and suitability of land crop. This type of ownership is inalienable and indefeasible. Its organization and internal management is regulated by law and traditions.

### **Restrictions**

The Mexican Constitution and the Law of Foreign Investments set restrictions on foreigners owning property on border areas and along the coast of the country. However, there are some mechanisms and exceptions for a person or a Mexican incorporated company with foreign investment to acquire property. Those mechanisms and authorizations depend on the purpose for which the real estate will be used.

## ***Real estate acquisition***

### **Negotiations**

Negotiations to buy or sell a property in Mexico are not specifically regulated, but rather attend to the will and good faith of the parties.

It is possible to take the negotiations through real estate agencies who serve as intermediaries between buyer and seller. If this is the case, foreign investors shall verify that agencies and their advisors have a certification issued by the AMPI (Mexican Association of Real Estate), which guarantees reliability and professionalism.

Potential buyers usually execute a purchase offer, which contains the general terms of the transaction, such as: information about the property, price, conditions for closing, assumptions, exclusive dealing periods and other typical clauses. Letters of intention may be in force for a certain period of time during which the prospective buyer must maintain the tender and the seller must accept or reject it. It should be noted that this pre-contractual documents are widely used, but might be difficult to enforce by the parties.

If the seller accepts the offer, the parties should execute a private purchase agreement, which is a binding document for the all parties to buy and sell the property.

The conditions and clauses of the sale agreement may be as broad as the parties' desire, but must follow the rules of the civil law in the place where the property is located.

Although the terms of the agreement can be freely agreed by the parties, it is common that at the time of the execution of the private purchase agreement, the buyer pays certain amount to the seller on account of the total price and they must set an approximate date on which both parties will attend the notary public to grant the correspondent public deed.

It is important to mention that it is not mandatory to execute a private purchase agreement, since, the final contract will be the public deed that will be signed before notary public. Nevertheless, this is a common practice that allows the parties have certainty of the deal while the notary public obtain certain documents issued by several authorities with different times of response.

Since gathering these documents may take between 2 to 4 weeks, a private purchase agreement may help the parties to prevent buyer or seller withdrawing from the purchase. Therefore, it is recommended to have a private purchase agreement binding the parties until the public deed is signed.

During the negotiation process, and certainly before executing a bidding document, it is recommendable to perform a preliminary investigation of the title property at the Public Registry of Property of the place where the property is located. This research is reliable, and brings legal certainty about whether the property has any encumbrance or restriction.

Additionally, if the property will be used by the buyer for business purposes, it is extremely important to verify the development program or “*bando*” of the state or municipality where the property is located. Development program or “*bando*” regulates the licenses and authorizations that can be granted according to the works/business to be carried out and the buildings that can be constructed in each land according to “land use” that have been appointed by the authorities.

### Public deed

To formalize the acquisition of real property through a sale (which is the most common scheme for transferring property), a notary public is always needed. The notary public is usually chosen by the buyer and, as a skilled lawyer in this matter, the notary will make the legal analysis of the business and will ask the actual owner to exhibit certain documents in connection with the property. The most frequent documents a notary should ask for are: (i) property title (i.e., public deed through which the current owner acquired the property); (ii) property tax ballot and any other documents regarding local taxes; (iii) the marital status of the seller.

The public deed is signed by the parties which in general, are the buyer and seller, unless there is another act that must be formalized simultaneously where another party may appear. For example, when the seller is obtaining a bank mortgage to carry out the purchase, the financial institution must appear as a third party.

In the content of the public deed, the notary relates all documents requested to the seller, the documents requested to the authorities and the personal information of the parties. It is a duty of the notary to make sure the property does not have any charge or encumbrance and that the local taxes related to the property are up to date.

The public deed will also contain the clauses by which the property is being transferred. There are several legal forms by which a property transfer can be performed, such as purchase, endowment, judicial allocation, inheritance allocation, transfer of property derived of a fund trust, etc.

It is worth mentioning that the seller is responsible for the hidden defects that the property may present. This clause is applicable even in the absence of the specific contractual provision, because it is considered a natural clause in every purchase contract. The seller is liable for latent defects for about 1 year. The latent or hidden defects are defined as any damage that makes the property unfit for its use.

Likewise, the seller is responsible for the reparation in case of eviction. This means that in case there is a judgment in favor of a third party where it is recognized the better right to own or hold the property than the new owner (buyer) the seller has the obligation to indemnify.

### Public registry of property

After the public deed is signed by the parties and all the legal and tax requirements are met, the notary will issue a “testimony”, which contains the deed that was signed. Please note that the deed needs to be signed on the official paper of the notary, so it remains in his or her custody. In Mexico the document known as property title,

is the “testimony”. The notary may issue as many testimonies as requested by persons with a legal interest in the property or by judicial authorities.

The first “testimony” issued by the public notary shall be registered in the Public Registry of Property corresponding to the place where the property purchased is located. The Public Registry of Property is a local authority and there is a Public Registry for each state.

Public Registries of Property have internal regulations and always are governed locally. Furthermore, when applying for a service in a public registry, there are fees that must be paid which vary from place to place.

### Notary public fees

In some states of Mexico, notary public fees are regulated by a tariff, but there are other states where fees are unregulated and are charged under the notary’s discretion.

Making a brief analysis of the total costs to be covered for the transfer of ownership of a property, it can be said that cost/fees may range from 4% to 8% of the commercial value of the property being purchased.

## *New buildings and construction issues*

In Mexico, it is possible to buy property in pre-sale status or under construction. If these properties are destined for residential use or to be promoted as a timeshare scheme, it is important to verify that the pre-contract signed with the builder is duly registered in the Federal Bureau of Consumer Protection.

Also, the builder is obliged to give the buyer a warranty for no less than 5 years for structural issues, 3 years for waterproofing, and 1 year for other elements counted upon the delivery of the property. The warranty will be in force since the property delivery. During the time of the warranty the builder must perform, at no cost to the buyer, any act aimed at repairing the defects or failures shown by the property.

In Mexico, you can also invest in real estate to modify and remodel or build. According to the building planned to construct, it is necessary to obtain permits or licenses granted by local authorities.

Although legislation regulating building authorizations and licenses is local, in most cases there are the following generic types:

### Construction license or “manifestation”

It must be requested by the owner of the property and is necessary for starting a construction in a land where there is no construction yet. This license is issued by the local authority in charge of urban development issues in accordance with the Urban Development Program or “*bando*” of each state or municipality.

When a property is considered as part of the Federal, Historic, Artistic and Archaeological Patrimony, or as part of a conservation area of a state, a technical analysis should be granted by the Ministry of Urban Development, the National Institute of Fine Arts and National Institute of Anthropology and History in order to construct or remodel such property.

### Special construction licenses

The special building permit or license is a document issued by the Mexican authority before expanding, altering, repairing, demolishing or dismantling a building or installation.

There are several specific licenses according to the size and use of the building to be constructed. It is advisable to verify the applicable legislation of the state where the land or building is located on a case by case basis.

In order to request the abovementioned licenses from the Mexican authorities, there may be other requirements that need to be previously fulfilled such as obtaining the Official Number and Alignment of the property.

### Acquisition vehicles

In Mexico, there are several alternatives when investing in the business of construction without spending a great part of a company's capital. Two of those schemes are briefly described below.

#### Trust

A Trust is regulated in México as a contract where there are three parties:

1. Grantor/Trustor
2. Trustee
3. Fiduciary

There are many types of Trusts, but focusing on building investment.

When an investor is willing to buy land where there is planning to develop apartments or offices building, under a condominium, the investor can negotiate with the current owner of the property to execute a Trust where the owner would be one of the trustees as well as the investor. In that case, there will be two kinds of trustees: A and B.

The investor (Trustee A) and the seller (Trustee B) can agree that by the end of the building process, the investor will pay the price of the property with a private unit such as an apartment or an office. For this transaction, the seller and the investor will execute a Trust with the fiduciary (that must be a financial institution authorized for this purpose).

Under this scenario, the investor can dispose of the land to develop the building without spending an initial amount for purchase of the property and instead spend directly on the building works.

In the Trust it is agreed that Trustee B will acquire a private unit and Trustee A will acquire the profits of the purchases of each private unit. In the end, when every unit, apartment or office is sold, the Trust will be extinct.

Some facts that are worth to consider is that under this juridical figure are (i) the purchase of each private unit must be done by a public deed of transfer of property derived from the purposes of the trust and (ii) the investor will have to pay for the fiduciary fees. Also, if properly implemented, no federal and local taxes may arise from setting up the trust and transferring the assets into the trust.

### Mortgage “bridge” loan or “*Crédito Puente*”

This mortgage loan, commonly known as “*Crédito Puente*” is an interesting mechanism to consider when investing in a building business.

Under this figure, an investor can request a loan from a financial institution in order to buy the land or property where the intention is to develop building business. Also this loan will be destined to finance the construction. The investor will guarantee the loan with a property mortgage.

After the construction of the buildings is over, or during the process, the investor will constitute the condominium of the building and agree with the Bank to divide the mortgage in order that each private unit responds for a part of the loan.

Therefore, when each private unit purchase is executed, a part of the paid price will be destined to pay for the loan, and the mortgage regards that private unit will be cancelled. This way, when the total of the private units are sold, the initial mortgage will be extinct.

### REITS type or vehicles

In Mexico, since the amendments of the Singular Circular for Issuers (“*Circular Única de Emisoras*”) were published on the Official Gazette in 2009, a new form of investment trust emerged to create opportunities for those investors who attempt to develop attractive projects in different industries, such as infrastructure, real state, private equity, etc.

Hence, a new form of investment was born in the Mexican Market, allowing small or medium companies to have unusual investors such as Mexican Pension Funds or AFORES (“*Administradoras de Fondos para el Retiro*”), who its own legislation allows to invest in negotiable structure instruments issued by an Investment Trust and listed on the Mexican Stock Exchange (“BMV”). This kind of Investment Trust may incorporate some characteristics of corporate governance and have to fulfil specific regulations established by National Banking and Securities Commission (“CNBV”) and the BMV. Furthermore, this Investment Trust might include an investment plan for the development of the project and contain stipulations about the functions in charge of the Technical Committee and the Advisory Investment Committee.

Since 2004 the Mexican tax legislation allowed the incorporation of new vehicles of investment created especially for the construction or acquisition of real estate to be granted under leasing activities, as it mentioned in the section “Mexican Real Estate Investment Trusts”. On May 2011 amendments to the Internal Regulations of the BMV were published, regarding the legal requirements of the Real Estate Investment Trusts. The certificates that represent Real Estate Investment Trusts are issued under certain tax benefits and according to some rules established on the Securities Market Law, General Law on Credit Instruments and Operations on Credit, Singular Circular for Issuers, Internal Regulations of the BMV, and Rules issued by the Central Bank, and the Secretary of the Treasury and Public Credit. These certificates need the approval from the CNBV and the favourable opinion for the BMV to be listed in the Mexican Stock Exchange.

In March 2011, *Fibra Uno Administración, S.A. de C.V.*, made a public offer for these kinds of certificates for a total amount of USD 8,876m or MXN 562,500m.

# Taxation of Mexican Real Estate Investments

## *Income tax*

### **Rental income**

Mexican taxpayers are subject to corporate income tax on their worldwide income. The tax rate is 30% for 2012, 29% for 2013 and 28% for 2014 onwards.

In general, taxable income is determined on an accrual basis. Any income related to the rental of real property should be accrued as part of the company's, branch's or REIT's taxable income.

According to the general rule established in the Mexican Income Tax Law (MITL), when the owner of the real property is a foreign resident, income tax should be paid at a 25% rate applicable to the gross proceeds, without any deductions. Also, please note that specific provisions according to a tax treaty concluded by Mexico may apply.

The tax is paid via withholding when the tenant is a Mexican resident. When both the landlord and the tenant are foreign residents, the landlord should remit the income tax to the Mexican tax authorities within 15 days after receiving the rental payment.

Payments to related parties located in a preferred tax regime (i.e. tax haven) are, in general subject to a punitive 40% withholding tax.

### **Depreciation**

The Mexican tax legislation allows the deduction of investments in assets via depreciation, using the straight-line method. The MITL provides the maximum depreciation rates that can be used for tax purposes for each type of asset, activity or industry.

An 'asset' is considered to be the investment in tangible goods used by a taxpayer to carry out its business activities and which value is diminished by use and time.

Companies are allowed to depreciate the entire cost of an asset, and may elect to start depreciating it either in the year in which the asset begins to be used or in the following year. Taxpayers lose the right to claim a depreciation deduction if they do not do so in the corresponding year.

The basis for the depreciation in the case of buildings is the purchase price plus incidental acquisition costs and improvements, and the maximum rate provided by the MITL is 5% per year. Land is not subject to annual depreciation.

### **Debt financing for the acquisition of real estate in Mexico**

When a real estate investment is financed through debt, several issues should be considered from a Mexican tax perspective, such as thin capitalisation, and back to back rules. Also, the non deductibility of interest for flat tax purposes should be taken into consideration at the moment of doing financial projections in the Mexican entity and determining the tax due when a finance scheme takes place.

### *Re-characterisation*

Mexico provides several rules that re-characterise interest payments as dividends according to the type of loan, such as profit participating loans, on-demand loans, back to back loans, or non-arm's length loans.

For Mexican tax purposes, a back to back loan is generally defined as any transaction in which one party provides cash, goods, or services to an intermediary who goes on to provide cash, goods, or services to the original party or a related party of the original party. Furthermore, back-to-back loans include loans that are guaranteed by cash, or other deposits by a related party of the borrower or by the borrower itself. As it can be seen this definition is quite broad and the rule should be analysed in detail on a case by case basis.

### *VAT*

Interest paid triggers VAT, which should be paid to the Mexican tax authorities on a self-assessment when interest is paid to a foreign resident. However, when the activities of the taxpayer are not subject to VAT (e.g., sale of houses and dwellings), VAT on interest becomes a cost on the hands of the payer that should be deductible for income tax purposes.

For Mexican tax purposes, both the terms of the loan and the interest rate should be established on an arm's length basis, if the transaction is carried out between related parties.

### *Withholding tax*

Interest income received by foreign entities is sourced in Mexico when funds are used in Mexico or when interest is paid by a Mexican resident or by a non-resident with a permanent establishment in Mexico. In most cases, interest income is subject to withholding tax at the 30% rate (29% in 2013 and 28% as from 2014); such withholding tax becomes payable (i) at the time the interest becomes due or (ii) at the time the interest is actually paid, whichever occurs first.

If interest is paid to a foreign registered bank that is resident in a tax treaty jurisdiction the applicable withholding tax rate should be 4.9%. Please note that a reduced income tax withholding rate may be applicable (e.g., 10% - 15%) when interest is paid to a tax treaty country and specific requirements are met (e.g., the interest is arm's length, the Mexican withholding agent receives a tax residency certificate from the foreign entity on a yearly basis, etc.).

### *Deductibility of interest*

Interest paid to foreign residents may be deducted for income tax purposes to the extent that the following conditions and requirements are met (non exhaustive list):

- The interest expense must be strictly indispensable for the business activity of the Mexican entity; therefore, the principal should be invested in the main activity of the Mexican company.
- Comply with Mexican withholding tax obligations.
- File informative tax returns with the Mexican tax authorities no later than 15 February of each year, disclosing information related to the loan.

- File an information return with the annual return, detailing transactions carried out with related parties in the previous taxable year.
- Comply with the 3:1 debt-to-equity ratio (i.e., thin capitalisation rules) at the end of each year.
- The transaction should be arm's length (the interest rate, the period in which interest and the principal become due, as explained above).
- The loan must not fall into the deemed dividend criteria, as explained above.
- Additional formal administrative requirements for deductions should be met, as listed in the Mexican Income Tax Law ("MITL"), e.g., support the expense with invoices complying with the requirements provided by the Mexican tax provisions.

#### *Inflation adjustment effect*

The monetary assets and liabilities (including MXN liabilities and foreign currency such as USD) of a company are subject to an annual inflation adjustment calculation, which could result in the Mexican taxpayer having an inflationary gain or loss. The monetary liabilities generate an inflationary gain.

#### *Foreign exchange gain/loss*

For debt denominated in a foreign currency (i.e. any currency other than Mexican pesos), the exchange gains and losses are subject to the same tax treatment as interest and are also accounted for on an accrual basis. Hence, a foreign exchange gain cannot be deferred.

#### **Loss carryforward**

Net operating losses (NOLs) may be carried forward for a period of ten years. No carrybacks are allowed.

The MITL does not limit the amount of NOLs that can be used to offset income each year during the ten-year carryforward. The only exception is the NOL derived from the disposition of shares that must be applied against gains of the same nature.

NOLs are also adjusted for inflation, and are a right specific to each taxpayer; so, they cannot be transferred to another entity, even in the case of a merger. In the case of a spin-off, NOLs can be divided between the surviving entity and the spun-off entity in accordance with some rules.

#### **Dividends and capital reductions**

Legally, dividends can only be distributed to the extent the distributing company has sufficient book retained earnings recorded in its financial statements.

Under the MITL, dividend distributions are not subject to withholding tax.

Dividends paid out from the Previously Taxed Earnings Account (CUFIN) are not subject to any further corporate income tax. CUFIN represents the company's after-tax retained earnings that can be distributed to the stockholders on a tax-free basis as a dividend payment. Dividends not distributed from the CUFIN account are subject to corporate income tax at an effective rate of 42.86%. This tax can be credited against the income tax of the given year and the following two years.

Regarding capital reductions the Capital Contribution Account (CUCA) tracks the capital contributions effectively made by the shareholders. CUCA is used to determine the taxability of capital stock redemptions and liquidations. In general terms, if the reimbursement of the share upon liquidation or capital redemption comes from CUCA or CUFIN balances, no corporate income taxation is due as a consequence of the capital reduction. Otherwise, corporate income tax at an effective rate of 42.86% should be applicable like a distribution of retained earnings. It is important to mention that the arithmetical calculation to determine whether a capital reduction triggers corporate income tax in Mexico is quite complex and a specific analysis is required on a case by case basis.

## *Flat tax*

### **Rate**

The flat tax rate is 17.5% for 2012 and the following years.

### **Income**

Income obtained from the following activities is taxable for flat tax purposes:

- sale or disposition of property,
- providing independent services,
- granting of the temporary use or enjoyment of assets.

Such activities are defined in the Value Added Tax Law.

### **Deductions**

Taxpayers are entitled to claim a deduction for, among others, the following expenses to the extent they fulfil the requirements established in the law:

- payments made for the acquisition of goods, inventory, independent services and the temporary use or enjoyment of assets. Such payments will be deductible to the extent they are made for purposes of generating income that is taxable under the flat tax law or for the management of the activities taxed in such law.
- local or federal contributions, except the flat tax, the income tax, cash deposit tax, the employer contributions to the social security system, housing funds and those that must be charged in accordance with other laws.
- sale returns, discounts and allowances that are received or provided.

Certain regular expenses, such as the following, are non-deductible:

- royalties paid to related parties, except if charged for the use of equipment
- salaries, wages and social contributions
- employee profit-sharing payments
- interest expenses, unless they are included in the sales price
- depreciation and amortisation

- income tax net operating losses
- cost of sales for inventories sold.

All expenses should comply with corporate income tax requirements in order to be deductible for flat tax purposes.

Flat tax is a 'cash basis' tax. Only the receipt of payment for goods or services is taxable, and a deduction may be claimed upon payment for the above-mentioned goods and services.

### Loss carryforward

The Flat Tax Law allows a credit when the flat tax deductions exceed the flat tax income. This credit is determined by multiplying such an excess by 17.5%.

The excess of flat tax deductions over flat tax income may be credited against flat tax of the following ten taxable years or until it is fully used, if earlier.

### Dividends

As mentioned above, a dividend may only be distributed to the extent the company has sufficient book earnings on its financial statements, is not subject to withholding tax, and to the extent it is paid out from the CUFIN it will not be subject to any further corporate income tax. However, a company that generates NOLs for income tax purposes and is in a flat tax paying position should not generate CUFIN, as flat tax functions as an alternative minimum tax. As a result, any dividend payments made by such a company would be subject to corporate income tax at a 42.86% rate. A detailed calculation should be performed in this regard.

### Value added tax (VAT)

According to the VAT Law, VAT is payable on the following activities:

- alienation of goods
- rendering of independent services
- rentals
- import of goods and services.

The general VAT rate is 16%. No special rates apply on the transfer of real property. The sale of land and residential construction are exempt from VAT.

The sale of commercial buildings is subject to VAT at the general 16% rate. Therefore, the value of the building plus all amounts additionally charged to, or collected from, the acquirer, such as other taxes, fees, normal or penalty interest, conventional penalties or any other item will be subject to VAT.

The rental of residential property such as houses or dwellings (except hotels, boarding houses) is not subject to VAT.

The rental of commercial property is subject to VAT. In this last case, the amount charged for the rent will be the tax basis to determine the VAT.

VAT is a 'cash basis' tax, with few exceptions (e.g. VAT derived from certain interest must be paid on an accrued basis), that is only the receipt of payment for goods or services triggers the output VAT liability, and an input VAT credit may be claimed when the taxpayer pays VAT to its providers of goods and services.

VAT paid on the acquisition or rental of commercial property (input VAT) should be recoverable for the party paying such tax. In order for input VAT to be creditable, the payment to which it relates should be deductible for income tax purposes and the VAT should be clearly stated in the corresponding invoice. If an entity carries out VAT-able and exempt activities, input VAT can only be credited in the proportion of the VAT that corresponds to those taxable activities, so specific allocation should be carried out.

VAT returns must be filed on a monthly basis. All monthly VAT payments are final. The return must be filed by the 17th day following the end of the month. VAT payments must be made together when filing the monthly return.

VAT favourable balances may be credited against future VAT liabilities, or they may be used to offset the tax liabilities arising from other federal taxes. In addition, the taxpayer is able to request the refund of a favourable VAT balance.

## *Municipal taxes*

### *Real estate transfer tax*

This tax is imposed on the purchaser of the real estate. The basis is the appraised value (performed by an official valuator or a cadastre) or market value (transaction or registered price) of the property, whichever is higher.

The tax rate depends on the legislation of the state where the real property is located. In general, the rates imposed by the states range between 1% and 5%. The tax rate in Mexico City may be as high as 5%.

The Public Notary is responsible for remitting the tax. The Notary collects the tax from the acquirer at the moment the public deed for the acquisition is signed and must remit it to the corresponding authorities together with the tax return in the term provided by the local legislation.

### *Real estate property tax*

Real estate property tax is a local tax. The mechanism to determine it varies, depending on the state and the municipality in which real estate is located. The owner of the real property is liable to pay this tax.

The real estate property tax is based on the official assessed value or the appraised value of real estate.

The tax rate depends on the legislation of the state where the real property is located. In most states, the tax rates are below 1%. However, the effective tax rate may be higher, as the total tax paid is comprised of the tax rate plus a fixed quota. In general terms, this tax is payable bimonthly.

### *Disposal of property*

Mexican taxpayers are taxed on the profit arising from the disposal of real property, which includes both land and building.

For income tax purposes, the capital gain is calculated by subtracting from the sales price, the tax basis of the real property. The tax basis is equal to the acquisition amount, plus improvements, less accumulated depreciation. The balance should be adjusted for inflation.

The gain will be accrued as part of the company's taxable income and subject to tax at the general 30% rate.

When the seller is a non-Mexican resident, the MITL provides a 25% tax rate on the gross proceeds of the sale, without any deduction. The tax is paid via withholding when the acquirer is a Mexican resident. When both the seller and the acquirer are foreign residents, the seller should remit the income tax to the Mexican Tax Authorities.

Alternatively, the MITL provides that if the seller appoints a legal representative in Mexico and complies with other formalities, the sale may be taxed by applying the general 30% tax rate to the net gain arising from the transaction. Such legal representative is responsible to remit the income tax to the Mexican tax authorities. There is no need to appoint a Mexican legal representative if the transaction is registered in a public deed.

It is important to mention that the MITL establishes that income tax should be paid on the hands of the acquirer when the commercial value exceeds by more than 10 % the sales price of the property. In these cases, income tax is calculated by applying a 25% tax rate (in case of foreign residents) to the difference between the commercial value and the sales price.

Flat Tax and VAT considerations need to be taken into account upon the disposal of property, as described below.

Notary fees, local taxes, such as the real estate property tax and other government fees need to be taken into consideration upon the disposal of property. In this regard, government fees are contributions to be paid for a service provided by an authority. In this case, the fees to which we refer are those derived from Public Registry of Property services regarding the issue of the encumbrance or non encumbrance certificate requested by the notary public and the registration of the first "testimony" according to the act or acts within it. In Mexico City, the notary public also requests to the Ministry of Urban Development a use of land certificate for the property that is being transferred, for which a government fee should also be paid.

### Purchase of a real estate company (disposal of shares)

An alienation of shares by a non-Mexican resident is taxable in Mexico when such shares are issued by a Mexican company or when 50% or more of the book value of the shares derives directly or indirectly from Mexican real estate.

For these purposes, the MITL provides two options to pay the corresponding income tax:

- apply a 25% rate on the gross proceeds; or
- apply a 30% rate on the net gain arising from the alienation. The net gain will be the difference between the sales price of the shares and their tax basis. To apply this option other formal requirements must be met (e.g. not being resident in

a preferred tax regime, appointing legal representative in Mexico, and carrying out a specific statutory report issued by a chartered public accountant, etc.).

The tax is paid via withholding when the acquirer of the shares is a Mexican resident.

When both the seller and the acquirer are foreign residents, the seller should remit the income tax to the Mexican tax authorities. However, if the seller resides in a non-tax haven country and appoints a legal representative in Mexico for the transaction, such legal representative is responsible to remit the income tax to the Mexican tax authorities. In these two cases the tax must be paid through the corresponding tax return within 15 days following the alienation of the shares.

Capital losses incurred by non-residents selling shares in a Mexican corporation are not deductible in Mexico.

Share disposal is not subject to Mexican Flat Tax or VAT.

### **Mexican real estate investment trusts (REITs)**

Under the MITL, the purpose of a Mexican REIT is the acquisition or construction of immovable property to be used in leasing activities. The immovable property must be held for at least four years. After such period of time the immovable property may be sold.

Upon contribution of the property, the REIT should issue the corresponding equity certificates. Investors contributing immovable property to the REIT are allowed to defer the payment of income tax on the gain from alienating such property. The tax is deferred until the date the investor sells the equity certificates, or the REIT sells the immovable property.

A REIT is required to invest at least 70% of its funds in the acquisition, leasing or sale of real estate; the remaining funds must be invested in registered government securities or in shares of certain investment entities.

The MITL grants REITs the benefit of not having to file income tax monthly advance payments. Instead, at the end of the tax year, the REIT calculates and pays the income tax related to its activities.

Mexican REITs must have at least ten non-related investors. Also, an investor may not hold more than a 20% interest in the trust.

Lastly, the benefits of Mexican REITs may also apply to corporations that are specifically created for the purpose of investing in real estate, and comply with the above-mentioned requirements.

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# *Real Estate Going Global Montenegro*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 16 August 2012.

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# *Real Estate Tax Summary – Montenegro*

## **Property rights on constructions**

A property law, effective as of March 2009, introduced a more liberal approach with respect to foreigners' rights to acquire real estate in Montenegro. The new law permits both foreign natural persons and legal entities to acquire ownership rights over land, apartments, residential buildings and business premises.

Furthermore, reciprocity of rights to purchase for Montenegrin citizens abroad is no longer required. Moreover, a certificate proving that the real estate is necessary for conducting business activity in Montenegro is no longer a prerequisite.

The law, however, does impose certain restrictions, stipulating that foreigners cannot acquire ownership rights over the natural resources, real estates of public interest, culture heritage and real estate in the state border line zone.

In addition to mentioned restrictions, a foreign natural person may acquire forestry and agricultural land that does not exceed 5,000 square metres, provided that the subject of ownership acquisition is a residential building located on that land.

This law should be an additional incentive for foreign investments, removing a much criticised business barrier that imposed limitations for foreign investors in the past.

## **Rental income**

Rental income realised by a resident company is a constituent part of its business income and is taxed at 9% after deduction of operational costs.

Income realised by a non-resident from renting an immovable in Montenegro that is attributable to its permanent establishment (PE) in Montenegro will be taxed along with other profits of the PE at 9% corporate income tax rate.

Income from renting a property in Montenegro realised by a non-resident without a PE in Montenegro would be subject to withholding tax at the rate of 9%.

## **Thin capitalisation**

Montenegro does not have thin capitalisation rules. There is only a requirement that interest expenses need to be at arm's length level in order to be deductible for corporate tax purposes. Any excess above market level will not be recognized as an expense for corporate tax purposes.

## Depreciation

Fixed assets are tangible and intangible assets of which the service life is longer than a year and the individual acquisition price at the time of acquisition was higher than EUR 300.

Real estate is depreciated at the rate of 5% using the straight-line method. The equipment, if it can be separated from the real estate, can be depreciated at rates from 15% to 30% annually, depending on the type of equipment, using the declining balance method.

# *Real Estate Investments – Montenegro*

## Preface

Land legislation is generally developed, and changes to tax laws are generally in favour of investors. However, this part of the region still suffers from legal and tax systems that are subject to frequent change, a regulatory framework which is often contradictory or unclear, and a lack of investment guarantees for foreign investors. Tax laws are often unclear, and the tax authorities lack sophistication, which can make it difficult to obtain certainty on the tax treatment of more complicated transactions. The case law and practice of court proceedings are in an early stage of development. Nevertheless, investors and developers who are well-prepared for the issues they may encounter, and who use advisors with real deal experience, can take steps to reduce the risks as far as possible.

## General

### *Legal aspects*

According to the Law on Foreign Investments of Montenegro (the Law), a foreign investor may conduct business in Montenegro through a:

- locally incorporated company
- branch
- special form of investment.

Montenegrin company law recognises the following legal forms of a locally incorporated company:

- General partnership (*ortačko društvo* or 'od').
- Limited partnership (*komanditno društvo* or 'kd').
- Limited liability company (*društvo sa ograničenom odgovornošću* or 'doo').
- Joint stock company (*akcionarsko društvo* or 'ad').

The company law recognises a branch, which does not have a status of legal entity and conducts its business operations in the name and on behalf of its founder.

Foreign legal entities and individuals can also invest in Montenegro via Concessions and B.O.T. agreements (build, operate and transfer) as forms of investments. A concession (permit) may be approved for foreign investors, for exploitation of natural resources, goods in common use, or for performing activities in common interest, and a foreign investor may be approved to build, operate and transfer certain facilities of infrastructure and communications, etc.

The law also envisages an investment agreement, which can have a form of a leasing agreement, franchising agreement, management agreement or sale and purchase agreement of immovable properties.

A foreign investor enjoys full legal security and national treatment, meaning that the same legal conditions are guaranteed to foreign investors as for domestic legal entities or natural persons.

Foreign investors are restricted from having a majority stake in companies dealing in production and trading of armament products, TV broadcasting and in certain enterprises conducting activities of a public interest.

## *Corporate profit tax*

### **Tax rate**

Corporate profit is taxed at a 9% flat rate.

### **Taxable entities**

A taxable person shall be a resident or non-resident legal entity that carries out business activities for profit-making purposes, including limited partnership.

### **Residency**

A legal entity is considered as a resident of the Republic of Montenegro if it is established or has its place of effective management and control in the territory of Montenegro. Residents are taxed on their income generated in the territory of the Republic, as well as on worldwide income.

Non-residents are taxed only on their income sourced through a PE on Montenegrin territory or on the income subject to Montenegrin withholding tax. A PE is any fixed place of business through which a non-resident conducts its business activities.

### **Tax base**

The taxable base is profit-determined by adjusting the accounting profit as stated in the profit and loss statement, determined in accordance with accounting legislation and provisions of the Corporate Income Tax Law.

Significant tax adjustments include:

- Expenses that are not recognised as expenses for corporate profit tax purposes:
  - Non-documented expenses.
  - Interests paid to non-residents at a higher rate than the normal commercial rate.
  - Administrative costs paid by a PE to a non-resident main office.
  - Expenses incurred other than for the purpose of conducting business activities.
  - Payments to employees and other persons based on profit distribution.
  - Penalties.
  - Contributions to political organisations.

- Expenditure recognised for corporate profit tax purposes up to a certain amount, or if certain requirements are met:
  - Depreciation computed in accordance with tax legislation.
  - Provisions, write-off of receivables and general provisions.
  - Expenditures related to health, education, science, religious, cultural, sports and charity work are tax-deductible up to 3.5% of total revenue.
  - Expenditures related to payments of membership to commerce, associations and unions are tax-deductible up to 0.1% of total revenue.
  - Representation expenses made for improvement of business activity are tax-deductible up to 1% of total revenue.

### Provisions and reserves

Provisions (indirect write-off) for bad and doubtful debts are recognised as expenses in the following conditions:

- That related revenue has already been accrued.
- That they were written off as uncollectible.
- That evidence of unsuccessful collection through a court procedure is provided.

### Adjustments of revenue

Generally, revenue established in accordance with accounting legislation is recognised for tax purposes. Revenues from dividends and shares in profit of another legal entity (recipient) shall not be included in the tax base, only if the recipient is subject to Montenegrin corporate tax.

### Group treatment

Companies are considered a group if one company directly or indirectly controls 75% of the shares in another company. A group of companies has the right to tax consolidation if all companies are Montenegrin residents.

Each company files its own tax balance sheet and the parent company files a consolidated tax balance sheet for the whole group. In a consolidated tax balance sheet, losses of one or more companies are offset by the profits of other related companies. Each company is liable to tax proportional to its share in the taxable profit of the whole group. Tax consolidation must continue for at least five years; otherwise, each company will have to pay all taxes that it would have paid if there had not been any consolidation.

### Carryforward of operational losses

Operational losses can be carried forward for five years. This relief does not end if a company's status changes.

### Treatment of status changes

Transfer of properties within status changes and distribution of share capital is not regarded as a sale of property under the Corporate Profit Tax Law (CIT Law).

The taxation of capital gains realised upon status change and distribution of share capital is deferred to the moment when the successor sells the acquired property. The deferral of the taxation of capital gain is allowed under condition that the owner of a company transferring the property receives shares, or share interest in the acquirer, and cash receipts that do not exceed 10% of the value of shares or stakes received.

### Tax depreciation

Fixed assets subject to depreciation for tax purposes are tangible and intangible assets with useful life longer than a year and under the condition that their individual acquisition value exceeds EUR 300. Fixed assets are divided into five groups, with depreciation rates prescribed for each as follows:

1. Group I	5%
2. Group II	15%
3. Group III	20%
4. Group IV	25%
5. Group V	30%

A straight-line depreciation method is prescribed for the first group while a declining balance method is prescribed for assets in other groups.

The real estate is classified into Group I for the purposes of tax depreciation.

### Taxation of capital gains

Gains realised by a company from sale of real estate, shares and securities will be considered capital gains and will be taxed at 9%. Taxable base is the positive difference between sales price and acquisition price of a qualifying asset adjusted for tax depreciation, i.e. acquisition value can be recorded at cost or at fair value.

The CIT Law provides for the separate taxation of capital gains from operational profits. Offset of operational profit and capital loss is not allowed (vice versa).

### Withholding taxes

Withholding tax at the rate of 9% is levied on certain payments to a non-resident (interest, dividends, share in profit, royalties and related rights, capital gains, lease payments for real estate and movables, consulting services, marketing research, audit services).

The amendments in force from June 2008 introduced a 9% withholding tax on dividend distributions and share in profit paid to Montenegrin tax residents (both individuals and legal entities).

The provisions of applicable double tax treaties regarding withholding tax are also applicable. However, the non-resident must prove residence of a state covered by such a treaty by submitting a valid document issued by that state (tax residency certificate of the recipient of the income) and proves beneficial ownership over the income.

### Value added tax (VAT)

The first sale of newly constructed buildings is subject to VAT at the general rate of 17%. The taxable base is the sale price.

The buyer can recover input VAT incurred at acquisition if the real estate will be used for VAT-able activities. However, should the real estate acquired be held for a period less than ten years the input VAT recovered at acquisition needs to be adjusted. The lease of commercial buildings is considered to be taxable supply and is subject to 17% VAT while the lease and sublease of flats and houses for residential purposes for a period longer than 60 days is VAT-exempt.

### *Real estate tax*

Ownership of immovable property is subject to annual real estate tax. The taxable base is the market value of the real estate as of 1 January of the year the tax is determined for. The tax rate is proportional and it is in range from 0.10% to 1.00% of the real estate market value.

Exemptions from property tax apply to government buildings, embassies, religious objects, buildings protected by the government for their historical and cultural value, real estate owned by the Central Bank of Montenegro and real estate for which the total taxable base is less than EUR 5,000, as long as the real estate is not used for making profit.

### *Transfer tax on immovable property*

#### *Scope of tax and taxpayer*

Tax is payable on the acquisition of ownership rights over immovable through purchase, exchange, inheritance, gift, acquisition of immovable during the liquidation or bankruptcy, acquisition, based on a court decision etc.

The taxable base is the market value at the moment of acquisition of immovable property: namely the price stated in the contract.

The tax on sale of immovable property is levied on the sale of immovable property, if VAT has not been charged on such a transfer (VAT and Transfer Tax exclude each other).

#### *Tax rate*

The tax rate on the sale of immovable property is 3%.

#### *Taxpayer*

Taxpayer is the buyer of the real estate.

### *Financing of municipalities in Montenegro*

The funds for financing municipalities in Montenegro consist of income realised by municipalities as well as revenue from taxes, fees and donations shared with the budget of the Republic of Montenegro.

Income realised by municipalities consists of:

- Local community taxes.
- Real estate tax (property tax).
- Surtax on personal income tax.
- Local community charges.
- Charge for settlement of urban land.

- Charge for use of municipality's roads.
- Charge for protection and improvement of environment.
- Revenue from property owned by municipality and ownership rights.
- Investment income (interests, stocks, shares, etc.).
- Collected penalties.
- Income from concession fee.
- Income realised by the municipality's administrative bodies in conducting its activities.
- Donations and subventions.
- Other local income set by the law.

Municipalities are independent in determining the level of local charges, which may vary significantly, unless the range of the specific tax form is defined by the law (e.g. real estate tax rate must be in range from 0.10% to 1.00%).

For investments of special interest for the local community, a local authority may be granted a conditional donation from the Republic of Montenegro. Conditional donations may be granted to a local authority if this authority has adopted a five-year investment plan. The local authority may be granted a conditional donation, which does not exceed 50% of the investment costs.

### Taxes and fees shared with central government

Personal income tax: 12% of entire personal tax collected in the territory of a municipality, except 16% for the Old Capital (*Prijestonica – Cetinje*) and 13% for the New Capital (*Glavni grad – Podgorica*).

Concession fees for usage of natural resources: 70% of fees collected in the territory of a municipality, except 20% of the fees collected for the usage of harbours.

Transfer tax on immovable property: 80% of taxes collected in the territory of a municipality.

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# *Real Estate Going Global Netherlands*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 6 August 2012.

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# Real Estate Tax Summary – Netherlands

## General

A foreign corporate investor may invest in Dutch property in various manners. The investor may invest directly, through a local company (such as a *Naamloze Vennootschap* or NV, *Besloten Vennootschap* or BV), through a Dutch holding company structure, a non-resident company or through a partnership. In this discussion, we assume the features of a partnership are such that the partnership is regarded as a non-transparent entity for (Dutch) tax purposes. In this case a partnership is treated similar to a company.

## Rental income

Net rental income is taxable in the Netherlands at the rate of 25% as of 1 January 2011. Profits up to EUR 200,000 are taxed against a reduced corporate tax rate of 20%. For profits exceeding EUR 200,000, a rate of 25% applies.

Dutch resident and non-resident companies and partnerships owning Dutch property are in principle allowed to deduct interest expenses on loans from banks or affiliated companies, and property-related costs from their taxable income. Certain expenses, such as costs related to the acquisition of property, refurbishment costs and interest incurred during construction, must be added to the acquisition price of the property.

In principle, there is no withholding tax on interest in the Netherlands.

## Thin capitalisation rules and other interest deduction limitations

Dutch thin capitalisation rules provide for a debt-to-equity ratio of 3:1. If the 3:1 ratio is exceeded, a corresponding part of the net interest due is not deductible. However, the non-deductible interest will not be higher than the net amount of interest due to related entities. Deduction of interest paid on genuine third-party loans is in principle not limited by the thin capitalisation rules.

Further, if a Dutch company is partly financed with a related party debt, under certain circumstances the debt could be requalified as equity. One important aspect of related party debt is the at arm's length principle. The terms and conditions of related party debt must be at arm's length, i.e. what would be the terms and conditions if a third party (not related) provided such loan. Requalification may limit the deduction of interest. The deductibility of intercompany interest may be also limited in specific situations under base erosion rules and recent regulations to limit the deduction of interest within a fiscal unity in case of excessive acquisition debt. There is no withholding tax or branch profits tax applicable to permanent establishments or real estate operations in the Netherlands.

## Fiscal unity

Under certain conditions, companies incorporated or established in the Netherlands may form a fiscal unity for corporate tax purposes. Within the fiscal unity, the results, i.e. profits and losses, are consolidated. Only one corporate tax return has to be filed.

## Depreciation

Property should, in principle, be stated at historic cost price, minus depreciation. Generally, an annual 1% to 3% depreciation charge on property, exclusive of land, is allowed. Based on a qualified expert's opinion, higher rates may be available. Under certain circumstances, property can be stated at lower 'going concern' fair market value.

However, depreciation of immovable property held for investment purposes will no longer be allowed when the tax book value (i.e. acquisition costs less accumulated depreciation) falls below the official property's fair market value for tax purposes (WOZ value). The WOZ value is annually determined by the municipal tax authorities. The WOZ value is based on the assumption that the property is freehold and free of lease. As a result, the WOZ value of commercial real estate may be lower than the fair market value. Depreciation of other immovable property (buildings employed in a trade or business), will be limited to 50% of the WOZ value.

## Capital gains on the sale of property

Local companies are subject to Dutch corporate tax, at the ordinary tax rates, on capital gains realised upon the sale of Dutch property. A capital gain is equal to the difference between the sales proceeds and tax book value. Dutch property is deemed to constitute a Dutch business, as a result of which, non-resident companies are also subject to Dutch corporate tax on capital gains realised on the sale of Dutch property.

It is possible to defer taxation on capital gains realised on the sale of Dutch property by creating a so-called reinvestment reserve. The property that has been sold must in principle be replaced by another asset in the year of sale, or within three years after the year of sale. The newly acquired asset needs to serve the same economic purpose as the asset sold. The reserve must be deducted from the purchase price of the newly acquired property, resulting in a lower tax book value and a lower depreciation charge in the future.

In the Netherlands, the sale of shares of a company, whose assets mainly consist of Dutch property, is not treated as the sale of property owned by the company.

## Participation exemption/withholding tax on dividends

Dividend income received by a Dutch holding company from a Dutch subsidiary company and capital gains realised on the sale of shares in the local subsidiary company are exempt from Dutch corporate tax under the Dutch participation exemption, provided that the company holds at least 5% of the shares of the subsidiary company and certain other conditions are met.

The Dutch participation exemption as a main rule will be applicable to subsidiary companies that are intended not to be held as a portfolio investment (intention test). A subsidiary that is held as a portfolio investment can however be regarded as a qualifying portfolio investment participation' in case either the asset test or the effective tax rate test is met.

Generally, dividends distributed by a resident company to its foreign corporate shareholder are subject to Dutch dividend withholding tax at the rate of 15%. Under the provisions of the EU Parent-Subsidiary Directive, the Dutch withholding tax rate on dividends may be reduced to zero, if the dividend is paid to a qualifying corporate shareholder that is resident in one of the EU countries. The Dutch dividend withholding tax rate may also be reduced under the double tax treaties concluded by the Netherlands.

## Loss carryforward

In principle, the carryforward of tax losses is limited to nine years. Tax losses can be carried back one year. Losses carried forward can be offset against future net rental income, and capital gains realised on the sale of Dutch property.

## Real estate transfer tax

The acquisition of legal and/or economic title to Dutch property is in principle subject to 6% real estate transfer tax on the fair market value (2% on residential property). The acquisition of newly developed or redeveloped land/property before (and under certain conditions up to ultimately two years after) the day the property is put into use, or acquisition of a building site, is exempt of real estate transfer tax if acquired for at least fair market value.

The acquisition of legal and/or economic title to at least one-third of an interest in a company, the assets of which consist for at least of 50% of property of which 30% is situated in the Netherlands, is also subject to 6% real estate transfer tax (2% on residential property as mentioned above). In this case, the tax is based on the pro rata part of the fair market value of the underlying property represented by the shares transferred.

## Value added tax (VAT)

The general rule in the Netherlands is that the supply and lease of property is VAT-exempt. There are, however, two important exceptions to this general rule. The first exception is that the supply of newly developed or redeveloped land/property before, on, or ultimately two years after the day the property was put into use or the supply of a building site, is always subject to VAT. The second exception is that, under certain conditions, parties can jointly opt for a VAT-able supply/lease of property. Such an option can be, under certain conditions, included in the notarial deed of transfer/lease agreement or else must be made by way of a request filed with the Dutch tax authorities. In case of a VAT-able supply/lease, the applicable VAT rate is 19% (please note that the VAT rate will increase to 21% from the 1 October 2012). An option for VAT-able lease/supply is only possible in case of use of property for at least 90% for activities that permit VAT recovery by the recipient. It may often prove beneficial to opt for a VAT-able supply/lease, since this would allow the supplier/lessor to recover the input VAT with respect to the property involved. It is general practice

that a supplier or a lessor adds an amount to the sales or lease price, if VAT-exempt, in order to compensate its VAT loss.

## Local taxes

Every owner or user of property located in the Netherlands is subject to local taxes on property, such as property tax (except for users of residential dwellings) and land draining rights. These taxes are usually based on the fair market value of the property. The local authorities are responsible for the determination of the value of the property.

# ***Real Estate Investments - Netherlands***

## **Preface**

Property investment has seen a considerable evolution in the last decades. Most investors and developers have extended their goals from the national to international level. As a result, they increasingly require the services of international property advisers. Among these services, tax will be of significant importance in the property business. In fact, maybe more than in other sectors of the economy, taxation of the transactions performed will impact the investor's net return. The present guide has been prepared by the Dutch Real Estate Group to provide general background information on the taxation aspects of property investments in the Netherlands. The guide starts with an overview of the direct and indirect tax aspects of direct property investments. Then, we outline the aspects of the purchase and sale of real estate companies and the investment in Dutch property through a partnership. Further, we will give an overview of the tax aspects of property financing. Finally, we give general information with regard to the Real Estate Group in the Netherlands. Obviously, this guide is not intended to be a comprehensive study on the subject. Accordingly, the advice of qualified professionals should be sought before any decision is reached on a specific point.

## **Direct investments in Dutch property**

Corporate and individual investors wishing to invest in property located in the Netherlands will have various options as to the best way of structuring such an acquisition. Basically, the choice will be between a direct acquisition of property and an indirect acquisition, i.e. a purchase of shares in a company owning property. In this chapter the tax issues of direct investments are discussed.

Whatever the status of an owner of property located in the Netherlands (whether a private individual or corporate body, resident or non-resident), the taxable basis of income derived from the property will be determined according to Dutch national tax law.

Similarly, in respect of indirect taxes, the Dutch real estate transfer tax or VAT rules may apply on any transaction performed on property located in the Netherlands.

### ***Corporate tax***

#### **Resident Companies**

Dutch limited liability companies, incorporated under the laws of the Netherlands (*Besloten Vennootschap* or BV and *Naamloze Vennootschap* or NV) companies), are deemed to carry out a business undertaking by law and are subject to Dutch corporate tax on their worldwide income.

The basis of the taxable income of a BV/NV company investing in Dutch property is the gross income realised on the property less allocable expenses and depreciation.

Allocable expenses include repair, maintenance, renovation and similar costs and interest expenses on loans taken out to finance the acquisition of the property. Please see section *'Financing the acquisition of Dutch Property'* for an outline of Dutch regulations on the limitation of interest deduction.

With the exception of land, property is depreciable. The depreciation method generally used for corporate tax purposes is the straight-line method. The original acquisition cost (i.e. the acquisition cost plus-related expenses such as registration duties, brokerage fees, notary's fees, architect's fees, transfer tax, non-recoverable VAT, etc.) is the basis for depreciation and the depreciation rate should be based on the normal useful life of the assets. As a general rule, 1% to 3% depreciation rates are acceptable for commercial properties like office buildings. However, if it can be substantiated that the useful life of the property is shorter, a higher depreciation rate may be applied. Higher rates may also be available if substantiated by experts' opinions. The land and the capitalised expenses related to the land cannot be depreciated.

However, as of 1 January 2007 depreciation of immovable property held for investment purposes will no longer be allowed when the tax book value (i.e. investment costs less accumulated depreciation) falls below the official property's fair market value for tax purposes (WOZ value). The WOZ value is annually determined by the municipal tax authorities. The WOZ value is based on the assumption that the property is freehold and free of lease. As a result, the WOZ value of commercial real estate may be lower than the fair market value.

Depreciation of other immovable property (buildings employed in the taxpayer's trade or business), will be limited to 50% of the WOZ value.

A property is not required to be revaluated for tax purposes when its value increases due to market developments.

Taxable income realised by a BV/NV company is subject to a flat corporate tax rate of 25% as of 1 January 2011. On profits up to EUR 200,000 a reduced corporate tax rate of 20% applies. For profits exceeding EUR 200,000 a rate of 25% applies.

The capital gains realised by Dutch BV/NV companies on the sale of Dutch property are subject to Dutch corporate tax. Capital losses realised on the sale of property are fully tax-deductible. The capital gain or loss realised on the disposal of the property is calculated as proceeds less the tax book value of the property (i.e. historic cost less tax depreciation).

The tax on property gains realised by a Dutch BV/NV company may however be deferred by creating a so-called 'reinvestment reserve'. This reserve can be created provided that the property is considered a business asset rather than inventory and the company has a genuine intention to acquire new qualifying Dutch property within three years following the year of disposal. The newly acquired asset needs to serve the same economic purpose as the asset sold.

If the company acquires new qualifying property within three years following the year of disposal, the cost basis of the newly acquired property is reduced by the amount of the reinvestment reserve.

As a result, the gain on the disposal of the property will be rolled over into the new property and will become taxable when the new property is disposed of. At the time the company no longer has the intention to acquire new property, or at the end

of the three-year period, the amount of the fiscal reserve is added to the taxable income of the company.

The reinvestment reserve of companies where 50% or more of the assets consist of portfolio investments must be added to the profit in the event of a change of 30% or more of ultimate control or ultimate entitlement to the company's capital.

### Non-resident companies

The Dutch taxable income of non-resident companies investing in Dutch property is subject to the ordinary Dutch corporate tax regime and tax rates.

Hence, the income and capital gains realised on the Dutch property investment is taxed in a similar way to that of Dutch BV/NV companies. The basis for the taxable income is the gross income (including capital gains) realised on the property minus allocable expenses and depreciation.

### Loss compensation rules

Losses relating to the property can be offset against any other taxable income generated by the BV/NV company (or non-resident company) in the same year. The carryback of tax losses is limited to one year. Carryforward of tax losses is limited to nine years. However, losses incurred by a 'pure holding' or 'group finance' company can only be offset against profits in other years, provided that the company qualifies as a 'pure holding' or 'group finance' company in such other year and the balance of the loans to and from related parties is not higher than in the year the loss was realised.

In the Dutch Tax Package 2010 an optional temporary extension of the carryback for losses from one to three years was introduced, for losses arising from the tax year 2009. Opting for the temporary extension of the carryback of losses to three years will also mean that the maximum period for tax loss carryforward will be reduced from nine to six years. Please note that the extension of the carryback of losses is capped at a maximum amount of EUR 10m of losses per year. The optional temporary extension has been abolished as of 2012 and is therefore effective only with respect to losses incurred in 2009, 2010 and 2011.

If it is probable that 30% or more of the ultimate control in a company has changed, it will no longer be possible to offset the tax losses realised before the moment of such change of control against profits realised beyond that moment.

A change in the ultimate control in the company is disregarded for purposes of the 30% change-of-control criterion, if the change results from the transfer of shares pursuant to inheritance or matrimonial law, or is the result of an increase in control by an ultimate shareholder who already held a one-third interest in the company at the beginning of the oldest year for which the losses are still available.

Further, if a 30% change of control took place but the company was not or could not have been aware of this change, then the provision does not apply, provided that the change can be considered ordinary trade in the shares of the company at the stock exchange. This can be determined by comparing the trade in these shares with the average trade in these shares in previous years. Furthermore, takeovers, mergers and demergers are not considered usual trade.

Losses are also still available for carryforward in the situation that 30% or more of the ultimate control has changed, and the passive investment and activity tests are met.

### *Passive investment test*

The passive investment test is met if, during the year the loss was realised and the year the loss was offset against taxable profit, no more than 50% of the assets of the company comprised of portfolio investments for a period of at least nine months in each of these years.

For the purposes of the passive investment test, cash as well as real estate, which is made available to third parties, is deemed to be a portfolio investment.

### *Activity test*

The activity test is met provided that the following is met:

- Immediately prior to the change of ultimate control, the level of activities of the company was not reduced by more than 70% compared to the level of activities at the beginning of the earliest year in which the tax losses are still available for carry-forward (scale-down operations).
- At the time of the change in the ultimate control, there was no intention to, within a period of three years, reduce the level of activities performed at that time by more than 70% of the level of activities performed at the beginning of the earliest loss year for which the losses are still available for carryforward (scale-down operations).

The activity test should be applied at the level of the 'taxpayer'. Consequently, if a company is part of a fiscal unity, the activity test should apply to the entire fiscal unity, i.e. the parent company is the representative taxpayer for all of the companies that are part of the fiscal unity.

For the purposes of the activity test, the understanding of the earliest year is the following:

If the main activity of the company at the time of the earliest loss year is started or acquired in that earliest loss year or in the three preceding years, then the level of activities immediately before or at the time of the ultimate change of control may not be reduced to less than 30% of the level of these activities in the loss year with the highest level of these activities.

In the case of a scale-down of activities (i.e. when not meeting the activity test), at the taxpayer's request, losses resulting from these activities may be offset against profits from business activities that were already being performed immediately prior to the change in ultimate control. This is not possible if the passive investment test is not met.

Offsetting tax losses against past profits is, in principle, not allowed if the ultimate control in the taxpayer has changed by 30% or more in the period between the year of the change and the beginning of the third year prior to the change. These losses can be carried back, however, if the following is met:

- In the period between the profit year and the loss year, the business activities of the taxpayer have not almost entirely ceased.
- No more than 50% of the taxpayer's assets comprise investments for a period of at least nine months in the year in which the losses were incurred, and in the year in which the losses are to be offset.

- Immediately prior to the change in the ultimate control, the business activities had not been reduced by more than 70% compared with those at the beginning of the first year in which tax losses were incurred (scale-down of operations).
- At the time of the change in the shareholding, there was no intention to reduce the business activities by more than 70% as compared with those at the beginning of the first year in which tax losses were incurred (scale-down of operations).

For certain aspects of this regulation, an advance-ruling request can be made to the tax inspector. Taxpayers are entitled to appeal against the tax inspector's decision.

If, as from a certain date, tax losses can no longer be offset against profits generated after that date as a consequence of this provision, the company may revalue the assets it held prior to the relevant date up to a maximum of their market value. In this way, losses incurred prior to the change of shareholders can be offset against existing hidden reserves.

## *Personal income tax*

### *Resident individuals*

The income of Dutch individuals is allocated to three 'boxes'. Each of these boxes has a separate tax treatment. The main forms of income taxed on the basis of Box 1 are income out of employment and business profits. This income is subject to progressive income tax rates with a maximum scale rate of 52%. Box 2 mainly contains income out of shareholdings of at least 5% such as dividends and capital gains. This income is taxed at a flat rate of 25%. Finally the income tax regime of Box 3 is applicable to savings and investments of a private individual (including shares [shareholdings less than 5%] and property investments). The total net value of the individual's savings and investments is taxed on the basis of a capital yield tax. The tax is based on a notional yield of 4% of the value of the net assets. The notional yield is taxed at a flat rate of 30%. The tax (1.2% of the average value of the net assets per year) is levied, irrespective of the actual positive or negative yield realised. This means that either more or less than the actual proceeds can be subject to tax.

If property is held as a portfolio investment, the so-called capital yield tax will apply (Box 3). Under certain defined circumstances, passive property investments that are leased to certain related companies or individuals do fall within Box 1 rather than Box 3.

For the purpose of Box 3 the value of the property will not be determined on the basis of the Property Valuation Act (WOZ), but on the basis of the open market value. The capital will be set at the taxable capital on 1 January of each calendar year.

As of 1 January 2010 the value of residential properties will be determined on the basis of the Property Valuation Act (WOZ).

Of the taxable capital of Box 3, in 2012 an amount of EUR 21,139 will be tax-free.

As a result of the notional yield, no taxable losses can be realised within Box 3. It is, therefore, not possible to set off any negative results actually realised on property held as portfolio investment against positive results from other sources of income, such as income from employment or business profits.

If net operating revenues and capital gains deriving from Dutch property are qualified as business profits or as income from independently performed services, they will be taxed at the Box 1 progressive tax rate (with a top rate of 52%). This can be the case if the activities in relation to the property investment go beyond those of a passive investor (property development, trading, etc.)

If a substantial interest holder makes property available to the company in which the substantial interest is held, the actual income is taxed under Box 1 instead of under Box 3.

### Non-resident individuals

Non-resident individuals investing in Dutch property are taxed in a similar way to resident individuals. Hence also non-resident individuals could be subject to Dutch taxation on any of the three boxes.

### *Real estate transfer tax*

The acquisition of property located in the Netherlands is, in principle, subject to a 6% real estate transfer tax on the fair market value of the property at the time of the acquisition (2% on residential property acquired between 15 June 2011 and 1 July 2012 by way of temporary measure). The transfer tax is levied on the acquirer of the property.

For Dutch real estate transfer tax purposes, the acquisition of the beneficial ownership of Dutch property is also subject to real estate transfer tax.

If the acquisition of property (full ownership or beneficial ownership) takes place within six months after a previous transfer of the same property, the taxable basis is reduced by the amount on which real estate transfer tax (or VAT that was not recoverable) has been paid upon the previous transfer.

Various exemptions from real estate transfer tax exist. The main exemptions apply to acquisitions legally subject to VAT (obligatory), or mergers and internal reorganisations. These exemptions are dealt with below.

To avoid accumulation of real estate transfer tax and VAT, the acquisition of property is not subject to real estate transfer tax if the transfer is subject to VAT (legally, not by means of a so-called option request), and the property is not used as a business asset. Please note that if the property has been used as a business asset, under certain conditions a request can be filed with the Dutch tax authorities to waive the transfer tax based on the special resolution for property developers (the so-called '*hardheidsclausule*').

This exemption is not applicable under the following conditions:

- The reimbursement paid for the property by the acquirer is less than the fair market value.
- The acquirer is not able to deduct at least 90% of the VAT on the purchase price.

The acquisition of property as a result of a legal merger is exempt from real estate transfer tax, provided certain conditions are met. The transfer of property within a group of companies is exempt from real estate transfer tax, provided that certain

conditions are met. A company forms part of a group if at least 90% of its shares are owned by other group companies.

## Value added tax (VAT)

### General

The basic concepts of the Dutch VAT system, such as taxable persons, nature of goods and supply of goods and services are in line with the sixth EU VAT Directive. The Dutch VAT regulations are, therefore, roughly comparable to those applicable in other EU Member States.

A taxable person is any person who regularly and independently carries out economic activities, i.e. the supply of goods or services.

### Tax rate

Please note that the Dutch VAT rate is set to increase from 19% to 21% on 1 October 2012. From that date, this VAT rate will apply to the supply of immovable property. With regard to the completion of transfers based on a contract concluded before 1 October 2012, instalments with deadlines expiring before 1 October will be subject to the 19% rate. Instalments with deadlines after 1 October will be subject to the 21% VAT rate.

### Supply of property

For Dutch VAT purposes, the supply of property qualifies as a supply of goods.

The general rule is that the supply of property is VAT-exempt. In that case, no VAT is due with respect to the supply of the property.

There are three important exceptions to this general rule.

- The supply of newly developed or redeveloped building, which takes place before, on or not more than two years after, the day it was first put into use, is always subject to VAT.
- The supply of a building site (special criteria apply).
- Any other supply of property becomes subject to VAT if parties opt for a VAT-able supply. Such an option can be included in the deed of transfer. This can also be achieved by filing an option request for a VAT-able supply with the tax inspector of the seller. The separate request is necessary in case the transfer (of e.g. beneficial ownership of the property) does not take place by notarial deed. For both cases this application (option) can only be made if the buyer rightly declares that it will use the property for purposes which, in principle, allow at least 90% recovery of input VAT.
- The supply of property can also qualify as a transfer of a going concern. Provided certain conditions are met, the transfer will not be treated as a supply for VAT purposes, so no VAT should be charged. However, this is not possible for sale and lease back.

It may often (but not always) prove beneficial to opt for a VAT-able supply.

The advantage of such an option is that the seller retains or acquires the right to recover the input VAT paid when acquiring or having built the property. Furthermore, the input VAT on the costs that are directly used for the VAT-able supply can then be

recovered. If the purchaser can fully (or almost fully) recover the input VAT on the supply, they will probably not object to the option.

If seller and buyer opt for a VAT-able supply, there is in most situations a reverse charge mechanism applicable with respect to the VAT, which is due on the supply. This means that the buyer themselves must account for the VAT, which is due on the supply (the supplier does not charge VAT), by reporting it as reverse charge VAT in its Dutch VAT return. The buyer can, in principle, recover the amount of reverse charge VAT as input VAT in the same VAT return. The reverse charge mechanism therefore brings along a cash-flow advantage for the buyer since there is no actual cash flow.

With respect to the recovery of input VAT on the purchase, building costs and maintenance costs relating to the property, the following should be noted.

- If the property is fully used for VAT-able activities (e.g. VAT-able lease, see further below), the input VAT with respect to this property can, in principle, be recovered.
- If the property is fully used for VAT-exempt activities (e.g. VAT, exempt lease, see further below), the input VAT with respect to this property can, in principle, not be recovered.
- If the property is both used for VAT-able and VAT-exempt activities, the recovery of input VAT with respect to this property is determined by calculating the proportion between the VAT-able and total activities: the VAT recovery percentage. In principle, this VAT recovery percentage is calculated on a turnover basis. In practice, however, parties or the tax authorities may use other methods to determine the VAT-recoverable percentage with respect to property, for example the 'square metre' ratio.

Under the so-called Dutch VAT revision rules, the (non)recovery of input VAT on the purchase (and in some cases also on the building costs) of a property is monitored for nine of the buyer's book years following the book year of the purchase (the so-called revision period). This means that when there is a change in the use of the property during this revision period, either an additional VAT payment must be made to or the owner of the property will receive an additional VAT refund from the tax authorities. Please note that there are very specific rules with respect to this subject.

In the same way as a transfer of the full title to property, a transfer of beneficial ownership of property is considered as a supply for VAT purposes. The transfer of the beneficial ownership usually includes the transfer of the beneficial ownership, whereby the buyer bears the risks of all changes in value, of complete loss, and all income and expenses. Hence, the seller transfers all benefits from, and interest in, the property to the buyer with the exception of the legal ownership.

If pursuant to the transfer of the beneficial ownership the legal ownership to the property is also transferred, then this is not another transfer for VAT purposes and is, therefore, not taxable. The same goods cannot be transferred twice.

Please note that the creation, transfer, amendment, waiver and termination of rights to which a property is subject (for example: right of usufruct or a long lease) will be deemed to be a supply of property (excluding mortgage and rent charges), provided that the value of the reimbursement for these rights is not less than the fair market value of the property. In the case where the reimbursement is less than the fair market

value of the property, the creation, transfer, etc. of the right is treated as a supply of services for VAT purposes (the letting of property, see further below).

### Lease of property

According to the Dutch VAT Act, the lease of property is, in principle, a VAT-exempt service. As an exception to this general rule, parties can opt for a VAT-able lease. The advantage of such an option is that the lessor can then recover the input VAT on costs with respect to this property. Please note that there are other specific exceptions as well.

It is possible to integrate an option in the lease agreement, provided that the following conditions are fulfilled:

- The lease agreement clearly states that the lease will be VAT-able. The lease agreement also specifies the commencement date thereof.
- Appended to the lease agreement (or included in the body of the lease agreement) is a declaration in which the lessee declares that the property will be used for purposes giving them the right to at least 90% recovery of input VAT.
- The lease agreement contains a full description of the property, information about where it is situated, and relevant land registration particulars, as well as the date of commencement of the lessee's financial year.
- All documentation of the aforementioned is retained in the lessor's administration.

The VAT option in the lease agreement can have a retroactive effect of three months as a maximum.

If a lessor leases parking space together with the property to a single lessee, the VAT regime applicable for the parking spaces, in principle, follows the VAT regime for the property. Hence, if the building is let VAT-exempt, the letting of the parking space will also be VAT-exempt. Please note that there are possibilities to let the lease of the parking places VAT-able and to safeguard the VAT recovery for VAT paid on the development and/or acquisition of parking spaces.

The Dutch VAT, which is due on supplies and services rendered by a foreign entrepreneur to a Dutch entrepreneur or a Dutch public body, is levied upon the Dutch recipient of the supply or service (reverse charge mechanism).

## Local taxes

### *General*

Every owner and user of property located in the Netherlands is subject to municipal taxes on property, such as property tax (except the users of residential dwellings) and land-draining rights. These taxes are in principle based on the fair market value of the property. The local authorities are responsible for determining the value of the property (the 'WOZ value'). The local authorities must base the taxation of the value of the property on the Property Valuation Act.

Based on the Property Valuation Act, all properties located in the Netherlands are valued every year. The Property Valuation Act stipulates the valuation rules. The value of the property is set on the value that property has on the reference date. The value reference date for the fiscal year 2012 is 1 January 2011. In determining the value of the property, elements that may influence the value of the property, such as rent, long lease rights and rights of usufruct are not taken into account. By fiction it is assumed that the property is put into full use immediately.

Besides general valuation rules, the Property Valuation Act also provides rules concerning the valuation methods. For non-residential property (such as office buildings) this is the fair market value. According to the Property Valuation Act, the value of the property is based on the adjusted replacement value if this value exceeds the fair market value of the property. The adjusted replacement value is mainly used in situations in which it is difficult to determine the fair market value of a property. In some cases it is very likely the value will be determined using the adjusted replacement value method. The adjusted replacement value method consists of the investment value (if the property is built from scratch) adjusted with the technical and functional correction for the obsolescence of the property. Also an equipment exemption is applicable if certain conditions are met. Whether the equipment exemption is applicable, it is necessary to have more information on the equipment used in the plant.

The WOZ value of the property will be stated in a formal decision. The value as stated in the decision will be applicable for a period of one year. The present period started on 1 January 2012 and will end on 31 December 2012. The WOZ value for the year 2012 is determined on the basis of market prices on the reference date 1 January 2011.

The WOZ value stated in the decision is the basis for levying real estate taxes. As from 2007 the WOZ value is also used as a starting point for assessing the cap in depreciation in the corporate income tax for buildings. It is therefore important to review this value very closely and to preserve rights, to file an objection against the decision.

The municipal tax authorities will levy real estate taxes. Also during the construction time the municipal authorities will levy real estate taxes. The basis for taxation in this period will be the situation at 1 January of each tax year. This means that the amounts payable of real estate taxes will increase during the construction period.

Each municipality is entitled to determine its own tariffs for real estate taxes from owners and users of property for tax year 2012. As of 2009, the real estate tax is determined on a pre-specified percentage of the total WOZ value. The average owner tariff for residential dwellings for the real estate tax is 0.1050% of the total value for the tax year 2012. The average owner tariff for non-residential dwellings for the real estate tax is 0.2410% of the total value for the tax year 2012. In determining the tax base for the property tax for the user, the value of residential dwellings and other residential parts of a property will not be taken into account. For users of real estate the average tariff for the tax year 2012 is 0.1944% of the total value.

### *Other taxes and charges*

Besides real estate taxes, local authorities levy other taxes and charges.

### Building charges

The costs that the local government incurs in relation to the building permit that has to be obtained can be charged to the person requesting the permit. Usually the charge is a percentage of the building costs. The levy of building charges can be very high, and a critical review is advised before payment is made.

### Polder board taxes

Depending on the local polder board, land draining rights will be levied for the water quantity control in specific areas.

### Wastewater pollution tax

The polder board levies a tax for the discharge of wastewater into the public sewage system. They also levy a tax for discharge of wastewater directly into surface water if the polder board is responsible for the water quality management. If wastewater is discharged into surface water in operation with the central government, the appointed bureau of the central government will raise a similar tax.

### Sewage system tax

For the right to be connected to the sewer system, usually an annual low-fixed amount of tax is levied. The amount of the tax can also be calculated as a percentage of the WOZ value.

### Other taxes

Other optional taxes are for example the Road management tax, Business improvement district tax, the Refuse matter tax and the Energy tax.

## Acquisition of a Dutch property company

Companies or individuals wishing to invest in Dutch property may also acquire the shares in a company owning property rather than making a direct purchase of the property. From a tax point of view, this choice may have a significant impact for both the seller and the purchaser.

Given the fact that the company may have a (tax) history and contingent liabilities it is generally advisable to conduct a due diligence review of the target company. In such a due diligence, e.g. the legal, corporate tax, VAT and transfer tax position of the company should be checked.

If necessary the seller of the company should be asked for certain guarantees on the (tax) position of the company.

### *Tax aspects*

#### Corporate taxes

##### *Resident companies*

If shares in a BV/NV company owning property are acquired by another Dutch BV/NV company, the latter company must value the shares in the acquired company at the historic acquisition price. Contrary to a direct purchase of property, the purchaser of the shares in a BV/NV company owning Dutch property will not benefit from any step-up in value of the property, because for corporate tax purposes, the company owning the property must continue to value the property at the original acquisition price (minus depreciation). Hence, the fiscal book value of the underlying property will

remain the same and the annual depreciation will be lower compared to a direct purchase of property.

Note that if a hidden increase in value is included in the fiscal book value of the property, the price negotiated for the acquisition of the shares is typically reduced by the net present value of the deferred corporate tax claim on the hidden reserves.

If the shares in a company owning property are acquired by a Dutch BV/NV company or a Dutch permanent establishment (PE) to which the shares in the company belong, the future dividends distributed by the property company to the BV/NV shareholder or PE are in principle exempt from Dutch corporate tax under the participation exemption rules. Also, capital gains realised on the sale of the shares in a property company are in principle exempt under the participation exemption.

The Dutch participation exemption applies if the company holds at least 5% of the shares of the subsidiary company and certain other conditions are met.

The Dutch participation exemption as a main rule will be applicable to subsidiary companies that are intended not to be held as a portfolio investment (Intention Test). A subsidiary that is held as portfolio investment can however be regarded as a 'qualifying portfolio investment participation' in case either the asset test or the effective tax rate test is met.

A subsidiary is considered a qualifying portfolio investment participation if the subsidiary's aggregated assets usually consist of less than 50% 'low taxed passive investments'. Generally speaking, such assets are assets that generate passive income such as interest, royalties and rental income. Real estate assets will by definition be 'good assets', as a result of which the participation exemption should apply to subsidiaries investing more than 50% in real estate, irrespective of whether the intention test or the effective tax rate test is met or not. Under the new effective tax rate test, the participation exemption will be applicable to subsidiaries that are subject to a profit tax resulting in a real (reasonable) levy of tax from a Dutch tax perspective. A regular profit tax rate of at least 10% should in general be considered a real levy of tax.

Likewise, losses resulting from a participation in a subsidiary company are generally not deductible. Under certain circumstances, losses incurred upon the liquidation of the subsidiary company are deductible at the holding company level.

Losses can be offset against any other taxable income generated by the BV/NV company in the same year. The carryback of tax losses is limited to one year. Carryforward of tax losses is limited to nine years. However, losses incurred by a 'pure holding' or 'group finance' company can only be offset against profits in other years, provided that the company qualifies as a 'pure holding' or 'group finance' company in such other year and the balance of the loans to and from related parties is not higher than in the year the loss was realised.

In the Dutch Tax Package 2010 an optional temporary extension of the carryback for losses from one to three years was introduced, for losses arising in the tax year 2009. Opting for the temporary extension of the carryback of losses to three years will also mean that the maximum period for tax loss carryforward will be reduced from nine to six years. Please note that the extension of the carryback of losses is capped at a maximum amount of EUR 10m of losses per year. The optional temporary extension

has been abolished as of 2012 and is therefore effective only with respect to losses incurred in 2009, 2010 and 2011.

Moreover, if the ultimate control in the taxpayer is changed by 30% or more, the possibilities available to offset tax losses may be limited.

For a detailed description of the application of the change of control rules, see section *'Direct investments in Dutch property'*.

### *Non-resident companies*

For non-resident companies acquiring shares in Dutch BV/NV companies, in principle, the same rules apply as for Dutch resident companies.

Dividends paid by the Dutch BV/NV company to the foreign parent company are in principle subject to 15% Dutch dividend withholding tax. Under the EU Parent-Subsidiary Directive and tax treaties concluded by the Netherlands, this rate is reduced or an exemption of dividend withholding tax is applicable.

If the foreign parent company is resident in a country with which the Netherlands did not conclude a tax treaty, the dividends and capital gains realised by the foreign parent company on the shares of the Dutch BV/NV company are subject to 25% Dutch corporate tax, unless the shares in the Dutch company can be allocated to a business undertaking of the foreign shareholder, provided that a substantial interest is held. A foreign parent company that acquires 5% or more of the shares in a Dutch BV/NV company will be considered the holder of a substantial interest.

## **Personal income tax**

### *General*

The income of Dutch individuals is allocated to three 'Boxes'. Each of these Boxes has a separate tax treatment (see *'Personal income tax'* of section *'Direct investments in Dutch property'*).

### *Resident individuals*

Dutch resident individuals who acquire, alone or together with their spouses, 5% or more of the shares in a BV/NV company owning property are considered the holder of a substantial interest for Dutch personal income tax purposes. Note that if a person has a substantial interest as defined above, then certain other relatives owning less than 5% will also be considered as a holder of a substantial interest.

Benefits derived from the substantial interest by Dutch resident substantial interest holders fall under Box 2 and are subject to a flat 25% tax rate. These benefits include the following:

- Dividends or profit rights.
- Capital gains realised on the transfer of shares or profit rights.
- Capital gains realised on the transfer of options granting the right to buy shares, profit rights to the BV/NV.

If a substantial interest holder makes property available to the company in which the substantial interest is held, the actual income is taxed under Box 1 instead of under Box 3. Furthermore, income or capital gains from loans provided by a Dutch resident

individual or a related party to the BV/NV company in which a substantial interest is held is taxed under Box 1 instead of Box 2.

Dutch resident individuals who acquire less than 5% of the shares in a Dutch BV/NV company owning Dutch property are not considered holders of a substantial interest. Income derived from such a shareholding is subject to the capital yield tax of Box 3. This means the income will be based on a fictitious return of 4% of the value of shares and taxed at a fixed rate of 30%. Consequently, 1.2% tax will be effectively levied on the total of shares in Box 3.

Dividend distributions by a Dutch company to its Dutch resident individual shareholders are subject to a 15% dividend withholding tax.

The dividend withholding tax is fully creditable against personal income tax, both for substantial interest holders and non-substantial interest holders.

### *Non-resident individuals*

Non-resident individuals who acquire 5% or more of the shares in a Dutch BV/NV company will also be considered the holder of a substantial interest and will be considered a non-resident tax payer for Dutch personal income tax purposes. Non-resident substantial interest holders are, in principle, subject to the tax rate of 25% (Box 2, refer above) applicable on dividends, capital gains etc., similar to Dutch resident substantial interest holders. Tax treaties may limit the right for the Netherlands to levy Dutch income tax on substantial interest income and gains.

The 15% (withholding) tax on dividends, which may be limited under the tax treaties concluded by the Netherlands to the reduced treaty rates, can be credited against Dutch income tax levied (if any) on the dividends received.

Non-resident individuals who are not considered holders of a substantial interest are not subject to Dutch personal income tax. However, the Netherlands will levy a 15% dividend withholding tax on dividends distributed by a Dutch BV/NV company to these shareholders. The withholding tax rate may be reduced under a tax treaty.

The Netherlands do not levy any withholding taxes on capital gains realised by non-resident individual shareholders on the sale of the shares in a Dutch BV/NV company.

### **Real estate transfer tax**

In principle, the acquisition of shares in a company owning Dutch property is not considered to be an acquisition of property itself and is, therefore, not subject to Dutch real estate transfer tax.

However, a company of which property accounts for at least 50% of the assets and of which 30% is Dutch property is generally considered a property company for real estate transfer tax purposes. The acquisition or expansion of at least one-third of an interest in a property company is subject to 6% real estate transfer tax on the proportionate part of the fair market value of the property (directly or indirectly) represented by the interest in the property company.

If the acquisition of shares in a property company (full title or beneficial ownership) takes place within six months after a previous transfer of the same shares or the property represented by the interest, the taxable basis is reduced by the amount on which real estate transfer tax was due upon the previous transfer.

In order to cancel out the so-called inflating, double-decker and spreading and additional purchase structures, the following anti-abuse provisions apply:

- A reference period applies, which is intended to prevent the asset side of the company's balance sheet from being inflated in the context of a transfer of shares as a result of which the transaction would be exempt from transfer tax.
- Assets and liabilities of subsidiary companies in which a parent company holds a direct or indirect interest of at least one-third are allocated to the parent company in proportion to the interest (proportional consolidation).
- The shares that are being held or acquired by companies and natural persons affiliated with the party acquiring the shares will be taken into account when determining whether or not the acquisition or extension leads to an interest of at least one-third. Note that affiliation entails a direct or indirect interest in value and/or vote of one-third or more.

Note that if an acquiring party has acquired a shareholding in parts, it will be liable to pay transfer tax on prior acquisitions of shares in a property company if these prior acquisitions and the acquisition at hand jointly lead to a qualifying interest and the prior acquisitions were made within a period of two years preceding the current acquisition at hand.

### VAT

The acquisition of the shares in a BV/NV company owning Dutch property is not subject to VAT (outside the scope of VAT). The VAT on relating (advisory) costs for this acquisition of shares can, in principle, be recovered in accordance with the VAT recoverable percentage that is applicable on general costs.

## Investing in Dutch property through a partnership

### General

Generally speaking, the main benefit of using a partnership (such as a Dutch *maatschap* or a *commanditaire vennootschap*) for the investment in property, as opposed to a Dutch BV/NV company, is that while often providing for limited liability (*commanditaire vennootschap*), the partnership may be structured as a tax transparent entity for Dutch tax purposes. A transparent partnership structure provides for a direct allocation of profits and losses to the partners, avoiding multiple level (corporate) taxation.

A further benefit compared to investing through a Dutch BV/NV company is that depending on the facts and circumstances, a private individual partner may benefit from the regime for portfolio investors, under which regime capital gains realised on the disposal of the property are exempt from Dutch taxation.

### Tax aspects

For Dutch corporate and income tax purposes, a Dutch partnership is generally considered a transparent entity if on the basis of the partnership contract the following applies:

- The partners are directly entitled to the partnership's profits.
- The admission and replacement of partners is subject to the prior written approval of all other partners.

A direct consequence of the transparent character of the partnership is that, rather than the partnership itself, the participants of the partnership are subject to Dutch corporate or personal income tax. For (corporate) income tax purposes, this means the following is true:

- All assets and liabilities of the partnership are directly allocated to the participants.
- All participants must report their share of the income derived by the partnership in their own Dutch tax return.

## Corporate tax

### *Resident companies*

A Dutch BV/NV company holding an interest in a partnership owning Dutch property is subject to taxation on all income realised by the partnership that is attributable to its share. Hence, rental income (i.e. gross rental income minus allocable expenses and depreciation) and capital gains realised are attributable to the corporate participant and are subject to corporate tax at the ordinary corporate tax rate.

### *Non-resident companies*

The Dutch taxable income of a non-resident company holding an interest in a partnership is subject to the ordinary Dutch corporate tax regime and tax rates.

Hence, the income and capital gains realised by the partnership, which are attributable to its partnership share are taxed in the same way as that of Dutch resident companies.

## Personal income tax

### *General*

The income of Dutch individuals is allocated to three 'Boxes'. Each of these boxes has a separate tax treatment (see '*Personal income tax*' of section '*Direct investments in Dutch property*').

### *Resident and non-resident individuals*

In principle, individuals (resident or non-resident) holding an interest in a partnership owning Dutch property as a passive investment will be considered passive investors and will be subject to the capital yield tax (Box 3) on the value of capital assets, which is attributable to their partnership (see '*Personal income tax*' of section '*Direct investments in Dutch property*').

## Real estate transfer tax

The acquisition of Dutch property by a partnership is, in principle, subject to Dutch real estate transfer tax under the same rules as a direct acquisition of Dutch property.

The acquisition of a participation in an existing partnership owning Dutch property is in principle subject to 6% real estate transfer tax on the proportionate share of the fair market value of the property at the time of the acquisition. However, if the partnership has a capital divided into shares, the partnership might be treated as a real estate company. In that case transfer tax is only due if an interest of one-third or more is

acquired or expanded (see *Real estate transfer tax* of section *Acquisition of a Dutch property company*). We note that the Dutch government has announced a change in legislation on this point.

## VAT

The transfer of Dutch property to a partnership is considered as a supply for VAT purposes to which the normal VAT rules for the supply of Dutch property apply. Please note that for VAT purposes the partnership may be treated as a separate taxable person. This means separate VAT registration and filing of VAT returns. For the normal VAT rules, reference is made to paragraphs *General* to *Property tax* of section *Direct investments in Dutch property*.

## Dutch REIT (FBI)

The Netherlands has a regime that can be compared with the foreign Real Estate Investment Trust (REIT). It is possible to invest in Dutch property through a Dutch BV, NV or fund for joint account (or a foreign comparable entity), which qualifies as an FBI (*Fiscale Beleggingsinstelling* or 'fiscal investment institution'). A qualifying FBI is subject to a corporate income tax of 0%. In order to qualify as an FBI, certain strict conditions must be met, among others: shareholder requirements, a profit distribution requirement, an activity test and certain leverage conditions.

On 1 August 2007 a new investment vehicle was introduced: the exempt investment institution (*Vrijgestelde Beleggingsinstelling* or VBI). The VBI is exempt both from Dutch corporate income tax and from Dutch dividend withholding tax. The VBI may only invest in so-called financial instruments and cannot itself invest directly in Dutch real estate.

# Financing the acquisition of Dutch property

## Equity financing

As of 1 January 2006 Dutch capital duty has been abolished.

## Debt financing

### Tax aspects

#### Corporate tax/personal income tax

Interest paid on loans taken out to acquire property or shares in a property company is, in principle, fully tax-deductible, provided that the loan is granted at arm's length conditions (i.e. as if granted by a third party). If, however, real estate is held as a passive investment by a private individual, the so-called capital yield tax of 'Box 3' might apply. In that case, loans taken out by a private person to acquire property or shares in a property company reduce the taxable base. The interest paid on these loans is not tax-deductible.

If a loan is taken out from a related party, whereas upon granting of the loan it is clear that the debtor will not be able to service the debt, the loan may be requalified as capital and the interest may not be deductible.

### *Limitations on deductibility of interest*

Anti-abuse rules may limit the deductibility of interest paid on certain loans taken out by companies.

### *Base erosion rules*

The limitation on the deductibility of interest, inter alia, effects interest paid on related party debts (directly or indirectly) in respect of:

- Dividends and repayments of capital declared but unpaid.
- Dividends and repayments of capital declared and paid when financed through a loan granted by a related entity or related person.
- Capital contributions into related companies.
- The acquisition of shares from a related party.
- The acquisition of shares in a company from a third party as a result of which the company becomes a related entity.

A related entity in this respect is defined as:

- An entity in which the taxpayer holds an interest of at least one-third.
- An entity that holds an interest of at least one-third in the taxpayer.
- An entity in which a third party holds an interest of at least one-third, while this third party also holds an interest of at least one-third in the taxpayer.

A related person in this respect is defined as a natural person who holds an interest of at least one-third in the taxpayer or a related entity of the taxpayer. For the purpose of the above related party test the term ‘interest’ refers to an (in)direct financial interest, an (in)direct interest in the control or a combination thereof.

The interest deduction is not denied if the taxpayer can demonstrate that the loan and the underlying transaction are based predominantly on sound business considerations.

If the debtor and the creditor are related parties and have entered into a loan agreement that has no fixed maturity date or has a term of more than ten years and either no interest is agreed upon or the interest rate is significantly lower (30% or more) than the interest that would be charged on similar loans between non-related parties, the interest and devaluation of the loan are not tax-deductible. If the term of the loan is extended, the loan is deemed to have that term from the date of the original agreement.

These rules regarding the deductibility of interest are very complex and it will be necessary to consider the rules carefully in respect of specific transactions to ensure deductibility of interest.

### *Hybrid loans*

Under certain circumstances a loan is treated as a hybrid loan for Dutch tax purposes. A loan is considered to be a hybrid loan for Dutch corporate income tax purposes in the following circumstances:

- The interest fully depends on the profits of the debtor.
- The term of the loan exceeds 50 years or the loan has no term but is only repayable upon bankruptcy, suspension of payment or liquidation of the debtor.
- The loan is subordinated to all other creditors.

When a loan is considered to be a hybrid loan, the tax consequences are as follows:

- Interest paid on a hybrid loan and revaluations of the principal are not tax-deductible by the debtor.
- A hybrid loan is deemed to be a participation under the participation exemption provisions if the creditor or a related party already owns a qualifying shareholding in the debtor. This means that interest on such loans and revaluations thereof are tax-exempt.
- The debtor must withhold dividend tax from interest paid on hybrid loans.

### *Thin capitalisation rules*

Thin capitalisation rules apply to all Dutch corporate taxpayers that form part of a domestic or international group of companies. These rules can be summarised as follows:

- The debt-to-equity ratio is 3:1, and is based on the average of the fiscal equity and the net balance of loans payable and receivable.
- If the 3:1 ratio is exceeded, a corresponding part of the net interest due is not deductible. However, the non-deductible interest will not be higher than the net amount of interest due to related entities.
- An alternative ratio may apply at the request of the taxpayer. In that case the maximum allowable debt-to-equity ratio is equal to the debt-to-equity ratio of the group, based on the consolidated commercial accounts. This ratio is based on the commercial accounts without netting debts and receivables.
- Deduction of interest paid on genuine third-party loans is in principle not limited by the thin capitalisation rules.
- Third party loans that are guaranteed by related entities are considered to be related party loans.

### *Restriction on deduction of excessive participation interest*

As of 2013, the new article 13l of the Dutch Corporate Income Tax Act will restrict deduction of participation interest. The non-deductibility applies to the participation interest that is considered 'excessive', the deduction of that interest is regarded as improper use of the Dutch Corporate Income Tax Act. The excessive participation interest is the interest that can be allocated to the participation debt. The participation

debt is determined by a mechanical, mathematical rule according to which the taxpayer is assumed to have financed its participations with equity first, a taxpayer friendly approach. Qualifying expansion investments are excluded from the participation debt formula.

Interest expenses (both group interest and third party interest) are not deductible to the extent these expenses are deemed to relate to the financing of participations (hereinafter: 'excessive participation interest') and to the extent the excessive participation interest exceeds a threshold of EUR 750,000. The excessive participation interest equals the fraction (average participation debt/average total debt) multiplied by the total interest expenses. Average is to be understood as the average of the debt at the beginning and at the end of the financial year. The participation debt equals the difference between the average cost price of the taxpayer's participations and the taxpayer's average equity for tax purposes. The total debt is the sum of the taxpayer's interest bearing debts. The cost price of the participations is calculated as the acquisition price of the participations increased by subsequent capital contributions to the subsidiaries and decreased by subsequent repayments of capital by the subsidiaries. The restriction on the deduction of participation interest only regards participations to which the participation exemption applies.

A transitional rule applies to participation investments made in financial years starting prior to or on 1 January 2006.

### *Interest on acquisition debt within a fiscal unity*

As of 2012 the deduction of interest due by a parent company on debt used to finance the acquisition of subsidiaries included in the fiscal unity (hereinafter: 'acquisition interest', 'acquisition debt' and 'tainted subsidiaries') may be restricted. The restriction applies to both (in)direct third party acquisitions and (in)direct intra-group acquisitions and to both third party acquisition debt and intra-group acquisition debt if and insofar as the deduction of the interest due on that debt has not already been fully restricted by other Dutch tax provisions.

As a general rule, acquisition interest may not be offset against profits of tainted subsidiaries. That restriction, however, only applies to 'excessive acquisition interest'. In the year a subsidiary is acquired, acquisition debt is regarded as excessive if and to the extent that debt exceeds 60% of the acquisition price. During the subsequent seven years the percentage is reduced by 5% per year. After seven years the part of the acquisition debt that exceeds 25% of the acquisition price is still regarded as excessive.

Excessive acquisition interest also includes (the pro rata part of) costs incurred by and foreign exchange results realized on acquisition debt. Foreign exchange gains are part of the parent company's profits that are available for setting off against excessive acquisition interest. Excessive acquisition interest that cannot be deducted in any year, may be carried forward and will be deductible from untainted profits in subsequent years.

The restriction on deduction of interest on acquisition debt within a fiscal unity entered into force as from 1 January 2012 and applies to fiscal unities entered into on or after 15 November 2011. Therefore, the restriction does not apply to fiscal unities entered into before 15 November 2011, even if, after that date, the acquisition debt is refinanced or a new fiscal unity is formed directly after the discontinuation of a previous fiscal unity.

### *Written down receivables*

The following corporate tax provisions apply in relation to written down receivables (bad debts):

- Compulsory profit recognition for tax purposes by the Dutch creditor in the event of a waiver or conversion into shares of written down receivables owed by an affiliated debtor. The same tax treatment applies if the circumstances in respect of the debt are changed such that it de facto serves as quasi-equity of the formal debtor. Under certain conditions it is possible to postpone taxation on such profit recognition. The compulsory profit recognition does not apply in the event that a Dutch creditor company waives a bad debt, provided that this triggers the recognition of a taxable profit in the hands of the debtor company, which is subject to an effective tax rate of at least 10% over taxable profits determined according to Dutch standards.
- Compulsory profit recognition for tax purposes by the Dutch creditor in the event of assignment, disposal or transfer to an affiliated company of written down receivables owed by a debtor/affiliated company.

### *VAT*

The financing of property with a (mortgage) loan is VAT-exempt.

### *Withholding tax*

The Netherlands do not levy withholding taxes on interest payments, with the exception of certain hybrid debts.

### *Property lease*

The laws of the Netherlands distinguish three types of property leases: the residential lease, the retail lease and the lease of other commercial property.

Residential leases are defined as leases of accommodation or parts of accommodation that are used by the lessee as a residence. Residential leases are subject to restrictions on their termination and increases in the rent payable.

Retail leases are defined as leases of premises or parts of premises that are used principally by the lessee for the purpose of retail trade, restaurants, public houses or craftsmanship in direct contact with the public. Although a lease for a maximum period of two years is allowed, a retail lease has a minimum term of ten years (five years plus an option for an additional five-year period) and after that period it may only be terminated by the lessor on limited grounds as specified by law.

Property not being used for residential or retail purposes (e.g. offices, warehouses and factories) is governed by the rent law (*Huurwet*). For this type of lease the restrictions with regard to the price and the unilateral termination by the lessor depend on whether the property is 'liberalised'. In practice, in most cases the lessee will be protected against vacation of the premises for a period of up to three years.

For all types of lease certain general rules apply. Basically, the lessor is obliged to keep the building in a good state of repair and to guarantee the lessee the peaceful enjoyment of it. The lessee is obliged to pay the rent and to use the rented asset in accordance with its destination. Unless agreed otherwise, the transfer of the property by the lessor will not terminate the lease, whereas the lessee cannot transfer his lease to a third party without the lessor's approval.

Contrary to a long lease, usufruct and building rights, a lease does not confer upon the lessee any right in rem, i.e. a right on the rented asset which may be exercised vis-à-vis third parties other than the lessor. In fact, the lease only gives rise to personal rights, i.e. rights of claim against the lessor to enjoy the rented asset.

Proposed legislation on the lease of commercial property will end the distinction between retail and other commercial leases. Under the new rules there will be no minimum lease duration. Nonetheless, unilateral termination by the lessor has to be requested in court on the limited grounds as set out by law. Yet, it seems highly improbable that this new legislation will be enacted soon.

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# *Real Estate Going Global New Zealand*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 20 July 2012.**

# Real Estate Tax Summary – New Zealand

## General

Non-residents may invest in New Zealand property directly, or through a local company, non-resident company, trust or partnership.

Investments in New Zealand real property by non-residents may require government approval. The Overseas Investment Office assesses applications for consent from foreigners who intend making substantial investments in New Zealand. An overseas person requires consent to acquire sensitive land, which is defined in Schedule 1 of the Overseas Investment Act 2005.

(For more information, refer to [www.linz.govt.nz/overseas-investment](http://www.linz.govt.nz/overseas-investment).)

## Rental income

Net rental income derived from New Zealand real property is taxable in New Zealand. The income tax rates for individuals, whether resident or non-resident, for the 2012–2013 tax year, which is the year ending on 31 March 2013, are as follows:

Taxable income NZD	Tax rate (%)
0 to 14,000	10.5
14,001 to 48,000	17.5
48,001 to 70,000	30.0
over 70,000	33.0

If the owner of the property is a trust, then generally the tax rate is a flat 33%.

If the owner of the property is a company, the tax rate is a flat 28%.

## Rental expenses

Expenses incurred in deriving rental income are generally deductible. Such expenses include interest on loans used to acquire the property, as well as other property costs, including repairs and maintenance, insurance, rates, administration costs and depreciation. Capital expenditure is not deductible but may be included in the acquisition cost of the property and as a result depreciated.

## Capital gains on the sale of property

There is no general capital gains tax in New Zealand, although the definition of income has been expanded to include profits and gains from certain transactions, notably some of those involving the sale of land. Profits on the sale of land are generally taxable only under the following conditions:

- The land was acquired with the intention of resale.
- If the taxpayer was in the business of dealing in land, developing or subdividing land, or erecting buildings.
- In certain circumstances, where the taxpayer, whether or not for business purposes, has developed or subdivided land, or profited from the land being re-zoned.

Any such gains are included in taxable income and taxed at the normal rates.

## ***Real Estate Investments – New Zealand***

### **Tax depreciation**

The depreciation rate for buildings with an estimated useful life of 50 years or more has been reduced to 0% from the 2011/2012 income year.

While the depreciation rate for most buildings is 0%, certain components of buildings, such as fixtures and fittings that constitute plant and equipment, are eligible for higher depreciation rates. Non-structural items such as internal non-load-bearing walls and wiring are depreciable at rates relevant to their estimated useful life. The components of a building eligible for a higher depreciation rate are different depending on whether the building is residential or non-residential.

Taxpayers who acquired a commercial building before the 2010/2011 income year and did not separately identify and depreciate the fit-out of the building at the time of acquisition may be entitled to depreciate a fit-out pool of up to 15% of the building's tax book value at 2% straight line per year until they dispose of the building. This concession is only available if taxpayers establish the pool in their 2011/2012 income year.

The 20% depreciation loading concession on new plant and equipment has been removed for assets purchased after 20 May 2010. A specific grandfathering rule was introduced stating that an item is eligible for depreciation loading if it was acquired, or there was a binding contract for its purchase or construction, on or before 20 May 2010. If assets that have been depreciated are sold at a value in excess of the depreciated value, the depreciation previously claimed may be recovered, resulting in taxable income in the year of sale. Rental property is deemed to have been sold if the use of the property is changed from business to private. The sale is deemed to take place on the first day of the tax year following the change in use.

A taxpayer is able to claim a tax deduction for a loss made on the disposal of a building in limited circumstances only. These circumstances are where a building has been rendered useless for the purpose of deriving income and has been demolished (or abandoned for later demolition) as a result of this damage. The damage must have been caused by a natural event outside the control of the taxpayer, agent or associate and must not be the result of the taxpayer's failure to act.

### **Dividends and withholding tax**

Dividends received by one New Zealand resident company from another are taxable, unless the other company is a wholly owned subsidiary, in which case the dividends are generally tax-exempt. A full imputation system exists in New Zealand, which enables New Zealand resident companies receiving dividends to gross-up dividends with tax credits for taxes paid. New Zealand resident recipients can use these credits to offset any income tax payable.

Dividends paid to non-residents are subject to withholding tax at the rate of 30%, although this is usually reduced to 15% for persons resident in a country with which

New Zealand has a tax treaty for the avoidance of double taxation. Treaties with certain countries (for example the US, Australia, Singapore, Hong Kong and Canada) have been renegotiated and withholding tax rates for dividends paid to recipients in these countries have been reduced further in some circumstances. Dividends that have full imputation credits or withholding payment credits attached to them are subject to special rules that reduce the withholding tax to either 15% or 0%.

## Tax losses

Tax losses incurred by both resident and non-resident taxpayers may be carried forward and used to offset income of any future year. In the case of companies, a loss can be carried forward only if there is at least a 49% continuity in the ultimate individual shareholding at all times from the year in which the loss was incurred to the year in which it is used to offset profits. Companies in the same group, with 66% commonality of ultimate individual shareholding, may transfer losses among themselves in certain circumstances, so that losses can be used to offset profits of another company in the same group.

Losses cannot be carried back.

## Thin capitalisation

Inbound thin capitalisation rules apply to non-residents who invest in New Zealand. Outbound thin capitalisation rules apply to outbound investments by New Zealand residents (whether owned by residents or non-residents).

The aim of the legislation is to restrict interest deductibility on excessively geared assets. An apportionment of deductible interest is required where an entity's debt percentage (calculated as total group debt/total group assets) exceeds both of the following:

- 60% from the 2011/2012 income year for “inbound” investments (previously 75%), or 75% for “outbound” investments; or
- 110% of the worldwide group's debt percentage.

For the purposes of calculating the debt percentage, only interest-bearing debt and assets producing income are taken into account. Use of the debt-to-asset percentage differs from most thin capitalisation models, which monitor an entity's debt-to-equity ratio.

## Other relevant taxes

Owners of real property are assessed for property taxes by local authorities. The rates are usually determined based on either the improved or unimproved value of the land, as well as its town-planning zoning classification.

Generally, goods and services tax (GST) is levied at a rate of 15%. However, the supply of residential rental accommodation, or leasehold land by way of residential rental, is treated as being exempt from GST.

From 1 April 2011 most sales of land (and buildings) between GST-registered persons are zero-rated for GST purposes. There is a transitional rule for some land transactions entered into before 1 April 2011, where time of supply is on or after that date. No changes have been made to business to consumer transactions.

Stamp duty was abolished effective 20 May 1999 and is no longer levied on the sale of land.

## Municipal tax system in New Zealand

Municipal government in New Zealand is made up of territorial authorities (also known as local authorities, city or district councils), regional authorities and community boards. Each of these constituents of municipal government has particular functions.

Local authorities perform services and carry out activities for the benefit of their community. Their responsibilities include providing libraries, parks, parking, civil defence and land use consents.

Regional authorities have an environmental focus and their responsibilities include resource management, harbour control, conservation and pest control.

Community boards represent the interest of local communities to their local territorial authorities.

### *Local authority rates*

Local authorities in New Zealand have the power to levy tax, known as rates, on land within their boundaries. 'General rates' are the principal source of revenue for local authorities in the carrying out of their work in providing services to their local communities.

Rates are levied on rateable properties based on their rateable value. Basically, all lands are rateable. The definition of land is very broad and may include the right to pass utilities over land, e.g. power lines and water pipes. Full or partial exemptions from rates apply in relation to certain land, including Crown land and land used for educational and charitable purposes.

Under the Local Government (Rating) Act 2002 the liability for rates is based on ownership of a 'rating unit'. Ownership of a rating unit generally follows the legal ownership, i.e. the person registered on the certificate of title will own the rating unit. However, there is an exception for certain types of leases.

The lessee will be the ratepayer in respect of a rating unit where a lease meets the following criteria:

- It is entered into after 8 August 2001.
- It is registered under the Land Transfer Act 1952.
- It is for a term that exceeds ten years.
- It provides for the lessee to be entered as the ratepayer in respect of the rating unit.

Parties to leases should consult transitional provisions applying for leases entered into before 8 August 2001.

Information as to the rateable value and rating unitholder (ratepayer) of all properties is recorded in district valuation rolls and the district ratings' information database. District valuation rolls are maintained by the various local authorities. Local authorities are required to use the value in the district valuation rolls to levy rates.

Valuations for the purpose of the district valuation rolls can be carried out by approved valuers only. Land and improvements must be revalued every three years, although it can be done at shorter intervals. The occupier or owner of the land may request a valuation at any time, but will need to meet the cost of any revaluation they initiate. Land and improvements will also be revalued when changes are made (such as subdivision, erecting a new building, or a change in use of land).

Local authorities must notify the occupier of the result of a revaluation. An occupier can lodge an objection to a revaluation with the local authority, which is then required to refer the objection to an approved valuer (which can be the valuer who revalued the property). Anyone affected by the review can require the objection to be heard by the Land Valuation Tribunal.

Under the Local Government (Rating) Act 2002, rates may be set as general rates or targeted rates.

### *Limitations on rates*

Revenue from general and certain targeted rates cannot exceed 30% of the total revenue from all rates sought by that local authority for that year.

Amounts referred to are exclusive of Goods and Services Tax (currently 15%).

### *Regional authority rates*

Ratepayers are also liable for regional authority rates. Regional authorities often cover the geographical jurisdiction of several local authorities. Regional authorities use the same methods in determining rates of their local authority members as detailed above.

## **Resource Management Act 1991**

The Resource Management Act 1991 (the RMA) has the potential to be a significant issue for businesses. The RMA aims to promote the sustainable management of New Zealand's physical and natural resources.

Resource consents under the RMA are required before undertaking certain activities that might impact on the natural character of the environment. The consent authorities are empowered to impose conditions on the grant of consents. The conditions can range from financial contributions to the need to obtain specific permits or submit to certain discharge restrictions.

The imposition of conditions is a complicated system and details are often embedded in the local authority plans. Local authorities have a certain amount of power over whether or not they impose conditions and there is a certain amount of room to negotiate on this point.

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All information used in this content, unless otherwise stated, is up to date as of 17 August 2012.

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## *Real Estate Tax Summary – Norway*

A foreign corporate investor may invest in Norwegian property directly or through a Norwegian limited liability company or Norwegian partnership owning the property.

From a Norwegian corporate tax perspective it is normally most tax efficient to invest in a SPV comprised by the tax exemption method (owning the property), as dividends and gains would then be tax exempt at the level of the Norwegian investor. Foreign corporate investors investing in a Norwegian entity covered by the tax exemption method could benefit from the exemption from withholding taxes on dividend distributions (provided that the investor company has sufficient substance and is not resident in a low tax jurisdiction outside the EEA).

### Rental income

Rental income in a Norwegian corporate investor is subject to the general Norwegian corporate tax rate of 28%.

Interest costs are in general tax deductible, whether arising from external or intra-group debt. However, thin capitalisation issues could limit the tax deductibility of interest on intra-group debt. The decisive test is whether the group company would have been able to obtain the same conditions from an external party (bank, financial institution, etc).

Interest payments are not subject to withholding tax.

### Tax exemption method

Capital gains on shares owned by a Norwegian limited liability company which are comprised by the tax exemption method are 100% tax exempt. Furthermore, dividend distributions from a Norwegian subsidiary where the Norwegian parent company owns and controls more than 90% of the shares and voting rights, are also 100% tax free. The same applies to dividends from foreign subsidiaries within the EEA if the subsidiary is actually established and carries out genuine economic activity there (substance requirements based on the ECJ ruling in the Cadbury-Schweeps case).

Dividend distributions that do not meet the conditions above, will be subject to 28% tax on 3% of the dividends (effective tax rate of 0.84%).

### Depreciation

The acquisition cost of land and sites is not depreciable for tax purposes.

Buildings/assets used for business purposes will normally be depreciable in accordance with the declining balance method. The buildings/assets are allocated to different depreciation groups based on type of asset (i.e. office buildings, other buildings and technical installations), and may be depreciated annually at the maximum rate for the group in question.

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# ***Real Estate Investments – Norway***

## **General**

According to the Real Estate Concession Act of 31 May 1974, acquisition of real estate including companies owning real estate, may require a concession.

If the foreign investor investing into Norwegian real estate or in partnerships owning Norwegian real estate is not a limited liability, a statement from the Ministry of Finance may be required to determine who the taxpayer is, the investment vehicle or its investors for Norwegian tax purposes. (This is mainly from a practical perspective in order to determine whether there is one or 100,000 tax returns that have to be filed.)

Due to the tax exemption method, seller of real estate will prefer to sell shares in the real estate owning limited liability company or ownership interest in the real estate owning partnership.

## **Tax rate**

The tax rate for both resident and non-resident real estate investors is 28%.

## **Rental income**

Rental income and other kinds of earnings derived from real estate in Norway are taxable, regardless of whether the owner resides in Norway.

## **Deduction of costs**

All costs related to operation and administration of the property, including depreciation, are deductible. This includes interest on loans obtained to acquire, maintain or improve the property. Interest on, and other conditions regarding loans between, related entities must be at arm's length.

## **Timing of income/gain and costs/losses**

The main rule for timing of income/gains and costs/losses for tax purposes is the realisation principle. (As of 1 January 2005, the accounting principle was abandoned as the main rule for accountable business activity.)

For income/gains the realisation principle implies that income/gain must be entered as income in the income year in which the taxpayer obtains an unconditional right to the consideration. (As a result, the time of payment is without consequence.)

For costs/losses the realisation principle implies that costs/losses are deductible in the income year in which the taxpayer incurs an unconditional obligation to pay the consideration. (As a result, the time of payment is without consequence.)

## Further on depreciation

The acquisition cost of land and sites is not depreciable for tax purposes, but must be capitalised. The same applies for buildings used for dwellings/housing (certain limited exemptions may apply).

Other buildings used for business purposes are depreciable in accordance with the declining balance method. These assets are divided into two depreciation groups:

- (Group h) buildings (other than office buildings), plants, hotels, rooming houses, restaurants, etc., which may be depreciated annually at a maximum rate of 4%. Buildings with such simple construction that, from the date of its erection is assumed to have a useful life of no more than 20 years, may be depreciated according to the declining balance method with a maximum rate of 10% annually.
- (Group i) office buildings may be depreciated annually at a maximum rate of 2%.

In addition:

- (Group j, from fiscal year 2009) unmovable equipment that serves the use of the building (e.g. as elevators, cooling plant) may be depreciated annually at a maximum rate of 10%.

For equipment qualifying under 'j' acquired before 2009 and which have earlier been reported in groups 'h' and 'i', it has been decided that it is possible in the tax return for 2009 to move 40% of the remaining balance in group 'h' and 'i' to group 'j' (subject to further conditions).

The assets are depreciable at the maximum rate, as of the year of acquisition, on a declining balance basis.

As part of the Norwegian stimulus package for the financial crisis the Government granted, *for 2009 only*, a start-deduction of 10% for any new acquisitions in group d.

## Maintenance costs and improvement costs

Maintenance costs are tax deductible in the year of accrual. Costs of improvement or extensions of the building in later years must be capitalised and depreciated together with the cost of the building.

## Tax consolidation

Norwegian tax law is based on the principle that each company is a separate taxpayer, irrespective of whether it belongs to a Norwegian or international group. However, Norwegian tax law allows for tax consolidation/group relief by way of group contributions.

A group contribution is a gratuitous and unilateral transfer of value from one taxpayer to another within the same group. In short, the group contributions allow a group company to offset its profits against tax losses in another group company. Group

contributions have many similarities with dividends; however, one of the major differences is that group contributions in addition to being rendered to the direct parent/shareholder, also may be rendered to an indirect shareholder, subsidiary or a sister company.

There are three main conditions for rendering group contributions with tax effect:

- Both the rendering and the receiving company must be Norwegian limited liability companies (or certain other types of companies mentioned in the Tax Act). If certain conditions are fulfilled, group contributions may be rendered to/from a Norwegian permanent establishment (PE) of a foreign limited liability company tax resident in a state within the EEA area.<sup>1</sup> Group contributions may also, provided the conditions are fulfilled, be rendered between Norwegian PE's of foreign limited liability companies.
- The rendering and receiving taxpayer must be within the same tax group, i.e. a common parent (Norwegian or foreign limited liability company) must directly or indirectly own and control more than 90% of the shares and voting rights in both companies. The ownership test is made at 31 December in the income year.<sup>2</sup>
- The group contribution must be lawful, i.e. among others within the dividend distribution capacity of the rendering company (which sometimes requires careful planning upfront to make sure that the rendering company has sufficient dividend distribution capacity to give away its taxable profits as a group contribution).

If the above-mentioned conditions (and certain other minor conditions) are fulfilled, a group contribution is deducted from the rendering taxpayer's taxable income<sup>3</sup> and is regarded as taxable income for the receiving taxpayer. The group contribution may exceed the rendering company's taxable income in the year in question; however, the part of the group contribution which exceeds the year's taxable income is not deductible, nor is it taxable for the receiver if the above-mentioned conditions (and certain other minor conditions) are fulfilled.

Group contributions are normally decided at the annual general meeting of the shareholders in the year following the income year. If the companies within the Norwegian group draw up statutory company accounts according to IFRS, careful long-term planning with respect to the group contribution capacity may be necessary.

Tax-effective 'debt pushdown' in the case of the acquisition of shares in a limited liability company holding real estate may, due to the group contribution regime, be possible (i.e. a Norwegian holding company is established, its acquisition of the shares in the real estate company is financed with debt<sup>4</sup> and the real estate company's income<sup>5</sup> is used to offset the holding company's loss).

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<sup>1</sup> The EEA area consists of the EU countries and the EFTA countries (Iceland, Lichtenstein and Norway).

<sup>2</sup> Or at the last day of the income year if using a deviant income year.

<sup>3</sup> However, the group contribution is limited to the year in question's taxable income – i.e. it may not create a loss for the rendering company.

<sup>4</sup> In case of shareholder/intra-group loan/guaranteed loan the debt equity ratio, interest rate, etc. depends on what is arm's length.

<sup>5</sup> To the extent there is distribution capacity.

## Local funding alternatives

### *Debt versus equity*

In Norway, financing with debt is often advantageous because interest costs are deductible (please see section *'Tax consolidation'* in the case of share investment), while dividend distributions are not.

Withholding tax is not levied on interest paid from a Norwegian debtor to a foreign creditor. However, there are withholding taxes on dividend payments. (Exemptions apply with respect to lawful dividends to certain limited liability companies that are tax-resident within the EEA area (tax exemption method), or the rate may be reduced through tax treaties.

If using a Norwegian limited liability company to acquire the real estate directly or indirectly through shares in a real estate owning company, the decision with respect to the funding (equity vs debt) should also take into consideration Norwegian company law restrictions – inter alia the dividend distribution or capital reduction capacity, the very strict lending prohibitions and financial assistance prohibition regarding intra-group loans.

### *Further on interest deduction*

The tax deductibility of interest is not dependent on the purpose of the debt, provided the debt cannot be characterised as equity.

In principle there is no difference between debt from unrelated parties and shareholders/intra-group debt. However, the question of, for instance, thin capitalisation normally arises with respect to shareholder loans/intra-group debt (and/or shareholders/intra-group guarantees or similar arrangements for unrelated party debt).

The Norwegian General Tax Act does not have any specific thin capitalisation rules. However, the arm's length principle (ALP) is applied and it requires that the company is not thinly capitalised. The ALP also requires that the debt interest and other conditions of shareholder/intra-group loans are the same as could have been obtained on a stand-alone loan from an unrelated party.

As there are no specific statutory regulations, a generally acceptable debt-to-equity ratio has not been set. The main issue for Norwegian tax purposes is what debt-to-equity ratio an independent lender would accept under the same circumstances. This assessment must be made on a case-by-case basis, where all relevant factors are taken into account (e.g. current and expected cash flow, type of business, contract situation, level of interest-bearing debt, interest coverage, security etc.).

In practice, the basic effect of a shareholders/intra-group loan (and/or shareholders/intra-group guarantees or similar arrangements for unrelated party loan) not fulfilling the arm's length requirement is:

- non-deductibility of the part of the interest that is related to debt that could not have been obtained by the company on commercially acceptable terms on a 'stand-alone' basis
- no deductibility/income for the company for the same part of currency losses/gains

- non-deductible interest payments may also be treated as deemed dividend and dividend taxation of the company's shareholders may be carried out on that basis (i.e. the dividend distributions may be seen as unlawful and thus not comprised by the tax exemption method for corporate investors).

If real estate is acquired directly by a foreign taxpayer, it is recommended that any loans are established at the point in time of the acquisition of the real estate and with the real estate as mortgage. Later refinancing, i.e. increase of loans or insertion of loans may be difficult.

### *Exchange gains and losses*

Exchange gains/losses on debts are normally taxable/deductible. With respect to gains on long-term loans, using a 'revaluation account' for tax purposes implies that the year's net unrealised exchange loss is deductible while net unrealised gains will only have to be entered as income to the extent that there is an uncovered loss in the 'revaluation account'.

## Capital gains and losses on the sale of property

Capital gains/losses on the sale of real property owned by both resident and non-resident taxpayers are taxable/deductible.

Normally, gains on sale of real estate, other depreciable property and non-depreciable property that is used for business purposes, may be transferred to a collective 'gains and loss account' to the extent the gains are not treated as income in the year of the sale. On a declining balance basis, at least 20% of such positive 'gains and loss account' must be entered as income annually. It is mandatory to transfer losses to the 'gains and loss account', which is charged with a maximum of 20% annually on a declining balance basis.

### *Capital gains and losses on the sale of shares in limited liability companies and ownership interest in partnerships*

Norwegian tax resident limited liability companies' gains on shares in Norwegian limited liability companies and similar Norwegian entities (and certain foreign limited liability companies/similar entities) are tax-exempt under the Norwegian tax exemption method. To the extent a gain on shares in a Norwegian limited liability company is not taxable; losses on the shares are not deductible either.

Non-resident taxpayers' gains on shares in Norwegian tax resident limited liability companies and similar Norwegian entities are not taxable in Norway. If the shares are effectively connected to a Norwegian PE, gains will tax exempt and losses will be non-deductible to the extent the foreign company is comprised by the tax exemption method (i.e. if the foreign company corresponds to a Norwegian limited liability company).

Norwegian or similar entities' (including certain foreign limited liability companies) capital gains on ownership interests in Norwegian partnerships (and equivalent foreign partnerships) are as a main rule, comprised by the tax exemption method.

However, capital gains in connection with realisation of an ownership interest in a Norwegian partnership or equivalent foreign partnerships are taxable if the partnership's value of shares etc. which are not comprised by the tax exemption method (e.g. investments in companies in low tax jurisdictions), at any point in time during the last two years prior to realization has exceeded 10% of the partnership's total value of shares etc.

Losses on ownership interests in Norwegian partnerships or equivalent foreign partnerships are only tax deductible if at least 10% of the Partnership's investments for two years prior to realisation continuously have comprised shares, etc. not covered by the tax exemption method (e.g. shares in companies in low tax jurisdictions).

There are many unresolved questions arising from the exemption from the main rule regarding partnerships. For instance, with respect to a chain of partnerships: If for instance a partnership owns an interest in another partnership, it is uncertain whether any shares owned by this second partnership should be taken into account when determining the total value of shares and the value of shares outside the exemption method for shares.

Direct and indirect costs connected to acquisition and realisation of investments that qualify for the tax exemption are not deductible. However, debt interest and certain other financing expenses in connection with share/partnership acquisitions are as a general rule deductible.

### *Limitations on the tax exemption method*

Prior to 2012, dividend distributions and capital gains comprised by the tax exemption method suffered an effective tax rate of 0.84% (28% taxation of 3% of the gains/dividends), pursuant to amendments made to the tax exemption method in 2008.

However, as per 1 January 2012 gains on shares comprised by the tax exemption method are 100% tax exempt.

Furthermore, dividend distributions from a Norwegian subsidiary where the Norwegian parent company owns and controls more than 90% of the shares and voting rights, are also 100% tax free. The same applies to dividends from foreign subsidiaries within the EEA comprised by the tax exemption method if the subsidiary is actually established and carries out genuine economic activity there (substance requirements based on the ECJ ruling in the Cadbury-Schweppes case).

Dividend distributions covered by the tax exemption method that do not meet the conditions above, will still be subject to 28% tax on 3% of the dividends (effective tax rate of 0.84%).

Ordinary group contributions or dividends when the subsidiary is owned and controlled with more than 90% are not covered by this rule and will therefore not be effected.

Ordinary group contributions are not covered by this rule and will therefore not be effected. If an extraordinary group contribution is given, this will, according to the tax authorities, be taxed as a dividend distribution.

## Loss carryforward and carryback

As of 1 January 2006, tax losses may be carried forward indefinitely. As of 1 January 2006 also, discontinuance of business activity in which the loss was incurred has no effect of the possibility to carry the loss forward. The carryforward may be lost or reduced due to debt remission or bankruptcy. Finally, carryforward of losses may be discontinued, due to 'look-through'/'substance-over-form' regulations.<sup>6</sup>

If the business activity in which the loss was incurred is discontinued or the company is wound up, the losses may be carried back up to two years prior to the year the business ceased/the company was wound up.

## Dividends and withholding tax

Lawful dividends distributed from a Norwegian limited liability company to its Norwegian tax resident shareholders, which are also limited liability companies/similar entities, are comprised by the tax exemption method.

Dividends distributed from a Norwegian limited liability company to its non-resident shareholders are subject to 25% withholding tax. The rate may, however, be reduced in the applicable tax treaty.

Lawful dividends paid to foreign limited liability companies (and certain other similar entities) tax-resident within the EEA area are not subject to withholding tax, provided the company is actually established and carries out genuine business activity in the EEA state.

Norwegian withholding taxes are only levied on dividends. Thus, payment of rent, interest, administration fees, other services fees and proceeds for property to non-residents are not subject to withholding tax in Norway.

## 'Look-through'/'substance-over-form'/'anti-avoidance regulations

### *The non-statutory rule*

A non-statutory anti-avoidance regulation has been developed by the Norwegian Supreme Court and the tax authorities over a long period of time.

The non-statutory anti-avoidance regulation is applicable if a transaction (or series of transactions) is (i) mainly tax motivated and (ii) is regarded as disloyal to the tax law.

If the non-statutory anti-avoidance regulation is applicable, the tax authorities are entitled to disregard the transaction/transactions for tax purposes.

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<sup>6</sup> For instance, if the prevailing motive for acquiring a company with a loss carryforward is to use the loss, the loss may be discontinued due to the 'look-through'/'substance-over-form' regulations.

If the non-statutory anti-avoidance regulation is not applicable to a transaction or series of transactions, the statutory anti-avoidance rule (see below) may, however, still apply.

### *The Tax Act 14-90*

A statutory anti-avoidance rule has been introduced as a result of the introduction of the exemption method for share gains. The rule applies to companies (and certain other entities) that have certain tax positions (e.g. loss carryforward and positive gains and loss account (i.e. a latent tax liability)). If such a company is party to a merger, demerger, or has its ownership altered as a consequence of a merger, demerger or other transaction, and it is likely (i.e. more than 50% probability) that the utilisation of such general tax position is the prevailing motive (i.e. more than 50% motive) for the transaction, the tax position(s) will be:

- discontinued if it represents a tax advantage (e.g. a loss carryforward will be discontinued), or
- entered as income without the right to settle against losses if it represents a tax liability (e.g. a positive 'gains and loss account' may not be used as basis for group contributions to the new owner that has a loss).

If the statutory anti-avoidance rule is not applicable to a transaction or series of transactions, the non-statutory look-through regulation may, however, still apply.

## Stamp duty on the transfer of real estate

A 2.5% stamp duty is payable on the transfer of real property in Norway. The stamp duty is calculated on the sales value (i.e. the market value) of the property. There is no stamp duty on sublease of property, or on the transfer of shares or parts in limited liability companies or partnerships holding real property.

## VAT

There is no VAT on purchase, sale, sublease, etc. of real property in Norway. The owner and sub-lessor of real property may apply for a voluntary VAT registration if the property is leased out for use in VAT-liable activity. Such registration may often be advantageous because it opens up for deduction of input VAT on construction, maintenance and improvement costs. The general VAT rate is currently 25%.

Please note that there may be VAT consequences connected to sale of real property, even though the sale as such is exempt from VAT, especially if the seller has deducted input VAT in connection with construction, etc.

Applicable from 1 January 2008, the building of a new building, or the rebuilding or improvement work on an existing building will create a possible obligation to return a proportional part of the deducted VAT (obligation to adjustment of VAT), provided the property is used more in non-VAT liable activity (compared with the original use), or sold within a period of ten years from the year of completion. A possible obligation to return a proportional part of the deducted VAT will also apply if the owner's right is changed in case of merger or demerger.

Provided the owner of the building does not have the right to deduct VAT at the time of building/rebuilding/improvement, due to non-use in activities liable to VAT, there will be created a potential right to deduct a proportional part of the VAT (right to adjustment of VAT) paid at the time of construction. This is provided that the building, or part of the building, is taken into use in business liable to VAT, or if leased out for use in VAT-liable activity within a voluntary VAT registration within a period of ten years from the year of completion.

This obligation or right to adjustment of VAT may be transferred to the buyer in case the property is sold. In order to transfer an obligation to adjustment of VAT, the parties need to enter into a contract according to the Norwegian VAT regulation section 9-3-3.

The obligation or right to adjustment of VAT occurs only if the VAT cost of the building or construction work exceeds NOK 100,000 (total cost must exceed NOK 500,000 including VAT). A lessee may also hold an obligation or right to adjustment of VAT provided rebuilding or improvement work is paid by them.

Adjustment of VAT shall only be made if the change of use of the property exceeds 10% compared to the utilization at the time of completion of the building/rebuilding/improvement work.

Please note that the Norwegian VAT authorities make stringent demands of documentation concerning building costs and costs in relation to the use of VAT-liable activity in the building.

## Other real estate taxes

Norwegian limited liability companies are not subject to capital/wealth tax. Non-resident investors, which are not limited liability companies, owning real property in Norway, may be liable to capital tax (net wealth tax) at a maximum rate of 1.1%. Debt related to the acquisition, maintenance and improvement of the property is deductible when calculating the net taxable wealth. Non-resident limited liability companies and similar entities are not liable to capital taxation in Norway. The rules regarding valuation of real estate for tax purposes have, beginning in 2010, been changed resulting in a higher tax valuation for some real estate, especially secondary and unused real estate.

Norwegian municipalities may levy a special real estate tax on specific properties in certain urban areas. The tax rate varies between 0.2% and 0.7%. The municipality of Oslo does for the time being not levy real estate tax.

## Advance, binding rulings

The Norwegian Tax Directorate may issue advance, binding rulings regarding certain questions concerning Norwegian tax law and VAT law. (In certain cases the local tax offices may also issue advance, binding rulings concerning Norwegian tax law.) The application for a ruling must be substantiated by a requirement to solve fiscal problems related to a specific and actual matter for the taxpayer. The question will either have to be of an important nature for the taxpayer or of common interest.

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# *Real Estate Going Global Philippines*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 22 June 2012.

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# *Real Estate Tax Summary – Philippines*

## General

Normally, foreign investors invest in Philippine real property through a corporation in a joint venture with Filipino individuals or Filipino-owned corporations.

## Rental income

Rental income earned by a real estate company is subject to ordinary corporate income tax at a rate of 30% on net taxable income, *i.e.* gross rental income less deductible expenses. There is a 5% creditable withholding tax (CWT) imposed on the gross rental amount to be withheld by the lessee, which can be used to offset or be credited against the 30% corporate income tax liability of the lessor. In effect, the 5% CWT withheld is an advance payment of income tax, and any CWT which could not be credited against any tax due in a particular tax year can be carried forward to succeeding years.

## Thin capitalisation

The Philippines does not have any statutory thin capitalisation rules, although this may not prevent the BIR from pursuing the issue. Revenue Audit Memorandum Order (RAMO) No. 1-98 notes that thin capitalisation is a common form of tax avoidance and suggests to examiners that they should apply a reasonable debt-to-equity ratio when examining taxpayers.

At a practical level, the Board of Investments and the Philippine Economic Zone Authority (PEZA) requirement that registered firms maintain a debt-to-equity ratio of 3:1 is a useful guide. The BIR has drafted a transfer pricing regulation (for related parties,) which provides for a debt-to-equity ratio of 3:1 but is still waiting for approval from the Department of Finance. If the debt-to-equity ratio is maintained below this ratio, the BIR is unlikely to raise an issue. Ratios above this level should be defensible, but at the cost of potentially having to manage a protracted dispute with the BIR.

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# *Real Estate Investments – Philippines*

## *Preface*

This guide has been prepared by PwC, in coordination with its correspondent Law Firm, Cabrera Lavadia and Associates, and provides an introduction to the Philippines' tax and legal regime that applies to real estate investors.

Although this summary has been prepared to reflect the laws and regulations as of 22 June 2012, this document is for guidance only and action should not be taken without obtaining specific advice.

## *Legal aspects*

### *Ownership of real estate*

Generally, foreign individuals or corporations cannot privately own land in the Philippines. However, foreign investors can acquire up to 40% of the equity in a domestic company that owns land in the Philippines. Moreover, foreign individuals or companies can own 100% of a condominium unit, although the condominium units owned by foreign investors should not exceed 40% of the total units in a particular condominium project.

Ownership of real properties is normally represented by titles issued in the name of the owner. Registration of title in the Register of Deeds constitutes notice to the world that the property is owned by the person in whose name it is registered. While title may still be established through other means, the burden is against the one claiming ownership who is not the registered owner.

### *Co-ownership*

There is co-ownership whenever the ownership of an undivided thing or right belongs to different persons. The share of the co-owners, in the benefits and charges, shall be proportional to their respective interests. It is presumed that the portions belonging to each co-owner is equal, unless the contrary is proved.

In the case of condominiums, the owners of the separate units have shared ownership over the common areas.

### *Leasehold*

Although foreigners are prohibited by the Constitution from acquiring lands in the Philippines except by hereditary succession, they can lease real property in the Philippines.

The maximum period allowed for the duration of leases of private lands to foreigners or foreign-owned entities not qualified to acquire private lands is 25 years, renewable for another 25 years.

Every lease of real estate must be recorded in the Registry of Property for it to be binding upon third persons.

## *Contracts*

Under the Statute of Frauds, the sale of real property or an interest therein must be in writing to be enforceable. However, such sale is valid regardless of the form it may have been entered into as long as the requirements of a valid sales contract are present.

To be binding to third parties, the sale must be registered in the Registry of Deeds of the province or city where it is located. The sale must be in a public instrument to be allowed registration.

## Tax aspects

### *Sale/acquisition of real estate property*

#### *Capital gains tax (CGT)*

Sale of real property shall be subject to a Capital Gains Tax (CGT) of 6% on the gain presumed to have been realized on the sale, exchange or disposition of lands and/or buildings which are not actually used in the business and are treated as capital assets.

Capital assets are defined as property held by the taxpayer (whether or not connected with his trade or business), but not including the following:

- stock in trade or other property of a kind which would properly be included in the inventory, if on hand at the close of the taxable year
- property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
- property used in trade or business, of a character which is subject to allowance for depreciation; and
- real property used in trade or business of the taxpayer.

#### *Ordinary income tax/expanded withholding tax*

Sale of real property classified as ordinary assets, however, shall be subject to ordinary income, and any gain/income from the sale or exchange of such real properties shall be subject to the 30% normal corporate income tax or 2% MCIT, as the case may be.

The gain is the difference between the gross selling price or the fair market value, whichever is higher, and the cost of the land.

The sale shall also be subject to the expanded withholding tax (EWT). The rate of withholding tax normally depends on whether the seller is exempt or taxable, habitually engaged in real estate business or not, and where the seller is habitually engaged in real estate business, on the amount of the gross selling price.

#### *Value added tax (VAT)*

Generally, sale of real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business is subject to 12% VAT. The VAT shall be based on the gross selling price of the real property sold.

The gross selling price of real property for VAT purposes is the higher amount among the following:

- the consideration stated in the sales document;
- the zonal value determined by the Commissioner; or
- the fair market value shown in the schedule of values of the Provincial and City Assessors (real property tax declaration).

The following sales are exempt from VAT if the instrument of sale (whether the instrument is nominated as a deed of absolute sale, deed of conditional sale or otherwise) is executed and notarized on or after 1 January 2012:

- sale of residential lot not exceeding PHP 1,919,500; and
- sale of residential house and lot or other residential dwellings not exceeding PHP 3,199,200.

The 12% VAT may be passed on to the buyer. If VAT-registered, the buyer may use the paid VAT as input tax credit against its own VAT obligations to the government.

No VAT, however, shall be imposed on the sale, exchange or transfer of securities forming part of a REIT's real estate-related assets.

### Documentary stamp tax (DST)

A DST of 1.5% is levied on the consideration paid for the real property, or its fair market value, whichever is higher.

## *Investment in a real estate company*

### Capital gains tax (CGT)

The sale of shares in a real property company not listed on the Philippine Stock Exchange (PSE) is subject to a capital gains tax (CGT) of 5% on the first PHP 100,000 taxable gain, and 10% on any gain in excess of PHP 100,000. If the shares are listed on, and traded through the PSE, then their sale will be subject to a stock transaction tax (STT) of 0.5% on the gross selling price of the shares.

If the seller is a resident of a country with which the Philippines has a tax treaty, then the seller may be exempt from CGT under the Capital Gains Article of that particular treaty. It should be noted, however, that under a majority of Philippine tax treaties, the exemption will not apply if the assets of the issuing company consist principally of real property. Note however, that certain tax treaties exclude STT, which is an excise tax rather than an income tax, from the scope of coverage.

To avail of the treaty benefits, it is required that the application for tax treaty relief be filed with the Philippine tax authorities before the first taxable event.

### Documentary stamp tax (DST)

The sale of shares in a real estate company which are not listed and traded through the PSE is subject to DST at the rate of PHP 0.75 for each PHP 200.00, based on the par value of the shares (effectively 0.375%). However, if the shares are listed and traded through the PSE, the sale of said shares is exempt from DST.

## Dividends

Dividends received by a resident corporation from a Philippine corporation are not subject to any income or withholding tax. However, if the recipient is a Filipino or resident alien individual, any dividend income derived from a Philippine corporation will be subject to a final withholding tax of 10%. On the other hand, dividends paid by a Philippine corporation to non-resident alien (NRA) individuals not engaged in trade or business in the Philippines are subject to a final dividend withholding tax of 25%, while dividends paid to a NRA engaged in trade or business in the Philippines are subject to withholding tax of 20%. A NRA individual who stays in the Philippines for an aggregate period of more than 180 days during a calendar year is deemed to be a 'non-resident alien doing business in the Philippines.'

Dividends paid to non-resident foreign corporations are subject to a tax of 30% in general. However, the tax rate applicable to a non-resident foreign corporation may be reduced under the following conditions:

- If the recipient is considered as a resident of a tax treaty country, the applicable tax treaty rate will apply.
- If the non-resident foreign corporation is liable for taxes on such dividend in its country of residence, but the country allows a credit of 15% of the taxes deemed to have been paid in the Philippines against the taxes due in the country of residence, then the non-resident corporation would be liable for only 15% Philippine dividend withholding tax.
- If the country of residence of a non-resident foreign corporation does not impose any tax on such dividends received from a Philippine corporation, then the 15% dividend withholding tax will also apply.

## *Taxation of a real estate business*

### Corporate income tax (CIT)

Corporate income is taxed at a rate of 30% on net taxable income, i.e. gross rental income less deductible expenses.

### Minimum corporate income tax (MCIT)

A MCIT of 2% of annual gross income is levied on a corporation beginning in the 4<sup>th</sup> taxable year following the year in which the corporation commenced its business operations. The MCIT will apply if it exceeds the regular corporate income tax payable.

For purposes of applying the MCIT, the term gross income means gross sales less sales returns, discounts and allowances, and cost of goods sold. Cost of goods sold includes all direct costs. The amount of MCIT exceeding the regular corporate income tax payable in a particular year can be carried forward and credited against the regular income tax payable for the following 3 consecutive tax years.

### Sale of real property

The sale of real property by real estate companies is treated as part of their ordinary income, and is subject to corporate income tax at the rate of 30% of their net taxable income. The buyer of the real property may be required to withhold certain CWT, ranging from 0% to 6%, depending on the type and on the amount of real property sold. The CWT withheld can be used to offset the corporate income tax owed by the real estate company.

## Interest

### Deductibility

Only resident foreign corporations, domestic corporations, resident aliens and Filipinos engaged in a trade or business are allowed to deduct interest paid on loans taken out to purchase real property. Furthermore, taxpayers are given the option to treat the interest paid on a loan, to acquire real property used in a trade or business, as either a deductible expense or a capital expenditure which may be depreciated.

However, the amount of interest expense claimed as a deduction shall be reduced by 33% of the interest income earned which had been subjected to final withholding tax. Interest on indebtedness between members of a family is not deductible.

### Withholding tax on interest income

Interest income received by residents or non-residents may be subject to withholding tax. The withholding tax rate depends on the source and the recipient of the interest income. Interest earned by resident taxpayers on Philippine currency deposits with banks in the Philippines is subject to 20% final withholding tax (FWT), while interest earned by the same taxpayers on their foreign currency account deposits with banks is subject to 7.5% FWT.

The long-term bank deposit (*i.e.* with a term of 5 years or more) of individual residents and non-resident aliens engaged in trade or business in the Philippines is exempt from income tax upon meeting certain conditions. Pre-termination of such deposit before the 5<sup>th</sup> year shall subject it to FWT at the rate of 5%-20%, depending on the length of time the deposit was held.

Non-resident foreign corporations are subject to 30% FWT on their peso bank deposits and 20% on the interest income derived from foreign-denominated loans extended to residents of the Philippines. The FWT on interest earned by non-resident foreign corporations may, however, be reduced by an applicable tax treaty subject to the filing of a TTRA.

### Loss carryforward

Net operating losses can be carried forward for the next 3 consecutive tax years. For this purpose, the term net operating loss means the excess of allowable deductions over the gross income of the business for that tax year. However, the carryforward will not be allowed if the net loss was incurred when the taxpayer was exempt from income tax in the year of loss. Furthermore, the carry forward shall be allowed only if there has been no substantial change in the ownership of the business or enterprise in that, if the business is a corporation, not less than 75% of the nominal value of the outstanding issued shares or paid-up capital is held by or on behalf of the same persons.

It has been recently held that in mergers, the loss carry forward of an absorbed corporation can only be availed of the said entity and cannot be extended or transferred to the merged or surviving entity.

Capital losses, or losses realised on the sale of capital assets, may only be deducted against capital gains. Capital losses may only be carried over to the succeeding year if the loss is sustained by an individual taxpayer.

## Depreciation

Real property should generally be stated at its historical cost. The cost of the real property can be depreciated, the amount or percentage of which should be a reasonable allowance for the exhaustion and wear and tear, including obsolescence, of the property used in a trade or business. However, land cannot be depreciated.

The reasonable allowance for depreciation may be computed under any of the following methods, as prescribed by the Secretary of Finance:

- The straight-line method.
- The declining balance method, using a rate not exceeding twice the rate that would have been used had the allowance been computed using the straight-line method.
- The sum-of-the-years' digits method.

Computing for depreciation using any other method that may be prescribed by the Secretary of Finance, upon recommendation by the Commissioner may be used.

## Value added tax (VAT)

Sales of real estate by real estate businesses are generally subject to 12% VAT. The VAT shall be based on the gross selling price of the real property sold. Please refer to the previous discussion on sale of real properties held primarily for sale to customers or held for lease in the ordinary course of trade or business.

## *Real Estate Investment Trusts*

The Real Estate Investment Trust (REIT) Act of 2009 defined a REIT as a stock corporation formed for the purpose of owning income-generating real estate assets. A REIT must be a public company.

The act extended certain incentives to REITs as long as the qualifying conditions are complied with. A REIT that owns land in the Philippines must comply with foreign ownership limitations imposed under Philippine laws.

REITs can enjoy various tax incentives such as, but not limited to, the following:

- Dividends distributed can be claimed as tax deductions. Dividends paid by the REIT to overseas Filipino workers are not subject to income tax/withholding tax (WHT) for 7 years from the affectivity of the REIT Law, which was on 17 December 2009.
- Not being subject to MCIT.
- Reduced CWT of 1% on income payment to REITs.
- Reduced DST rate and registration fees on sale/transfer of real property including security interest related to REITS (50% of the DST and registration fees).
- Exempt from Stock Transaction Tax (STT) on any initial public offering and secondary offering of shares (STT rate 1% to 4%).
- 10% Final Tax on dividends unless lower treaty rate is applicable.

- REITs not considered as dealers in securities are not subject to 12% Value-Added Tax on sale of securities forming part of its real-estate related assets.

However, to avail of these incentives, a REIT should comply with the following requirements, among others:

- Remain a public company as defined in the REIT Law.
- Maintain the listed status of its securities.
- Make an annual distribution of at least 90% of its distributable income to its shareholders.

The Securities and Exchange Commission (SEC) and the Bureau of Internal Revenue (BIR) have issued implementing regulations of the REIT Law.

## *Local tax system in the Philippines*

### **General**

In the Philippines, local taxation is a right delegated by the National Government to local government entities, pursuant to the policy of promoting local autonomy. This policy is implemented through the Local Government Code of 1991 (Code) and its implementing rules, which codified and consolidated laws and regulations in connection with the taxing powers of local government entities.

Under the present tax structure, local government entities, through their respective *sanggunians* (local legislative councils) may levy and collect taxes as specified in the Code, which varies with the kind of local government unit (LGU) concerned. LGUs, from the largest to the smallest unit, are the province, city, municipality and barangay. For instance, a province may levy a tax on transfer of real property ownership, which is not generally allowed for a municipality or a barangay; a municipality may levy a tax on business, which a province cannot levy; while a city may levy taxes that a province or municipality is allowed to levy.

There are a variety of other taxes, fees and charges that may be levied by LGUs under the Code. The rates set out below are the maximum rates of tax prescribed under the Code. However, LGUs have the authority to adjust the prescribed rates once every 5 years, but in no case shall such adjustment exceed 10% of the rates fixed under the Code. In most cases, local governments have not exercised this authority, so the rates will typically remain within these prescribed ceilings.

In addition to the taxes specifically enumerated in the Code, LGUs may also impose taxes, fees and charges provided they do not overlap with taxes already imposed by the National Government or other applicable laws, and that such additional taxes, fees and charges are not unjust, excessive, oppressive, confiscatory, or contrary to declared national policy.

Following is a summary of the taxes that may be imposed by each LGU, as specified under the Code.

### **Real property taxes**

Provinces and cities, as well as municipalities within Metropolitan Manila, are primarily responsible for the levy and collection of the real property tax (RPT).

For purposes of assessment, real property is classified as residential, agricultural, commercial, industrial, mineral, timberland, or special. Cities or municipalities within the Metropolitan Area, through their respective *sanggunians*, have the power to classify lands in accordance with their zoning ordinances.

All owners of real property are required to file with the provincial, city, or municipal assessor a sworn declaration of the current and fair market value of their real property once every 3 years. Where any owner fails or refuses to make such a declaration, the assessor concerned shall do so in the name of the defaulting owner.

The basis of the RPT shall be the assessed value of the property, which is computed as a certain percentage (i.e. assessment levels based on classification of the real property at rates not exceeding those prescribed under the Code) of the fair market value of the real property (as fixed by ordinances enacted by the *sanggunians* of the province, city, or municipality concerned). Moreover, real property is classified, valued and assessed on the basis of its actual use, regardless of location, whoever owns it and whoever uses it.

Currently, there are 3 pending bills to amend the Code (i.e. the proposed House Bill No. 1607 and Senate Bills No. 688 and 971), wherein a collegial body named the ‘Local Assessment Council’ shall be established to prepare the schedule of fair market values of real property, removing such from the responsibility of one Local Assessor.

### Basic real property tax

A province, city, or a municipality shall fix a uniform rate of basic RPT, applicable to their respective localities, as follows:

- In the case of a province, at the rate not exceeding 1% of the assessed value of real property.
- In the case of a city or a municipality, at the rate not exceeding 2% of the assessed value of real property.

### Special levies on real property

In addition to the basic real property tax, a province, city, or a municipality may impose the following:

- An additional levy for the Special Education Fund (SEF) equivalent to 1% of the assessed value of real property.
- An additional *ad valorem* tax on idle lands in the form of an annual tax at a rate not exceeding 5% of the assessed value of the property. For this purpose, idle lands include the following:
  - Agricultural land exceeding one hectare in area that is suitable for cultivation, dairying, inland fishery and other agricultural uses, 50% of which remains uncultivated or unimproved by the owner of the property or person having legal interest therein. However, an agricultural land planted with at least 50 trees to a hectare or used for grazing purposes is not considered idle land.
  - Non-agricultural land exceeding 1,000 square metres in area and located in a city or municipality, 50% of which remains unused or unimproved by the owner of the property or person having legal interest therein.

- Presently, House Bills No. 650 and 1092 are pending proposing to increase the *ad valorem* tax rate on idle lands from 5% to 10%. Additionally, House Bill No. 3421 proposes a higher rate of 20%, while exempting from the said tax non-agricultural lands planted with 50 trees to a hectare or a proportion thereof, if less than a hectare.
- A special levy on lands that are specially benefited by public works' projects or improvements funded by the concerned LGU shall not exceed 60% of the actual cost of such projects and improvements, including the cost of acquiring the land and such other real property in connection therewith. The special levy will not apply, however, to lands exempt from the basic RPT and to the remainder of the land portions of which have been donated to the LGU concerned for the construction of such projects and improvements.

### Local business tax

If the municipality or city in which the company is located does not provide a specific local business tax rate for real estate businesses, the local business tax will generally not exceed 2% of the gross receipts of the preceding calendar year in the case of a municipality, or 3% in the case of a city.

### Local transfer tax

Local transfer tax on the sale, exchange, or transfer of real property will generally not exceed 0.5% of the total consideration involved in the acquisition of the property or the fair market value, in case the monetary consideration involved in the transfer is not substantial, whichever is higher, will be assessed.

### Other regulatory fees and charges

The LGU may also charge other regulatory fees upon the annual renewal of the business permit (i.e. sanitation fees, fire inspection fees, etc.) and also impose and collect such reasonable fees and charges for services rendered, public utility charges and toll fees or charges.

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# *Real Estate Going Global Poland*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 19 June 2012.**

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# *Real Estate Tax Summary – Poland*

## Rental income

Net income received by corporate taxpayers is taxable in Poland at the general corporate income tax rate of 19%. Generally, all expenses incurred by companies on earning or securing their taxable revenues, including interest paid, are deductible for corporate income tax purposes (except those costs specifically disallowed in the Polish Corporate Income Tax Law) as long as they have been properly documented. Costs of discontinued projects can also be deductible for corporate income tax purposes.

Consolidation for income tax purposes is possible in Poland under specific and relatively strict conditions.

## Thin capitalisation rules

The law sets a maximum debt-to-equity ratio of 3:1 for loans drawn from qualifying lenders (i.e. shareholder(s) holding directly at least 25% of shares in a Polish company, as well as 'sister' companies, if the same entity holds directly at least 25% of the shares both in the creditor and the debtor company). When this ratio is exceeded, interest paid on restricted loans, in relation to the part of loans exceeding three times the value of the registered share capital, will not be tax-deductible.

## Depreciation

Tax-deductible depreciation of buildings is subject to maximum straight-line rates. Depending on the type of the building, these rates range from 1.5% to 10% annually.

Usually non-residential buildings are depreciated over 40 years (using 2.5% tax depreciation rate). Non-residential second-hand or improved buildings can be depreciated over a period of 40 years, decreased by the number of full years that elapsed from the day of the building being put into use for the first time until entry thereof into the taxpayer's fixed assets register. Nevertheless, the depreciation period calculated this way cannot be shorter than ten years, i.e. 10% is the maximum annual tax depreciation rate.

Land is not depreciated for tax purposes.

## Loss carryforward

According to the Polish Corporate Income Tax Law, tax losses may be carried forward for five consecutive years, with no more than 50% of the amount of the loss from each year to be used in any one year.

## Withholding taxes

### *Dividends*

The general withholding tax with respect to dividend payments is 19%, regardless of whether the recipient is resident or non-resident. If the recipient is a non-Polish tax resident, an appropriate double tax treaty may reduce this rate.

Since Poland's accession to the EU, the Polish Corporate Income Tax Law has been amended by implementation of the provisions of the Parent-Subsidiary Directive. Namely, withholding tax exemption has been introduced, applying to dividends being paid by a Polish taxpayer to EU/EEA/Swiss parent companies provided that certain level of shareholding is maintained for an uninterrupted period of two years and certain additional conditions are met.

### *Interest and royalties*

The withholding tax rate on interest amounts to 20%, unless an appropriate double tax treaty provides for its reduction. There is no withholding tax on interest and royalties paid within Poland and they are generally treated as taxable income upon receipt.

Due to accession to the EU, Poland introduced Interest and Royalties Directive, under which EU Member States are to apply a tax exemption (under certain conditions) for interest and royalties paid to associated companies from other EU Member States. However, Poland was granted a transitional period, so currently, interest and royalty payments made from Poland to associated companies in other EU Member States may be subject to withholding tax at 5% (unless the respective double tax treaty provides for more preferential taxation). The full exemption shall be applicable, starting from 1 July 2013.

The said reduced withholding tax rate (or full exemption starting from 1 July 2013) may be applied to interest paid to certain related companies (direct shareholders, direct subsidiaries or third companies having the same direct shareholder), provided that certain capital links are maintained for an uninterrupted period of two years and certain additional conditions are met.

### *Intangible services*

Payments for services of intangible character (i.e. management, consulting services, guarantees) to non-residents are subject to 20% withholding tax in Poland, unless an appropriate double tax treaty provides for more preferential taxation.

The application of the treaty benefits is conditional upon possession by the Polish payer of a certificate of residence of the foreign recipient.

## Taxes on capital

There are no separate capital taxes. However, commercial companies should remember that capital increases are subject to notary fees and Civil Law Activities Tax (CLAT). Loans are generally subject to 2% CLAT, but a number of exemptions are available.

## Capital gains on sale of property

There is no distinct capital gains tax regime in Poland. Capital gains are taxed at the general corporate income tax rate of 19%, unless otherwise determined by the provisions of an applicable double tax treaty.

Many treaties concluded by Poland provide for exemption from Polish taxation of capital gains on the sale of shares of Polish real estate holding companies. However, there is a tendency to renegotiate treaties to include in them so called 'real estate clause' allowing Poland to tax capital gains on such disposal.

## Real estate transfer payments/VAT

The sale of development land is generally subject to VAT at a 23% rate, recoverable under standard VAT rules. VAT treatment of sale of developed properties depends on a number of conditions, including classification of the object of transaction as assets on piecemeal basis or a going concern, certain features of the property sold, as well as, to some extent, the decision of the parties to transaction. Namely, sale of assets on piecemeal basis may be obligatorily taxed with VAT (at the relevant rate), obligatorily exempt from VAT or exempt from VAT with the option tax the supply. In case of classification of the object of transaction as going concern, such sale is out of scope of VAT. If the acquisition of real estate (land and/or buildings, constructions) is VAT-exempt or out of scope of VAT, Civil Law Activities Tax (CLAT) of 2% is levied. As opposed to VAT, CLAT is not recoverable.

The standard 23% VAT rate is reduced to 8% with respect to supply of residential buildings qualifying for the social housing programme, which is not exempt from VAT, based on the above outlined rules.

VAT at the rate of 23% is also generally applicable to income from the lease of buildings, except for residential buildings leasing, which is VAT-exempt under certain conditions. This is generally recoverable by the tenant as input VAT. However, companies providing exempt services (e.g. financial services) are generally unable to recover input VAT. Charges for the lease or rental of property situated in Poland are subject to Polish VAT, even if the charge is made to a non-resident foreign company.

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# *Real Estate Investments – Poland*

## Legal considerations

There are relatively few formalities required to purchase real estate located in Poland. After Poland's accession to the EU, acquisition of real estate by investors of the European Economic Area (EU plus Iceland, Liechtenstein and Norway (EEA)) and Switzerland was liberalised. Foreign investors are in principle free to acquire real estate, through entities with a legal personality, partnerships or even through registered branches, with some exceptions regarding agricultural and forest lands.

The firmest form of title to land is an absolute property ownership (freehold). Another widely encountered form of legal title to land recognised by the Polish Civil Code is perpetual usufruct (lease). It applies only to land owned by the State or by local authorities.

Perpetual leases can be contracted for a fixed period of time, not shorter than 40 years and not exceeding 99 years. Nevertheless, in the last five years of the duration of perpetual usufruct, the person holding the perpetual interest may request for an extension for a further period not exceeding 99 years. Such a request can be rejected only for reasons of important public interest. The perpetual tenant is obliged to pay annual rent, up to 3% of the market value of the real estate, notwithstanding the so-called first fee for leasing the land for perpetual usufruct, which constitutes 15% to 25% of the value of the real estate. The perpetual usufruct agreement can be terminated in specific cases, such as a breach of the tenant's covenants. This mechanism permits creation of a perpetual usufruct interest in land simultaneously with a freehold one, which can be retained by the State or a local authority. This interest can be used effectively in development and investment situations. The perpetual tenant can dispose of its interest in the land without consent of the real estate owner.

The third most common form of title is a short lease. This is a lease granted for a period determined in the lease contract, whether definite or indefinite, where rights and obligations are also open to negotiation between the parties.

## Tax considerations

Similar to other countries in the region, the tax system in Poland is relatively new, and its rapid development has meant relatively frequent changes in tax legislation. In general, the change has been positive and the legislation is continuously developing towards EU standards.

In Poland, a court ruling is normally binding only on the parties to the case. That is to say, there is not a case law system of universally binding precedents. Nevertheless, court rulings are growing in importance, and published cases are studied by both the tax authorities and tax practitioners. To resolve doubts on specific issues, experts on tax matters should be consulted, or clarification should be requested from the tax authorities. However, it is important to note that the interpretation of the tax laws is constantly changing as new questions are brought to the government's attention, and those seeking to do business in Poland should ensure that the information they have is as up to date as possible.

## *Anti-avoidance*

There have been significant developments in respect of anti-avoidance measures. The features of most types of contracts are defined in the Civil Code. Nevertheless, the courts may look through these contractual arrangements and there have been instances of the courts using powers derived from the Civil Code to re-characterise transactions for tax purposes. The tax authorities are also becoming more sophisticated in their approach to tax avoidance. Not only literal wording of the parties' declarations but also intentions and purpose of the act are examined. Should the tax authorities state that another legal act was disguised by the parties by means of the transaction, the tax consequences will be identical as for this disguised act. Furthermore, the Polish Tax Ordinance gives the courts an authority to judge whether a civil law action undertaken by a particular taxpayer, actually results in legal consequences. Subsequently, the court's decision might be the legal basis for further actions undertaken by the tax authorities. This regulation entitles the tax authorities to re-characterise transactions for tax purposes on the basis of tax, not only civil law regulations.

## *Related-party transactions*

The tax regulations contain rules to prevent the abuse of transfer pricing, both international and domestic, as well as specific rules for the market valuation of consideration in kind. Thin capitalisation rules are also in place.

## *Tax rulings and APAs*

The current regime for issuing interpretation of the tax law by the tax authorities has been in place since 2007.

The authority to issue rulings on most of the individual matters is the Minister of Finance (in practice, rulings are issued by designated Directors of Tax Chambers on behalf of the Minister of Finance). Generally, the ruling should be issued within three months of filing the application for the ruling. However, the tax authority is entitled to prolong this period if, in the authority's view, a taxpayer causes delay, e.g. if the actual state or the taxpayer's standpoint presented in the application is not sufficiently clear. In such a case, the taxpayer should be informed of the new deadline for issuing the ruling. If the deadline is not met – either the original mentioned in the Tax Code or the prolonged one – it is assumed that the Minister of Finance appraises the standpoint presented in the taxpayer's application as correct.

The ruling issued on behalf of the Minister of Finance is not binding to other tax authorities (e.g. tax offices and fiscal control offices) from the formal point of view. Nevertheless, compliance with the interpretation still should not be harmful to the taxpayer, i.e. the taxpayer should not be obliged to pay any penalty interest or be subject to fiscal-penal responsibility, even if the tax authorities do not agree with the Minister's ruling in their proceedings. Only in the case where negative tax implications result from compliance with the ruling that covers future transactions, will the taxpayer also be free of tax as a tax exemption will occur.

Entities performing related party transactions may also apply to the Minister of Finance for Advanced Pricing Arrangements (APAs) available under certain conditions.

## *Late payment of taxes*

The standard penalty interest rate for late payment of taxes (currently 14.5% per annum) may be reduced by 25% (i.e. to 10.88% a year, given the current standard rate)

in the case of a voluntarily corrected tax return, provided that other statutory requirements are also met.

## Legal implications

### *Real estate permits*

Acquisition of Polish real estate by foreign investors (companies and individuals) generally requires a permit issued by the Minister of Internal Affairs. However, since Poland's accession to the EU, this general rule does not apply to acquisitions made by the investors of the EEA and Switzerland (although restrictions on acquisition of agricultural and forest land are kept for a transitional period).

Please note that not only foreign investors, but also Polish entities that are controlled by foreigners within the meaning of the Polish Act, on acquiring the real estate by foreigners, that wish to purchase either ownership or a perpetual usufruct interest in Polish real estate must, in most cases, obtain a permit from the Minister of Internal Affairs. However, a permit is generally not required in cases of acquisitions made by the companies controlled by investors from the EEA and Switzerland.

A permit from the Minister of Internal Affairs is subject to stamp duty of approximately EUR 400. The procedure for a foreign-owned company to obtain such a permit is relatively straightforward, yet it may take up to 2–3 months.

In addition, permits from the Minister of Internal Affairs are required for the acquisition of a stake in a Polish company that owns or holds in perpetual usufruct, real estate under the following conditions:

- If as a result of the purchase of shares, the company in question will become a controlled company, in the meaning of the Polish Act on acquiring the real estate by foreigners in which the foreign investors would have a dominant position.
- The company in question is already such a controlled company, and the stake is acquired by a foreign investor who is not yet a stakeholder.

Such a permit is also subject to stamp duty of approximately EUR 400.

Permits are valid for two years; a promise of a permit may be obtained (valid for one year). Acquisition of Polish real estate without a permit, if such a permit is required, is invalid by the virtue of law.

### *Anti-monopoly consent*

Under certain conditions, the Polish Anti-monopoly Office should be notified of enterprises' concentrations (mergers, takeovers, purchase of a part of the target's assets). Generally, an intention to concentrate must be reported if it involves enterprises whose aggregate worldwide turnover exceeds the equivalent of EUR 1bn or whose aggregate turnover in Poland exceeds the equivalent of EUR 50m in the financial year preceding the notification.

## Choice of entity

Foreigners from the EU Member States, Member States of the European Free Trade Agreement (EFTA) – parties to the Agreement on the EEA – and foreigners from the states not being parties to the Agreement on the EEA who may enjoy freedom of establishment under agreements concluded by those States with the European Community and its Member States, may undertake and carry on economic activity on the same terms as Polish citizens.

In case of other foreigners, subject to reciprocity, unless international agreements ratified by Poland otherwise provide, foreigners can undertake and carry on economic activity on the territory of Poland on the same terms and in the same forms as the Polish entrepreneurs.

There are generally two groups of entities recognised in Poland: partnerships and commercial companies. Commercial companies are separate legal entities and their shareholders are not liable for the company's obligations, while the partnerships, in general, have unlimited liability for the partnership's obligation on the part of their partners.

At present, Polish commercial law allows for the formation of the following types of vehicles open to foreign investors:

- Registered partnership.
- Limited partnership.
- Joint stock partnership.
- Limited liability company.
- Joint stock company.

In the absence of reciprocity, foreigners (subject to certain exemptions) may form only limited partnerships, limited liability companies and joint stock companies, or they may join such partnerships and companies and take up or acquire their shares.

Apart from establishing Polish companies, a foreign investor may also operate on the Polish market via a registered branch, which may be allowed to carry out economic activities in Poland. The main activities of the registered branch of a foreign entity may comprise the development and/or lease of real estate in Poland, provided that such activities are also performed by that foreign entity.

Below we briefly outline the key features of the above presented vehicles.

### *Registered partnership*

A registered partnership is based on the provisions of the Commercial Companies Code. The partners have unlimited liability, and the partnership is not a legal person, yet may acquire the rights and assume the obligation on its own.

The concept of legal personality separates business operations and liabilities resulting from activity of that legal person from the property of partners. As a consequence,

partners in the registered partnership are jointly and severally liable with regard to all liabilities and obligations of the partnership, without any limit, to the whole of their estate.

### *Limited partnership*

A limited partnership is a specific form of a registered partnership. A limited partnership has at least one partner who is responsible for the management of the partnership and has unlimited liability. The other partner or partners have limited liability, and are liable only to the extent indicated in limited partnership's Articles of Association. Additionally, the limited partner is exempt from the above liability up to the value of the contribution made to the limited partnership. A limited partnership is not a legal person.

### *Joint stock partnership*

A joint stock partnership is a partnership of a hybrid character, the legal construction of which is based on selected regulations concerning a limited partnership and a joint stock company. A joint stock partnership should have at least one partner who bears unlimited liability for the partnership's obligations, i.e. the general partner, and the other partner, the shareholder, whose responsibility for the partnership's obligations is excluded, and may represent the partnership only as its proxy. Both general partners and shareholders are entitled to participate in the partnership's profits in proportion to their contributions. A joint stock partnership does not have legal personality. This form of partnership is often used in real estate investment fund structures.

### *Limited liability company*

A limited liability company is the most frequently used entity for specific investment in Poland when the shares in the company are not intended for public subscription. In the case of large investments that require a public profile, and may lead to a listing or public raising of capital, formation of a joint stock company would be advisable.

Establishment of a limited liability company is, however, much more straightforward than establishment of a joint stock company. Furthermore, a limited liability company may be established by a sole shareholder, unless this shareholder is a limited liability company having only one shareholder.

The minimum share capital required for the establishment of a limited liability company amounts to approximately EUR 1,250.

### *Joint stock company*

A joint stock company is more suitable for large investments that require a public profile, and that may lead to a listing or public raising of capital, since it is perceived on the local market as being a more substantial entity than a limited liability company.

The minimum share capital required for the establishment of a joint stock company amounts to approximately EUR 25,000.

## Tax implications

### *Buying and selling property*

#### Capital gains

There is no distinct capital gains tax regime in Poland. Capital gains are taxed at the general corporate income tax rate of 19%, unless otherwise determined by the provisions of an applicable double tax treaty.

Most of the treaties concluded by Poland provide for exemption from Polish taxation of capital gains on the sale of shares of Polish real estate holding companies. However, foreign companies are subject to Polish corporate income tax at the standard tax rate on capital gains realised on the sale of Polish real estate.

Recently, Poland has renegotiated various double tax treaties, introducing, among others, changes in taxation of real estate disposals through sales of shares. Many new double tax treaties feature a clause for the application of Polish tax on the sales of shares in a Polish company in which most of the assets are real estate (while the general rule is non-taxation of such profits in Poland); compare double tax treaties with Ireland, Denmark, Germany, Sweden, Austria and the UK. Such a clause is not included in the treaty with the Netherlands and also in the newly renegotiated treaty with Cyprus that may be expected to come into force on 1 January 2013. However, the protocol amending the treaty with Luxembourg provides for the real estate clause (this will become binding on 1 January of the year following completion of ratification process).

#### Value added tax (VAT) and transfer taxes

The sale of development land is generally subject to VAT at a 23% rate, recoverable under standard VAT rules. Note that this standard rate may be increased (generally up to 25%) in case the ratio of public debt to GDP as at December 2012 and 2013 exceeds 55%.

Supplies of buildings and constructions or their parts (together with plots of land on which they are located) – classified as assets on piecemeal basis – are generally exempt from VAT. The exemption is not applicable for supplies: (i) effected before or in the course of so-called ‘first occupancy’, or (ii) effected less than two years after the ‘first occupancy’. The ‘first occupancy’ is understood to be the release of the buildings, constructions or their parts (after their construction or improvement amounting to at least 30% of the initial value) to the first purchaser or the first user in performance of activity subject to VAT (e.g. sale or lease). The taxpayer is entitled to resign from the above VAT exemption, provided that the vendor and the purchaser are registered VAT taxpayers and they submit to the relevant tax authorities a joint declaration confirming that they choose to tax the supply of the building, construction or its part with VAT.

VAT exemption also applies to supplies of buildings, constructions or their parts, effected before or in the course of the ‘first occupancy’, or within two years after the ‘first occupancy’, provided that: (i) in relation to these buildings, constructions or their parts, the vendor was not entitled to decrease the output VAT by the amount of input VAT; and (ii) the vendor has not incurred improvement costs related to the supplied buildings, constructions or their parts, with respect to which they were entitled to recover input VAT or such improvement costs were lower than 30% of initial value of the supplied buildings, constructions or their parts. The latter condition is not applicable in case the improved buildings, constructions or their parts have been used

by the taxpayer for at least five years for the purposes of effecting taxable activities. In case the building, construction or its part qualifies for this exemption, the taxpayer is not allowed to opt for the VAT taxation of the effected supply.

Where the object of the transaction is classified as a going concern, sale of the real property would be out of scope of VAT. The currently prevailing practice is to treat the sale of building – even fully operational and generating 100% of the Vendor's revenues and costs – as sale of assets on piecemeal basis (rather than a going concern). Hence, such transactions are commonly treated as VAT-able. However, due to recent developments regarding individual rulings, change of the above market practice may not be ruled out.

If the acquisition of real estate (land and/or buildings, constructions) is VAT-exempt or out of scope due to the classification of the object of the transaction as a going concern, Civil Law Activities Tax of 2% is levied.

The standard 23% VAT rate is reduced to 8% with respect to supply of residential buildings qualifying for social housing programme, which is not exempt from VAT, based on the above outlined rules.

Construction services are generally subject to VAT at 23%. The exception to this rule is 8% VAT rate applicable to construction services connected with real estate, covered by a social housing programme.

Input-VAT on creation (i.e. construction) or acquisition of fixed assets would be subject to recalculation during the consecutive five years (for fixed assets other than real estate the initial value of which exceeds approximately EUR 3,500) and ten years (for real estate). Namely, if in a given calendar year of the appropriate period an asset would be used for the purpose of non-VAT-able activity, the respective amount of input-VAT on its creation/acquisition and offset against output-VAT, would have to be paid back to the tax office.

### Use of separate property holding companies

It is a common practice to hold properties in separate special purpose companies. Disposals are effected by sale of shares in such companies.

Since a local company holds the property, it is important for the holding company to be located in a jurisdiction with an appropriate double tax treaty. Selection of an appropriate jurisdiction is of considerable significance, in particular as far as taxation of capital gains on disposal of shares in real estate holding companies, as well as withholding tax treatment of various payments are concerned.

## *Financing real estate in Poland*

### Debt

There are thin capitalisation rules in the Polish tax law system, and a Polish entity must comply with the permitted debt-to-equity ratio in order to be able to fully use interest costs. The law sets a maximum debt-to-equity ratio of 3:1 for loans drawn from qualifying lenders, i.e. shareholder(s) holding directly at least 25% of shares in a Polish company, as well as sister companies, if the same entity holds directly at least 25% of the shares in the creditor and the debtor company.

Only the registered and paid-in share capital is used as the basis for calculation of a debt-to-equity ratio for thin capitalisation purposes. In addition, share capital for thin

capitalisation purposes is calculated without taking into consideration the part of the share capital which was covered by contributions of shareholders' loans and by the interest on these loans (debt-to-equity swap), as well as the part of the share capital which was covered with intangibles not subject to tax depreciation deductions (e.g. know-how).

Part of the interest on the loan from a qualifying lender that exceeds three times the value of the Polish company's share capital will not be treated as a tax-deductible cost.

The Corporate Income Tax (CIT) regulations define the term 'loan' very broadly for thin capitalisation purposes. It should be understood as receiving funds subject to repayment, issuance of bonds, as well as deposits.

Transfer pricing rules also apply. Loans must bear market terms, including a market rate of interest. Poland, as a member of the Organization for Economic Cooperation and Development (OECD), has adopted the arm's length standards enumerated in the OECD Transfer Pricing Guidelines.

Transfer pricing regulations apply also to permanent establishments (PEs) of foreign entities.

Interest on loans drawn in order to acquire shares is, as a rule, tax-deductible. However, the timing of deductibility of such interest (at the moment of payment or at the moment of subsequent disposal of shares) is not specifically regulated in the Polish CIT Law.

Interest on construction loans accrued during the construction period must be capitalised to the value of the development and depreciated. Interest accruing after bringing the asset into use is tax-deductible on a cash basis. Loans are generally subject to CLAT of 2% of the amount of the loan.

Loans made by banks and by non-Polish entrepreneurs whose mainstream business activity comprises granting loans and provision of credits, as well as loans provided by other entities that may be classified as provision of financing, subject to VAT, are exempt from this tax.

Moreover, loans from direct shareholders are also not subject to CLAT.

Drawing a loan by a Polish resident from a foreign lender is not subject to any foreign exchange restrictions.

Nevertheless, there is a formal requirement for reporting cross-border loans to the National Bank of Poland.

Please note that payments between the Polish residents can be agreed and settled in a foreign currency.

## Equity

Equity funding is subject to CLAT at the rate of 0.5%. The equity contribution of the investor may be made either in cash or in kind. The company may, however, also be provided with non-equity capital such as additional payments (subject to certain restrictions) or loans.

## Operating real estate

### Rental income

Net income received by corporate taxpayers is taxable in Poland at the general CIT rate of 19%. The current rate has been in force since 2004.

Generally, all expenses incurred by companies on earning or securing their income, including interest paid, are deductible for corporate income tax purposes (except those costs specifically disallowed in the Polish CIT law) as long as they have been properly documented. Consolidation for income tax purposes is possible in Poland under specific and relatively strict conditions.

### Depreciation

Accounting depreciation is similar to Western European standards. Although depreciation for tax purposes is normally based on accounting depreciation, it is possible for differences to arise between accounting and tax-deductible depreciation.

Generally, taxpayers can use two basic methods of depreciation – straight line (for all assets) and reducing balance (selected assets, mostly machinery and equipment, using, generally, coefficient 2).

Tax-deductible depreciation is subject to maximum straight-line rates. For buildings, depending on type, these rates generally range from 1.5% to 10% annually (in case of certain second-hand buildings). Usually, non-residential buildings are depreciated over 40 years (using 2.5% tax depreciation rate). Non-residential second-hand or improved buildings can be depreciated over a period of 40 years, decreased by the number of full years that elapsed from the day of the building being put into use for the first time until entry thereof into the taxpayer's fixed assets register. Nevertheless, depreciation period calculated this way cannot be shorter than ten years, i.e. 10% is the maximum annual tax depreciation rate.

Polish law provides for accelerated depreciation for assets used in conditions of intensive use. The definition of intensive use is use more intensive than in average conditions or subject to exceptional technical demands. On the other hand, the taxpayers may individually decrease the depreciation rates for fixed assets, upon their entry into the fixed assets register or as of the beginning of a given tax year.

Land is not subject to tax depreciation. The acquisition costs of land may be recognised as tax-deductible at its disposal.

### Loss carryforward

According to the Polish CIT Law, tax losses may be carried forward for five consecutive years, with no more than 50% of the amount of the loss from each year to be used in any one year.

### Taxes on capital

There are no separate capital taxes. Companies should, however, remember that capital increases are, generally, subject to notary fees and CLAT.

### Property tax

A local annual property tax is assessable on real property (Real Estate Tax). The rate of tax is dependent on the location, type and purpose of a property, and is applied to the area (in case of land and buildings) or value (in case of constructions).

The maximum Real Estate Tax rates for property used for business purposes for the year 2012 may not exceed the following:

- PLN 0.84 per square metre of land.
- PLN 21.94 per square metre of buildings.
- 2% of the value of structures (i.e. other real estate developments) established in accordance with specific regulations in this respect.

There have been discussions on introducing real estate tax based on the value of real estate; however, currently there are no specific plans in this respect.

### VAT

VAT at the rate of 23% is generally applicable to income from the lease of buildings, except for lease of residential buildings, which is VAT-exempt under certain conditions. This is generally recoverable by the tenant as input VAT. However, companies providing exempt services (e.g. financial services) are generally unable to recover input VAT.

Charges for the lease or rental of property situated in Poland are subject to Polish VAT, even if the charge is made to a non-resident foreign company.

## *Withholding taxes*

### Dividends

Generally, dividend payments are subject to 19% tax, regardless whether the recipient is resident or non-resident. If the recipient is a non-Polish tax resident, the relevant double tax treaty may reduce this rate.

Inter alia, liquidation proceeds and remuneration for compulsory or automatic redemption of shares in a company are treated similarly as dividends.

### Outbound dividends

Following provisions of the Parent-Subsidiary Directive, exemption from withholding tax applies to dividend payments made by Polish taxpayers abroad, subject to the following conditions being met jointly:

- The paying company has the seat or management on the territory of Poland.
- The recipient has its worldwide income (irrespective of the place where it is derived) subject to taxation in the EU, an EEA country, or Switzerland.
- The recipient holds directly at least 10% of shares in the Polish company paying a dividend for an uninterrupted period of at least two years (in case of the dividend payments made to the Swiss beneficiaries, the required direct shareholding amounts to at least 25%).
- The recipient is not exempt from tax on all its income, regardless of its source.

Moreover, in general, the dividend recipient has to have ownership title to the shares in the Polish company.

Pursuant to the Polish Corporate Income Tax Law, the above-mentioned exemption is also applicable, even if the uninterrupted holding period of two years lapses after the date when dividends are paid.

In order to enjoy the exemption from Polish withholding tax on dividends based on the Polish tax regulations implementing provisions of the Directive, the relevant double tax treaty should allow for exchange of tax information between the tax authorities of Poland and the country of the dividend recipient.

Notwithstanding the above, application of withholding tax exemption would be conditional upon possession by the Polish dividend paying company of a relevant certificate of tax residence of the dividend recipient and written statement confirming that the dividend recipient is not exempt from tax on its income, regardless of its source.

### Domestic dividends (dividends paid between Polish companies)

Similar exemption rules apply to Polish CIT taxpayers who receive dividends from domestic companies. A dividend is not included in the recipient's income, if the recipient has continuously held a 10% minimum share in the capital of the payer of the dividend for at least two years.

### Inbound dividend

Polish CIT taxpayers who receive dividends from European companies (i.e. including entities of the EU, the EEA and Switzerland) and PEs thereof, do not include dividends into their worldwide income provided that a minimum 10% shareholding is maintained for at least two years. In all other cases, the dividend receipts are added to the worldwide income and taxed at the standard CIT rate of 19%. Double taxation is avoided by an application of the ordinary tax credit method.

### Interest and royalties

The withholding tax rate on interest and royalties amounts to 20%, unless an appropriate double tax treaty provides for its reduction. There is no withholding tax on interest and royalties paid within Poland and they are generally treated as taxable income upon receipt.

Nevertheless, due to accession to the EU, Poland introduced Interest and Royalties Directive, under which EU Member States are to apply a tax exemption (under certain conditions) for interest and royalties paid to associated companies from other EU Member States. However, Poland was granted a transitional period, so currently interest and royalty payments made from Poland to associated companies in other EU Member States may be subject to withholding tax at 5% (unless the respective double tax treaty provides for more preferential taxation). The full exemption shall be applicable starting from 1 July 2013.

The said reduced withholding tax rate (or full exemption starting from 1 July 2013) may be applied, provided that the following conditions are met jointly:

- The paying company has the seat or management on the territory of Poland.
- The recipient has its worldwide income (irrespective of the place where it is derived) subject to taxation in an EU, or EEA country.

- The recipient has a direct minimum holding of 25% in the capital of the paying company, or the paying company has a direct minimum holding of 25% in the capital of the recipient, or a third company has a direct minimum holding of 25% both in the capital of the recipient and in the capital of the paying company.
- The recipient is not exempt from tax on all its income, regardless of its source.

The holding has to result from ownership title to the shares.

Pursuant to the Polish Corporate Income Tax Law, the above-mentioned exemption is also applicable in case the uninterrupted holding period of two years lapses after the date when interest or royalties are paid.

In order to enjoy the reduced withholding tax on interest and royalties based on the Polish tax regulations implementing provisions of the Directive, the relevant double tax treaty should allow for exchange of tax information between the tax authorities of Poland and the country of the payment recipient.

Notwithstanding the above, application of the reduced withholding tax rate would be conditional upon possession by the Polish paying company of a relevant certificate of tax residence of the recipient and written statement confirming that the recipient is not exempt from tax on its income, regardless of its source.

### **Intangible services**

Payments for services of intangible character (i.e. management, consulting services and guarantees) to non-residents are subject to 20% withholding tax in Poland, unless appropriate double tax treaty provides otherwise.

The application of all the above-mentioned treaty benefits is conditional upon possession by the Polish payer of a certificate of residence of the foreign recipient.

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# *Real Estate Going Global Portugal*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 29 June 2012.**

# Real Estate Tax Summary – Portugal

## General

Foreign corporate entities and real estate funds may invest in properties located in Portugal by setting up or acquiring local companies, such as joint stock companies (*Sociedade Anónima (SA)*), private limited liability companies (*Limitada (Lda)*), partnerships (*Sociedades em Nome Colectivo ou Sociedades em Comandita*), or by means of the direct acquisition of the legal title of such properties. In the latter case, such investments can be either made through a branch, i.e. a Permanent Establishment (PE), or as a passive investor, without a branch.

## Rental income

Net rental income is taxed at the 25% main Corporate Income Tax (CIT) rate, plus a local surtax, *derrama municipal*, which is levied by several municipalities in Portugal, of up to 1.5% of taxable profit, not considering any tax losses carry forward. An additional surtax, *derrama estadual*, a state surtax that is also levied in two tax brackets: the first, with a 3% rate, applicable to the part of taxable profits between EUR 1.5m and EUR 10m, and the second with a 5% rate, applicable to the part of taxable profits that exceeds EUR 10m.

The final tax rate for a company may increase to 26.5% and ultimately it can go up to 31.5%, if local and state surtaxes are due.

Resident companies and branches, i.e. PEs of non-resident companies, are allowed to deduct interest, depreciation charges (if the investment property is booked at cost) and other property expenses such as taxes and duties paid. Taxation is levied on an accrual basis. Under certain conditions, these expenses should be added to the property's acquisition cost. Tax depreciation charges are not allowed in case of investment property booked at fair value.

Non-resident companies carrying out passive investments, in general, may not be deemed to have a PE in Portugal. Therefore, in general terms, they are not allowed to deduct interest and depreciation charges, being only entitled to deduct maintenance and repair expenses when actually paid and properly documented. Taxation is levied on a cash basis. Net rental income will be taxed at the income tax rate of 15%.

## Depreciation

In case the company opts for booking the investment property at cost, it should be depreciated for taxation purposes, at a 2% rate annually for flats or apartments, offices and commercial property and at a 5% rate annually for industrial buildings. Depreciation is calculated under the straight-line method.

Land cannot be depreciated for tax purposes.

The property should also be subject to an impairment test and if any loss is accounted for, its acceptance for tax purposes is subject to the fulfilment of strict tax exceptional devaluation requirements.

If any impairment loss related to the property is recognised and not deductible for tax purposes in the year on which it is accounted for, considering that it is an asset that is subject to depreciation, the impairment's tax deductibility would be deferred for the remaining useful life of the property, meaning, the respective amount will be eventually recovered for CIT purposes.

No tax depreciation charge is allowed in case the company opts for booking the investment property at fair value. Any variations on the fair value of the property will be accounted for in the company's profit and loss account. These variations are not relevant for taxation purposes.

## Capital gains on the sale of property

Capital gains arising on the sale of property by tax resident companies and PEs of non-resident companies are taxed at the 25% main CIT rate. The final tax rate for a company may increase to 26.5% and ultimately it can go up to 31.5%, if local and state surtaxes are levied.

According to the reinvestment relief mechanism, 50% of the net annual capital gains arising from the sale of fixed assets owned for at least one year are considered for taxation purposes. For that, the sale proceeds must be reinvested in the acquisition of other fixed assets. This regime also applies where the proceeds from the sale are partially reinvested, with the necessary adaptations.

Any capital gain arising from the sale of property located in Portugal when owned by a non-resident entity without PE in Portugal is taxable at a rate of 25%.

## Loss carryforward

Since 2012 tax losses can be carried forward for 5 years. The carryforward period for tax losses generated in 2010 and 2011 was of 4 years and before 2010, of 6 years. Losses can be used to offset net operating income and capital gains realised on the sale of property located in Portugal.

The deduction of tax losses is limited to 75% of the taxable profit of the year, with the possibility of carrying forward the remaining 25% in future years within the established carry forward period (5, 4 or 6 years).

Nevertheless, the company loses the right to keep on carrying forward the tax losses in the year when either of the following changes occur: (i) if the object, purpose of the company, as stated in its articles of association is changed (formal test) or if the nature of its activities is substantially changed (substance test); or, (ii) if there is a change of at least 50% of the share capital or the majority of the voting rights of the company.

The Portuguese Tax Administration may nevertheless authorise otherwise upon a request submitted by the company before proceeding with any of such modifications.

# Real Estate Investments – Portugal

## Direct investments in Portuguese property

Corporate and individual investors planning to invest in property located in Portugal may opt between various ways to structure such investment. Basically, they can opt between a direct acquisition and an indirect acquisition (i.e. a purchase of shares in a company owning property in Portugal). The main tax issues arising from direct investments are addressed in this section. Another way to structure investment is through real estate funds incorporated under Portuguese law.

### Tax aspects

Whatever the status of the owner of property in Portugal, whether an individual or a corporate entity, resident or non-resident, the taxable basis of income derived from property will be determined according to Portuguese domestic tax law.

Similarly, with respect to indirect taxes, the Portuguese Property Transfer Tax (IMT) and VAT rules may apply on any property transaction in Portugal.

### Corporate tax

#### Resident companies

Under Portuguese tax law, companies that have their head office or place of effective management in Portugal qualify as Portuguese residents for tax purposes, and are therefore subject to Portuguese (CIT) on their worldwide income.

The taxable income of Portuguese resident companies is subject to a main CIT rate of 25%, plus a local surtax, *derrama municipal*, which is levied by several municipalities in Portugal, of up to 1.5% of taxable profit, not considering any tax losses carry forward. An additional surtax, *derrama estadual*, is also levied in two taxation brackets: the first, with a 3% rate, applicable to the part of taxable profits between EUR 1.5m and EUR 10m, and the second with a 5% rate, applicable to the part of taxable profits that exceeds EUR 10m.

The final tax rate for a company may increase to 26.5%, and ultimately, it can go up to 31.5%, if both *derrama municipal* and *derrama estadual* are due.

The basis of the taxable income of Portuguese resident companies investing in property is the gross income realised on the property, less allocable expenses and depreciation (if booked at cost). Allocable expenses include repair, maintenance, renovation and similar costs, and interest expenses on loans taken out to finance the respective acquisition. Tax depreciation charges are not allowed in case of investment property booked at fair value.

Capital gains realised on the sale of property are treated as part of the company's taxable income for CIT purposes. Capital losses realised are fully deductible. Capital gain or loss realised corresponds to the difference between the sale price, net

of inherent charges, and acquisition cost, net of impairment losses and accumulated tax depreciation charges.

Please note that when the sale price of the property is lower than its tax registration value, the seller must either: (i) adjust the annual CIT return for the amount corresponding to the positive difference between the tax registration value and the amount stipulated in the sale agreement; or (ii) prove to the Portuguese Tax Administration that the price of the transaction was effectively lower than the tax registration value of the building, by, e.g. giving evidence that the construction costs were actually lower than those established by law. In this case, the Portuguese Tax Administration may have free access to the bank accounts of the seller as well as that of its managers on the date the sale occurred.

To exclude inflationary gains made on the disposal of tangible fixed assets held in the company's balance sheet for at least two years, the acquisition cost of these assets is multiplied by the official monetary devaluation index that is published annually.

According to the reinvestment relief mechanism, only 50% of the net annual capital gains arising from the sale of fixed assets owned for at least one year are considered for taxation purposes. For that, the sale proceeds must be reinvested in the acquisition of other fixed assets. This regime also applies where the proceeds from the sale are partially reinvested, with the necessary adaptations.

Given a final corporate tax rate of 25% (or 26.5% if *derrama municipal* is levied or 31.5% if both surtaxes are levied), then the capital gain arising from the sale of the fixed asset when the reinvestment relief is adopted attracts an effective tax rate of 12.50% (or 13.25% or 15.75%, depending on the surtaxes) corresponding to 50% of the capital gain.

Nevertheless, in order to benefit from this regime, companies must state in their tax return, corresponding to the tax year when the assets are sold, that they intend to reinvest the proceeds.

If the reinvestment does not take place, an adjustment will have to be made to taxable income for the year subsequent to the year of the sale, corresponding to the amount of the non-taxed capital gain multiplied by 1.15. Late assessment interest will accrue. If no tax is due in the year of the sale because of tax loss carry forward, accumulated losses are adjusted accordingly.

Portugal changed its accounting rules applicable to statutory accounts (SNC) to be in line with the International Financial Reporting Standards. The new rules are in force since 1 January 2010.

According to the SNC, property classified as investment property may be valued according to the following criteria:

- Cost model subject to depreciation and impairment; or
- Fair value model.

The main features for tax purposes of the cost model are:

- Depreciation: The property will be subject to annual depreciation, which is deductible for tax purposes (up to a maximum of 2% per year), except the part regarded as land.

The CIT rules do not require that the amounts to be claimed for tax purposes are accounted for as costs in the same tax period; however, the tax rules prevent the accumulated depreciation claimed at the end of each tax year exceeding the accumulated accounting depreciation and impairment losses accounted for in prior years.

- Impairment loss: Property should also be subject to an impairment test, and if any loss is accounted for, its acceptance for tax purposes is subject to the fulfilment of strict tax exceptional devaluation requirements.

If any impairment loss related to the property is recognised and not deductible for tax purposes in the year in which it is accounted for, considering that it is an asset that is subject to depreciation, the impairment's tax deductibility would be deferred for the remaining useful life of the property, meaning, the respective amount will be eventually recovered for CIT purposes.

- Future sale of the property: In such case, the computation of any capital gain results from the difference between the sales value minus the acquisition price (net of any accumulated tax-deductible depreciation charges and impairment losses that have already been considered as deductible for tax purposes).

The main features of the fair value model for tax purposes are:

- Depreciation: Tax depreciation is not allowed.
- Fair value variations: Any variations on the fair value of the property will be accounted for in the company's profit and loss account. These variations are not relevant for taxation purposes.
- Future sale of the property: In such case, the computation of any capital gain results from the difference between the sales value minus the acquisition price (without considering any variation on the fair value of the property because it has not been accepted for tax purposes), meaning that the 'loss' for tax purposes of the annual depreciation amount will be recovered at this stage through the computation of a lower capital gain (or higher capital loss).

For completeness, according to the Portuguese Company Law, any impact on the company's net profit of year derived from the application of the fair value model is not subject to dividend distribution to its shareholder, until it becomes effectively realised, i.e. any gain on the fair value of properties may only be distributed to shareholders when the property is effectively sold.

In case the company opts to account for the investment property by the cost model, with the exception of land, property is depreciable. The original acquisition cost of property, i.e. the acquisition cost, plus related expenses such as registration duties, brokerage fees, notary and architect's fees, is the basis for tax depreciation. The cost of acquisition also includes irrecoverable VAT.

By contrast, as a general rule, interest derived from loans contracted for the acquisition of tangible fixed assets, and foreign exchange differences related to tangible fixed assets

arising either from actual payments, are not considered as part of the acquisition cost. Notwithstanding this, where the construction works last more than one year, interest can be capitalised.

For tax purposes, depreciation of property should be charged to the P&L account on a straight-line basis, according to the rules and rates laid down in the tax law, which defines maximum specific rates to be used for each type of fixed asset. The declining balance method cannot be used for buildings. No depreciation for tax purposes is allowed for goodwill.

Depreciation rates for property may vary between 2% and 5%, depending on the type of the property, e.g. 2% annually for flats or apartments, offices and commercial property; 5% annually for industrial buildings or hotels. Land and the capitalised expenses related to it cannot be depreciated. If the land value is not known or determinable, it is deemed to account for 25% of the acquisition cost of the property.

Since 2012, tax losses, i.e. accounting losses adjusted to comply with tax law criteria, can be offset by taxable income arising in the following 5 years. The carry forward period for tax losses generated in 2010 and 2011 was of 4 years and before 2010, of 6 years. The deduction of tax losses is limited to 75% of the taxable profit of the year, with the possibility of carrying forward the remaining 25% in future years within the established carry forward period (5, 4 or 6 years).

Nevertheless, the company loses the right to keep on carrying forward the tax losses in the year when either of the following changes occur: (i) if the object, purpose of the company, as stated in its articles of association, is changed (formal test) or if the nature of its activities is substantially changed (substance test); or (ii) if there is a change of at least 50% of the share capital or the majority of the voting rights of the company.

This holds true unless the Portuguese Tax Administration, upon a request submitted to the Ministry of Finance before proceeding with any such modifications, authorise otherwise.

### *Non-resident companies*

Under Portuguese corporate tax law, distinction has to be made between non-residents with a PE, and non-residents without a PE located in Portugal.

PEs of non-resident entities are subject to similar CIT rules to those applicable to Portuguese resident entities. Hence, the basis for the taxable income of entities investing in Portuguese property is the gross income, including capital gains realised on the property, minus allocable expenses and depreciation (if applicable). For non-residents without a PE in Portugal, income derived from property located herein will be subject to CIT as follows:

- Capital gains realised on the disposal of property will be subject to a 25% CIT rate.
- Rents received will be subject to a provisional 16.5% withholding tax (WHT), where the entity paying the income is required to have accounts and bookkeeping. The tax withheld corresponds to an advanced payment on account of the final tax due, with a final rate of 15% applicable. Tax refunds for the difference are allowed. Where the rents received are paid by entities not required to have accounts and bookkeeping, no provisional WHT is levied.

- When owned by an entity resident for tax purposes in a tax haven, according to a list published by the Government (tax haven entity), unused property or property not allocated to an economic activity is always deemed to be let and, consequently, generating rental income. For tax purposes, the deemed annual gross rental income is one-fifteenth of the tax registration value. This rule is not applicable where the tax haven entity is able to demonstrate that the property is not used by an entity domiciled in Portugal and is indeed vacant.

## Personal income tax

### *Resident individuals*

Individuals resident in Portugal are liable for personal income tax on family income arising worldwide.

Tax resident status in Portugal applies when an individual stays an aggregate of more than 183 days in Portugal in a given calendar year, or, if on 31 December the individual possesses a home in the country, and it can be assumed that this will be used by the person as a place of habitual residence or abode.

An individual that transfers its tax residency to a tax haven country or jurisdiction is also deemed to be tax-resident in Portugal in the year of the transfer and in the following four years, unless the individual is able to prove that there are good reasons for that transfer, such as the carrying out of a temporary activity for a Portuguese company.

The general principle is that resident individuals investing in property located in Portugal are subject to personal income tax on the income allocated to the property. Nevertheless, a distinction has to be made between individuals carrying out a business undertaking, and individuals owning properties outside the scope of a business undertaking.

In the former case, the taxable income is determined under the rules applicable to Portuguese resident companies (see section, '*Direct investments in Portuguese property*' – '*Corporate tax*'). Tax losses arising from the business undertaking can be carried forward to offset profits arising from the same business undertaking within the subsequent 5 years.

Taxable income is subject to progressive tax rates, which vary between 11.5% and 46.5%, depending on the respective tax bracket.

In the case of individuals obtaining income from property located in Portugal, which does not qualify as profits of a business undertaking, these are subject to personal income tax as follows.

Capital gains realised on the disposal of property is equal to the difference between sales price and purchase price. Duly documented improvement expenses, incurred in the previous five years, plus costs inherent to the disposal are added to the purchase price. In order to exclude purely nominal or inflationary gains, the purchase price is multiplied by the official monetary devaluation index.

The annual net balance between capital gains and capital losses should be included in the annual income tax return, and is subject to tax at rates varying between 11.5% and 46.5%, depending on the annual taxable income. Nevertheless, 50% of the capital gains are not subject to tax, except if the counterpart is resident in an offshore country.

The concept of property rent is defined by the tax law in very broad terms and includes, among other items, fees for services provided in relation to leased property, lease of equipment, fixtures and fittings installed in the leased property, etc.

Tax is withheld, or not, depending on the tax status of the entity paying the rent. While rents paid by companies, entrepreneurs or independent professionals required to have accounts are subject to a 16.5% provisional WHT, no provisional WHT applies in the case of rents paid by non-professional individuals.

Where applicable, the tax withheld constitutes an advanced payment on account of the final tax due, at rates varying from 11.5% to 46.5%, depending on the annual taxable income. Tax refunds are allowed.

### *Non-resident individuals*

Non-resident individuals are subject to personal income tax on the capital gains arising from the sale of property located in Portugal, at the autonomous rate of 25%.

Rental income for non-resident individuals is subject to an autonomous rate of 16.5%.

Residents from another country of the European Union (EU) or of the European Economic Area (EEA) may opt to have their capital gains or rental income taxed at the same rates as Portuguese residents, i.e. 11.5% and 46.5% (for residents in the EEA, the country must have a tax information exchange in place with Portugal).

To calculate the applicable tax rate, the individual's worldwide income is taken into account, as for Portuguese resident individuals.

All other Portuguese-sourced income is subject to similar rules as those for resident individuals (see section, *'Direct investments in Portuguese property' – 'Personal income tax'*).

Double tax treaties concluded by Portugal grant Portugal the right to tax income derived from property located in Portugal.

### **Property taxes**

#### *Property transfer tax (Imposto Municipal sobre as Transmissões Onerosas de Imóveis or IMT)*

IMT is levied on the transfer of ownership of property located in Portugal at the rate of 6% for the acquisition of residential property above EUR 550,836. However, for dwellings acquired for own residential purposes, the 6% rate only applies for dwellings above EUR 574,323. The IMT rate is 5% for rural land and 6.5% for other urban properties and other onerous acquisitions. When an entity acquiring a property located in Portugal is tax-resident or domiciled in a tax haven, the IMT rate is 10%, except in case of individuals.

IMT is applied to the higher of the purchase price or the official tax registration value, appraised under the annual local property tax (IMI) rules. This tax is borne by the acquirer, whether resident or non-resident.

In relation to the acquisition of residential property, the tax rate may be reduced if the acquisition price does not exceed a certain amount, which is updated every year. Full exemption is also available for lower amounts (in 2012 less than EUR 92,407).

For IMT purposes, we list below several actions that are deemed transfers of property:

- Promissory sale or exchange of property agreements in which the economic ownership transfer of the properties occurs.
- Letting of property for more than 30 years.
- Direct acquisition of at least 75% of the share capital of private limited liability companies, general partnerships, or limited partnerships that own property.
- Irrevocable powers of attorney related to property acquisitions or share capital of limited liability companies in the conditions stated above.
- Transfer of contractual position foreseen in promissory sale agreement.

Several exemptions from this tax are available, in particular, for the following situations:

- Operations qualifying as restructuring or cooperation projects, upon previous request, which are:
  - Mergers
  - Split-ups or spin-offs through transfer to a newly established company of all the assets of other companies, which are allocated to a technically independent business, provided that the transferor ceases to engage in the corresponding activity.
  - The acquisition by an existing company, under certain conditions, of all the assets of other companies, which are allocated to a technically independent business, provided that the transferors cease to engage in the corresponding activity.

The acquisition of property bound for resale may also benefit from IMT exemption, if the acquirer is able to demonstrate to the tax administration that it is acquiring the property for resale and is acting in a normal and usual basis, i.e. on a business basis. For this purpose, the acquirer should demonstrate that it has made at least one transaction in the previous year, i.e. either acquired property for resale or sold property previously acquired for resale. If no transaction has been made by the acquirer in the previous year, IMT will have to be assessed and paid, although the acquirer may be entitled to claim later from the tax administration the tax paid on the acquisition. For this purpose, the same property has to be sold within three years, and the new purchaser may not acquire it for resale again.

### *Stamp duty*

As a general rule, stamp duty is levied on the transfer of property ownership at 0.8%. The taxable basis is the purchase price, or the tax registration value appraised under IMI rules.

However, if the transfer of property is subject to VAT (by means of waiving the VAT exemption), it is not subject to stamp duty.

### *Annual local property tax (Imposto Municipal sobre Imóveis or IMI)*

IMI is the municipal tax levied on the ownership of property. The tax is due by the owner of the property on 31 December of each year.

IMI is levied on the definitive assessed tax registration value of land and buildings located within each municipality. New assessment rules have been in force as of 1 December 2003 (with further changes from 1 July 2007) in order to adjust the tax basis of the buildings.

According to the IMI rules, the tax registration value of the urban properties will also be adjusted. In case of property intended for commercial, industrial and services the tax registration value is updated annually, based on the official monetary devaluation index. The remaining property (e.g., for residential purposes) is updated on a triennial basis, based on 75% of the official monetary devaluation index.

IMI taxable basis is calculated in accordance with the tax registration value of the property and the corresponding rates are:

- Rural property – 0.8%.
- Urban property appraised under the *Contribuição Autárquica* rules – 0.5% to 0.8%.
- Urban property appraised under the IMI rules – 0.3% to 0.5%.
- Tax resident in a tax haven owning urban property in Portugal, except for individuals – 7.5%

The applicable rates for urban property held by either Portuguese residents or non-residents (but not residents from a tax haven), can be tripled annually in the event that the building is unoccupied for over one year or in ruins.

Several IMI exemptions are available. Among others, we highlight the following:

- Houses or flats considered as permanent places of abode.
- Buildings qualified as historical property.
- Property owned by open-ended or publicly offered close-ended real estate funds and pension funds established under Portuguese law.
- Property acquired by property trading companies under certain conditions.

This tax is allowed as a deduction in the computation of corporate tax, for companies owning and using land or buildings for their business undertaking.

### *Special tax (Contribuição Especial)*

Literally translated as special tax, *Contribuição Especial* may be defined as a contribution due to extraordinary benefits, or externalities, arising from works of general or public interest, or when the activity carried out by one entity causes higher public expenditure in the services or facilities that have to be provided by the state or municipalities. In summary, this tax is levied on the increased worth of land capital.

Major infrastructure works have been undertaken in Lisbon and its outskirts, including the *Circular Regional Interna de Lisboa* (CRIL), or Lisbon inner ring-road, the *Circular Regional Externa de Lisboa* (CREL), or Lisbon outer ring-road, the train crossing on the first bridge across the river Tagus and new subway lines extending to Lisbon's outskirts. The construction of a second bridge across the river Tagus, and the area around the EXPO 1998 site are also of great relevance for the city. This tax also applies as a result of infrastructure work undertaken in Porto and its outskirts.

From a tax standpoint, it is considered that the underlying values of properties deemed to be close to these infrastructure works have increased substantially, simply because they now benefit from them. The *contribuição especial* is a tax on this valuation rise.

In general, this tax is levied on the increased value of farmland when construction is undertaken. However, it also applies to the increased value of construction plots, or development land, as well as areas resulting from the demolition of already existing buildings. Nevertheless, a special tax only applies when the relevant land is located in a parish that is referred to in the Special Tax Statute.

Special tax is applicable over a 20-year period, and it cannot be levied twice on the same property, being an one-off tax. Equivalent or similar taxes or impositions, such as capital gain charges (*encargos de mais-valias*), which is a charge levied by the municipalities due to the licensing process, should also not be levied on properties located in the areas subject to the special tax.

### *Urban rehabilitation*

The Portuguese Urban Rehabilitation Regime provides tax incentives for the rehabilitation of properties that started on or after 1 January 2008 and are concluded by 31 December 2020.

The property subject to rehabilitation must fulfil certain requirements related to its lease status or its physical location.

In broad terms, this regime includes several tax incentives. Among others we highlight:

- Possible IMI exemption for urban property subject to rehabilitation, applicable for a period of five years which may be renewed for a subsequent period of five years.
- Possible IMT exemption for the acquisition of urban property considered a permanent place of residence destined for urban rehabilitation. It must be the first transaction of the building after the rehabilitation and the building must be located in an urban rehabilitation area.
- Income obtained by both individuals and corporate investors and derived from the units held in the referred funds is subject to a WHT rate of 10% for income tax purposes.

Several particularities apply in the case of tax-exempt entities and non-residents.

### *Value added tax (VAT)*

#### *General*

In accordance with the Portuguese VAT code, operations subject to IMT are VAT-exempt. As a result, the transfer of property subject to IMT is, as a general rule, exempt

from VAT. Although there are some exceptions, the leasing of property is also a VAT-exempt operation under the Portuguese VAT code.

Contrary to what happens in other EU Member States, Portuguese VAT provisions do not distinguish between new and second-hand or old property properties.

Besides, the basic concepts of the Portuguese VAT system, such as taxable persons, nature of goods, supply of goods and services, are in line with the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and the Portuguese VAT regulations are, therefore, comparable to those applicable in other EU Member States.

The supply of goods and services are the main target transactions, being, in principle, subject to VAT. Any operation not falling within the supply of the goods concept (and that implies any sort of payment or contribution, either in cash or in kind), qualifies as a supply of services, meaning this is a residual concept.

For civil law purposes, the transfer of legal ownership, or other rights on property, is submitted to specific contractual and registration formalities typified in the law. VAT legislation transposed this concept in order to qualify property transactions.

As for services related to property, the definition is unclear, and has to be ascertained on a case-by-case basis. The most common transaction falling within the scope of services is the leasing of property.

The place of supply of property, including the settlement, transfer, assignment, or yield of rights *in rem* (i.e. beneficial ownership), is the Portuguese territory whenever the property concerned is located in Portugal. As a result, Portuguese VAT should be charged. This is also applicable to installation and assembling supplies of property, although simplification measures are applicable when the supplier is a non-resident entity with no PE herein.

Services connected with property such as leasing, repairs, etc. will also be considered located in Portugal if the respective property is located there. Other services, like engineering and architectural projects, will follow the same rule, provided they are related to a particular existing property. In the case of consultancy and advisory services not linked with a specific building, the place of supply will be the place where the recipient of the services has established their business.

The general rule of the Portuguese VAT code is that the taxable amount will be the consideration paid for the supply of goods or for the services rendered by the acquirer or a third party.

This value includes taxes, duties and other charges, exclusive of VAT. Ancillary and incidental expenses such as commissions, packing, transport, insurance and publicity costs, charged by the supplier to the acquirer, will also be included in the taxable amount, and are fully applicable in what concerns property supply.

### *Transfer of property (exemption waiver)*

As previously mentioned, the general rule in Portugal is that the transfer/leasing of property is VAT-exempt.

Nevertheless, in order to minimise the effects arising from this exemption, the relevant legal provisions allow a VAT-exemption waiver, with the VAT rate of 23% (on

the mainland), 22% (on Madeira island) and 16% (on the Azores islands) then applicable.

In order to qualify for the exemption waiver, several strict conditions need to be met. According to the VAT-exemption waiver regime on real estate transactions, there are three main types of conditions that need to be met:

- Conditions regarding the property:
  - The property (land for construction, building, or fraction of a building) is registered for tax purposes.
  - The property is registered in the name of the owner or landlord, and it cannot be residential property.
  - The sale or the lease agreement needs to cover the whole of the property unit.
  - The property unit is allocated to the undertaking of VAT-able transactions, i.e. those that give a right to deduct input VAT.
  - In the specific case of lease agreements, the annual rent should amount to at least one-twenty-fifth (1/25) of the acquisition price or construction cost of the property.
- Situations where it is possible to apply:

Once all conditions above are met, it is only possible to apply for the VAT-exemption waiver (charging VAT on the sale or lease agreement), if one of the following situations arises:

- In the first sale or letting following the construction of the property where it is possible to recover the total amount (or part) of the input VAT arising from the construction.
- In the first sale or letting upon major improvement works that increase the tax registration value of the property by more than 50%, when input VAT can still be recovered.
- In every subsequent sale or letting followed by a previous VAT transaction, when the property is still within the clawback period (in certain cases, VAT recovered may need to be paid back to the Government Revenue department, currently 20 years).

It is not possible to waive the VAT exemption in the case of subletting, except when the building is used for industrial purposes.

- Status of the parties

Regarding seller/landlord and the acquirer/tenant, respectively, being VAT taxpayers, both parties need to:

- Have VAT-able revenue exceeding 80% of total turnover. This rule may exclude the possibility of a waiver in the case of insurance companies, banks and

financial institutions, the State and municipalities in general, when using the property or letting of property.

- Having accounts prepared under local adopted accounting principles, as required by both personal and corporate income tax codes.

This means that entities that own property in Portugal which are considered non-resident without a PE in Portugal, are not able to apply for the VAT-exemption waiver, and are therefore not able to recover any input VAT.

The VAT-exemption waiver is requested on a transaction basis, in respect of each building/land sold or leased, through a request made by the seller/landlord to the Portuguese VAT administration on its internet website; and it has to be obtained prior to the signing of the sale or lease agreement.

Input VAT incurred with each operation or project, and with construction works, is deductible, from the moment the property is allocated to VAT-able operations, for a period of four years back from the date of each invoice issuance.

As mentioned, the transfer of property located in Portugal is, in principle, subject to IMT, and therefore VAT-exempt. Nevertheless, the VAT exemption can be waived, but that will have no consequences with regard to IMT, meaning that avoidance of this tax cannot be achieved by means of charging VAT on the transaction. As a result, if the option for taxation is exercised, both VAT and IMT will be levied, with VAT calculated upon the value of the transfer. If VAT is levied, stamp duty will not be due.

In the event of an acquisition of property, in principle, the VAT will be self-assessed by the acquirer, meaning that VAT will be charged and deducted, if and when possible by the acquirer of the property.

### *Right to deduct input VAT*

Mixed VAT-able entities, i.e. entities that carry out both taxable and exempt operations, are entitled to deduct VAT on the proportion of the taxable operations carried out, based on a specific method of calculation (pro rata method). This is where the numerator includes the operations with a right to deduct input VAT, exclusive of VAT, and the denominator the total amount of operations exclusive of VAT.

The fraction gives the percentage of deductible VAT, which is calculated on a yearly basis, based on the calculations of the previous year, i.e. the last VAT return, but must be adjusted at the end of each year.

Deduction per distinct activity, which allows the deduction of VAT on a separate basis for each taxable and exempt activity, is another VAT deduction regime available (allocation method), which requires separate accounts per activity. This regime is compulsory in the case of property activities, such as property developers.

Taxable persons are allowed to combine both VAT deduction regimes.

In the case of VAT-exemption waiver, reimbursement of total input VAT can only be claimed after the acquisition agreement or the definitive leasing contract is signed (in both cases prior VAT-exemption waiver certificates must be obtained).

The deduction of the VAT incurred by the seller/landlord related to each building, or unit thereof, must be made on a case-by-case basis in respect of each building sold or

leased. The VAT incurred in each building or land acquired or constructed can only be deducted within four years, counting from each invoice issuance date.

The seller/landlord is required to file periodic VAT returns from the moment the certificate is issued by the tax department.

VAT returns should be filed on a monthly or quarterly basis, depending on whether the annual turnover equals or exceeds EUR 650,000, being delivered to the VAT administration by the tenth day of the second subsequent month after the month when the chargeable events occurred. Quarterly returns have to be filed with the Portuguese Tax Administration by the fifteenth day of the second month after the respective quarter calendar ends.

VAT deduction on property is subject to a VAT claw back period of 20 years (10 years for properties acquired before 13 February 2001), during which certain occurrences may require VAT adjustments. The right to VAT deduction is attributed, provided the property is allocated to a VAT-able activity. Any modifications to this situation in the course of the 20 (10)-year period since the occupation of the property require adjustments of VAT on behalf of the revenue.

### *Foreign entrepreneurs*

Foreign entities that own Portuguese property, obtain income from such property and that do not have a PE in Portugal have to obtain a taxpayer number from the National Register Collective Body, and register with the Portuguese Tax Administration by filing a Statement of Beginning of Activity.

In this situation the foreign entity would not have to prepare accounts. This means that a foreign entrepreneur would not be able to waive the VAT exemption on the acquisition/sale of property, or on lease agreements, and is therefore unable to deduct input VAT on the acquisition of property (or VAT on construction costs).

If a PE exists in Portugal, besides the above-mentioned obligations, foreign entities are subject to registration with the Commercial Registry Office. From an accounting standpoint, the foreign entity must prepare accounts.

If the use of the property is restricted to rental/leasing, and the exemption waiver option is not exercised, no further requirements will arise from a VAT point of view, apart from registration for VAT purposes. However, if the foreign entity wishes to deduct input VAT and to exercise the waiver option, it will be required to file monthly or quarterly VAT returns.

The reverse charge mechanism is applicable where the supplier of goods or services is not VAT-registered in Portugal and the supplier of the goods, uses for the supply, a VAT-registration number of an EU country. In those cases, the Portuguese VAT entity will account for the VAT due, and will do the corresponding deduction, if it is entitled to, on its own VAT return.

# Acquisition of a Portuguese property company

## *General*

Companies or individuals wishing to invest in Portuguese property may acquire the shares in a company owning property, rather than make a direct purchase of the property.

Given the fact that the company may have a tax history and contingent liabilities, it is generally advisable to conduct a due diligence review of the target company. In such a due diligence, corporate tax, VAT and the transfer tax position of the company should be checked. If necessary, the seller of the company should be asked for certain guarantees on the tax position of the company.

## *Tax aspects*

### *Corporate tax*

#### *Resident companies*

If shares in a company owning property are acquired by another company, the latter company must value the shares in the acquired company at the acquisition price.

Contrary to a direct purchase of property, the purchaser of the shares in a property company will not benefit from any step-up in the value of the property for taxation purposes, since for corporate tax purposes, the company owning the property must continue to value the property at the original acquisition price, even if booked at fair value. Hence, the fiscal book value of the underlying property will remain the same, and the annual depreciation (in case of being booked at cost) will be lower, compared to a direct purchase of property.

In the case of a dividend arising from substantial shareholdings, the beneficiary company may qualify for a special tax regime in accordance with which no WHT is levied on the payment of the dividend, and the dividend is fully exempt from corporate income tax when received.

For these purposes, besides the subsidiary being subject to corporate tax, the following conditions should also be met:

- **Holding level:** the parent company must have a direct shareholding of at least 10%.
- **Holding period:** the respective shareholding must be held for one consecutive year before being entitled to the exemption, or, since the incorporation date of the subsidiary, if this period is shorter, providing the same one-year holding period is observed.

Under the above-mentioned circumstances, no WHT will be levied, and the parent company will be allowed a full exemption from corporate income tax on dividends received, except when held for less than one consecutive calendar year before actual distribution, under which the WHT is levied. If the above conditions are not met, WHT will be levied.

The corporate income tax withheld constitutes an advanced payment on account of the final tax due by the company receiving the dividend.

In cases where dividends are paid either to a Portuguese holding company, i.e. *Sociedade Gestora de Participações Sociais* (SGPS), which has held the shareholding for at least one year, or within a fiscal unity, no WHT will apply.

Capital gains realised on the sale of shares are part of the company's taxable income, and are equal to the difference between transfer price and acquisition price of the shares. Only 50% of the negative balance between capital gains and capital losses arising on the sale of the shares is tax-deductible.

However, capital losses arising on the sales of shares are not tax-deductible if maintained for less than three years and the following applies:

- The shares were acquired to a related entity.
- The shares were acquired to a tax haven entity.
- The shares were acquired to an entity subject to a special tax regime.

Also, capital losses on the sale of shares are not tax-deductible if shares are sold to a related party or to a tax haven entity.

A company subject to corporate income tax may apply to the reinvestment relief mechanism. Therefore, capital gains arising from a 10% shareholding owned at least for one year should only be taxed for 50% of the gain, where the proceeds from the sale of the shares are reinvested in the acquisition of the share capital of a resident company, or in the acquisition, fabrication or construction of tangible fixed assets, non-consumable biological assets, or investment properties that are allocated to the entity's activity. This regime also applies where the proceeds from the sale are partially reinvested.

Given a final corporate tax rate of 25% (or 26.5% if *derrama municipal* is levied or 31.5% if local and state surtaxes apply), the adoption of reinvestment relief will result in an effective tax of 12.50% (or 13.25% or 15.75%) corresponding to 50% of the capital gain.

In order to benefit from this regime, companies must state in the tax return corresponding to the tax year when shares are sold where they intend to reinvest the proceeds.

If the reinvestment does not take place, an adjustment will have to be made to the taxable income of the second year after the year of sale, corresponding to the amount of the non-taxed capital gain multiplied by 1.15. Late assessment interest will accrue.

If no tax is due because of tax losses carry forward, accumulated losses are adjusted accordingly.

Please note that Portuguese holding companies (SGPS) have a special tax regime that concerns the taxation of capital gains generated from the sale of shares.

### *Non-resident companies*

Dividends distributed by a resident-affiliated company to a non-resident parent company are subject to a 25% WHT (or 30% if distributed to a resident in a country,

territory or region subject to a clearly more favourable tax regime, i.e., a tax haven entity).

Under the EU Parent-Subsidiary Directive, this rate can be eliminated where the EU parent company also qualifies for the Directive, meaning the non-resident parent company has to hold at least 10% of the share capital of the affiliated company resident in Portugal for one consecutive year.

Where the minimum holding period of one consecutive year is not observed, provisional WHT under domestic law is levied. Such provisional WHT may be refundable when the minimum holding period of one year is achieved.

The WHT rate may also be reduced, usually to 15% or 10%, under the tax treaties concluded by Portugal.

Capital gains arising from the sale of shares acquired before 1 January 2001 held in Portuguese resident property companies by non-resident companies is exempt in Portugal.

Capital gains arising from the sale of shares acquired on and after 1 January 2001 held in Portuguese property resident companies by non-resident entities is subject to 25% corporate income tax in Portugal. This tax may be avoided, depending on whether the non-resident entity is entitled to the protection of a tax treaty that does not give the right to Portugal to tax such capital gains.

## Personal income tax

### *Resident individuals*

Fifty percent of the annual net balance between capital gains and capital losses obtained by Portuguese residents arising from the sale of property is taxed through brackets with rates varying from 11.5% to the maximum marginal rate of 46.5%.

Capital gains arising from the sale of shares, including the ones held in the share capital of property companies is subject to taxation at the rate of 25%. Or if the individual opts to be taxed at marginal tax rates, such capital gains will be added to the remaining income and taxed through brackets with rates varying from 11.5% to a maximum of 46.5%.

The taxable gain is equal to the difference between the sale price and purchase price of the shares.

Dividends are subject to a 25% WHT. As of 1 January 2006, such a WHT corresponds to the final taxation of such income, unless the individual opts to include the respective amount within their overall income, in which case the tax withheld corresponds to an advance payment of the final tax due under the marginal rates applicable to the total income.

Since 2012, dividends paid or made available to resident individuals by non-resident entities residents for tax purposes in a tax haven, according to a list published by the Government, are liable to a tax rate of 30%, either by WHT or by the application of a special rate.

### *Non-resident individuals*

Capital gains arising from the sale of shares held by non-resident individuals in property companies resident in Portugal are taxed at a 25% flat rate. This taxation may be avoided, depending on whether the non-resident entity is entitled to the protection of a tax treaty that does not give the right to Portugal to tax such capital gains.

Dividends paid to non-resident individuals are subject to WHT at a standard rate of 25% (or 30% if distributed to a resident in a country, territory or region subject to a clearly more favourable tax regime). The WHT rate may be reduced, usually to 15% or 10%, under the tax treaties concluded by Portugal.

### **Property transfer tax (IMT)**

In principle, the acquisition of shares in a company owning Portuguese property does not qualify as an acquisition of property itself; it remains, therefore, outside of the scope of this tax.

However, an exception to this principle applies in cases where shares representing 75% or more of total share capital of an Lda company, of a general partnership, or of a simple limited partnership, owning property are acquired. (See section '*Investing in Portuguese property through a partnership*'.) In this case, the purchase of shares qualifies as a deemed purchase of property, with the tax levied on the fiscal value of the property in proportion to the shareholding transferred.

### **Value added tax (VAT)**

The acquisition of the shares in a company owning Portuguese property is not subject to VAT.

## **Investing in Portuguese property through a partnership**

### *General*

The term 'partnership' may be misleading for investors from most countries whose legal systems include similar types of business organisation, but according to which they are non-incorporated entities, i.e. are not considered as legal entities separate from their partners.

In fact, under Portuguese company law, partnerships are incorporated, meaning they have a legal existence separate from the partners, with several consequences at different levels, e.g. in the field of taxation, where the tax transparency regime is not automatically applicable on the grounds of the legal form adopted.

### *Tax aspects*

#### **Tax transparency regime**

Under Portuguese tax law, the tax transparency regime only applies in very strict cases to a few predetermined entities, not being automatically applicable on the ground of the legal form adopted.

In respect of investments in Portuguese property, companies qualifying as *Sociedades de Simples Administração de Bens*, i.e. companies that manage their own assets

passively, will qualify for the tax transparency regime, provided they do not have more than five shareholders in any day of the calendar year. These can be incorporated both under the form of an Lda or of an S.A. company.

In order to qualify as a *Sociedade de Simples Administração de Bens*, besides having as statutory purpose the management of its own assets, the following circumstances should also apply:

- The company's activity is restricted to the management of its own assets, owned on a permanent basis, so this can be regarded as a passive investment.
- Although the company may carry out other activities, the average of the income related to the passive activity of the three previous years should exceed 50% of the average of the total revenue of the company in the same period. In this case, the transparency regime is only applicable after the third year.

Under the tax transparency regime, the taxable income obtained by the transparent entity is not taxed at the entity level, being allocated to its partners on a proportional basis and taxed at their level.

For the purposes of the allocation of income to be made under this special tax regime, non-resident entities owning a share participation in a company subject to it are deemed to have a PE in Portugal to which the income is allocated.

## Investing in Portugal through a real estate fund

### *General*

#### Real estate funds and the management company

The sole purpose of real estate funds established under Portuguese law is to invest, according to a shared risk principle, funds obtained from investors. Assets are separate and autonomous from the unit holders, but are jointly owned by them. The fund is not a legal entity and it is ruled in the fund bylaws.

It is mandatory that they are managed by management companies, which must be incorporated as joint-stock companies (*Sociedades Anónimas, SA*), with an effective head office in Portugal. Its statutory objective should mainly be to manage one or more funds for the account of the respective unit holders.

#### Types of real estate funds

These funds are divided into investment units and can either be: (i) opened-ended, in which case the units are issued in a variable number; (ii) closed-ended, where the units are issued in a fixed number; (iii) semi close-ended, where the first two types coexist.

#### Regulatory aspects to be considered

The setting up of a real estate fund is subject to prior authorisation from the Portuguese securities market commission (CMVM) upon request of the management company. The Bank of Portugal and the CMVM are both responsible for the supervision of the fund and other related entities.

### Qualifying assets

The qualifying assets to these funds are: (i) urban properties or units divided into horizontal property and rural/farm land; (ii) investment units in funds; (iii) cash instruments, such as bank deposits, certificates of deposits; (iv) shareholdings in property companies under certain circumstances.

## *Taxation regime of real estate funds*

### Taxation at the real estate fund level

For corporate income tax purposes, real estate funds incorporated under Portuguese law are taxed under the tax neutrality principle, i.e. the investor should bear identical or similar taxation investing in it, as if it had directly invested in property.

The real estate funds are taxed on a cash basis. The net rental income is taxed at 20%. Expenses incurred with conservation and maintenance of the property are tax deductible. Since 2012, IMI is also tax deductible.

The net capital gain may be taxed at a final rate of 12.5%. Interest and depreciation charges are not tax-deductible, nor are any other expenses that are not directly related to the property such as, e.g. the management fee charged to the real estate fund. The tax is assessed and paid by the management company annually (April of the following year to which it refers).

Property acquired/owned by open-ended or publicly offered close-ended real estate funds that are set up and operate in accordance with the Portuguese law are fully exempt from IMT and annual IMI. Real estate funds are not exempt from stamp duty on the acquisition of property, levied at 0.8%. Stamp duty is not levied when VAT is charged on the transaction.

### Taxation at the unit holder level

Income paid by the real estate funds to taxable entities resident for tax purposes in Portugal is taxed at the level of the unit holders. These entities are entitled to recover the taxes paid by the real estate fund against their annual tax liability, with any excess refundable by the Government Revenue department.

Income paid to non-resident entities, without a PE in Portugal, is fully exempt from further WHT in Portugal, but a refund of the taxes paid by the real estate fund is not allowed.

## *Other real estate funds*

### Real estate urban rehabilitation investment funds

Real estate investment funds that:

- set up and operate in accordance with the Portuguese law between 1 January 2008 and 31 December 2012,
- whose assets are comprised of at least 75% by properties subject to urban rehabilitation and
- such properties are located in certain specific areas

are fully exempt from corporate income tax on all types of income (including rental income and capital gains). These may also benefit from IMT and IMI exemption.

## Real estate investment funds for residential letting

This new type of real estate fund (*Fundos de Investimento Imobiliário para Arrendamento Habitacional* – FIIAH) set out according to the Portuguese legislation, between 1 January 2009 and 31 December of 2013, may benefit from several tax benefits until 2020. Some of these benefits are:

- Corporate income tax exemption on all types of income.
- IMI exemption for properties that are part of the portfolio of the FIIAH.
- Property transfer tax exemption for acquisitions made under this regime by the FIIAH.

At the unit holder level:

- Personal and corporate income tax exemption on income distributed by the fund. This exemption does not apply to capital gains arising from the sale of such participation units.

Some tax benefits may also be applicable to individuals that sell their residential properties and subsequently sign a lease agreement for such property. Several conditions need to be met.

The above-referred tax regime and respective exemptions are not applicable to entities resident in a country or jurisdiction with a more favourable tax regime (listed tax havens).

## Investing in Portugal through *Sociedades de Investimento Imobiliário* (SIIMO)

### *General*

The *Sociedades de Investimento Imobiliário* (SIIMO) have been introduced in 2010. They are regulated investment vehicles for investing in property. As they are recent, there is no information about their actual use and practical experience about them.

The SIIMO are collective investment schemes adopting the legal form of a joint stock company (*sociedade anónima*), which can either be a fixed capital company (SICAFI) or a variable capital company (SICAVI), whose assets are managed, on a fiduciary basis, on the sole interest of their shareholders. SIIMO can be internally managed, or managed by an independent management company. Assets are entrusted to a depositary bank.

### *Regulatory aspects*

There is regulatory supervision of the SIIMO, the regulatory authority being the CMVM. The management company, if any, is governed by the banking law, is supervised by the Bank of Portugal and is only allowed to manage regulated funds.

Periodical financial reports are sent by the management company to the CMVM.

## *Taxation regime of SIIMO*

Tax neutrality also applies for SIIMO.

The SIIMO are taxed under the same rules as apply for real estate funds for both income and property taxes. SICAFI are taxed like a close-ended real estate fund and SICAVI are taxed like an open-ended real estate fund.

## *Financing the acquisition of Portuguese property*

### *Equity financing*

#### *Portuguese tax aspects*

Under Portuguese tax law, subscription and paying in of statutory share capital at incorporation as well as subsequent increases are not subject to stamp duty.

Registry fees, as well as other related expenses (e.g. contractual expenses), are due on this type of operation.

If the contributions of the shareholders are made in kind by means of a transfer of property to the company, property transfer tax, or IMT, will be levied under general rules. (See section '*Direct investments in Portuguese property*' – '*Property taxes*').

### *Debt financing*

#### *Portuguese tax aspects*

##### *Deductibility of interest*

The general principle regarding the acceptance of costs and expenditures as tax-deductible, is that these are necessary for the company's activity, or may be considered indispensable to generate the taxable profits and gains obtained by the company.

To this extent, interest and other financial expenses are, in principle, tax-deductible, provided they are established at arm's length. Nevertheless, interest arising from financing provided by shareholders can only be deductible to the amount that corresponds to the 12-month Euro Interbank Offered Rate (Euribor) plus a 1.5% spread, on the financing date. This limitation is not applicable to situations subject to transfer pricing rules and to some tax treaties.

##### *WHT on interest*

##### *Resident entities*

Interest received by Portuguese resident companies and individuals, arising from loans and paid by an entity taxable in Portugal, are subject to a 16.5% WHT, which assumes the nature of an advance payment of the final tax due. Interest from bank deposits are subject to a 25% withholding rate, also regarded as an advance payment for companies, but individuals can regard it as a final tax.

##### *Non-resident entities*

Interest received by non-resident companies and individuals, arising from loans and paid by an entity taxable in Portugal, are taxed at a 25% (or 30% if due to a resident in a country, territory or region subject to a clearly more favourable tax regime) flat withholding rate, in cases where the entity receiving the interest is resident in a country that has not signed a tax treaty with Portugal. Where the beneficiary is resident

in a country that has concluded a tax treaty with Portugal, the withholding rate may be reduced, in most cases to 10% and 15%.

Portugal has implemented the Interest-Royalty Directive, under which Portugal still levies WHT at until 30 June 2013 and nil afterwards. The minimum shareholding required is 25% and the definition of associated company is in line with the one set out in the Directive.

### Indirect taxes (stamp duty)

Stamp duty, which applies to a wide range of documents and acts, is also levied at different rates on different aspects/components of funding operations. In this respect, it is important to distinguish between those concluded with banks or other credit institutions, and those established with the company's shareholders. In the former case, stamp duty applies as follows:

- Principal lent or capital guaranteed, depending on the maturity, at 0.04% per month for funding up to one year, at 0.5% for funding with maturity varying from one year to less than five years, and 0.6% for five or more years.
- Commissions on guarantees, at 3%.
- Interest, commissions and other fees charged by banks or financial institutions, at 4%.

Shareholders' loans may also be subject to stamp duty, although several exemptions are available, depending on the specific terms and conditions of the transaction.

### *Debt/equity ratio*

When considering a company's funding provided by shareholders, special tax rules on thin capitalisation should be taken into consideration. Thin capitalisation rules apply in Portugal to entities taxable therein on their indebtedness towards non-resident related parties. A debt-to-equity safe harbour ratio of 2:1 applies. Indebtedness towards non-resident third parties (e.g. banks) but guaranteed or secured by non-resident related parties is also covered by thin capitalisation rules. Since 1 January 2006, the thin capitalisation rules are not applicable when the debt is obtained from a related entity resident for tax purposes in an EU Member State.

Interest arising from excessive non-resident-related party debt will be disallowed as a deductible tax expense, unless the taxable entity or company is able to demonstrate that its indebtedness level and capital structure is established at arm's length. However, the part of interest whose tax deductibility is disallowed under these rules is still subject to WHT as interest, and not as a deemed dividend.

For the purposes of the Portuguese thin capitalisation rules, related parties, qualifying equity and qualifying debt are defined as follows:

- Related parties are defined as under the same rules that apply to transfer pricing.

Qualifying equity, which will be relevant for these purposes will be the amount determined in accordance with the Portuguese generally accepted accounting principles, with the following exceptions:

- The part of the statutory share capital that has not yet been fully paid in.

- Technical or other revaluation of assets not covered by tax legislation.
- Adjustments resulting from the application of the equity method to account financial investments.

For qualifying debt, related parties' indebtedness is defined as any form of financial assistance given by the related parties to the Portuguese company. Two other forms of financial assistance are also considered:

- Balances outstanding more than six months, resulting from trading or commercial transactions.
- Non-resident third-party financing with recourse to related parties as defined under this legislation.

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# *Real Estate Going Global Romania*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 15 June 2012.**

# Real Estate Tax Summary – Romania

## General

In the Romanian law is enshrined the principle of free transferability of assets, with only few restrictions on the acquisition of real estate or a set of conditions to be met to this effect (e.g. restrictions/conditions to be fulfilled for foreign companies and individuals; the pre-emption right of the state regarding certain property with special statute, etc).

Romanian natural persons and legal entities (regardless of the citizenship of the shareholders) are free to acquire land.

Foreign citizens, stateless persons and legal entities are allowed to acquire land ownership in Romania only under certain circumstances. European nationals, part of the EU or EEA, may freely acquire construction land in Romania if they are resident and will be allowed to acquire agricultural land and woodland after seven years would have been passed from Romania's accession to EU. Foreign nationals outside the EU and the EEA will be able to acquire ownership in compliance with an international treaty.

## Taxation of income obtained from transfer of real estate, from sale of shares or direct investments

The income from the transfer of real estate is taxed differently depending on the period of ownership and the value of the real estate.

Capital gains from sale of shares are taxed in Romania at 16%. Foreign individuals are generally subject to the same tax treatment as Romanian individuals, but depending of the fiscal residence of the individual, treaty relief may be available.

In the event of a direct investment, under Romanian law, any profit (including capital gains) related to Romanian real estate earned by a non-resident company is subject to 16% profit tax. Under most of the currently applicable double tax treaties concluded by Romania, capital gains obtained by non-residents from real estate property located in Romania are generally taxable in Romania. Ownership of real estate does not necessarily constitute a permanent establishment (PE) in Romania.

## Rental income

If the landlord is an individual, the net rental income (i.e. after a deemed expenses deduction of 25%) is subject to individual income tax at a flat rate of 16%.

If the landlord is a company, the net rental income is taxed at 16% profit tax. Expenses incurred that are directly related to the obtainment of the rental income are generally

tax-deductible from the taxable revenue as a whole, although there are some special rules that might make some expenses non-deductible.

## Depreciation

The depreciation method to be used for buildings is the straight-line method. Other methods, such as the accelerated depreciation or reducing balance methods, are not applicable for buildings.

## Property taxes

### *Building tax*

For buildings owned by companies, the building tax rate is set by the Local Council at between 0.25% and 1.5% of the entry value of the building, adjusted by the value of reconstruction, consolidation, modification and extension works, and the revaluation, if applicable. If a building has not been re-valued in the last 3 years, the rate will be increased and will be between 10% and 20%, while if it has not been re-valued in the last 5 years, between 30% and 40%. The taxable value of fully depreciated buildings is reduced by 15%.

Building tax is paid twice a year, by 31 March and 30 September, in equal instalments. As a general rule, if the building tax due for the entire year is paid in advance by 31 March, a reduction of up to 10% may be granted by the Local Council.

### *Land tax*

Owners of land are subject to land tax established at a fixed amount per square metre, depending on the rank of the locality where the land is located and the area or category of land use, in accordance with the classification made by the Local Council.

Companies are not subject to land tax on land where buildings are sited.

Similar to building tax, land tax is paid twice a year, in equal instalments, by 31 March and 30 September. A 10% reduction is granted for full advance payment of this tax by 31 March.

# ***Real Estate Investments – Romania***

## **Legal framework**

### ***Acquiring title to real estate in Romania***

The principle of free transferability of assets, with the owner being free to dispose of property, is enshrined in Romanian law. The applicable law prescribes a few restrictions on the acquisition of real estate or a set of conditions to be met to this effect (for instance: for the time being, foreign companies and individuals may not acquire title to agricultural and forest land in Romania; the duty to observe the pre-emption right of the state if selling property qualified as historical monument; the pre-emption right of the state if selling woodland; the pre-emption right of the dispossessed owner to the purchase of their expropriated real estate when the scope of the dispossession was not fulfilled; the pre-emption right of the lessee for the nationalised houses before 1990, which are not resituated back to the former owners, etc.).

Romanian natural persons and legal entities (regardless of the citizenship of the shareholders) are free to acquire land.

Foreign citizens, stateless persons and legal entities are allowed to acquire land ownership in Romania, only under the following circumstances:

- European nationals (a category including nationals of the European Union (EU) and of the European Economic Area (EEA)), under Law No.312/2005 (which entered into force on 1 January 2007), may freely acquire construction land in Romania if they are resident (i.e. they hold a residence permit issued by the Romanian authorities in case of individuals or having a secondary office registered with the Romanian Trade Registry for companies). Agricultural land, woods and woodland may not become the property of EU nationals before seven years have passed from Romania's accession (however, EU/EEA farmers wishing to establish their business in Romania are permitted to buy such land as from the accession date).
- The law states that EU citizens and companies that are not resident in Romania may acquire construction land for secondary residences only after five years, following the law's entry into force thus starting with 1 January 2012.
- Foreign nationals outside the EU and the EEA will be able to acquire ownership in compliance with an international treaty to which Romania is a party and on a reciprocal basis.

Foreign individuals or companies may own buildings and may acquire the right to use land (based on lease agreements, concession agreements, etc.).

### ***Notarisation and registration of title to real estate***

Romanian law requires the notarisation of any transfer agreement regarding ownership of land or house located in Romania. Notarisation is compulsory for the validity of

the ownership transfer. The notarised form for the transfer of ownership over houses is mandatory starting July 2010.

The ownership transfer has to be recorded in the Real Estate Register (Land Register) in order to be effective against third parties. However, in some parts of Romania, the registration of ownership in the Real Estate Register has only recently been implemented and, therefore, it may be difficult to verify ownership when purchasing real estate property. It is advisable to conduct legal title checks of any property prior to acquiring it.

Note that more recently (i.e. 1 October 2011), Romania adopted a new Civil Code which stipulates that the registration with the Land Register is made for the validity of the ownership transfer and not only for ensuring its effectiveness against third parties. However, the said provisions will only enter into force after the full cadastral mapping of real estates in Romania is completed.

The National Cadastre and Land Registration Agency regulates the real estate property registration in Romania, a role taken over from the Ministry of Justice. This Agency also coordinates and oversees the performance of cadastral work at the national level.

Ownership and other real rights to an immovable asset are to be entered in the real estate information register (i.e. Land Register), solely on the basis of deeds creating or transferring rights *in rem*, which have to be concluded with the observance of the authentic (notarised) form.

Upon authentication of an instrument establishing, modifying or extinguishing a legally enforceable right in property, the notary public requests a Land Register abstract for authentication or, as the case may be, a certificate of charges. For the valid conclusion of a transferring deed of ownership, the owner is obliged to present the notary public a fiscal certificate attesting that the property is not state-owned and that there are not any outstanding taxes. During the term of validity of the abstract for authentication, the Real Estate Registry may only register the transaction for which the abstract was issued.

After the public notary has prepared the deed of conveyance, which alters, establishes or extinguishes a legally enforceable right in real estate, the notary shall register the operation with the Land Register.

### *Time-sharing legislation*

The Government Emergency Ordinance that transposes Directive 2008/122/CE of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts” has also taken effect starting from 23 February 2011.

### *Mortgaging real estate*

Mortgages are created under authentic deeds and must be recorded in the Land Register to have an effect towards third parties.

Mortgages are created only over land/buildings as a whole or over the share owned by any of the co-owners. The creation of mortgages over a future asset is subject to compliance with specific regulations regarding mortgage credit for real estate investments, based on the prior registration with the Land Register of the building permit and the partial delivery and acceptance minutes.

The intent to create a mortgage over land/building may also be registered with the Land Register. Further to the intent being registered, if effectively created, the mortgage has a ranking corresponding to the intent of creating the mortgage already registered with the Land Register. Recording of the intent to mortgage expires after two months.

In order to foreclose on the mortgage, the mortgagee (e.g. a bank) must resort to a bailiff to start the foreclosure procedure. Commencement of this procedure is registered in the Land Register. Objections can be filed against the foreclosure procedure in front of a competent court, which may suspend the foreclosure procedure based on a specific request to this effect.

In the event of bankruptcy, the mortgagee submits its claim to the liquidator and has priority in the sale proceedings of the asset mortgaged over any other receivables, except for the taxes, stamps and other liquidation costs relating to the sale of the asset.

### *Large retail outlets*

The operation of large retail outlets (i.e. premises larger than 1,000 square metres) requires approval from the Social and Economic Council in charge of examining and approving such large retail outlets.

### *Public–Private Partnership (PPP) legislation*

New legislation instrumental to EU integration relating to public–private partnerships (as a variety of works concession agreements) has been enacted (i.e. Emergency Ordinance no. 34/2006). The focus of the recent legislation is the design, financing, building, exploitation, maintenance and transfer of any public asset under a ‘public–private partnership agreement for work concessions’.

In accordance with the above provisions, assets being private property of the state resulting from the implementation of a PPP project, as well as the plots of land used for the project, may be alienated, mortgaged, pledged or posted as security for the benefit of third parties, provided the prior approval of the owner has been obtained.

## **Taxation**

### *Introduction*

Set out below are the main provisions within the Fiscal Code regarding real estate. The current definition of real estate property refers to land, buildings or constructions built or incorporated into a land area.

### *Taxation of investments through a Romanian company*

On the sale of real estate by a local company the capital gain is included in the taxable profit of the company, subject to 16% profit tax (if in an overall profit position). Capital losses on sale of real estate may generally be offset against regular profits of that company.

The sale of shares in a Romanian company by another Romanian company is also subject to 16% profit tax/income tax. If the shares in a company are sold by a non-resident corporate shareholder, they are also generally subject to tax at 16%, although

a relevant double tax treaty may exempt the transfer of shares from tax in Romania (by allocating the right to tax these to the country of the seller).

### *Taxation of income obtained from transfer of real estate by Romanian and/or non-resident individuals*

Income from the transfer of real estate is taxed as follows:

- for real estate owned for less than three years:
  - for values up to RON 200,000 the income tax is 3%
  - for values exceeding RON 200,000, the income tax is RON 6,000 + 2% of the amount exceeding RON 200,000.
- for real estate owned for more than three years:
  - for a value up to RON 200,000 the income tax is 2%.
  - for a value exceeding RON 200,000, the income tax is RON 4,000 + 1% of the amount exceeding RON 200,000.

No income tax is due for ownership over estates acquired under special laws, for donations between third-degree relatives, donations between spouses, and for inheritances, provided the procedure is finalised within two years (an income tax of 1% is levied if the procedure is not completed within those two years).

Income tax due for transfer of ownership is calculated at the value declared by the parties in the transfer documents and withheld by the notary public. If the value declared by the parties is lower than the estimated value established by the expert appraisal conducted by the Chamber of Notaries Public, the income tax is calculated at the reference value. The tax remittance deadline is day 25 of the month following that when the income was withheld.

### *Taxation of sale of shares in the case of Romanian and/or non-resident individuals*

Capital gains from sale of shares are taxed in Romania at 16%.

The obligation of calculating and paying the income tax representing advance quarterly payments for the annual income tax on capital gains from the transfer of securities held in listed companies lies with the taxpayers. The obligation of calculating, withholding and wiring the income tax in case of gains from the transfer of shares in case of non-listed companies lies with the buyer, at the moment of acquisition.

Any net loss resulting from the transfer of securities, other than shares and transferable securities in non-listed companies can be carried forward for up to seven consecutive tax years.

Foreign individuals are generally subject to the same tax treatment as Romanian individuals. However, based on the fiscal residence of the individual, treaty relief may be available. Depending on the details of the transaction, the taxpayer has

the obligation to compute, withhold and pay the capital gains tax from sale of shares. To fulfil this requirement, non-residents may appoint a Romanian fiscal representative or a tax agent.

### *Direct investment by foreign companies*

In the event of a direct investment, under Romanian law, any profit (including capital gains) related to Romanian real estate earned by a non-resident company is subject to 16% profit tax. Under most of the currently applicable double tax treaties concluded by Romania, capital gains obtained by non-residents from real estate property located in Romania are generally taxable in Romania. Ownership of real estate does not necessarily constitute a permanent establishment (PE) in Romania.

In general, starting with 2010, all Romanian companies are subject to an advance payment tax system (quarterly payments made based on last year's profit tax adjusted by the inflation rate). However, in case of foreign companies, income from sale of shares and real estate located in Romania will continue to be due by the 25th of the month following the quarter in which the transaction took place.

Foreign legal persons are required to submit annual profit tax returns. They may appoint a tax agent/fiscal representative for meeting the above requirements for payment of profit tax and the submission of annual tax returns.

### *Basis of taxation*

The taxation of an owner of real estate property is as follows:

#### *Rental income – individuals*

If the landlord is an individual, the net rental income (i.e. after a deemed expenses deduction of 25%) is subject to individual income tax at a flat rate of 16%.

Individuals who derive income from more than five rental contracts in one year are obliged for the next fiscal year to treat such income as income from independent activities and pay tax accordingly.

Foreign individuals who earn rental income are required to submit a statement on the income estimate within 15 days of the conclusion of the rental contract.

#### *Rental income – companies*

If the landlord is a company, the net rental income is taxed at 16% profit tax. Expenses incurred that are directly related to the obtainment of the rental income are generally tax-deductible from the taxable revenue as a whole, although there are some special rules that might make some expenses non-deductible. In their Articles of Association, companies should have 'rental activity' listed as their object of business in order to let real estate property.

### *Depreciation*

The depreciation method to be used for buildings is the straight-line method. Other methods, such as the accelerated depreciation or reducing balance methods, are not applicable for buildings.

The Official Fixed Assets Catalogue, published under government decision, states the useful lives to be used for tax purposes. Ranges are provided for classes of fixed assets, from which the taxpayer can choose the useful life. The depreciation rates

applicable to buildings vary according to the type of building. For office buildings, the depreciation period is between 40 and 60 years, while for other commercial buildings the depreciation period is between 32 and 48 years. Improvements made to buildings by the owner will generally follow the depreciation period of the building. Improvements in a leasehold property are generally depreciable over the remaining contractual period. It is possible to identify various components of the building, which can be depreciated separately.

Accounting revaluations are considered when computing the depreciable amount of fixed assets.

Land is not depreciable.

### *Leasing provisions*

Instead of a rental agreement, buildings could be leased either on a financial or operational basis.

A financial leasing contract is any leasing contract that meets at least one of the following conditions: the risks and benefits of the ownership over the goods subject to leasing are transferred to the user upon commencement of the leasing contract; the leasing contract explicitly provides for the transfer of ownership over the goods subject to leasing to the user upon expiry of the contract; the user has an option to buy the goods subject to leasing upon expiry of the contract and the ratio between the residual value and the principal is less than or equal to the ratio between the normal maximum useful life, minus the leasing period, and the normal maximum useful life; the leasing period exceeds 80% of the normal useful life of the goods subject to leasing (for the purposes of this definition, the leasing period includes any period for which the leasing contract may be extended); the total value of the leasing rates, ancillary expenses excluded, is higher than or equal to the entry value.

An operational leasing contract is any leasing contract concluded between the lessee and the lessor who transfers to the lessee the risks and benefits related to the ownership over the leased goods except for the risk of selling the goods at their residual value, and which does not fulfil the conditions of financial leasing. The risk of selling the goods at their residual value occurs when the purchase option is not exercised upon commencement of the agreement or when the agreement expressly provides for the return of the goods.

Under financial leasing, the lessee (user) is treated from a tax perspective as the owner, whereas under operational leasing it is the lessor that is treated as such. The depreciation of assets that are the object of a lease agreement may be made by the lessee, under financial leasing, or by the lessor, under operational leasing. With financial leasing, the lessee deducts interest, and with operational leasing, the lessee deducts rent (leasing instalment).

### *Revaluation of fixed assets*

Companies are allowed to revalue their fixed assets at the end of each year, according to their own accounting policies. Starting with 1 May 2009, the step-up in value is not effective for tax purposes when calculating depreciation expense. The same principle would apply when the building is sold or written-off. So there is no longer a tax benefit for revaluations. This rule applies for all revaluations performed after 1 January 2004.

Companies need to keep separate records to reflect the distinct computation of the fiscal and the accounting regulations.

### *Loss carryforward*

Taxable losses can be carried forward for seven consecutive years (starting with losses incurred in year 2009). For losses incurred prior to 2009, the carryforward period is five years.

## Value added tax (VAT)

### *Real estate operations*

#### **VAT exemption with the option for taxation**

Under the current VAT law, rental/leasing of real estate property is deemed as a VAT-exempt operation without deduction right. However, the landlord/lessor has the option to apply VAT for any such operations, based on a notification submitted to the tax authorities.

The sale of real estate property (except for the sale of new buildings and building land) is also treated as a VAT-exempt operation without deduction right. If the exemption is not favourable (i.e. as the initial input VAT can become a cost in whole or in part), VAT-registered persons can opt to tax such operations, based on a notification filed with the tax authorities.

Starting with 1 January 2010, the supply of land on which a structure sits, but where demolition is in progress, would be treated from a VAT perspective as a sale of land.

#### **Mandatory taxation**

As mentioned above, sale of new buildings and parts thereof and building land is taxable with 24% VAT. A new building (or parts thereof) is one that is sold by the end of the year following its first usage/occupation. Any construction that has been transformed insofar as the cost of its transformation exceeds 50% of the building's market value is also considered a new building. Building land is deemed any unimproved/improved land on which constructions can be raised.

A reduced rate of 5% VAT applies for certain homes and buildings in accordance with the social policy.

#### **Input VAT adjustment**

The input VAT related to a real estate property should be adjusted over a period of 20 years, provided the landlord /lessor does not opt to tax the rental fees/lease instalments or the seller does not opt to tax the sale transaction. The adjustment period starts on 1 January of the year in which the real estate is commissioned and applies only for real estate commissioned after 1 January 2007.

The applicable adjustment period is five years (transitory regime) for real estate commissioned/modernised/purchased before 1 January 2007. However, if such real estate is modernised after 1 January 2007 and the value of this modernisation exceeds 20% of the real estate value, then a new adjustment period of 20 years is applied for the value of the modernisation. This new adjustment period starts on 1 January of the year in which the modernisation is commissioned.

The adjustment should be made in accordance with the percentage of the real estate property rented/leased/sold within the VAT-exemption regime, insofar as such transactions are performed within the 20-year adjustment period (5-year, under the transitory regime). The adjustment of the VAT deduction right should be performed one-off, when the destination of the goods change (e.g. from exempt without deduction right to taxable and vice versa).

### *Transfer of business*

Under the harmonised Romanian VAT legislation, the full or partial transfer of assets, irrespective of the framework they are performed under (e.g. mergers, divisions, contributions in kind, etc.), will be treated as a non-taxable operation, provided the beneficiary is a taxable person and the transferred assets can function as an independent business unit. The beneficiary is treated as the successor to the transferor for the adjustment of the initial input VAT related to the assets transferred (provided the transfer is performed within the adjustment period).

In case VAT is charged on top of the value of the transaction the tax authorities will allow the deduction of the related VAT at the level of the beneficiary provided that the VAT taxation regime was not applied for tax optimisation reasons.

### *Import of equipment*

Acquisition of goods dispatched from outside the EU will be subject to 24% import VAT. However, the import VAT is not actually paid to the state budget, but reported in the VAT return as both output and input tax, provided the importer is registered for VAT purposes in Romania and provided it holds a VAT deferment certificate issued by the National Customs Authority. The condition of having a VAT deferment certificate is only applicable until 31 December 2012. After this date all taxable persons registered for VAT purposes in Romania will be able to obtain import VAT deferment relief.

### *VAT refund*

#### **Established businesses**

Although in theory VAT recovery should be made within 45 days of the date of filing the VAT return, in practice it is a lengthy procedure (especially in Bucharest), based on a prior tax inspection, at least in the first 12 months of activity. Subsequently, the company can benefit from a fast VAT refund, if it achieves a low score in the risk analysis performed by the tax authorities. Due to budget shortages VAT refunds are being delayed. However, the VAT receivables could be offset against other payable taxes and social contributions due by the company or could be assigned to another taxpayer. Please note that large and medium-sized taxpayers, as well as certain companies performing exports, can benefit from a VAT refund with a subsequent fiscal inspection, except for the cases where a high fiscal risk is assessed by the tax authorities

#### **Non-Romanian businesses**

A company established in another Member State could claim a refund from the Romanian tax authorities of the VAT paid for goods/services acquired in Romania, based on the 9th EU Directive (VAT refund for taxable persons established in the EU). The VAT refund is granted, provided that the operations performed by the company in Romania do not entail a VAT registration requirement or a fixed establishment of the company in Romania.

In addition, Romania implemented the refund procedure based on the 13<sup>th</sup> EU Directive for VAT related to purchases made in Romania by non-EU established

businesses under reciprocity conditions. In principle, a non-EU business will be entitled to benefit from a VAT refund, under the 13th EU Directive, for the VAT paid on goods/services purchased in Romania, if its operations herein do not entail a VAT registration requirement or a fixed establishment in Romania.

### *Domestic withholding taxes*

A 16% withholding tax rate generally applies on income sourced from Romania by non-resident companies, such as dividends, interest, commissions, services performed in Romania, management and consulting services (irrespective of where they are performed), etc.

The EU Parent-Subsidiary Directive is applicable to dividends distributed by Romanian companies to other Romanian companies or companies from the EU (holding for more than two years at least 10% of the capital of the Romanian company distributing the dividends). This implies that dividend distributions to qualifying shareholders are no longer subject to dividend withholding tax.

The EU Interest and Royalties Directive is also applicable so that no withholding tax may be levied for interest payments made between related parties, provided the conditions of association and a 2-year period are met.

The aforementioned domestic withholding tax rates can be reduced by double tax treaties provided the beneficiary of the payment makes a fiscal residence certificate available, its copy or any other document attesting to its tax residency, as well as a statement that it is the beneficial owner of the income.

### *Notary and cadastral fees*

Notary fees are applicable on the transfer of real estate property, depending on the value of the transaction.

On 22 February 2011, Order no. 46/C/2011 regarding the notary public fees came into force; so, based on its provisions, the notary public fee for authenticating the sale and purchase agreement of a real estate is computed as follows:

Value of the transaction (in RON)	Amount of the fees (in RON)
Below 15,000	2.2% but no less than 150
From 15,001 to 30,000	330 + 1.6% for the amount exceeding 15,001
From 30,001 to 60,000	580 + 1.3% for the amount exceeding 30,001
From 60,001 to 300,000	970 + 0.9% for the amount exceeding 60,001
From 300,001 to 600,000	3,130 + 0.65% for the amount exceeding 300,001
Over 600,001	5,080 + 0.44% for the amount exceeding 600,001

However, certain discounts may be applied, e.g. a 15% discount if the buyer is a lawyer or a 30% discount for the sale purchase agreements concluded under the government state aid program 'First Home'.

A fee would also be due to the National Agency for Cadastre and Land Registration for changing the owner of 0.5% of the value of the agreement.

### *Other taxes*

Other taxes and charges, which could be material, are due on the construction of buildings, as well as on the transfer of land from one designated category of usage to another. Reference is made to the separate section on local taxes.

### *Considerations on financing*

Should the investment in the real estate project be financed through a loan taken up by the Romanian company, the deductibility of interest and foreign exchange losses is subject to certain limitations (including thin capitalisation rules) as set out in the Romanian Fiscal Code.

The first rule limits the deductibility of interest on loans contracted with parties other than credit institutions to a certain limit. For loans denominated in foreign currency the limit is currently set at 6%; this limit can be updated yearly. The limit for RON loans is the reference interest rate indicated by the National Bank of Romania for loans denominated in local currency RON. For your reference, the NBR interest rate is 5.25% starting with 30 March 2012. Interest exceeding this limit is non-deductible and cannot be carried forward. Interest paid to credit institutions, as well as interest related to bonds traded on a stock exchange is also exempt from this rule.

The second rule is the general thin capitalisation rule. This rule states that if a company's debt-to-equity ratio is higher than three to one, or if the company's equity is negative, the total amount of interest due and the net foreign exchange losses cannot be deducted from a tax perspective in the year in which they are accounted for. However, these expenses are carried forward to future years and they may be deducted at once in the year when the debt-to-equity ratio is 3:1 or less. Please be aware that only loans with a term of over one year can be taken into account for this rule. As with the rate restriction, loans granted by credit institutions or bonds listed on the stock exchange are not subject to these rules.

For purposes of applying the thin capitalisation rules, equity includes share capital, reserves, retained earnings, current year earnings and other equity elements. Both debt and equity are calculated as the average of values at the beginning and at the end of the period for which profit tax is calculated.

### *Accounting requirements for Romanian companies*

Accounting Law 82/1991 (last republished in 2005) governs general accounting for Romanian companies. Legal companies, other than credit institutions, insurance companies and entities regulated by National Securities Commission, apply the Order no. 3055/2009 approving Accounting Regulations that are in compliance with European Directives.

Order no. 3055/2009 is in compliance with the 4th and 7th EU Directives.

## Municipal tax system in Romania

Local taxes are established by the Fiscal Code. The local authorities are allowed to adjust local taxes annually.

Local/county councils and the General Council of the Municipality of Bucharest are allowed to set the tax rate a maximum of 20% in excess of the ranges provided by the Fiscal Code on an annual basis. The tax is adjusted every three years, by 30 April of the year in question, with the year-to-date value of the inflation rate (i.e. considering the inflation rate available at the previous adjustment).

Late-payment interest accrues at 2% of the amount past due, calculated for each month or part thereof. Also, late payment penalties of 5% or 15% of the overdue tax liabilities accrue, if the liabilities are overdue by more than 30 days or 90 days, respectively. The late payment penalty does not remove the obligation to pay late payment interest.

### *Building tax*

Owners of buildings should pay building tax, except for cases where an exemption applies. The building tax rate is established by the local authorities with distinctions made between individuals and companies.

For individuals, 0.1% is applicable on the taxable value of the building. The taxable value of a building varies, depending on the surface area, type of construction, location, etc. These rates can be increased to 65% for the first building owned besides the one of domicile, 150% for the second building owned besides the one of domicile and 300% for the third and any additional building besides the one of domicile. These provisions regarding the increase of building tax will apply until 31 December 2011. For companies, building tax ranges between 0.25% and 1.5% of the initial accounting value, including revaluations. This percentage is increased to between 10% and 20% if the building has not been revaluated in the last three years and 30% - 40% for buildings not revaluated in the last five years.

Building tax is also applicable to buildings that are fully depreciated, but the taxable base for the building tax would be reduced by 15%. Certain buildings (bridges, wells, power plants, platforms, etc., stipulated in a list provided by law) are not subject to building tax.

Building tax is payable twice a year, by 31 March and 30 September. The payment in advance, by 31 March of the year, may lead to a tax reduction of up to 10%, based on a decision of the local council.

The Fiscal Code stipulates that building tax is applicable on the value assessed in the leasing contract and payable by lessee for buildings subject to a financial leasing contract.

### *Land tax*

Owners of land are subject to land tax, which is established at a fixed amount per hectare, depending on location and rank. There are certain exemptions (e.g. for land that is used to host buildings). Building tax is payable twice a year, by 31 March and 30 September. The payment in advance, by 31 March of the year, may lead to a tax reduction of up to 10%, based on a decision of the local council.

The Fiscal Code stipulates that for land subject to a financial leasing contract, land tax is payable by the lessee.

## *Charges for permits and authorisations for construction*

The main permits and authorisations for construction are as follows:

- **Certificate for urbanism.** The certificate for urbanisation is priced at a fixed amount per square metre, depending on the location, and is payable at the beginning of the construction. The tax for obtaining the certificate for urbanisation for the countryside is 50% less than the one available in urban areas.
- **Construction authorisation tax.** Construction authorisation tax is calculated as 1% of the authorised value of the investment. Residential buildings can benefit from a 50% reduction of this tax. This tax should be paid before the delivery of certificates, notices and authorisations for construction. When the assets are brought into operation, the local authorities reconcile the construction authorisation tax value by comparing the authorised value with the real value of the assets.
- **Extension of availability tax.** In order to extend the availability of the certificate for urbanism and construction authorisation, a 30% tax of the initially paid tax is due. Authorisation of the organisation of construction site works. This tax is assessed at 3% of the value of construction organization works.

Please note that there are also two other taxes applicable to constructions, which are not payable to the local budget, the most relevant being:

- **Fee to the Construction Inspectorate.** A monthly fee needs to be paid by companies to the Construction Inspectorate, amounting to 0.7% of the value of the expenses incurred for performing authorised constructions (i.e. buildings and installations), as well as of the modernisation, transformation, consolidation and repair work on these constructions. Late payment penalties of 0.15% per day of delay are due, but they are capped at the value of the fee.
- **Tax due to the Social Security Fund of the Constructors.** A monthly fee of 0.5% of the expenses incurred, as cited in the statement of works, needs to be paid to the Constructors' Social Security House.

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### **Assurance**

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# *Real Estate Going Global Russia*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 10 July 2012.

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# *Real Estate Investments - Russia*

## *Preface*

In recent years, property investors and developers have become much more international in their outlook. Property has effectively become part of the global marketplace. In Russia, flexibility is a critical success factor for structuring any real estate investment, and comprehensive due diligence prior to any transaction is vital.

The changes that have taken place in the Russian real estate market over the last few years provided tremendous challenges and opportunities for Russian and foreign investors, construction companies, property developers and the industries that support them. The market was developing beyond recognition since the collapse of the Soviet Union, although the market suffered a major setback following the economic crisis in August 1998 and lately in 2008–2009. Since 2000 until the current financial crisis, with a relatively stable currency the Russian economy was recovering strongly. During that period, the growth of local businesses and continuing expansion of foreign companies in Russia boosted demand for newly constructed high-class offices, manufacturing and warehousing facilities, hotels and retail areas. This growth went along with the restoring confidence of foreign investors; the lifting of Russia's rating by the rating agencies to investment grade with a stable outlook, was another indication of this process.

## *Possession of Russian land*

The land code in effect since 2001 provides foreign legal entities with the right to purchase and own land plots, subject to some restrictions depending on the location of the plot (locations near state border, agricultural land, etc.). The land code also gives preferences to companies (including foreign legal entities) in acquiring the land plots on which buildings owned by these companies are located. Nonetheless, in practice, barriers to private land ownership continue to exist. Currently the private ownership of land is extremely difficult to achieve in many locations, especially the Moscow city centre. In such locations, it is still generally more common for a property owner to acquire a 49-year lease rather than to own the land. The local rules governing the ownership of buildings and structures are less restrictive and many of these are owned by domestic and foreign legal entities and individuals.

## *Profits tax*

### *Rental income*

Rental income of landlords operating through a Russian subsidiary or a permanent establishment (PE) (branch) of a foreign legal entity is subject to Russian profits tax. Taxable profits are calculated as gross revenues less most economically justified business-related expenses, supported by relevant documentation.

Taxable profit is calculated on the basis of tax accounting records. All tax accounting entries as well as relevant tax returns are prepared in Russian roubles.

Profits from rental activities accruing to Russian entities and to foreign entities with a permanent establishment in Russia are subject to the maximum corporate profit tax rate of 20%. The tax is distributed between the federal (2%) and regional (18%) budgets, with regional authorities having the right to lower the regional share in the rate down to 13.5% for certain categories of taxpayers, although such reductions are not common in the real estate industry.

Rental income from immovable property received by foreign legal entities that do not hold the property through a PE in Russia is generally subject to withholding income tax levied on gross rentals at the rate of 20%. Double tax treaties do not provide reduced rates of withholding tax with respect to such rental income from immovable property.

In repatriating income from rental property held in a Russian legal entity, dividends payable to foreign legal entities are generally subject to a 15% withholding tax, subject to reduction under an applicable double tax treaty. For property held directly by a foreign legal entity through a PE in Russia, there is no further Russian withholding tax (after normal taxation of the branch profits) on distributions of branch profits to the head office.

In a structure with two Russian entities in the chain of ownership, dividends paid from one Russian legal entity to another Russian legal entity would generally be subject to a 9% dividend withholding tax (the Russian entity recipient would not pay additional profits tax on the received dividends). In cases where a Russian legal entity owns shares in a non-Russian legal entity, dividends received would also generally be subject to Russian tax at a rate of 9%. A 0% profits tax rate applies to dividends received by a Russian company if it owns not less than 50% of the capital of the subsidiary (both Russian, and foreign other than established in a country being in a 'blacklist' of the Russian Ministry of Finance) for a period of not less than 365 calendar days. The Russian Ministry of Finance blacklist includes offshore countries and countries that do not support the exchange of information procedures. When dividends received by a Russian company do not qualify for the 0% rate, the 9% rate applies.

On debt financing of Russian property companies or branches of foreign entities, interest payments to non-resident companies would generally be subject to 20% withholding tax, subject to an applicable double tax treaty relief.

### *Profits' tax-deductible expenses*

The major peculiarities and limitations on deductibility of expenses in relation to real estate activities are set out in the subsections below.

#### **Tenant's capital improvements**

Inseparable capital improvements of leased objects that are not reimbursed to tenants by lessors would be depreciated by tenants during the lease term at rates calculated on the basis of useful life of the inseparable improvement (e.g. lift) or, in case this particular inseparable improvement is not named in the statutory classification of fixed assets, on the basis of useful life period of the fixed asset (i.e. building) itself. This means that in most cases the lessee of a building would be able to deduct for profits tax purposes only part of the cost of such improvements (since the useful life of buildings/inseparable improvements typically exceeds lease terms).

#### **Depreciation**

As a general rule, depreciation of fixed assets can be charged under a straight-line or reducing balance method. However, tax depreciation of buildings should generally be

on a straight-line method only. Minimum annual depreciation rate for buildings is 3.33% and could be higher for certain types of buildings. Tax depreciation is charged on the historic cost of the building, net of recoverable VAT.

Taxpayers have the right to deduct for profits tax purposes the cost of investments into fixed assets of up to 10% (up to 30% in relation to fixed assets belonging to depreciation groups from 3 to 7) of the initial cost of the fixed asset in the period in which depreciation of the relevant asset starts (depreciation premium); this allowance applies also to capital improvements.

However, if a taxpayer applied a depreciation premium and then sold the relevant fixed asset within five years since the date of putting the fixed asset into operation, the depreciation premium should be recaptured and included in the taxable income of the taxpayer.

The useful life of a fixed asset, and hence the rate of depreciation to be applied for profits tax purposes, is established at the discretion of taxpayers within the limits established by the Government for various categories of fixed assets.

Most types of buildings cannot be depreciated over less than 30 years using the straight-line method (although some limited types of buildings can have a shorter useful life). Land cannot be depreciated.

### Costs related to acquisition/lease of land

Costs related to acquisition of land from the state or municipal authorities may be profits tax-deductible under a special procedure (generally either evenly over a period of at least five years or in amount not exceeding 30% of taxable base of the previous tax period until the total amount is expensed). These provisions apply to taxpayers who enter into the relevant sale-purchase agreements within the period from 1 January 2007 to 31 December 2011.

Starting from 1 January 2012 costs related to acquisition of land plots (irrespective of who is the seller) are not deductible for profits tax purposes other than as a deduction against proceeds on any future sale with special rules for deduction of losses.

Costs related to lease of land (i.e. rent payments) are generally profits tax-deductible provided that general criteria of economic justification and proper support by primary documents (e.g. lease agreement, invoices, acts of acceptance, etc.) are met.

### Interest deductibility

Interest on debt taken out to finance business activities including investments in immovable property is generally profits tax-deductible, subject to certain specific limitations outlined below.

Deductible interest expenses should not exceed the average interest charged on debt obligations issued in the same quarter under comparable conditions (i.e. similar currency, period, amount and collateral) with a deviation of not more than 20% or, in absence of debt obligations issued in the same quarter under comparable conditions or at discretion of the taxpayer should not exceed 15% on loans taken out in foreign currency, or the Bank of Russia refinancing rate ('CBR Rate') multiplied by 1.1 for rouble loans. The multiplication factor 1.1 has been increased to 1.8 for rouble loans and the deductibility limit of 15% for foreign currency loans has been changed to the CBR rate multiplied by 0.8 for the period from 1 January 2011 to 31 December 2012.

### Thin capitalisation rules

Where a Russian legal entity obtains loans from a foreign company that directly or indirectly owns more than 20% of the charter capital of the Russian company ('Substantial Shareholders') and the debt-to-capital ratio exceeds 3:1 (for banks and companies engaged exclusively in financial leasing the ratio is increased to 12.5:1), the Russian thin capitalisation rules may be applied. In such a case, the interest expense on the loan will be only partially deductible. The deductible portion will generally be equal to the interest on the amount of the loan not exceeding 3 times the share of the Substantial Shareholder in equity (or 12.5 times for banks and companies engaged exclusively in financial leasing). Under the domestic tax legislation the portion of interest that is deemed non-deductible under the thin capitalisation rules would be reclassified as a dividend and taxed correspondingly. The notion of controlled debts for thin capitalisation purposes also includes debts obtained from Russian organisations that are affiliated with the Substantial Shareholders, as well as debts in relation to which such affiliated person or Substantial Shareholders act as guarantor or otherwise secure the debt.

### Loss carryforward

Russian legal entities and foreign companies having a PE in Russia can carry losses forward and offset them against profits in future years. Losses incurred in a particular year may be used in any year over the subsequent ten years.

Where buildings and other fixed assets are sold at less than net tax book value, losses on such disposals should be claimed for deduction in equal parts over the remaining useful life of the property sold.

### *Taxation of capital transactions in property*

Taxable profits from sale of property by Russian companies and branches of foreign entities are calculated as gross sales proceeds less the net tax book value of the property. Profit from the sale of property is subject to a general profits tax rate of 20%.

If Russian immovable property is sold by a foreign company without a PE in Russia, the purchaser is required to withhold tax at the rate of 20% of the capital gain if the vendor can confirm the acquisition costs with appropriate documents; otherwise, the 20% tax rate should be applied to the gross sales price. No exemption can be obtained under double tax treaties. The same rates and rules apply to the sales of shares in Russian companies where more than 50% of the assets constitute real estate; this income, however, may be protected from Russian tax under certain (although not all) applicable double tax treaties. It should be noted that capital gains from disposals of shares in Russian companies and relevant derivatives are fully exempt from withholding tax if the shares qualify as publicly listed securities.

0% profits tax rate applies to income from sale of non-quoted (for the full period of holding by seller) shares in Russian companies in case at the moment of realisation these shares were held by the seller for not less than five years. This exemption applies only to the shares acquired after 1 January 2011. Due to a technical error until further changes to the Tax Code this exemption may not apply to income of foreign companies.

### *Contributions to charter capital*

For profits tax purposes, the cost of the property received as a contribution to the charter capital of the taxpayer generally equals the cost (net book value)

determined on the basis of tax accounting of the contributing party; potentially, expenses incidental to the contribution may be taken into account. Special rules are established for situations where contributing parties are foreign legal entities or individuals. In case appropriate documentary evidence of the cost of the property is unavailable its cost will equal zero for profits tax purposes.

## Value added tax (VAT)

Generally, VAT is charged on the supply of goods, works and services in the territory of the Russian Federation at the rate of 18%.

VAT is payable on an accrual basis.

Rental of property is generally subject to VAT. Where the parties to the lease arrangement are located in different countries (for example the landlord is located outside Russia) for VAT purposes, the service is considered to be performed where the real property is located.

Under special provisions based on the concept of reciprocal treatment, accredited individuals and accredited foreign entities of some 100 countries are exempt from VAT on rental costs.

Taxpayers are required to reinstate VAT they previously recovered if they start using relevant fixed assets for non-VAT-able activities. In particular, VAT incurred on acquisition/construction of immovable property should be reinstated unless the fixed assets have been fully depreciated or have been used by the taxpayer for more than 15 years. This rule affects, for example, a real estate company that after, say, five years of leasing out a building starts leasing (part of) the premises to accredited foreign legal entities that have the right to enter into a non-VAT-able lease. Such reinstated VAT may however be expensed (deducted for profits tax purposes).

VAT is charged on capital transactions in property (other than when a disposal is made by an individual that is not an individual entrepreneur and in some other cases). Owners of the premises (e.g. investors) are in principle entitled to recover VAT incurred in relation to completed stages of construction under the general VAT recovery rules, i.e. without waiting for commissioning of the building. Moreover, starting from 2009, VAT on advances paid to contractors is in principle recoverable in the period when the advance is paid, i.e. before the acceptance of completed construction stages.

Where a finished building is purchased by an investor for use in a business that is VAT-able, input VAT incurred could in principle be recovered immediately or offset against output VAT provided certain requirements for input VAT recovery are met. Previously, physical refund of VAT from the budget was very difficult and the most common way of VAT recovery was through offset against VAT accrued on sales. However, recently there have been improvements in this respect. In particular, starting from the 1st quarter of 2010 the taxpayers are entitled to apply a simplified VAT refund procedure, the main features of which are as follows:

- Obtaining VAT refund/offset within 12 days starting from the date of submission of respective claim for VAT refund (i.e. before the completion of an obligatory desk audit).

- To apply for VAT refund the taxpayer should obtain and submit to the tax authorities the bank guarantee.
- The taxpayers meeting certain criteria (large taxpayers) could apply for VAT refund without bank guarantee.

Sale and lease of residential property is generally exempt from VAT. However, in case of assignment of property rights in relation to residential premises, VAT is charged on the difference between the sale price of the rights and the cost of the rights, at 18/118 rate (e.g. if during a pre-construction sales period a taxpayer obtains a right to purchase a residential unit at a pre-determined price, and then transfers that right to another taxpayer for consideration).

Special VAT rules apply when a building is constructed by the developer's own workforce ('self-construction'), rather than under a contract with a separate construction company. The value of self-construction works is included into the VAT-able base. However, such VAT could be claimed for recovery in the same tax period.

Transactions with securities (including shares in a property holding company) are exempt from VAT.

Certain types of imported technological equipment (components and spare parts thereof), analogues of which are not produced in Russia, are exempt from Russian VAT provided that they are mentioned in a special list approved by the Russian Government.

In the case of a contribution of assets to the charter capital of an enterprise, the contributing party shall reinstate VAT on contribution of fixed assets to the charter capital of a company that it previously recovered in relation to such fixed assets, in an amount proportionate to the net book value of the fixed assets. This reinstated VAT, however, is subject to recovery for the receiving party.

Lease of land is generally subject to VAT (there are some exemptions for cases where land lease payments are made directly to the state or municipal bodies). Sale of land plots (parts of land plots) is not subject to VAT.

## Other taxes

### *Property tax*

Property tax is levied at a maximum rate of 2.2% (the local authorities have the right to reduce the rate, but tend not to). The property tax base for Russian legal entities and PEs of foreign legal entities is generally defined as the average yearly net book value of fixed assets defined under Russian accounting rules, including real property but excluding land. For foreign legal entities that own immovable property in Russia but do not have a PE in Russia, property tax must still be paid and the tax base is determined by a government appointed agency.

Individuals that own real estate property are also subject to property tax. The tax base is the inventory cost of the property. The rates are established by local authorities and shall not exceed 2% of the inventory value (which may not correspond to either purchase price or market value).

## *Land tax*

There is a levy on owners and users of land but lessees of land are exempt from this charge. Land tax is calculated on the basis of so called 'cadastral' value of land defined in accordance with land legislation and the tax rate, which should not exceed 1.5% yearly.

## *Insurance contributions*

Starting from 1 January 2010, Russian unified social tax (introduced in 2001) has been replaced by insurance contributions to separate pension, social and medical insurance funds. The base for insurance contributions is largely the same as it was for UST, i.e. salaries and other remuneration. The assessment rates are flat. In 2012 an individual's salary and other remuneration is subject to insurance contributions at the following assessment rates:

- 30% on the yearly salary and other remuneration cumulated up to RUB 512,000;
- 10% on the amount exceeding RUB 512,000.

One tax base is established for contributions to all the funds.

In addition to insurance contributions to pension, social and medical insurance funds, employers shall pay 'accident insurance' contributions (AICs) with respect to payments made to employees. The AIC rate ranges from 0.2% to 8.5% of the amount of remuneration, depending on the level of risk associated with the industry in which the employer operates. Activities are classified into 32 groups of activities, depending on their risk profile. Higher rates are applicable in riskier industries such as construction, etc. Lease of own non-residential immovable property triggers a 0.6 % tax rate.

## *Personal income tax*

Individuals are taxed on the proceeds from property sales. With respect to residential property an individual that is a Russian tax resident can either claim a statutory allowance or calculate taxable income as a difference between sale proceeds and documented costs. The statutory allowance with respect to real estate constitutes RUB 1m (approximately USD 30,000). If a three-year holding period has expired, the total amount of income is exempt. This exemption does not apply to entrepreneurial income of individuals.

The tax rate is 13% for Russian tax residents. Russian tax residents are individuals that have spent not less than 183 days in Russia in any 12 consecutive months (de facto – not less than 183 days in a given calendar year). Russian-sourced income of individuals that are not Russian tax residents is subject to 30% personal income tax with no deductions or reliefs available.

## *Stamp duty*

Stamp duty for registration of agreements for disposal of immovable property is RUB 15,000 (RUB 1,000 for individuals). Stamp duty for notarial certification of residential mortgage contracts is set at RUB 200 and 0.3% of the contract amount for other real estate, but not more than RUB 3,000. The duty for state registration of agreements on pledge of immovable property, i.e. mortgage agreements, and for the issuance of relevant registration documents is established at RUB 1,000 for individuals and RUB 4,000 for legal entities.

Stamp duty is charged on obligatory notarisation of certain deals at the maximum amount of RUB 20,000.

A notary fee (not a stamp duty) is charged with respect to notarisation of real estate (sale) deals, notarisation of which is not obligatory at:

- 1% of the amount of the contract that do not exceed RUB 1m, but not less than RUB 300;
- RUB 10,000 plus 0.75% of the amount of the contract exceeding RUB 1m for the contracts with amount from RUB 1,000,001 to RUB 10m;
- RUB 77,500 plus 0.5% of the amount of the contract exceeding RUB 10m for the contracts with amount more than RUB 10m.

Usually, such notarisation is not required.

The fee is increased by 1.5 times if notarisation is carried out outside the notary office.

## Regional and municipal taxes in Russia

The Russian tax system generally includes three ‘levels’ of taxes: federal, regional and municipal. Federal taxes are governed by the federal laws and are effective all over the Russian Federation. Regional taxes are set by the laws of the constituent territories of Russia, based on the provisions of the Tax Code, within the limits established by the Tax Code. Rates may vary from one constituent territory to another. Local taxes are introduced by the acts of the municipalities based on provisions of the Tax Code, and rates of municipal taxes may also vary from one municipality to another. Moscow and St. Petersburg are separate constituent territories of the Federation, representative authorities (city parliaments) of which set both regional and municipal taxes.

Below you will find a summary representing the main Russian regional and municipal taxes as of 1 January 2012.

Tax	Base	Rate
<b>Regional taxes</b>		
Corporate property tax	The annual average net book value of fixed assets defined in accordance with accounting data	Up to 2.2% per annum (in Moscow – 2.2%)
Transport tax	Engine power, register ton, or vehicle unit	Fixed rates per types of transport vehicles and tax base units
Gambling tax	Gambling facilities (slot machines, bookmaker offices, etc.)	Tax rate is a fixed amount per each type of facility
<b>Local taxes</b>		
Land tax	So-called ‘cadastral’ value of land plots	Fixed percentage rates varying depending on allowed use of land plots not exceeding 1.5%

Tax	Base	Rate
Tax on property of individuals	Total inventory value of realty (residential property, garages, other buildings and premises)	Rates vary depending on the value of property and shall not exceed 2% per annum

In addition, regional and municipal authorities receive specific portions of federal taxes collected in their constituent territories (municipalities), and may introduce tax incentives in respect of regional (local) portions of some federal taxes within certain limitations.

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# ***Real Estate Going Global Serbia***

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All information used in this content, unless otherwise stated, is up to date as of 16 August 2012.

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# *Real Estate Tax Summary – Serbia*

## Property rights on constructions

A foreign investor can acquire directly ownership over the real-estate property or indirectly acquiring shares in a Serbian company owing real-estate.

A foreign investor can directly acquire ownership of a building/part of a building provided that the following two conditions are met:

- Reciprocity between Serbia and the country of the foreign investor's origin.
- A building/part of a building is necessary for conducting business in Serbia, which implies that a foreign investor has presence in Serbia either through a local company or through a branch/representative office.

A foreign natural person who is not conducting a business in Serbia may acquire ownership on a flat/residential building by purchase or inheritance, under the condition of reciprocity in both cases.

## Rental income

Rental income is included in taxable profits of a company holding real estate and subject to 10% corporate profit tax.

Non-residents generating rental income in Serbia are subject to 20% withholding tax rate (excluding rental income attributable to permanent establishment in Serbia). This rate can be decreased under the applicable network of double tax treaties. Serbia has in place double tax treaties with the most of the European countries.

Income realised by a non-resident from renting an immovable in Serbia that is attributable to its permanent establishment in Serbia will be taxed along with other profits of the permanent establishment at 10% corporate income tax rate.

## Thin capitalisation

According to new thin capitalisation rules applicable from 2010, 4:1 debt-to-equity ratio is applied to companies, and 10:1 for banks. Interest on related party debt exceeding this threshold is not tax-deductible.

## Depreciation

Fixed assets are tangible and intangible assets of which the service life is longer than a year and the individual acquisition price at the time of acquisition was higher than the gross wage per employee in Serbia, according to the latest figures published by the statistics authority of Serbia.

Real estate is depreciated at the rate of 2.5% using the straight-line method. The equipment, if it can be separated from the real estate, can be depreciated at rates from 10% to 30% annually, depending on the type of equipment, using the declining balance method.

# Real Estate Investments – Serbia

## Preface

Land legislation is generally developed, and changes to tax laws are generally in favour of investors. However, this part of the region still suffers from legal and tax systems that are subject to frequent change, a regulatory framework which is often contradictory or unclear, and a lack of investment guarantees for foreign investors. Tax laws are often unclear, and the tax authorities lack sophistication, which can make it difficult to obtain certainty on the tax treatment of more complicated transactions. The case law and practice of court proceedings are in an early stage of development. Nevertheless, investors and developers who are well-prepared for the issues they may encounter, and who use advisors with real deal experience, can take steps to reduce the risks as far as possible.

## Legal aspects

A foreign legal entity or a natural person (foreign investor) may conduct business in Serbia through:

- a locally incorporated company
- a branch/representative office of a foreign entity
- a special form of investment.

Serbian company law recognises the following legal forms of a locally incorporated company:

- General partnership (*ortračko društvo*, or 'o.d.', or 'od').
- Limited partnership (*komanditno društvo*, or 'k.d.', or 'kd').
- Limited liability company (*društvo sa ograničenom odgovornošću*, or 'd.o.o.', or 'doo').
- Joint stock company (*akcionarsko društvo*, or 'a.d.'. or 'ad').

Certain business activities can be conducted only through a specific legal form of a company, e.g. a bank must have a legal form of a joint stock company. Any real estate-related business activity can be conducted through any legal form of a company.

A representative office does not have the capacity of a legal entity, and is considered to be a part of a foreign entity. As such, it performs only certain preliminary and preparatory activities such as marketing, market research, etc. It may not enter into any contracts other than those for the purpose of its own operations.

A branch is also not a legal entity but a part of the foreign entity which set it. It performs all business activities in the name, and on behalf of, its founder.

Special forms of foreign investments are: Concession and BOT. A concession is granted by the government for the use of natural wealth, goods in common use, or for conducting business activities of common interest, for a period of up to 30 years. Concession activities are run through a local entity established in the form of either a joint stock or a limited liability company.

A BOT (the right to build, operate and transfer) is granted with relation to specific facilities such as infrastructure, communications, etc. After expiry of the agreed period, the ownership over the subject of BOT is transferred to the Republic of Serbia.

A foreign investor may invest in Serbia either alone or jointly with another foreign or domestic investor. An exception to this rule is a restriction for a foreign investor to have a majority stake: in a local company registered for production and trading of armament products, in a local TV/radio broadcasting licence holder, and in areas defined by the law as restricted zones.

A foreign investor is considered equal to domestic legal entities and natural persons in terms of its status, rights and obligations.

## *Acquisition and transfer of property rights on real estate*

Transfer of ownership over real estate is done by means of a duly signed and court certified purchase agreement. However, ownership right is deemed to be officially constituted upon its inscription in the public books – land books or cadastre.

## *Property rights over land*

Serbian legislation differentiates between agricultural and construction land. Agricultural land is land designated for agricultural purposes. It can be in all forms of ownership (state, private). However, a foreign investor can acquire ownership on agricultural land only through a locally incorporated company.

Construction land may be in all forms of ownership, and is divided into two categories: city construction land and land outside the boundaries of city construction land.

While city construction land is the land on the territory of inhabited towns, land outside the boundaries of city construction land lies outside inhabited towns. Both must be designated so by means of appropriate planning documents.

In general, construction land in public ownership may be sold/leased on the basis of a public auction/tender, but only for construction purposes. Municipalities define procedures, requirements and leasing programmes for the land.

The new Serbian Law on Planning and Construction adopted in September 2009 regulates conversion of the form of ownership over developed construction land. In other words, previous legislation allowed owners of constructions only the right to use of land pertaining to their construction, which was state-owned. The new law provides for the possibility of conversion of such right to use, into private ownership.

## Tax aspects

### *Corporate profit tax*

There are no specific rules dealing solely with the taxation of the real estate activities. Therefore, common corporate profit tax provisions are applicable.

The corporate profit tax law has not been adjusted to reflect the adoption of the IFRS concept in the accounting system. Consequently, tax inefficiency or even double taxation may appear in the case of a real estate accounted for as an investment property measured at the fair market value.

### Tax rate

The Serbian corporate profit tax rate is 10%.

### Rental income

Rental income realised by a resident company is a constituent part of its business income and is taxed at 10% after deduction of operational costs.

Income realised by a non-resident from renting an immovable in Serbia that is attributable to its permanent establishment (PE) in Serbia will be taxed along with other profits of the branch at the 10% corporate income tax rate.

Income from renting an immovable property in Serbia realised by a non-resident without a PE in Serbia would be subject to withholding tax at the rate of 20%.

### Residency

A legal entity is considered resident in Serbia if it is established or has its place of effective management and control in the territory of the Republic. Residents are taxed on their worldwide income.

Non-residents are taxed only on their income sourced through a PE on Serbian territory. A PE is any fixed place of business through which a non-resident conducts its business activities.

### Tax base

The taxable base is profit-determined by adjusting the accounting profit as stated in the profit and loss statement and determined in accordance with IFRS and accounting legislation, in accordance with the provisions of the Corporate Profit Tax Law.

Significant tax adjustments include:

- Expenses that are not recognised as expenses for corporate profit tax purposes:
  - Non-documented expenses.
  - Adjustments of individual claims from persons that are also creditors.
  - Expenses incurred other than for the purpose of conducting business activities.
  - Payments to employees and other persons based on profit distribution.
  - Penalties.

- Gifts and contributions to political organisations.
- Expenses incurred on the basis of impairment of assets, except in the case of damage resulting from force majeure.
- Expenditure recognised for corporate profit tax purposes up to a certain amount:
  - Depreciation computed in accordance with tax legislation.
  - Provisions, write-off of receivables and general provisions.

### Reserves and provisions

Provisions (indirect write-off) for bad and doubtful debts are tax-deductible if at least 60 days have expired from the due date. Provision has to be made individually for each debt. Write-off of individual debts, except for those from debtors that are at the same time, creditors, is recognised as expense on the following conditions:

- That related revenue has already been accrued.
- That they were written off as uncollectible.
- That evidence of the failure to collect debts through court orders is provided.

Long-term provisions are recognised for tax purposes if they are made for the renewal of natural resources, warranty period costs and retained caution money and deposits.

### Thin capitalisation

According to new thin capitalization rules applicable from 2010, 4:1 debt-to-equity ratio is applied to companies, and 10:1 for banks. Interest on related party debt exceeding this threshold is not tax-deductible.

### Adjustments to revenue

Generally, revenue established in accordance with IFRS and accounting legislation is recognised for tax purposes. Areas where adjustments are more likely include:

Income from related party debtors cannot be less than a market-related amount. Dividends and other income that constitute a share in profit of residents are not included in the tax base if they are received from residents.

Income resulting from a fair market value adjustment of an investment property is taxable when recognised. On the other hand, fair market value adjustments with a negative impact on profit and loss account would not be considered deductible as no negative adjustment of the revenue is available for corporate profit tax purposes.

### Group treatment

Companies are considered to be a group if one company directly or indirectly controls 75% of the shares in another company. A group of companies has the right to tax consolidation if all companies are Serbian residents.

Each company files its own tax balance sheet and the parent company files a consolidated tax balance sheet for the whole group. In a consolidated tax balance sheet, losses of one or more companies are offset by the profits of other related companies. Each company is liable to tax proportional to its share in the taxable profit

of the whole group. Tax consolidation must continue for at least five years; otherwise, each company will have to pay all taxes that it would have paid if there had not been any consolidation.

## *Tax incentives*

### *Tax holidays*

Profit earned on the basis of a concession is tax-exempt for a period of five years.

Up to ten years' tax holiday for companies investing RSD 800m (approximately EUR 8m) and employing at least 100 workers, in proportion to investment.

### *Tax credits*

Profit of the subsidiary in the underdeveloped areas is decreased in proportion to the overall profit of the company (during a two-year period) on condition that books for the subsidiary are kept separately.

Tax credit of 20% (40% for small enterprises) for investment in fixed assets, up to 50% of corporate profit tax liability. Any unused tax credit can be carried forward for ten years.

The tax liability for companies employing disabled persons is decreased in proportion to the percentage of such persons to the total number of employees.

### *Loss carryforward*

Tax losses (operational losses adjusted for the non-deductible or partially deductible expenses) can be carried forward for five years. This relief does not end if a company's status changes.

### *Deferred taxation of capital gain*

Taxation of capital gains is deferred following restructuring, e.g. a merger, acquisition, or division. The tax liability arises subsequently when, for example, the new legal entity sells the property taken over. This deferment applies if the owner of a transformed company receives in addition to shares in a new company, cash receipts that do not exceed 10% of the nominal value of shares or stakes obtained.

### *Depreciation*

Fixed assets are tangible and intangible assets of which the service life is longer than a year and the individual acquisition price at the time of acquisition was higher than the gross wage per employee in Serbia, according to the latest figures published by the statistics authority of Serbia.

Real estate is depreciated at the rate of 2.5% using the straight-line method.

The equipment, if it can be separated from the real estate, can be depreciated at rates from 10% to 30% annually, depending on the type of equipment, using the declining balance method.

### *Taxation of capital gains*

Capital gains are taxed separately, i.e. tax loss cannot be used for offsetting against capital gains. Offset of capital gains is possible only with unused capital losses brought forward or realised in the same year.

Capital losses can be carried forward for up to five years.

Capital gains are determined on the basis of the historical acquisition price of a property sold. Up to 2010, investment property accounted for at fair value has suffered multiple taxation, i.e. as operational income in the year the property is revalued, and as capital gains income because the revaluation, although it has been subject to tax, is not recognized for capital gains purposes. The amendment addresses this issue by stipulating that when calculating the capital gains, the revaluation that was subject to tax is recognised for tax purposes.

### *Withholding taxes*

Lease payments to non-residents made in relation to real estate and other assets are subject to a withholding tax at the rate of 20%.

In addition, withholding tax at the rate of 20% is levied on payments to a non-resident made in relation to dividends, share in profit, royalties and interest. Taxable base is the gross payment.

Capital gains are subject to 20% tax realised by non-residents from both resident and non-resident. Instead of withholding payment according to the amendments, a non-resident taxpayer realizing a capital gain is obliged to appoint a tax representative, who will have to submit a tax return to the tax authorities on their behalf. In this case, tax is payable based on the decision issued by the tax authorities.

The provisions of applicable double tax treaties regarding withholding tax will apply. However, the non-resident must prove residence of a state covered by such a treaty by submitting a valid document issued by that state, i.e. a tax residency certificate of the recipient of the income. A residency certificate has to be on the bilingual form prescribed by the Serbian Ministry of Finance.

### *Value added tax (VAT)*

VAT was introduced in Serbia in 2005 (to replace the former sales tax).

The general rate is 18% and the special rate is 8%.

The first sale of newly constructed buildings is subject to 18% VAT. The taxable base is the sales price. The first sale of newly constructed buildings for accommodation purposes is subject to the special VAT rate of 8%.

Input VAT incurred on a real estate that would be used for VATable activities can be recovered immediately. VAT recovery at present seems to function quite well in Serbia, irrespective of the amount concerned. The deadline for recovery is 45 days from the submission of the VAT return. However, if the real estate is kept for a period less than ten years, an adjustment of input VAT is required.

The rental of real estate is considered to be a taxable service and, therefore, is subject to 18% VAT. The taxable base is the rent. The only exception is rental of residential buildings for housing purposes, which is VAT-exempt without recovery right.

Sale and rental of land is VAT-exempt, without recovery right for relating input VAT.

### *Property tax*

Real estate ownership is subject to annual property tax, payable on a quarterly basis. For those taxpayers who keep the accounting books, the tax rate is flat. For those

taxpayers who do not keep the accounting books, tax rates are progressive, depending on the value of the real estate. An overview of progressive tax rates is provided below.

If the owner of real estate is a company or a sole proprietor who keeps books, the taxable base is the net book value of the property as of 31 December of the year that precedes the year for which the tax return is submitted.

For taxpayers who do not keep books, the taxable base is the market value of the real estate as of 31 December of the year which proceeds the year for which the tax return is filed. Every year, that value is adjusted by depreciation, to a maximum of 40% of the market value of property. The rate of depreciation is 0.8% and the straight-line method is used.

Exemptions from property tax apply to government buildings, embassies, religious objects, buildings protected by the government for their historical and cultural value, real estate for which total taxable base is less than RSD 400,000, land in preparation, and city construction land under 1,000 square metres.

Real estate that is, according to accounting regulations, disclosed in the balance sheet as 'held for sale', is also exempt from property tax.

## Property tax rates

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### Taxpayer who keeps books (companies and some sole proprietors)

0.40% flat rate

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### Taxpayer who does not keep books (individuals and some sole proprietors)

Tax basis	Tax rate
Up to RSD 10,000,000 (EUR 84,000)	0.40%
From RSD 10,000,000 (EUR 84,000) to RSD 25,000,000 (EUR 208,000)	RSD 40,000 (EUR 333) + 0.60% on the amount exceeding RSD 10,000,000 (EUR 84,000)
From RSD 25,000,000 (EUR 208,000) to RSD 50,000,000 (EUR 416,000)	RSD 130,000 (EUR 1,083) + 1% on the amount exceeding RSD 25,000,000 (EUR 208,000 )
Above RSD 50,000,000 (EUR 416,000)	RSD 380,000 (EUR 3,166) + 2% on the amount exceeding RSD 50,000,000 (EUR 416,000)

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Note that presented amounts are maximum possible exposures. Municipalities are allowed to assess tax rates at the lower level.

## Transfer tax

### Scope of Transfer tax and taxpayer

Tax on transfer of title over property is payable by a natural person or legal entity who sells rights in relation to real estate, intellectual property and the like. The taxable base is the price stated in the contract, or the market value of the property, if higher.

Transfer Tax is levied on transfer of immovable property, if VAT has not been charged on such a transfer (VAT and immovable property transfer tax exclude each other).

### **Tax rate**

The tax rate is 2.5% for transfer of real estate (and all other taxable transfers), and the base is the sales price. If the tax authorities believe that the sales price does not represent the market value, they will assess tax on the market value.

The taxpayer is the seller, but the buyer is jointly responsible for the tax.

## **Financing of municipalities in Serbia**

The funds for financing municipalities in Serbia are income sourced from the municipalities, from funds transferred from the public income of the Republic of Serbia and a percentage are obtained from the public income generated from games of chance.

### ***Income sourced from the municipalities***

- Property tax, except tax on the transfer of absolute rights and inheritance and gift tax.
- Local administrative charge.
- Local community charge.
- Residence tax.
- Urban land usage charge.
- Charge for the settlement of urban land.
- Charge for the protection and improvement of the environment.
- Income from concession fee and, income stemming from other concession agreements signed by the municipality.
- Collected penalties and expropriated property for misdemeanour offences of municipal regulations.
- Leasing fees for the lease of state-owned buildings.
- Sale proceeds from the sale of state-owned movable property.
- Income realised by the municipality's administrative bodies in conducting their activities.
- Income from interest on the municipality's funds.
- Donation proceeds.
- Self-contribution established in the municipality.

- Other local income set by the law.

Municipalities are independent in terms of determining the level of local taxes and charges and these may therefore vary significantly. Maximum tax rates and amounts of charges can be imposed and limited by the law.

### *Income from transfers of the public income realised on the territory of the municipality*

Taxes collected on the territory of the municipality and which therefore belong to the municipality can be classified as follows:

Personal income tax assessed on the following income:

- 80% of the personal income tax on salaries payable should be based on the place of residence of the employees, except 70% for Belgrade.
- Agricultural and forestry income.
- Income from self-employment.
- Income from real estate.
- Leasing fees for the leasing of movable property.
- Insurance of persons.
- Other income as set by the law.
- Inheritance and gift tax
- Tax on the transfer of absolute rights

Charges collected on the territory of the municipality which belongs to the municipality:

- Annual charge for the use of motor vehicles.
- Environmental charge.
- Minerals usage charge.
- Charge for material extracted from the rivers.
- Forest usage charge.
- Water usage charge.
- Charge for the transformation of agricultural land to other types of land.
- Charge for use of natural therapeutic factors.
- Tourist charge.

- Other charges set by the Law.

Additionally, the municipalities can receive:

- Non-designated transfers (equalisation transfers, compensation transfers, transition transfers, etc.) from the budget of Serbia depending on its level of development, income, etc.
- Designated transfers for specific purposes.

### *Public income from gambling and lottery*

According to the Law on Games of Chance a certain percentage of income can be realised by the Republic of Serbia from gambling and lottery and can be used to finance municipalities.

This percentage is set at 40% of the public income, which is generated from games of chance. It is distributed to municipalities for the realisation of certain aims as set by the regulations. This distribution implies a public invitation for all municipalities to apply for obtaining part of these funds.

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All information used in this content, unless otherwise stated, is up to date as of 18 June 2012.

# *Real Estate Tax Summary – Singapore*

## General

Foreign investors may invest in the Singaporean commercial property market with little or no restriction.

Residential property is divided into three main groups, as follows:

- Private apartment blocks and condominium units.
- Public housing developed by the authorities.
- Landed property, or houses.

Foreign investors are generally limited to investing in private apartment blocks and condominium units. They are prohibited from purchasing the following property:

- Singaporean residential landed property; and
- all the apartments within a building or all the units in an approved condominium development, unless an approval is obtained from the relevant authority.

Foreign investors are also generally prohibited from investing in Singaporean public housing.

## Loan financing

Generally, banks in Singapore will not finance the full acquisition price of Singaporean commercial property. When purchasing a Singapore residential property, it is possible to finance up to 80% of the market valuation of the property. Interest payments made to Singaporean banks on borrowings to directly acquire an investment property are deductible against rental income. However, certain restrictions can apply to losses and excess tax depreciation (see ‘Tax depreciation and losses’ below).

Withholding tax of 15% applies to interest paid to a foreign lender. This rate may be reduced through the application of double taxation treaties. Interest payments made are deductible for income tax purposes against rental income subject to the restrictions outlined above.

Singapore does not have formal thin capitalisation rules and as a result it is possible to structure a Singaporean property acquisition with considerable tax efficiency. However, attention should be paid to the application of general anti-avoidance provisions and specific conditions under the relevant double taxation agreements.

## Rental income

Net rental income is taxable at the corporate tax rate of 17% (for accounting period ending in 2009 and onwards) in the case of a company. In the case of individuals, the net rental income is taxable at the rate of 20% if they are non-resident, and at the tax rate, ranging from 0% to 20% if they are resident.

In calculating net rental income, landlords are able to deduct all related outgoings and expenses incurred, including any interest payable on loans taken out to buy the property, property taxes payable, and repairs and maintenance costs.

Commercial property landlords must also charge Goods and Services Tax (GST), currently at 7%, on all rental income (see '*Goods and Services Tax*' below).

## Tax depreciation and losses

Tax depreciation on plant, furniture, fixtures and fittings is only available to those taxpayers who are carrying on a trade, profession or business. The Inland Revenue Authority of Singapore (IRAS) regards property leasing as a non-business activity in some cases, such that tax depreciation is not available.

For taxpayers who are regarded as carrying on a trade, profession or business, tax depreciation claims can generally be made straight-line over three years. However, where the business is one of 'making investments', which includes the business of letting immovable properties, tax losses and excess tax depreciation cannot be carried forward or set off against any other income. What defines 'making investments' is a grey area.

Industrial building allowances (IBA) can also be claimed in respect of capital expenditure on the construction or purchase of an industrial building. Office buildings and residential properties do not qualify. An initial allowance of 25% is available, together with an annual allowance of 3% where the building is purchased new. Where it is purchased second-hand, only the annual allowance is available. However, IBA has been phased out with effect from 22 February 2010. With the phase-out, IBA will not be allowed on capital expenditures on the construction or purchase of industrial buildings or structures incurred after 22 February 2010, except in specified scenarios.

Capital expenditure which is incurred on or after 23 February 2010 up to the date of the completion of the construction or renovation/extension of an approved building or structure may qualify for Land Intensification Allowance (LIA). Generally, industry sectors with large land takes and low gross plot ratios may qualify for this LIA incentive. To enjoy the benefits under the LIA incentive, an applicant should obtain approval from the Economic Development Board from 1 July 2010 to 30 June 2015. Approved LIA recipients will enjoy an initial allowance of 25% and an annual allowance of 5% on qualifying capital expenditure incurred on or after 23 February 2010.

A special tax deduction is allowed for "renovation and refurbishment" expenditure incurred on certain fixtures, fittings and installations for renovations undertaken by companies. Deductions are capped at SGD 300,000 over a three year period from year of assessment 2013 onwards.

## Disposal of property – tax depreciation

Where tax depreciation has been claimed on qualifying plant and machinery or qualifying industrial buildings, and that asset/property is subsequently sold, a balancing allowance or charge will be made to the vendor, depending on whether the proceeds are less than or greater than the written-down tax cost base.

## Disposal of property – capital gains tax

There is no capital gains tax in Singapore, and therefore gains on the disposal of a residential or commercial property should be tax-free unless the property has been held as a trading asset, in which case the gains will be taxed at the prevailing corporate tax rate (currently 17%). The question of what is, and what is not, a trading asset is nevertheless the subject of much debate.

## Tax losses

Generally, losses incurred in Singapore that are not subject to the restrictions described above may only be carried forward against future income, on the basis that they arise from the carrying on of a rental trade or business and subject to the continuity of the shareholdings test. However, with effect from year of assessment 2006 (accounting periods ending in 2005), losses of up to SGD 100,000 can be carried back one year. These provisions do not apply to a company that is in the business of making investments.

## Withholding tax on dividends

There is no withholding tax on dividends paid by Singaporean companies.

## Stamp duty

Stamp duty is levied on the sale or transfer of shares in a Singaporean company at the rate of 0.2% unless the shares are scripless. There are no look-through provisions for land rich companies.

Stamp duty is payable on the purchase price of Singaporean immovable property. The stamp duty rates are as follows:

- For the first SGD 180,000 – 1%.
- For the next SGD 180,000 – 2%.
- For amounts in excess of SGD 360,000 – 3%.

Leases with annual rental not exceeding SGD 1,000 are exempt from stamp duty. The above is usually borne by the purchaser (i.e. a buyer's stamp duty or BSD) unless otherwise agreed between the relevant parties.

For residential property purchases after 8 December 2011, additional buyer stamp duty is payable by the following purchasers at the corresponding rates on the total amount of consideration or value of the property, (whichever is the higher):

- Foreigners<sup>1</sup> and non-individuals – 10%
- Singapore permanent residents who already own one or more residential properties, whether owned wholly, partially, or jointly with others; and Singapore citizens who already own two or more residential properties, whether owned wholly, partially, or jointly with others – 3%

A Seller's stamp duty (SSD) was imposed on sellers who bought residential properties on or after 20 February 2010 and sold them within one year of acquisition. The SSD was calculated in accordance with the BSD.

Varying SSD rates will be subsequently imposed for residential properties which were acquired on or after 30 August 2010 and sold within three years of acquisition, depending on the holding period.

SSD is levied on residential properties that are acquired on or after 14 January 2011 and disposed of within a certain duration. The applicable rates are as follows:

- Holding period of 1 year: 16% of price or market value, whichever is higher.
- Holding period of 2 years: 12% of price or market value, whichever is higher.
- Holding period of 3 years: 8% of price or market value, whichever is higher.
- Holding period of 4 years: 4% of price or market value, whichever is higher.

## Goods and services tax (GST)

GST, which is currently at 7%, is payable on the acquisition cost of commercial property. However, if an investor acquires commercial property with an existing rental income stream, this may be viewed as a transfer of a going concern, which is an excluded transaction and therefore not subject to GST. GST is payable on rentals derived from commercial property, but this can be recovered by the tenant if his business is registered for GST purposes.

GST is not payable on the purchase of residential property, and similarly is not levied on rentals from residential property, as these are exempt supplies.

## Property tax

Property tax is payable annually, and is determined by the Property Tax Division of the IRAS. Generally, it is based on the annual rental value of the property. The prevailing property tax rate is 10% for commercial, industrial and residential properties. In the case of owner-occupied residential properties, the property tax rate is a progressive rate from 0% to 6% (from 1 January 2011 onwards).

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<sup>1</sup> Foreigners of certain nationalities who fall within the scope of respective Free Trade Agreements will be accorded same treatment as Singapore citizens.

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All information used in this content, unless otherwise stated, is up to date as of 9 July 2012.

# Real Estate Tax Summary – Slovakia

## General

A foreign corporate or individual investor may acquire real estate in Slovakia directly (with a few exceptions, such as forest and agricultural land where restrictions should have remained in place until 2012; however, the Slovak Republic asked the EU commission for a prolonging restriction period up to 30 April 2014), or through a subsidiary or branch registered in the Slovak Commercial Register. The most commonly used forms of legal entities are as follows:

- Joint stock company (a.s.), i.e. a corporation.
- Limited liability company (s.r.o.).
- Limited partnership.
- General partnership.

## Rental income

Rental income is part of the corporate income tax base and is taxed as ordinary income. It is subject to the standard corporate tax rate, which is 19%. Rent paid to legal entities is tax-deductible on an accruals basis. Rental payments to an individual are tax-deductible for the tenant on a cash (paid) basis.

## Depreciation

Real estate, as other fixed assets, is subject to tax depreciation on an annual basis. There are four tax depreciation groups for assets, with depreciation periods ranging from 4 to 20 years. Most buildings of a permanent nature fall into the fourth group, and are depreciated over 20 years using a straight-line or accelerated method of tax depreciation. The taxpayer can decide to interrupt tax depreciation of tangible assets for one or several tax periods. The depreciation period is then prolonged by the number of taxable periods in which the asset was not depreciated.

Tenants can depreciate technical enhancements done in rented premises if it is agreed in rental agreement in writing.

Land cannot be depreciated.

## Financing real estate

- Debt: Currently, there are no thin capitalisation rules in Slovakia.
- Equity: There are no limitations on financing real estate with equity.

- **Financing:** Mortgages were introduced in Slovakia in the year 2000, and the range of mortgage products offered by banks increased thereafter.
- **Tax grouping:** There are no tax grouping rules in relation to corporate tax in Slovakia. However, it is possible to create a VAT group in Slovakia.

## Real estate transfer tax

Real estate transfer tax was fully abolished for transactions taking place on or after 1 January 2005.

# *Real Estate Investments - Slovakia*

## Direct investments in Slovak estate

### *Legal aspects*

#### **Ownership**

Ownership of a property is a right to possess, enjoy, use and dispose with the property in the limits of the legal regulations.

Unlike in some other countries, in Slovakia the legal principle ‘*superficies solo cedit*’ does not apply, i.e. the ownership of land and building may be split. Thus, the building and the land may belong to different owners.

In general, ownership of a real estate is governed by Slovak Civil Code, Cadastral Act and by Act on Ownership of Flat Apartments and Non-Residential Premises as a special law, governing the ownership of flat apartments and non-residential flat premises.

#### **Co-ownership**

Property may be owned by two or more co-owners. In that case, the ownership is split into a co-ownership shares according to the participation of co-ownership types. These are (i) common co-ownership, where the shares are exactly determinable; and (ii) community co ownership of spouses, which applies only for married couples, and shares are not determinable, as the whole property of spouses is owned jointly and inseparably. The co-owner has the exclusive use of the share for the purpose for which it is intended and a share in the common parts of the property and in the land.

In case that the construction and technical designation of the building allows, flats and non-residential premises can be deemed to be stand-alone real estate from the legal point of view. Owners of such flats or non-residential premises then own shares of the common parts of the real estate co-ownership.

#### **Real estate acquisition**

##### *Preliminary negotiations and due diligence*

Although negotiations can be conducted freely, there is an obligation for the parties to negotiate in good faith. A heads of terms may set out the basis on which the parties are entering into negotiations. The existence of such a letter or agreement will enforce the obligation to negotiate in good faith. Such a document may comprise a number of assumptions. It is important to inform the other party each time an assumption proves to be incorrect or can no longer be relied on. However, heads of terms are not fully covered by Slovak law, therefore an interpretation risk might arise and thus it is recommended to structure it carefully.

##### *Preliminary contracts*

It is possible to proceed directly to completion, without any preliminary agreement.

However, in Slovakia it is possible to enter into reservation agreement (RA) or agreement on future real estate purchase agreement (AFREPA) before dealing with pre-completion formalities.

RA or AFREPA are types of agreements, where the buyer usually deposits part of the purchase price to the hands of a notary, bank or an attorney, and undertakes to not to offer the real estate for other persons, and at the same time the parties undertake to conclude an agreement on purchase of the real estate. The eventual deposited 'reservation price' usually constitutes a part of the purchase price. The 'reservation price' can act as the contractual penalty, in case that the final purchase agreement is not concluded.

AFREPA is usually concluded, when the real estate cannot be subject to the purchase (i.e. is not finished, and is registered and not transferable).

### *The real estate purchase agreement*

In the purchase agreement, both parties are committed: one party is committed to sell and the other party is committed to purchase, as soon as the property is identified and its price agreed upon.

The real estate purchase agreement has to be in writing and the signature of the seller shall be authorised either by an attorney registered with the Slovak Bar Association, or a notary public. The signatures of both contractual parties must be on the same document of the agreement.

When the authorisation is done by an attorney, the attorney is obliged to find out the identity of the contractual parties and their proxies, assessing whether the agreement is not contrary to the law, bypass the law, is not against the good morals, and whether there are no circumstances, which could lead to arising of damages of either party.

### *Pre-completion formalities*

#### *Real estate purchase agreement*

Apart from the general contractual requirements as specified above and the purchase price, the real estate purchase agreement must contain the following essentialities:

- description of the real estate in the scope as it is defined in the deed of ownership (in case of residential and non-residential premises, there are further specific agreement requirements, set out by the law);
- if the real estate is shared, determination of the size of co-owner share.

### *Land Cadastre*

Once agreement(s) have been executed, the following pre-completion formalities will be carried out:

Application to the locally competent Land Cadastre must be submitted, as the legal effect of the real estate transfer occurs only after the transfer has been registered by the Land Cadastre, by its decision.

The applicants for the registration procedure of real estate transfer are the contractual parties to the real estate transfer agreement.

The application is written and must contain:

- name, surname and permanent residence address of the contractual parties (in case of individuals), or business name, registered seat (in case of legal entities);

- name of the respective Land Cadastre;
- reference of a legal act, based on which the right to the real estate is being transferred (i.e. the real estate purchase agreement);

The annexes, which must be attached to the application, are:

- public deed or other deed, proving the right to the real estate, if this is not a part of the deed of ownership;
- identification of land plots, on which the real estate is located;
- geometrical plan, if the land is being divided or merged, or if an encumbrance to the land is being created;
- power of attorney, if a proxy is acting on behalf of either contractual party.

After receiving the application, the Land Cadastre assesses whether:

- the agreement is concluded in a prescribed form;
- the seller is entitled to act with the property;
- the expressions of will are sufficiently certain and comprehensive;
- the contractual dispositions or rights to act with the property are not restricted;
- the contract is not contradicting or bypassing the law, or is against good morals;

If the agreement is prepared in the form of a notary deed or authorized by an attorney, the Land Cadastre only assesses, whether it is compliant with the Cadastral Operate (i.e. other real estate and its cadastral documentation in the surrounding area).

Provided that the criteria as described above are met, the Land Cadastre should issue a decision on transfer of the real estate within 30 calendar days. However, in practice this period can be and often is prolonged up to 90 calendar days.

The applicants for the registration procedure of real estate transfer have an option to apply for an expeditious proceeding, where the Land Cadastre should issue the decision within 15 working days.

### **Post-completion formalities**

After the real estate is validly transferred, there are no special requirements with regards to the ownership of the real estate.

### **Acquisition costs**

The notary and attorney fees are carried by the requestor of the respective service and the fees of Land Cadastre are carried by the person, who files the application to the Land Cadastre.

Unless otherwise agreed, when transferring residential and non-residential premises, the seller generally bears acquisitions costs, with the few exceptions set out by the law.

The contractual parties may agree on different regime of the costs bearing. However, such an agreement is not legally binding towards the notaries, attorneys and the Land Cadastre, and it is binding only between the buyer and the seller.

### *Notaries' and attorneys' fees and expenses*

Notary's fees are calculated based on the Regulation on Remuneration and Reimbursements of notaries public, depending on the type of service, and therefore it may vary and cannot be generalised.

Attorney's fees are primarily based on an agreement which must be concluded in line with good morals and the fees are calculated pursuant to the Regulation on Remuneration and Reimbursements of the Attorneys and according to the one of the following:

- hourly rate (upon a specific request from the client);
- lump sum;
- as a ratio of the purchase price (up to 20%) – if the attorney is representing the client with a court proceeding or proceeding before other authority; and
- tariff fee – this type of fee is used, when the client does not agree with the attorney on the price (based on a value of property and number of acts).

It is common practice to agree with the attorney either based on an hourly rate or a lump sum, taking into account specific legal action.

### *Land Cadastre's fee*

Land Cadastre's fee is EUR 33 when the application is submitted electronically (using guaranteed electronic signature), or EUR 66 when application is submitted in a paper form.

The application for expeditious proceeding is charged by a fee of EUR 265.50.

## *Tax aspects*

### *Tax-deductible costs*

A company or individual owning property in Slovakia can deduct interest expenses and property-related costs, e.g. tax depreciation, repairs, maintenance and utilities, from its taxable rental income, subject to the general conditions in the Slovak Tax Act. Property management fees can also generally be treated as tax-deductible.

If the individual claims the deduction of actual costs they should keep evidence of income and costs in sequential order, and supporting documents. If an individual is not a VAT payer, then for income tax purposes they can deduct from rental income a lump sum of 40% to represent expenses, instead of treating actual expenses as tax-deductible.

Also, the first EUR 500 (for 2011) of taxable rental income for individuals is exempt from Slovak tax, unless this exemption has already been used by the individual against other qualifying types of income. With effect from 1 January 2012 tax allowances cannot be claimed by an individual to reduce his rental income for current tax period.

## Capital gains on the sale of real estate

Corporate or individual owners of real estate are subject to tax on profits realised on the sale of real estate at the flat rate of 19%. There is no specific capital gains tax. Losses realised on the sale of buildings, but not land, are generally tax-deductible for corporate income tax purposes.

Specific tax exemptions apply to sales of real estate by individuals, where certain conditions are met.

## Business combinations

Since 2010, two alternatives were introduced for the tax treatment of the following transactions:

- In-kind contributions to a company's share capital; and
- Mergers and demergers.

Under the first alternative, the recipient of the in-kind contribution, or the legal successor in a merger or demerger, records the assets and liabilities at their fair values for tax purposes. Related revaluation difference arising on revaluation of the transferred assets and liabilities to their fair values will be taxable or tax-deductible for the contributor (in-kind contribution), and the legal successor or the dissolved company (merger or demerger).

The second alternative requires the recipient of an in-kind contribution, or its legal successor, to continue to use the original tax book values of the assets and liabilities of the contributor, or the company wound-up without liquidation through the merger or demerger. In this case any revaluation difference arising at the time of the in-kind contribution, merger, or demerger is not taxable/tax-deductible.

## Value added tax (VAT)

Transactions with real estate are either subject to VAT of 20%, or are VAT-exempt. Renting of real estate is generally exempt from VAT, but the charging of an exempt rental fee limits the landlord's ability to deduct related input VAT. As a result, in certain circumstances, the lessor can opt to charge 20% VAT on the lease.

The supply of real estate is VAT-exempt, except for supplies made within five years after the official completion of construction or within five years from the day when the building was put in use for the first time. The transferor can opt to charge 20% VAT on sales of real estate. Also, transfers realised as a result of a finance lease contract are generally subject to 20% VAT. Supply of land is VAT-exempt, except for construction land.

The period for adjustment of the input VAT deduction on immovable property, in the case of change of its intended use, is either 10 or 20 years depending on certain criteria. The period for archiving invoices received in relation to such immovable property is also extended to 20 years.

With effect from 1 October 2012 the supply of real estate or part of real estate in Slovakia which the Seller opted to tax should be subject to the reverse-charge mechanism if the customer is a Slovak VAT payer. It is also planned that a taxable person who supplies a building, part of building or construction building land will automatically become a Slovak VAT payer upon the sale of such goods (e.g. house,

apartment) if the VAT registration turnover threshold (EUR 49,790) is reached by such a sale.

### Taxation of Slovak source income

Generally, the gain from disposal of real estate located in Slovakia or the rental income from the real estate located in Slovakia is subject to Slovak taxation at 19% if paid to foreign tax resident under Slovak tax legislation.

A tax securement of 19% applies to rent paid by a Slovak entity to a non-EU entity for real estate located in Slovakia. No tax securement is required for rental payments to EU-resident entities. The tax securement is considered a tax advance. The entity receiving the rental income should file a Slovak tax return, and calculate its Slovak tax base (i.e. income less tax-deductible costs attributable to earning the income). If the tax return is not filed, the tax authorities can consider the tax securement to be a final tax.

The disposal of shares in a Slovak company by a foreign company is free of Slovak tax unless the shares are sold to another Slovak entity. Even in this case, an applicable double tax treaty will often provide that the sale of shares is not subject to Slovak tax unless the foreign company selling the shares has a Slovak permanent establishment (PE) to which the gain can be attributed.

There is no withholding tax on dividends paid by Slovak entities out of profits arising in 2004 and subsequent years. The distribution of profits arising in earlier periods is subject to withholding tax of 19%, which is reduced under most double tax treaties. Where such dividends are paid to EU resident companies holding at least 25% of the share capital of the Slovak payer, there should also be no Slovak withholding tax under Slovak tax law.

The domestic rate of withholding tax on royalties paid to non-Slovak entities is also 19%. Under most double tax treaties, the withholding tax on royalties is reduced, often to 5% or 10%. The royalty provisions of the EU Interest and Royalty Directive came into effect in Slovakia on 1 May 2006. As a result, there is no Slovak withholding tax on royalties paid by a Slovak company to a related company seated in another EU Member State that is the beneficial owner of the royalties, provided certain conditions are met.

If interest is paid by a Slovak entity to a foreign entity, it is subject to withholding tax of 19% under Slovak domestic law. However, most DTTs reduce the withholding tax on interest to nil. Moreover, as a result of implementation of the interest provisions of the EU Interest and Royalty Directive into Slovak tax law, interest paid by a Slovak entity to a related company seated in another EU Member State is not subject to Slovak tax, provided certain conditions are met.

Other EU country tax residents can decide whether they will consider tax withheld on royalties and interest as tax advance and deduct in Slovak tax return, or treat it as final tax. The tax return should be filed in three months after year-end (or in extended deadline). The EU residents should report taxable income but can deduct related costs to that income. The withholding tax exceeding Slovak tax liability can be refunded.

### Transfer pricing

The Slovak tax authorities are paying greater attention to the pricing of transactions between Slovak tax residents and their foreign-related parties.

The tax legislation reflects the transfer pricing methods commonly used in OECD member countries. These transfer pricing methods include comparable uncontrolled

price, resale price, cost plus, profit split and transactional net margin methods. The legislation provides local tax authorities with the flexibility to use these methods, or a combination thereof, when reviewing related party transactions.

Taxpayers are obliged to keep transfer pricing documentation supporting the prices used in transactions with their foreign related parties. From 1 January 2009 specific transfer pricing documentation must be maintained by Slovak companies, the extent of which depends on the company concerned.

### Loss carryforward

Tax losses that started to be used in 2004 and later years can be carried forward and used over the next five years. Tax losses suffered in 2010 and later years can be carried forward over seven years. Each year's tax loss is considered separately and can be used over its own five- (or seven-) year utilisation period starting with the tax period immediately following that in which the taxpayer reported the tax loss. If the taxpayer reports another tax loss during the utilisation period, they can carry this forward as well, together with the earlier tax loss.

### Municipal taxes

#### *Real estate tax*

Slovakia levies a real estate tax on companies and individuals owning land, buildings, flats or apartments, and non-residential premises in residential buildings, such as blocks of flats or apartments. Generally, the real estate tax is payable by the registered owner of the land, building, or owner of the apartment. If the taxpayer cannot be determined, the tax is payable by the user of the land, individual or legal entity who uses the building. The real estate tax is governed by the Act on Local Taxes and includes the basic annual rates.

Generally, the tax liability depends on the area of ground occupied by the real estate in square metres, the number of floors, the nature and purpose of the building and its geographical location. Under the Slovak Act on Local Taxes the basic annual tax rate for tax on apartments is EUR 0.033 per square metre of floor area of the apartment. However, the tax rates are normally changed by the municipality issuing a General Binding Regulation on yearly basis.

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# *Real Estate Going Global South Africa*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 16 August 2012.

# Real Estate Tax Summary – South Africa

## General

Non-residents may invest in South African (SA) property by direct offshore ownership of the property, or via resident companies, close corporations, trusts, share block schemes or unit trusts.

In the case of direct offshore ownership, a non-resident company seeking to acquire SA real property is required to set up a SA branch (or, as termed in the South African Companies Act, an 'external company') if it engages in business activities or is party to an employment contract in SA. There is no similar requirement for non-resident individuals.

There are few restrictions on non-residents making property investments. Dividends, rent and interest are, generally speaking, freely remittable. Certain aspects of the making and the repatriation of loans by non-residents to residents, and the payment of interest thereon, require the prior approval of the South African Reserve Bank.

Profits distributed by way of dividend are subject to a 15% dividend withholding tax (WHT) subject to any relief under applicable double tax treaties.

South Africa also imposes local borrowing restrictions in certain cases (see section '*Thin capitalisation*' below).

## Residence basis of taxation

SA applies a residence basis of taxation. This has the effect that SA residents are taxed on their worldwide income.

Resident is defined as follows:

- Any natural person who is ordinarily resident in South Africa.
- Any natural person who is physically present in South Africa for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate each of the five preceding years and for a period exceeding 915 days in aggregate during those five preceding years.
- Any person other than a natural person, which is incorporated, established or formed in South Africa, or which has its place of effective management in South Africa.

Non-residents are taxed on a source basis of taxation.

## Rental income

Rental income derived from SA property is taxable in South Africa. If the property owner is a resident company or close corporation, the corporate tax rate of 28% applies. A 15% WHT will be imposed on any profits paid as dividends by these companies and/or close corporations, subject to relief under any applicable double tax treaty. If the property owner is a non-resident company through its SA branch, the corporate tax rate of 28% applies to the branch profits and no WHT applies on the remittance of the branch income.

If the property is owned by a non-resident individual, tax rates varying from 18% to 40% apply. For the 2012/13 tax year ending on 28 February 2013, the highest rate of 40% applies to taxable income in excess of ZAR 617,000.

## Thin capitalisation

Interest on borrowings used to acquire property is generally tax-deductible against rental income, subject to compliance with transfer pricing rules.

Currently, interest payments made by SA residents to non-residents are not subject to any WHT. These payments are also normally exempt from SA corporate or individual taxes in the hands of the non-resident provided that:

- if the recipient of the interest is an individual, he or she has been physically present in South Africa for 183 days or less in aggregate during the relevant year of assessment
- if the recipient of the interest is a company, this company did not, at any time during the relevant year of assessment, carry on business in South Africa through a permanent establishment (PE).

Other operating costs incurred in deriving rental income such as the costs of insurance, repairs and maintenance, and property management fees are also deductible for tax purposes. Costs that are capital in nature, such as legal costs incurred in relation to the acquisition of the property are not deductible for income tax purposes, but can normally be added to the base cost of the property when it is sold (see section '*Capital gains tax*' below).

Non-residents willing to borrow from SA banks in order to finance foreign direct investment into South Africa (e.g. a purchase of real estate) may do so, but limits are set as to the amount of borrowings. Authorised Dealers (i.e. local banks) may grant or authorise local financial assistance facilities to non-residents, limited to 100% of the rand value of the funds introduced from abroad and invested locally. The effect of the limitation essentially creates a 1:1 ratio between foreign investment funding and locally sourced borrowings. In terms of the property example above, non-residents would, as a result, be required to fund at least 50% of the rand value of the property from abroad, and may borrow the remaining 50% locally.

It should be noted, however, that if non-resident holding companies require local borrowings in excess of the 50% limit, the Financial Surveillance Department may on application review the local borrowing restriction. The Department may permit SA companies in which non-residents hold directly or indirectly 100% of the share capital to borrow locally up to a maximum of 300% of the total shareholder's investment; this

is generally known as the company's 'borrowing base' or 'effective capital'. In order to further liberalise the above-mentioned restriction, the regulations allow for an increase in effective capital proportionate to increases in local participation in the shareholding of the entity. For example: where non-residents hold 75% and residents hold 25% of the share capital respectively, the effective capital will be 333%.

## Depreciation and building capital allowances

Depreciation and building capital allowances used to be available only if the buildings were used in the industries of manufacturing, providing of residential accommodation, hotel keeping, farming, mining, or in terms of special urban renewal projects, provided certain requirements were met. From 1 April 2007, the depreciation allowance is extended to all other commercial buildings as well. In addition, allowances have been introduced for buildings used in research and development (R&D) activities and for airport and port buildings.

### *Deductions in respect of manufacturing buildings*

The write-off rate for manufacturing buildings and improvements thereto depends on the date when the construction of the building or the improvement commenced, as shown below:

<b>Date when the building was erected</b>	On or after 15/03/1961 but before 1/01/1989	On or after 1/01/1989 but before 1/06/1996	On or after 1/06/1996 to 30/09/1999 (incl).	After 30/09/1999	On or after 1/04/2000 (if acquired from other person)
<b>Annual write-off rate</b>	2%	5%	10% (if brought into use on or before 31/03/2000)	5%	5% (even if the seller eligible for 10%)

The building must, during the relevant year of assessment, be used wholly or mainly for the purposes of carrying on therein, in the course of the taxpayer's trade, a process of manufacture or any other process, which is of a similar nature. With regard to the term 'mainly used' the SARS has issued a practice note in terms of which the building must be used at least 50% for manufacturing purposes. If the building is leased to another person, the lessor may only claim the allowance if the tenant uses the building wholly or mainly for carrying on therein a process of manufacture or similar process, in the course of the tenant's trade. The allowance is granted in respect of buildings erected or purchased by the taxpayer, provided, in the case of a purchased building, that it was not used by the seller or that the seller was entitled to the allowance. The annual allowance is granted in full when the building is brought into use, and is not apportioned where the building is used only for part of a year. It must be noted that where offices are erected simultaneously with the manufacturing buildings, they will qualify for the deduction; however, where the office space is erected at a later stage, it will fall outside the scope of the allowance. The annual allowance may be recouped when the building is sold.

## *Deductions in respect of residential units*

With regard to transactions concluded before 21 October 2008, the taxpayer may deduct a 10% initial allowance, and a 2% annual allowance, in respect of the cost of erection of a residential unit in a housing project. A housing project is defined as being a project for the erection of a building or buildings in South Africa, consisting of at least five residential units. A residential unit is defined as any self-contained residential accommodation consisting of more than one room, excluding any hostel, hotel or similar accommodation, the erection of which was commenced by the taxpayer on or after 1 April 1982, but before 21 October 2008, and which was erected under a housing project either to be leased to a tenant for the purpose of deriving a profit, or to be occupied by a bona fide full-time employee of the taxpayer. Where the building is erected on leasehold property, the allowance will only be granted if the taxpayer is entitled to occupation for ten years from the date of commencement of erection.

The allowance in respect of any unit will be granted in the tax year during which the unit is leased or occupied for the first time, provided that at least five units have been leased or occupied. When a unit is no longer used as intended, the full initial allowance, less one-tenth for each completed year that the unit was leased or occupied by employees, will be recouped. In addition, the annual allowance will not be granted for that or any succeeding year, during which the building was not used as intended. The initial allowance may be recouped, but only to the extent that it has not already been included in taxable income when a unit becomes unavailable for leasing or occupation.

With effect from 21 October 2008 the taxation of residential units has been revised and significant legislative changes have been introduced. In terms of the new legislation, taxpayers will now have the benefit of an allowance for both the cost and improvements to residential units.

In order for the legislation to find application the taxpayer must own a new and unused residential unit, the unit or improvements must be used solely for the purposes of a trade carried on by the taxpayer, it must be situated in South Africa and form one of at least five residential units owned by the taxpayer. Low-cost residential units will qualify for the allowance except where the units will be provided to employees who carry on the trade of mining.

Low-cost residential units are defined as either stand-alone units with a cost not exceeding ZAR 200,000 or apartments with a cost not exceeding ZAR 250,000. In terms of the Act, the owner of such property may not charge a monthly rental fee in excess of 1% of the total cost; furthermore, the cost figure will be increased by 10% annually for purposes of calculating the rental charge.

In terms of the allowance an amount equal to 5% of the cost of any new and unused residential unit (or improvements) will be allowed as a deduction from the income of the taxpayer. Where the transaction relates to low-cost residential units as defined, an additional 5% of the cost will be allowed as a deduction against income.

The cost of residential units or improvements for the purposes of the amended regime will constitute the lesser of the actual cost, incurred by the taxpayer, of the asset, or the direct cost under a cash transaction concluded at arm's-length on the date on which the transaction for the acquisition, erection or improvements were concluded, including the direct cost of the acquisition, improvement or erection of the residential unit.

Where a part of a building was acquired and the taxpayer did not construct or erect it the cost will be 55% of the acquisition price if a part is acquired and 30% of the acquisition price if an improvement is acquired.

It is important to note that the amendment contains a 'deemed allowance rule'. For instance, where the residential unit or improvement was first brought into use in the preceding year of assessment and the income generated did not form part of taxable income, the deduction will nevertheless be deemed to have been allowed; this will in effect reduce the tax value of the residential unit or improvement.

In terms of low-cost residential units and improvements the legislature has developed a regime whereby employers who provide low-cost residential units to employees via interest-free loans can claim a deduction.

The employer will be entitled to claim 10% of the outstanding loan at the end of the year of assessment as a deduction; this allowance can be claimed over a maximum of ten years. Furthermore, the amendment contains a recoupment provision for any amounts paid back to the employer in respect of the loan, the deemed recoupment will be limited to the lower of the amount repaid on the loan, or the amount claimed as a deduction.

### *Deductions in respect of hotel buildings*

The write-off rate, or annual allowance, for qualifying hotel buildings and improvements thereto is 5%, if erection commenced on or after 4 June 1988. If erection commenced before 4 June 1988, an investment allowance of 10%, and an annual allowance of 2% are granted. It is important to note that the cost of the hotel forms the basis for the calculation of the allowance; accordingly, the land value will be excluded. Furthermore, the allowance will only be available where the taxpayer erects the building and not where it is purchased. Improvements to hotel buildings which do not extend the exterior framework of the building, and which commenced on or after 17 March 1993, qualify for a write-off rate of 20%.

Depending on when the erection of the building or qualifying improvements commenced, the different rates that are applied can be summarised as follows:

- before 4 June 1988 2%
- from 4 June 1988 onwards 5%
- from 17 March 1993, in respect of improvements that do not extend the exterior structure of the building 20%

The annual allowance granted in respect of the building or improvements is limited to the cost of the building or improvements.

### *Deductions in respect of plant and equipment*

Certain limited components of buildings may be considered to be plant and equipment. These are generally depreciable for tax purposes over their useful lives. Qualifying items include air conditioning, with a write-off period of 6 years (the recommended write-off periods for air-conditioning acquisitions on or after 1 March 2009 are 6 years for a window type, 5 years for a mobile unit and 10 years for a room unit), lift and elevator equipment, with a write-off period of 12 years, and demountable partitions,

with a write-off period of 6 years. Values for depreciation depend on the allocation of the purchase price of the property specified in the purchase contract.

### *Deductions in respect of buildings used in farming and mining*

The cost of buildings erected for farming or mining purposes is generally deductible in full in the year when it incurred. However, any deductions relating to mining or farming are usually ring-fenced and deductible only against income received from the respective business, with the excess being carried forward to the next year.

### *Deductions in respect of leasehold improvements*

A tenant who is obliged to effect the improvements on the land or buildings used by him/her is eligible for an allowance based on the cost of improvements, provided that the land or buildings are used by the tenant in the production of income and that the value of the improvements constitutes income in the hands of the lessor. The annual allowance is equal to the cost of the improvements divided by the number of years during which the tenant has the right of use in respect of property, but not more than 25 years.

Where the improvements have been effected in terms of an agreement and the value has been provided for in that agreement, the allowance will be limited to such amount.

Where no value has been agreed in the contract, the commissioner may limit the allowance to an amount he/she deems fair and reasonable. In practice the fair and reasonable cost to the lessee is taken as the value to be used.

Special rules apply where the improvements are to be made on land owned by any sphere of the government of South Africa. Improvements made in compliance with these rules will be deemed to be owned by the person making such improvements for the purposes of all the other allowances available and will have to meet all the requirements of the other sections as well to entitle the taxpayer to the allowance.

### *Deductions in respect of urban development zones*

An accelerated depreciation allowance is available in respect of the cost of erection, extension, addition, or improvement of commercial or residential buildings located within demarcated areas within certain municipalities (as published by the Minister of Finance in the *Government Gazette*). The allowance is available for property developers as well as other taxpayers who bring derelict or obsolete buildings back onto the market, provided that the building is used solely for the taxpayer's trade.

The allowance will come into effect where the taxpayer incurred expenditure on the erection or improvement of both residential and commercial buildings; the taxpayer must own the building and can lease such property where it was acquired from a developer. It is imperative that the building be situated in the demarcated areas and used solely for trade purposes.

In terms of buildings that have been purchased, the contract of sale must have been concluded on or after 8 November 2005 and the allowance must not have been claimed by the developer. Furthermore, the allowance will not be available where the building ceases to be used solely for purposes of trade, was disposed of in the previous year of assessment, or was brought into use after 31 March 2014. In general the allowance can be calculated as follows:

- Where a new building is erected or an existing building is extended, 20% of the cost of erection or extension in the year in which the building is first brought into use and 8% in each of the succeeding 10 years.
- Where an existing building, or part of that building is improved (refurbished) without changing its structural or exterior framework, the allowance is 20% of the cost of the improvement in the year in which it is brought into use and 20% in each of the succeeding 4 years.

In respect of low-cost residential units, in respect of any erection, extension, addition or improvement commencing on or after 21 October 2008 the allowance is as follows:

- Where a new building is erected or an existing building is extended the allowance is 25% in the year in which the building or extension is brought into use, 13% in the following 5 years and 10% in the last year.
- Where an existing building, or part of that building, is improved (refurbished) without changing its structural or exterior framework, the allowance is 25% of the cost of the improvement in the year in which it is brought into use and 25% in each of the succeeding 3 years.

Where a part of a building in an urban development zone was purchased from the developer, the allowance will be available but limited in the following manner:

- 55% of the cost if the part of the building was erected or extended by the developer and
- 30% of the cost if the part of the building purchased was improved by the developer.

### *Deductions in respect of research and development buildings*

The allowance for the cost of buildings used for R&D activities of the taxpayer is 50% of the cost in the first year of use, 30% in the second and 20% in the third year. This allowance will not extend to the R&D relating to social sciences, humanities, marketing, business processes and management, or to any activities related to the development of trademarks.

From 1 April 2012 buildings used for R&D purposes are subject to an allowance at a rate of 5% per year.

### *Deductions in respect of airport and port buildings*

A 5% annual depreciation for airport buildings has been available since 2001. The asset is deductible to the extent that the asset is used in the production of income. From 1 January 2008, this depreciation has been extended to port buildings as well.

### *Deductions in respect of commercial buildings*

The deductions described above do not extend to a wide range of commercial buildings such as offices, shopping malls, warehouses and any other buildings used by taxpayers for the purpose of producing income in the course of their trade. From 1 April 2007, a deduction of 5% yearly of the cost of the building or improvement thereto can be claimed for all such buildings (except those used for the provision of residential

accommodation). To qualify for the allowance, the building or improvement has to be new and unused, and the erection or construction thereof must have commenced after 1 April 2007.

## Cost of obtaining finance

Costs of obtaining finance, including legal costs and stamp duty, are normally regarded as being of a capital nature and so not tax-deductible. Interest, however, is normally deductible. The raising fees are in most cases treated in the same way as interest.

## Capital gains tax

Capital gains tax (CGT) was introduced in South Africa from 1 October 2001, and applies to capital gains or losses realised on or after that date.

Capital gains tax applies to the disposal on or after 1 October 2001 of SA resident's worldwide assets, and the following assets of non-residents:

- Immovable property situated in South Africa held by that person, or any 'interest' or rights of whatever nature of that person to, or in immovable property situated in South Africa.

An 'interest in immovable property' situated in South Africa includes an interest of at least 20% held by a person (alone or together with a connected person), in the equity of a company, or in any other entity, if, at the time of disposal, 80% or more of the market value of such shares or interest is directly or indirectly attributable to immovable property situated in South Africa. This excludes immovable property held by a company or other entity as trading stock.

- Any asset that is attributable to a permanent establishment of that person in South Africa.

A capital gain arises where the proceeds received for the disposal of the asset exceeds the base cost of the asset. Special inclusions and exclusions exist for both the determination of the base cost and proceeds in respect of such asset. Generally the base cost includes the direct cost of acquisition of the immovable property as well as certain indirect costs such as valuation fees, consulting, legal, accounting or agent fees, transfer duty and advertising costs. These indirect costs extend to both the acquisition and disposal of the asset.

Net capital gains are included in the taxable income of a taxpayer at the following inclusion rates:

- 33.3% for individuals and special trusts (i.e. trusts formed to benefit a minor child, or a physically or mentally handicapped person).
- 66.6% for all other taxpayers, including companies and other trusts.

The effective CGT rates are as follows for the following entities:

Type of taxpayer	Inclusion rate (%)	Statutory rate (%)	Effective rate (%)
Individuals	33.3	0–40	0–13.3
Trusts	66.6	40	26.7
Companies	66.6	28	18.6
Permanent establishments (branches)	66.6	28	18.6

Gains realised on the sale of property are generally subject to CGT. Certain exemptions, however, exist in this regard, e.g. an exemption of the gains from the sale of the property used as a primary residence to the limit of ZAR 2m or an exemption of the gains from the sale of the property, during years of assessment commencing on or after 1 March 2009, for proceeds of ZAR 2m or less, provided the property was used as a place of ordinary residence and only used for domestic purposes for the total period of ownership and an annual exclusion of ZAR 30,000, regardless of the type of gain, for individuals and special trusts.

Where a company or a trust makes a disposal of an interest in a residence owned by it, rollover relief is provided for. The company or trust is deemed to have made that disposal for an amount equal to the base cost of the interest as at the date of the disposal, if certain requirements are met. The result will be that the company or trust would not have to account for a capital gain or loss on the disposal of such residence.

The requirements for the rollover relief to be applicable are:

- the disposal must take place on or before 31 December 2012
- the residence must be mainly used for domestic purposes during the period 11 February 2009 until date of transfer by one or more natural persons (who ordinarily resided in it and are connected persons to the trust or company) and
- in the case of a company making the disposal, the company must, within six months from the date of disposal, have taken steps to liquidate, wind up, or deregister, or
- in the case of a trust making the disposal, within six months of making the disposal:
  - the founder, the trustees and the beneficiaries of that trust must have agreed in writing to the revocation of the trust, or
  - application must have been made to a competent court for the revocation of the trust.

Where a person during any year of assessment disposes of an asset for proceeds in a currency other than the SA rand (ZAR), that person must determine the capital gain or capital loss on the disposal in that currency and that capital gain or loss must be translated into ZAR by applying the average exchange rate for the year of assessment in which that asset was disposed of.

## Dividends and withholding tax

Dividends paid by a SA resident company or close corporation are potentially liable to dividends tax and subject to WHT at 15% of the dividend paid by the company to the beneficial owner of the dividend. This WHT is paid by the company declaring the dividend from the amounts withheld on behalf of the beneficial owner, who bears the ultimate burden of the tax.

Certain persons are exempt from the dividends tax. This exemption applies in general to South African tax resident companies, government and certain government entities and regulated intermediaries (in respect of listed shares).

## Beneficiaries and trusts

Whether trusts or the beneficiaries are subject to income tax depends on whether or not the beneficiaries have a vested right to the income or capital of the trust.

Where a beneficiary has a vested right to the income of the trust, the trust is ignored for tax purposes and the income is taxable in the hands of the beneficiary at the appropriate individual or corporate rate. In this case, it is also the beneficiary who can claim the deductions and allowances which, however, are limited to the income from the trust. Any excess deductions can be carried forward to the next year.

The same look-through approach applies to capital gains. Capital losses, on the other hand, will never be 'passed on' to a beneficiary and have to be contained in the trust.

Where no vested right exists, the income and capital gains are taxed in the hands of the SA resident trust. Any after-tax distributions to a beneficiary are not subject to tax in the hands of the beneficiary. Income retained in the trust is taxed at a flat rate of 40%.

## Loss carryforward

In general, the revenue losses may be carried forward indefinitely and may be used to offset future taxable income. However, the tax advantage of the revenue losses is lost when the taxpayer ceases trading for a full year of assessment. Losses incurred by a trust cannot be used by the beneficiaries, and these losses will remain in the trust to be used to offset future taxable income earned in the trust.

Where an individual incurs losses from letting of residential accommodation, these losses may be ring-fenced and can only be set off against rental income of future years. The ring-fencing applies only where the person is in the highest tax bracket and there is no reasonable prospect of deriving taxable income from rental within a reasonable time period.

Capital losses will only be deductible against capital gains, and not against income from other sources. If an assessed capital loss is sustained, the loss is carried forward to subsequent years, to be used to offset any future taxable capital gain.

## Real estate transfer duty/value added tax (VAT)

The acquisition of legal title to a property in South Africa is subject to a real estate transfer duty. The rate for all persons is on a sliding scale: 0% on the purchase price below ZAR 600,000, 3% on the price from ZAR 600,000 to ZAR 1m, 5% on the price from ZAR 1m to ZAR 1.5m and 8% on the price that exceeds ZAR 1.5m.

No duty is payable in respect of the registration of any property transferred by any public benefit organisation.

The Minister of Finance may make an announcement to reduce or change the rate of transfer duty, effective from the date of the announcement.

Taxpayers engaged in corporate reorganisation transactions as envisaged in the Income Tax Act (e.g. asset for share company formations, amalgamation transaction, intra group transactions etc.) will now additionally obtain relief from transfer duty.

If the seller is a registered VAT vendor, VAT is levied on the transaction at a rate of 14% or 0%. If this is the case, no transfer duty would be payable on the transaction. If a registered VAT vendor acquires property from another VAT vendor and pays VAT, or acquires property from a non-registered VAT vendor and pays transfer duty, the VAT or notional input VAT amount paid may be reclaimed as an input VAT credit, provided that the property will be used for the purpose of making taxable supplies.

In the case of a purchase from a non-VAT vendor, the notional input credit for the VAT vendor purchaser is permitted but will be deferred to the extent that actual payment is made and until the property is registered in the purchaser's name.

## Other relevant taxes

Securities Transfer Tax (STT), known as stamp duty prior to 1 July 2008, is imposed at the rate of 0.25% on the transfer of all shares of companies incorporated in South Africa as well as foreign companies listed on the Johannesburg Securities Exchange. In addition, STT will arise on the transfer of a members' interest in a close corporation, the cession of dividends rights and on the cancellation/redemption of securities. STT is calculated on the higher of the consideration paid, or the market value.

On death, estate duty is levied on SA real property in the deceased estate. The rate applicable is 20% of the taxable value of the estate, less an exempt amount, which is currently ZAR 3.5m. Estate duty is not payable on the part of the estate inherited by a surviving spouse.

Donations tax is payable on certain donations made by any resident. The applicable rate is 20%, payable on the value of any property disposed of under any donation. In the case of a natural person, donations not exceeding in aggregate ZAR 100,000 in a tax year will be exempt from donations tax.

## Withholding taxes on sale of property

Any person who purchases SA immovable property from a non-resident on or after 1 September 2007 must withhold a percentage of the purchase price and pay it over to the South African Revenue Service, if the purchase price of the property exceeds ZAR 2m. The withholding constitutes 5% of the purchase price if the seller is an individual, 7.5% if the seller is a company and 10% if the seller is a trust.

If the purchaser knows or should reasonably have known that the seller of the property is a non-resident and fails to withhold the tax, he/she will be personally liable for the amount not withheld as prescribed. This, however, does not apply if the sale was effected with the assistance of an estate agent.

A purchaser may apply for a directive from the South African Revenue Service granting him/her permission not to withhold or to reduce the amount of the withholding in respect of the above-mentioned tax depending on the circumstances.

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# *Real Estate Going Global Spain*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 2 August 2012.

# *Real Estate Tax Summary – Spain*

## *Direct taxation*

### *Investment through a Spanish subsidiary*

The net income of a Spanish entity is taxed at 30%. When investing through a real estate investment fund or company, a reduced rate of 1% applies. The Spanish REIT (SOCIMI) is subject to a corporate income tax of 19%, and is applicable to qualifying subsidiaries of REITs listed in the EU or EEA.

### *Financial expenses capping rule*

The financial expenses-capping rule limits tax relief for net financial expense to 30% of the operating profit, with a minimum of EUR 1m treated as tax deductible. Financial expenses disallowed can be carried forward for 18 years, increasing the interest expense in the subsequent years, which will be subject to the 30% limit (with the exception of the period of liquidation and winding up).

### *Depreciation*

Generally, an annual 2% depreciation charge on property (exclusive of land) is allowed. The depreciation charge allowed for industrial buildings is 3%. Depreciation rates can be doubled in the case of buildings considered as used assets, i.e. of more than ten years.

### *Loss carryforward*

Tax losses incurred by a PE or Spanish subsidiary can be carried forward 18 years and may offset capital gains or ordinary income. For newly created companies incurring losses, the 18-year period will start to compute once profits are achieved.

### *Withholding tax*

Dividends payable to the parent foreign company are withheld at a 19% rate on the gross (21% in 2012-2013), or at a reduced rate, which on average is 10%, provided by the relevant double taxation treaty.

Provided that the conditions under the Parent-Subsidiary EU Directive are met, dividends paid to EU resident companies will not be subject to withholding in Spain. However, the Spanish anti-abuse clause must be carefully considered.

Interest is also subject to a 19 % withholding tax (21 % in 2012-2013) or at a reduced rate depending of the relevant treaty applicable. However, interest payable to EU resident lenders is withholding tax exempt.

In principle, rents are subject to a 19 % withholding tax (21 % in 2012-2013). However, this withholding may be avoided by the landlord if a Business Tax certificate is obtained.

### *Capital gains on the sale of property*

Capital gains are taxed at a 30% rate using a specific tax calculation in which the acquisition cost may be updated. However, taxation may be reduced to an effective 18% tax rate through a 12% tax credit, provided that the property is considered a business asset rather than inventory, and the company meets the reinvestment conditions established by the law. These conditions, among other circumstances, require the reinvestment to be made within a term of one year prior to the disposal of the property or three years after said disposal.

As a measure to stimulate transactions within the real estate market, future capital gains on disposal of urban properties qualifying as fixed assets and acquired between 12 May and 31 December 2012 shall be 50% tax exempt.

### *Capital gains on the sale of shares of real estate companies*

The disposal by a non-resident entity of shares in Spanish entities in which the assets are mainly composed of Spanish property is subject to a 19% tax rate (21% in 2012-2013), unless the sold shares are held by a company resident in a state where the double tax treaty between that state and Spain does not grant Spain taxing rights over capital gains stemming from the disposal of shares of a Spanish real estate company.

### *Direct investment through a permanent establishment in Spain*

A business structure (permanent place of business, employees, empowered agent, or any other treaty requirement) is needed for a PE. The net income (gross income less interest, depreciation, salaries and other expenses) is taxed at a 30% rate.

When the income obtained by the PE is transferred abroad, complementary taxation of 19% on gross income is levied (21% in 2012-2013). This does not apply when the head office is located within the EU, or when the relevant double taxation treaty does not recognise such an additional tax (which is so in the majority of the cases).

### *Direct investment without a permanent establishment*

Non-residents operating in Spain without having a Spanish PE are taxed at 24% on their gross income, i.e. no deduction of expenses is allowed (24.75% in 2012-2013). However, EU residents without a PE should be allowed to deduct those expenses allowed pursuant to the Individual Income Tax Act, as long as they are directly related to the income obtained in Spain and the taxpayer can provide supporting evidence that this is the case. The resulting scenario would be that regular net income obtained by EU residents without a PE would be taxed at 24% compared with taxation at 30% on net income obtained by PEs. In addition, capital gains taxation stands at 19% for non-residents without a PE (21% in 2012-2013) as opposed to 30% for PEs with recourse to reinvestment relief.

## Indirect taxation

### *Value added tax (VAT)*

In general terms, the acquisition of new buildings and urban land are subject to VAT at a rate of 18% (21% effective from 1 September 2012).

Transfers of rural lands, and used buildings are exempt from VAT. Used for this purpose means that the building is transferred for the second or subsequent time, except when the building is acquired for rehabilitation. Nevertheless, the option to VAT may be implemented and, accordingly, the transfer may be subject to VAT under certain circumstances.

Letting of commercial property is always subject to 18% VAT.

### *Transfer tax*

A transfer tax, typically of 7%, depending on the location of the real estate, is levied on transfers not subject or exempted from VAT. The transfer of real estate qualifying as a going concern is subject to transfer tax as opposed to VAT.

Transfers of shares in companies where at least 50% of their assets consist of property in Spain are subject to transfer tax when, as a result of the transfer, the acquirer achieves a dominant position, which is deemed to have happened when the acquirer's share capital in the company rises to more than 50%. It should be noted that the Spanish regulations in this respect have been subject to the EU scrutiny.

### *Stamp duty*

Normally, a 0.5% to 2% stamp duty arises jointly with VAT, and when some transactions related to real estate operations are documented in a public deed, such as mortgages, new building deeds, etc.

## Municipal taxes

### *Business tax*

Any business developed in Spain is subject to business tax levied on a yearly basis. Its cost will depend on the specific activity carried out by taxpayers. Business activity tax is deductible for corporate tax purposes.

Exemptions are available: First two years of activity; Taxpayers with an annual turnover under EUR 1m (according to the last corporate income tax return filed); individuals.

### *Real estate tax*

Real estate tax is levied on an annual basis and the tax rates may range from 0.4% to 1.10%, applicable to the cadastral value of urban properties, and 0.3% to 0.9%, applicable to the cadastral value of non-urban properties. Such a rate is increased or decreased by the local authorities, depending on the specific location of the property. The taxpayer is the owner of the real estate. Real estate tax is deductible for corporate tax purposes.

### *Tax on increase of value of urban land*

A tax on the increase of the value of urban land will accrue upon the transfer of urban land. The taxpayer is the seller.

### *Tax on construction, installation and building projects*

A tax levied on construction, installation and building projects applies to the effective cost of the work. The taxpayer is the owner of the construction work, not necessarily the owner of the building. It is a deductible expense for corporate tax purposes.

The maximum tax rate will be 4%, depending on the population of the municipality where the works are carried out.

# ***Real Estate Investments - Spain***

## **Understanding the basic principles**

### ***Legal environment***

#### **Definition of real estate activities**

For legal purposes, the definition of real estate promoter is included in the Building Act and is legally defined as the person, individual or entity that decides programmes and finances the building works, to be enjoyed by itself, or to be sold or leased. Real estate promoters have several obligations, as follows:

- to hold legal title to the land that allows the promoter to build on it;
- to provide the relevant data needed to prepare the building project;
- to obtain the prior compulsory licences and administrative authorisations;
- to subscribe such insurance policies as are compulsory under the scope of the law;
- to deliver to the transferee the documentation regarding the work executed.

For legal purposes, the definition of real estate lessor is included in the civil code and in the Urban Leases Law, and is legally defined as the person, individual or entity that leases urban real estate, either a dwelling, premises or for commercial activities.

Financial lessors are defined in the Law of Discipline and Intervention of Credit Entities. Under this definition, only financial institutions duly registered in the CNMV (Spanish Securities Exchange Commission) may lease assets under the scope of financial leasing agreements.

For tax purposes, the definition of real estate activities is included in the VAT Act, and in the Local Revenue Act regarding business tax. For corporate tax purposes, there is no specific definition, nor are there any specific regulations applicable to real estate promoters or lessors; so accounting rules are applicable to determine the taxable income of these activities, taking into account the exceptions contained in the Corporate Tax Act.

Please note that, as from March 2005, there are more obligations for lawyers, notary publics, accountants and entities in charge of real estate-related activities, among others, to obtain and deliver information periodically to the Executive Service of the Commission for the prevention of money-laundering activities.

#### **The property right**

The private property right is contained in the Spanish constitution and regulated in the civil code and other civil regulations. According to the constitution, no one can be deprived of their property except in the case of just cause of public utility or social interest, by means of the corresponding indemnification established by law.

The transfer of private property must be recorded at the Land Registry in order to be enforced *vis-à-vis* third parties.

Public property is recognised both in administrative regulations and in zoning regulations. The public authorities can own premises under private legislation and public legislation.

### The ground lease right (*derecho de superficie*)

This *in rem* right is a special right over the surface of the plot, which permits the construction of buildings over or under the land that does not belong to the constructor. It may also be granted over existing constructions. The granting of this right implies the division of the ownership of the plot between the owner and the ground lessee until the end of the stipulated term. Once that term has expired, all the constructions owned by the ground lessee will be the property of the owner.

As from July 2007, the ground lease is regulated in the Spanish Urban Planning Act. This Act provides that the ground lease must be granted by the owner of the plot before a Public Notary, and the deed must be recorded at the Land Registry, in order to be legally established. The term of the ground lease cannot exceed 99 years in any case.

The deed may also establish additional regulation of the ground lease right:

- Agreements concerning acts of disposal by the ground lessee.
- Guarantees *in rem* to secure the performance of the contract.
- Provisions regarding the construction (time limits, type of construction, etc.).

### Construction right

According to the Urban Planning Law regulated by the state, the owner of a plot has the right and the responsibility to construct. However, the owner must obtain specific licences, and be aware of having to comply with several compulsory rules, failing which the ultimate sanction could be the demolition of the construction.

### Usufruct right and other figures of divided property

The Spanish civil code contemplates the right to use and have the benefit of the plot granted to the owner to another person. This right can be onerous or free, and can be for the entire life of the person to whom it is granted or, on the contrary, just for a specified term.

This type of right is customary in Spanish heritage law. The principal is legally obliged to grant this right to over one-third of their properties to the widow/widower (unless otherwise provided in the principal's will and subject to the provisions of the Spanish civil code).

This right can be recorded at the Land Registry in order to be enforceable *vis-à-vis* third parties, for which purpose it is granted before a Public Notary prior to the recording.

Regarding other figures of divided property, indivisible property (*propiedad pro-indiviso*) is worthy of mention. This is a kind of property owned by two or more persons indivisibly, i.e. it not being possible to make a physical division of the property among the different persons that own the plot in a specified percentage.

Another form of divided property is the regime of community of owners of a building. In this form, the building is divided into premises or flats, which are owned by one person or many persons as separate property, as the case may be, there being certain

common areas that belong as indivisible property to the community. This is similar to the concept of condominium ownership.

These two types of divided property are regulated by the civil code, real estate code and other civil regulations. They can be recorded at the Land Registry in order to be enforceable *vis-à-vis* third parties.

Finally, the time-sharing property scheme should be taken into account, as will be explained below.

### Lease contracts

Lease agreements are specifically included in the civil code, which distinguishes between urban leases and rural leases. With respect to urban leases, these are regulated in the Urban Leases Law, distinguishing between residential and non-residential urban leases.

Although they are considered personal rights, lease agreements can be recorded at the Land Registry, pursuant to the real estate code, which has taken into account the protection that the lessee needs before third parties who can acquire the land or premises that the lessee occupies.

### Administrative concessions

The public authorities can grant administrative concessions over plots or premises with public utility in favour of natural persons or legal entities, selected by tender. According to these concessions, the concessionee can carry out works and develop activities in order to obtain profits.

These concessions are regulated by administrative law and civil law. They can be recorded at the Land Registry over the plot in order to be known by third parties.

### Town Planning regulations

The urban planning competence for legislation is transferred to the regional authorities (Autonomous Communities) in Spain, with the exception of the regional authorities of Ceuta and Melilla, where the central state authorities have legislative capacity.

On the other hand, the town halls also have competences in several kinds of planning proceedings as well as all the matters related with the granting of the building licences.

The urban planning laws regulate three different areas, which are the following:

- **Zoning:** it is the first step of the Urban Procedure and defines the different kind of planning instruments. The main document under planning regulation for each municipality is the General Master Plan. It is the cornerstone of Spanish planning law. It is a general and comprehensive town and country planning document and relates to an individual municipality. The PGOU establishes the main rules and guidelines and also chooses which planning model applies. The practical achievement of the PGOU depends on the class of land, which is established by the PGOU itself and various other planning instruments.
- **Management:** it refers to the development and implementation of the projects that Spanish Administration use to organise and distribute the land in some specific areas, attending the town planning elaborated by local administrations. The object is to redistribute between the owners all the rights and charges that result from the plan.

- Licences and authorisations: for the development of activities in premises

Although the regulation of these authorisations and licences varies from one municipality to another, there are four basic different types of licences necessary to build and carry on a business in Spain from a general point of view:

- A building licence (*Licencia de Obras*).
- An activity licence (*Licencia de Actividades e Instalaciones*).
- A first occupation licence (*Licencia de primera ocupación*).
- An opening or operating licence (*Licencia de Apertura o Funcionamiento*).

Licences are regulated by regional regulations (*normativa autonómica*) and finally, municipal regulations (*normativa municipal*). According to those regulations, the regimen of the licences can change. It has to be taken into account that the licences are granted by the town hall authorities. This means that the process to obtain the licences may vary in the different municipalities regarding term, resolution, documentation requested, etc.

## Tax environment

This section analyses the general principles governing Spanish taxation of real estate investments. In this respect, it should be noted that the analysis of the particular tax provisions that might be applicable in the different Spanish autonomous communities, and especially in the Basque Country, Navarre and the Canary Islands, are outside of the scope of this brochure.

### The scope of Spanish taxation

Under Spanish domestic law, income and capital gains triggered by Spanish real estate properties are taxable in Spain, whether realised by a Spanish resident or non-resident. Moreover, Spanish law provides for the taxation in Spain of capital gains stemming from the sale, by a non-resident, of the shares of a company, whether or not Spanish, whose principal assets consist of Spanish properties.

The application of these provisions to non-residents depends on the contents of the tax treaty that binds Spain and the country of residence of the owner of the properties or shares of real estate companies.

Most of the tax treaties concluded by Spain stipulate, according to article 6 of the OECD Model Convention, that real estate income is taxable in the country where the property is located. Yet, only through a case-by-case analysis will it be possible to determine whether Spain has the right to tax or not.

### Income/capital gains tax

There are no separate taxes for income and capital gains in Spain.

### Resident entities

Spanish resident entities are subject to Spanish corporate tax on their worldwide net income and capital gains.

Taxable income generated by resident companies is subject, as a general rule, to a flat corporate tax rate of 30%.

For corporate tax purposes, the starting point to determine taxable net income and capital gains is the company's annual accounts. Nevertheless, adjustments are normally required in order to bring the annual accounts figures in line with tax rules.

Rules governing the accounting results are contained in the Commercial Code, Corporations Act and in the General Accounting Plan. New Spanish GAAP rules came into effect as of January 2008. However, special accounting rules for real estate entities have not been enacted, but the old real estate accounting plan would remain applicable as long as it is compatible with general GAAP.

Net income is generally determined on an accrual basis, i.e. income has to be attributed to the year to which it economically pertains.

Spanish tax regulation requires that transactions carried out between related parties comply with arm's length principles. Transfer pricing regulations oblige taxpayers directly to price their intercompany operations at arm's length and impose the obligation to make available to the tax administration, documentation that justifies the prices applied. All domestic and international transactions between related entities must be valued at arm's length for tax purposes and be duly documented.

Corporate tax returns must be filed annually, within 25 calendar days following the six months subsequent to the end of the tax period.

Corporate tax must be paid on a prepayment basis at periodical intervals throughout the financial year.

### **Joint ventures (*Unión Temporal de Empresas (UTEs)*)**

Joint ventures are especially used by construction and engineering companies when a contract is given to more than one company. They are treated as Temporary Consortia companies, not paying corporate tax on the part of taxable income imputable to the member resident company. However, this tax regime will not be applicable to the portion of the taxable base of the joint venture attributable to non-resident members. This taxable base is taxed at the general tax rate of the corporate income tax, i.e. 30%.

### **Community of owners and civil partnerships**

Income corresponding to communities of owners and partnerships that carry on business activities as entrepreneurs will be attributed to common owners or participants, respectively, in accordance with the rules or agreements applicable in each case.

These are forms used to develop real estate activities in Spain in order to avoid the tax and administrative costs of incorporating a company. Notwithstanding the above, special care regarding the liability regime applicable to the members of these forms must be considered. Both of them are regarded as VAT taxpayers.

### **Participatory account contract (*contrato de cuentas en participación*)**

This is a type of legal contract whereby an owner of land transfers, or merely allows an entrepreneur named as a management participant, normally the constructor, to use

the land. As consideration for such use, the management participant must pay a portion of the profits obtained in the developing of the real estate promotion, or in the business carried out on the land, to the non-management participant.

The remuneration paid by the management participant to the non-management participant, i.e. the owner of the land transferred or contracted to the management participant, is tax-deductible for corporate tax purposes.

### Resident individuals

Resident individuals are subject to Spanish personal income tax on their worldwide income.

Trusts are not specifically recognised under Spanish law.

The personal income tax base shall be taxed at the progressive rates stated in the state and autonomous communities' scales with a marginal tax rate of 52% in 2012 and 2013. Nevertheless, capital gains generated are subject to a flat rate of 19% (21% on the amount exceeding EUR 6,000). For years 2012 and 2013, rates have been increased (in tranches): 21% for gains up to EUR 6,000, 25% between EUR 6,000 to EUR 24,000, 27% for gains above EUR 24,000). Under Spanish personal income tax legislation, income stemming from real estate assets can fall within the following categories:

- Returns on real estate.
- Business earnings, determined pursuant to corporate tax rules.
- Capital gains or losses.

Capital gains and losses derived from properties applied to the real estate activity carried out as a business activity, such as the facilities used for the real estate activity, shall not be considered as business earnings, and will be taxed according to the tax regime applicable to capital gains and losses described below.

### Net wealth tax

Before 2008, resident individuals were subject to wealth tax on their worldwide net wealth, and non-resident individuals on their net assets located in Spain. However, a law passed in December 2008 abolished in practice this tax through a 100% tax rebate with retroactive effect to January 2008 for both resident and non-resident individuals. However, regions have been entitled to reintroduce this tax for 2011-2012.

### Non-resident entities and individuals

Non-resident entities and individuals are subject to taxation in Spain solely on their Spanish source income.

The basis for taxation of a direct property investment in Spain held by a non-resident will depend on the status of the non-resident for Spanish tax purposes. Permanent establishment (PE) investment is taxed at a 30% rate on the net income and capital gains. On the other hand, non-PE investment is taxed at a rate of 24% on the gross income (24.75% in 2012-2013), plus a separate rate of 19% on the capital gains (21% in 2012-2013).

However, EU residents without a PE should be allowed to deduct those expenses allowed pursuant to the Individual Income Tax Act, as long as they are directly related

to the income obtained in Spain and the taxpayer can provide supporting evidence that this is the case. In particular, this means that, for real estate lease activities carried out by an EU resident with no fixed place of business in Spain, the taxable base would be made up of rental income less expenses as opposed to the current gross rental income system.

Spanish domestic legislation provides a 19% branch tax applicable to entities' PE investments (21% in 2012-2013), but not to individuals. This tax can be avoided when the head office is resident in an EU member country, or in a country that has signed a treaty with Spain, which does not contain any provisions on branch tax, subject to reciprocity conditions.

## Value added tax (VAT)

### *General*

The basic concepts of the Spanish VAT regime, such as taxable persons, nature of the goods, delivery of goods and supply of services, have been made consistent with the 6th EC Directive. As a result, Spanish VAT regulations are comparable to those applicable in the other EU Member States. VAT grouping rules are available.

The current Spanish standard VAT rate is 18% (21% effective from 1 September 2012).

For VAT purposes, a PE exists when a real estate is leased in Spain. The PE for VAT purposes must be registered before the Spanish tax administration as a VAT taxpayer, even when it would not be considered as PE for income tax purposes.

VAT-registered entities are required to file VAT returns on a quarterly or monthly basis (dependent on the quantum of turnover). Where a Spanish VAT-registered company was in a net VAT repayment position in respect of a calendar year, a refund could be claimed during January of the following year. The Spanish tax authorities would then have a period of six months in which to make a repayment where due, after which point the tax authorities would also be liable to pay repayment interest. In order to alleviate this financial cost, net input VAT can be recovered on a monthly basis.

### *Transfer of property*

For Spanish VAT purposes, property qualifies as goods and the transfer of property as a supply of goods.

The general rule is that the transfer of newly developed or redeveloped property located in Spain carried out by VAT taxpayers is subject to VAT, whereas the transfer of used property is VAT-exempt and subject to transfer tax.

In addition, the transfer of urban land carried out by VAT taxpayers is subject to VAT, whereas the transfer of land that does not fulfil the qualification for urban land is subject to transfer tax.

However, Spanish VAT legislation provides a specific rule for VAT-exempt real estate transfers, so that the transaction may be VAT-able.

Nevertheless, the acquisition of shares in a company, where at least 50% of assets being real estate located in Spain, is subject to transfer tax typically at a 7% rate when, as a result, more than 50% in the shareholding of the company is, directly or indirectly, achieved. The Spanish Supreme Court has recently referred a preliminary question to

the ECJ to conclude on the compatibility of such rules with the VAT Directive and with the freedoms of establishment and movement of capital.

### *Letting of property*

Supply of services means any transaction that does not constitute a supply of goods. Supplies of services on property fall within the scope of Spanish VAT with the exception of the lease of dwellings, which is subject to transfer tax.

## **Other indirect taxes**

### *Transfer tax*

Transfer tax can be an important cost factor, not only in asset deals, but also in share deals.

Transfer tax is levied on the transferee of the property, typically at a 7% rate, depending on the autonomous community in which the property is located, on the fair market value of the property at the time of acquisition, when the transferee is a non-VAT taxpayer, or when the transfer is declared VAT-exempt. The transfer of real estate qualifying as a going concern is subject to transfer tax as opposed to VAT.

Transfer tax is also levied on income arising from the leasing of dwellings, at a reduced tax scale on an annual basis.

### *Capital tax*

Capital tax may be applicable under an indirect investment structure carried out through a Spanish company. Even though incorporations and share capital increases are exempt, decreases of share capital are subject to capital tax at 1%.

On the other hand, the incorporation of a PE is subject to capital tax in Spain at a rate of 1%, provided that the head office is resident in a non-EU country.

In this case, the taxable base would consist of the greater of the following amounts:

- Funds formally assigned to the PE in the deed of incorporation.
- The result of applying, during the first year of activity of the PE, the proportion between the turnover of the PE and the total turnover of the head office to the fiscal capital of the head office as defined by Spanish tax law, which is net worth excluding the results of the year.

If additional funds were assigned to the PE, capital tax will also be due. In this case, the same rules concerning the calculation of the taxable base would be applicable.

Direct real estate investments that do not constitute a PE will not be subject to this tax.

Furthermore, capital tax will not be levied when the holder of the PE is a non-resident individual.

### *Stamp duties*

Stamp duties are incompatible with transfer tax, but not with VAT. Therefore, the transfer of a property subject to VAT can also be subject to stamp duties, at a 0.1% to 1.2% rate – depending on the location of the property – applicable to the value of the transferred asset, provided that the transfer is documented in a public deed and that such deed has to be registered in a public registry.

Notwithstanding the above, when real estate is acquired in a VAT transaction as a consequence of the waiver of the applicable exemption, the tax rate could range between 1% and 2%, depending on the autonomous community.

Mortgages are subject to stamp duties also at a rate of 0.1% to 1.2%, depending on the location of the property. No stamp duties are levied on any other kind of loans, even participating loans or any other kind of debt instrumented in securities, provided that they are not secured by a mortgage.

### Local taxation

Local taxation may have a relative importance, depending on the characteristics of the activity in particular:

- Business tax, on the specific activity carried out by taxpayers.
- Real estate tax, on the ownership of the property.
- Tax on increase of value of urban land, upon the transfer of urban land.
- Tax on construction, installation and building projects, applicable to the effective cost of the work.

## Direct purchase of assets

### *Legal aspects*

#### The pre-contract: purchase option, promise to sell/buy

Pre-contract, such as purchase options or the promise to sell or buy, can be executed before a notary or, alternatively, privately between parties. They can be recorded at the Land Registry according to what is established in the Real Estate Code and Normative applicable.

#### Purchase option

With the pre-contract known as the purchase option, the seller, referred to as a promisor, undertakes during a certain term, the obligation to sell to the other party, the beneficiary, the property (object of the contract) on the date when the beneficiary gives notice of its will to buy the said property.

The fact of the beneficiary accepting the promise by signing such a preliminary contract does not in any way represent an undertaking to buy. The beneficiary simply acknowledges the promise of the seller, the sole party bound by the contract.

When the beneficiary exercises the option to buy, the sale is completed. Failing this, the seller is released from their promise, and is free to sell the premises to a party other than the beneficiary.

There can be an option price fixed by mutual agreement between the parties.

The purchase option will be enforceable vis-à-vis third parties if it is duly recorded at the Land Registry. For such recording at the Land Registry of the purchase option, the requirements according to the Real Estate Code are as follows:

- Mutual agreement between the parties in relation with the recording.

- Price determined for the acquisition of the premises and, if any, the price established for the option.
- Term to exercise the option, required to be less than four years, except in the case of a lease with purchase option, in which the term will be the same as the lease. But in case of extension of the lease, the option expires.

### Promise to sell/buy

According to the Spanish civil code, the promise to buy or sell, when there is an agreement between parties concerning the object and the price, will give the parties the right to claim the performance of the contract. This means this type of contract implies a reciprocal undertaking binding the parties to perform it.

### Exchange control regulations

The acquisition of real estate valued more than EUR 3,005,060.52, or the incorporation of a Spanish subsidiary or a branch made by non-Spanish nationality investors, is considered as foreign investments in Spain, and needs to be communicated to the Investment Registry belonging to the *Ministerio de Economía y Hacienda*, once they have been carried out.

The acquisition of any real estate by an investor located in a territory previously defined as a tax haven is also considered a foreign investment in Spain. In any event that the foreign investor is located in a tax haven, the communication mentioned above needs to be submitted to the Investment Registry before the execution of the investment.

### Tax aspects

50% exemption on capital gains derived from real estate.

As a measure to stimulate transactions within the real estate market, future capital gains on disposal of properties acquired between 12 May and 31 December 2012 shall be 50% tax exempt.

The exemption is applicable to taxpayers of Corporate Income Tax, Individual Income Tax, and Non-Resident Income Tax (without a permanent establishment in Spain).

For Corporate Income Tax purposes, the conditions of the exemption are the following:

- Eligible assets are those urban properties (i) qualifying as fixed assets (i.e. not stock), and (ii) acquired within the above given time frame;
- A 50% exemption is applicable on capital gains obtained at any time after the entry into force of this new rule;
- Impairment in value of the properties, if any, is disallowed for the calculation of the exemption;
- Transactions, acquisitions and transfers between entities of the same corporate group are disallowed for exemption purposes;

The 50% exemption is compatible with the reinvestment relief (reducing the effective taxation rate to 9%).

## VAT/transfer tax

The following operations, when carried out by VAT taxpayers, are subject to VAT.

Transfer of property or rights on property.

- Urban land (i.e. land ready for development) or land under urbanisation in progress (i.e. preparing the infrastructure for development of the area), at 18% (21% effective from 1 September 2012).
- Buildings still in construction, at 18% rate (21% effective from 1 September 2012).
- First transfer of new dwellings, at an 8% rate (10% effective from 1 September 2012), or at a 4% rate if under 'official protection' regime.
- First transfer of other new premises and commercial buildings, at an 18% rate (21% effective from 1 September 2012).
- Transfers of buildings for rehabilitation, at 18% (21% effective from 1 September 2012).
- Transfers of buildings to be demolished, in order to carry out a new real estate promotion, at 18% (21% effective from 1 September 2012).
- Transfers of purchase options on real estate, at 18% (21% effective from 1 September 2012).
- Transfers of a ground lease right, at 18% (21% effective from 1 September 2012).

Otherwise, transfers of used buildings and rural land are, in general, exempt from VAT, and subject to transfer tax. However, Spanish legislation provides a rule for renouncing to such an exemption, in order to submit the operation to VAT taxation.

On the other hand, the acquisition from non-VAT taxpayers of property located in Spain is subject to transfer tax typically at a 7% rate on the fair market value of the property at the time of acquisition.

## Option to VAT

This is a commonly used procedure that does not need prior approval from the tax authorities.

In order to qualify for a waiver, it is required basically that the buyer must be a VAT taxpayer, eligible for the full recovery of input-VAT, so that the transaction may be VAT-able. In this respect, it should be noted that the option for a VAT-able transfer is based on a strict formal procedure that needs to be followed carefully in order to avoid transfer tax.

The advantage of the option for a VAT-able transfer is that, as opposed to VAT, transfer tax will not be completely recoverable by the buyer, although transfer tax will be partially recoverable via the corporate tax depreciation of the relevant assets.

It should be noted that there is a bill under discussions which is proposing the reverse charge mechanism to apply to those scenarios where the option to VAT is implemented by the seller. The self-charge mechanism means that the buyer will self-charge VAT. A condition of the option to charge VAT is that the buyer may fully deduct input VAT borne on the acquisition of the property, such that self-output VAT would be fully deductible at the buyer's level.

### VAT recovery

Under Spanish rules, VAT can be deducted once a company or entrepreneur begins to output VAT. Notwithstanding the above, the company or entrepreneur is allowed to do a provisional deduction before they begin to output VAT. Such provisional deduction has to be regularised through the application of the average deduction rate corresponding to the first four years of business or professional activities in which the company or entrepreneur will output VAT.

### Stamp duties

The transfer of a property subject to VAT is also subject to stamp duties, at a 0.1% to 1.2% rate – depending on the location of the property – (rates are typically higher if the option to VAT has been implemented), provided that the transfer is documented in a public deed and that such deed has to be registered in a public registry.

### Acquisition of an entrepreneurial activity as a whole

It is also to be noted that, under Spanish VAT legislation, the transfer of the entrepreneurial activity as a whole may not be subject to VAT. This implies that the buildings transferred as a result of the transfer of the entrepreneurial activity would be subject to transfer tax.

However, the transfer of a leased property would be treated as a regular transfer subject to VAT, provided that neither material means nor staff are transferred.

## Acquisition of a Spanish property company

### *Legal aspects*

#### Corporations in Spain

There are two kinds of companies that limit the liability of its shareholders for the amount of stock capital previously contributed by each of them. These companies are the limited liability company, or *Sociedad de responsabilidad Limitada* (S.L.), and the private limited company, or *Sociedad Anónima* (S.A.).

In both cases, the incorporation requires the granting of a public deed, and its registration at the Mercantile Registry. The regime on corporate agreements, corporate administration, books and records, annual accounts, audit reports and acts subject to be filed with the Mercantile Registry, are substantially similar for S.L. and S.A.

With respect to the formal requirements of the purchase of shares, it is important to notice the difference between these two types of companies. These differences are detailed below.

#### *Private limited company (Sociedad Anónima)*

The transfer of shares is different in the cases of registered shares and bearer shares.

- Registered shares do not have to be granted before a Public Notary or recorded at the Companies Register. Public limited company law states that once the managers of the company have checked the transfer of the shares, they have to record it in the Register Book of Registry Shares. Public limited company law also provides that the registered shares can be transmitted by endorsement.

- Transfer of bearer shares does not need to be granted before a Public Notary or registered. Only the title tradition is required, according to what is established in the Companies Code.

Should the transfer of any kind of shares imply the transformation into a sole partner company, this new condition has to be included in a public deed and recorded at the Companies Register according to the aforementioned law.

### *Limited liability company (Sociedad de Responsabilidad Limitada)*

- The transfer of interests must be executed in a public deed granted before a Public Notary, and has to be registered at the Partners Register Book according to the limited liability company law.
- There is a pre-emptive right of purchase granted to the rest of the shareholders.
- Should the transfer of interests imply the transformation into a sole partner company, this new condition has to be included in a public deed and recorded at the Companies Register according to the aforementioned law.

## *Tax aspects*

### *Transfer tax*

Although exempt from both VAT and transfer tax in principle, under Spanish legislation, the acquisition of a property through a share deal can give rise to transfer tax, since the transfer of securities is subject to transfer tax at the typical rate of 7% under the following circumstances:

- When the transferred securities correspond to entities in which at least 50% of the assets are made up of real estate located in Spain.
- When, as a consequence of the transfer of the securities, the acquirer obtains, directly or indirectly, more than 50% of the capital stock.

Provided that such participation may be held directly or indirectly, for these purposes, transfers of shares in a holding company participating in a Spanish real estate company may give rise to transfer tax.

Increases of interest may also be subject to transfer tax.

Furthermore, the transfer of shares received as a result of a non-monetary contribution of a property within a term of three years after the contribution of the property will also be subject to transfer tax.

Transfer tax, when applicable to share deals, cannot be avoided by renouncing the VAT exemption.

It should be noted that the Spanish real estate transfer tax (RETT) rules for share deals have been subject to the scrutiny of EU institutions. In particular, the Spanish Supreme Court has recently referred a preliminary question to the ECJ to conclude on the compatibility of such rules with the VAT Directive and with the freedoms of establishment and movement of capital.

# Building/rehabilitation of real estate

## *Legal aspects*

### Construction contracts

In Spain there are two types of construction contracts: public construction contracts regulated by the Law of Contracts of the State, or *Ley de Contratos del Estado*, and private construction contracts regulated by the civil code and/or the Building Act.

Public construction contracts are celebrated by public authorities and public entities that grant the construction of public works to a private company chosen by public tender. On the other hand, private construction contracts are celebrated between natural and/or legal persons, and are denominated as construction leases, or *arrendamiento de obras*.

### The building rehabilitation

The duty of building rehabilitation was contained in the previous Urban Planning Laws, as well as the Urban Planning Law published by Spain in 1998, which is currently in force. Article 19 of this law states that the owners of any kind of construction must comply with the regulations related to rehabilitation that are developed by the regional and municipal authorities.

The rehabilitation is normally previewed for those constructions that have any cultural or historic value. In many cases, it is only applied to parts of constructions that are considered valuable by the zoning authorities. Notwithstanding, this duty can be applied to any kind of construction in case the competent authorities may consider it.

## *Tax aspects*

### Income tax

As stated in the Spanish domestic rules, construction, installation and assembly works, the duration of which exceeds 12 months, constitute a PE, and shall therefore be taxed as such. Nevertheless, when a tax treaty applies, its rules have to be examined, as they can introduce a different period of duration of the works in order to consider the existence of a PE in Spain.

### Tax on construction, installation and building projects

This tax is levied on construction, installation and building projects and is applicable to the effective cost of the work. The taxpayer is the owner of the construction work, which is not necessarily the owner of the building. This tax is a deductible expense for corporate tax purposes.

The maximum tax rate will be 4%, depending on the municipality where the works are carried out.

# Financial investments in Spanish real estate

## *Legal aspects*

Changes in the regulations of the real estate investment companies and funds have made them more attractive for investors, provoking a significant increase of investments in this sector as well as the creation of new institutions.

Real estate investment companies are collective investment institutions that take the form of limited companies, *or sociedades anónimas*, which have the exclusive purpose of investing in urban real estate to be leased.

Real estate investment funds are collective investment institutions that have the exclusive purpose of investing in urban real estate to be leased. Real estate investment funds must be managed by a management company. The majority of the members of the board of the management company must be persons with proven experience in real estate and financial markets.

## General notes on collective investment institutions

The minimum share capital of real estate investment companies is EUR 9,015,182.

The minimum equity of real estate investment funds is EUR 9,015,182. The minimum number of shareholders of real estate investment companies, and the minimum number of participants of real estate investment funds is 100, without counting those whose participations exceeds 25% of the institution's share capital.

Accordingly, with these rules, there are no limitations in the sense that an individual or entity may have a majority interest in a collective investment institution, provided that 100 shareholders' respective participations in the fund does not exceed 25% of the institution's share capital.

## Transitory period concerning the investment policy

For newly incorporated collective investment institutions, and in respect of their investment policies, there is a transitory period of three years from its formal registration with the *Comisión Nacional del Mercado de Valores* (CNMV) in order to fulfil the legal requirements regarding the investment policy. Once this transitory period is completed, all the requirements regarding the investments in urban real estate must be fully completed or, if this is not the case, the entity could lose its legal consideration as a collective investment institution.

The applicable Spanish regulations concerning investments managed by these real estate investment institutions provide for several additional requirements to be observed during the transitory period. These requirements relate to such areas as investments in fixed income, or following rules of risk diversification.

## Investment regime

Collective investment institutions must invest in urban real estate to be leased as dwellings, offices, commercial facilities, or students' and elderly residences. In addition, these institutions can invest in real estate in construction phase, options, or real rights over real estate and administrative concessions that allow for the lease of real estate.

Real estate investment funds must invest at least 70% of their total assets in real estate. The rest of their assets can be invested in fixed income, although special requirements of liquidity must be met.

With each type of institution, no single property can represent more than 35% of the institution's total assets.

Properties that make up the assets of these entities cannot be sold during a three-year holding period, unless express authorisation of the CNMV is granted.

These entities can only carry out certain real estate promotions.

The borrowed funds of collective investment institutions cannot exceed 50% of the institution's total assets.

### Restrictions on operations with directors, administrators, managers, participants and partners of these institutions

Restrictions exist relating to the purchase, sale or lease of the assets of real estate investment companies and real estate investment funds to their directors, administrators, managers, participants and partners. In addition, restrictions exist relating to the acquisition by these institutions of properties from companies of the same group, or which form part of the group of the management company.

### Inspection and supervision

The CNMV shall inspect and supervise collective investment institutions to make certain they fulfil all legal requirements.

## Tax aspects

### General aspects

Resident shareholders or unitholders of these entities do not have to include in their personal income tax any income until the date these entities distribute their profits, or the date on which the interest owned is transferred by the shareholder or unitholder.

Dividends and profits distributed by these entities do not give any right to apply to its resident shareholders or unitholders any credit to avoid double taxation.

### Real estate investment companies

Real estate investment companies, the exclusive social purpose of which is investment in urban real estate to be leased, are eligible for a low income tax rate of 1% if all the regulatory and tax requirements are met.

### Real estate funds

The main differences between real estate funds and real estate investment companies are discussed above under the section '*Financial investments in Spanish real estate – Legal aspects*'. These funds are taxed in basically the same manner as real estate investment companies.

### Mortgage securitisation funds

Mortgage securitisation funds are taxed following the standard income tax regime, but income received by the funds is exempt from withholding tax.

## *Spanish REIT: Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario (SOCIMI)*

### *Legal form and capital requirements*

The only legal form that is permissible for a SOCIMI is a Spanish corporation (*Sociedad Anónima*). The nominal capital of a SOCIMI must amount to at least EUR 15m. There is a maximum threshold for external debt of up to 70% of the value of the SOCIMI assets.

### *Listing requirements*

SOCIMIs must be listed on a recognised stock exchange in Spain, the EU, or the EEA.

### *No investment restrictions on shareholders*

There are no specific provisions restricting the investment of shareholders into the SOCIMI. However, pursuant to the applicable stock exchange regulations a listed entity must have at least 100 shareholders with an interest of less than 25% each. In addition, a 25% free float is required.

### *Asset/income/activity tests*

The corporate activity of the SOCIMI must be one of the following: (i) the acquisition and development of urban real estate for rent; (ii) the holding of shares in other SOCIMIs or in foreign companies subject to a similar REIT regime; (iii) the holding of shares in Spanish or foreign companies with the same corporate activity, dividend distribution obligations, leverage restrictions, asset and income tests as SOCIMIs; (iv) the holding of units in Spanish regulated real estate collective investment institutions.

At least 80% of the value of the assets must consist of qualifying real estate assets and shares. Qualifying assets must be held for a minimum period of three years, extended to seven years for self-developed real estate. In addition, at least 80% of the SOCIMI's earnings must relate to rent and dividends from qualifying shares.

### *Distribution requirements*

The SOCIMI is obliged to distribute the following amounts:

- At least 90% of profits derived from rental income and ancillary activities.
- At least 50% of capital gains derived from qualifying real estate assets and shares. The remaining gain should be reinvested within a three-year period or fully distributed once the three-year period has elapsed and no reinvestment has been made.
- 100% of profits derived from dividends received from other SOCIMIs, foreign REITs, qualifying subsidiaries and collective investment institutions.

### *Tax treatment at SOCIMI level*

The taxable base corresponding to the portion of qualifying income shall be subject to a 19% corporate tax rate as opposed to the standard corporate tax rate, which currently stands at 30%. All other income will be taxed at the standard rate. The SOCIMI's resident 100% subsidiaries may benefit from this tax regime.

A 20% exemption on income from residential property is available when the majority of the assets held by the SOCIMI are dwellings.

### Tax treatment at the investor level

Dividend distributions by the SOCIMI both to residents and non-residents are not subject to Spanish withholding tax.

#### *Non-residents and individual resident shareholders*

Dividends derived from SOCIMI shares are exempt. Capital gains derived from the disposal of SOCIMI shares are partially exempt. The exemption is equal to 10% of the acquisition value of the shares multiplied by the number of years the shares have been held, less exempt dividends received during the holding period.

#### *Non-residents with a PE and resident corporate shareholders*

Dividends are subject in their entirety to corporate income tax at the general rate (30%). Those dividends distributed out of profits taxed at the reduced rate at the level of the SOCIMI are entitled to a tax credit to avoid double taxation equal to 19% (effective taxation of 11% at the level of shareholders). Dividends taxed at the general rate are entitled to the same tax privileges that apply to ordinary dividends. Capital gains derived from the disposal of SOCIMI shares shall be subject to the general income tax rate, i.e. 30%.

### Transition to SOCIMI/Tax privileges

New or existing companies and collective real estate investment institutions can opt to join the SOCIMI regime by notifying the tax administration. The regime applies retrospectively from the beginning of the financial year in which the SOCIMI has validly applied to join the tax regime. There is no entry tax charge established for the transition to the SOCIMI regime.

Transfer tax, capital duty and stamp duty benefits may apply.

Delisting, waiver of the regime, substantial non-compliance with reporting requirements or dividend distribution obligations or any other requirements will result in removal from the SOCIMI regime.

### Loss of the SOCIMI regime

If the company loses the REIT status, a new election for the SOCIMI regime to apply cannot be made for five years.

## Financing the acquisition of Spanish property. Capital contribution and dividends

### *Legal aspects*

#### Minimum share capital

One of the main differences between an S.L. and an S.A. is the minimum share capital required for their incorporation. For an S.A., the requirement is EUR 60,102 and minimum 25% paid up of each share. For an S.L., the requirement is EUR 3,006 and a minimum 100% paid up of each share.

### Minimum debt/equity ratio

When losses reduce the net worth of an S.A. below two-thirds of the share capital at the end of two consecutive fiscal years, the company is obligated to reduce the share capital. This rule does not apply to an S.L.

When the losses reduce the net worth of the company – either an S.A. or an S.L. – below half of the share capital, the company is obligated to be dissolved, unless other measures, such as capital increase/decrease, or shareholders contributions are taken to recover the net worth of the company.

## Tax aspects

### Capital duties

The incorporation of a Spanish subsidiary is exempt from capital tax.

The incorporation of a Spanish branch would imply a 1% capital tax cost, provided that the head office is located in a non-EU country. The taxable base would consist of the funds formally allocated to the PE, or, if higher, the result of applying the proportion between the turnover of the Spanish PE and the total turnover of the head office to the fiscal capital of the head office as defined by Spanish legislation. This is defined as net worth excluding the results of the year.

### Dividends

Regarding the distribution of dividends, 19% (21% in 2012-2013) of the gross amount should be withheld when paying them to a Spanish resident company or a company resident outside of the EU, in a country that has not concluded a double taxation treaty with Spain.

Otherwise, the applicable treaty should be consulted in order to determine the withholding tax rate applicable.

If dividends are paid to a company resident in a member country of the EU, and the company owns a direct stake of at least 5% in the capital of the subsidiary, and has one year of seniority, the provisions of the EU Parent-Subsidiary Directive apply. Because of this Directive there is no withholding on the dividends, provided the following conditions are met:

- Both companies are subject to direct taxation in the pertinent country of residence.
- The profit distribution is not the consequence of the liquidation of the subsidiary.
- Both companies take one of the forms provided in the Appendix to the EU Directive.
- The anti-abuse provision of the Spanish EU parent subsidiary regime is overcome.

The period of one year of previous seniority may be met if after that date the shareholder maintains the stake for a period of one year.

## Debenture and interest

### *Legal aspects*

#### *The mortgage and other guarantees*

The mortgage is a real and voluntary guaranty that guarantees the payment of a specific credit. The mortgage has to be duly drafted before a public officer and registered at the Land Registry in order to be duly constituted.

Spanish law contemplates a special procedure for the execution of the mortgage, which permits the creditor or third person to be the new owner of the plot in approximately no more than one year, by public tender.

There are other kinds of guarantees, such as the right of distraint, susceptible to be recorded at the Land Registry. This right guarantees the performance of certain obligations. These guarantees are compulsory for the owner of the plot or premises by a judge resolution, and for its execution the actor has to follow the Spanish customary procedures established in law.

### *Tax aspects*

#### *Income tax*

#### *Interest tax deductibility: Transfer Pricing*

Assuming that loans are granted at arm's length basis, the deductibility of interest depends on the way the investment in Spain is to be made.

- In the case of direct investments, interest paid on loans taken out to acquire property, would be deductible as long as they are directly related to the income obtained in Spain and the taxpayer can provide supporting evidence that this is the case.
- In the case of investments through a PE or Spanish subsidiary, interest paid by virtue of a loan agreement contracted for the acquisition of real estate is, for corporate tax purposes, in principle fully deductible, provided that the parties met the arm's length principle. However, the PE cannot deduct interest paid to its foreign head office, except under a provision of a tax treaty that may allow such deduction.

Furthermore, when interest is paid to any of those countries or entities considered as a tax haven for Spanish tax purposes, deductibility depends on the proof that the loan is needed for the activity, and that the conditions established respect the arm's length basis rules.

New transfer pricing rules are applicable for tax periods starting as of December 2006. Documentation regulations shall be observed.

#### *Withholding tax on interest*

Interest payments made by a Spanish debtor – be it a company or PE – to a non-resident in consideration of a loan or current account is, in principle, subject to a 19% withholding tax (21% in 2012-2013), unless provided otherwise by a tax treaty. In this case the tax rate generally ranges between 0% and 10%. However, Spanish domestic law provides for a withholding tax exemption on interest paid if the lender is an EU entity without the involvement of a PE. A certificate of tax residence in the EU must be provided by the lender to the Spanish payer of the interest in order to avoid the withholding on the payments.

## Financial expenses-capping rule

A new financial expenses–capping rule replaces the Spanish thin capitalisation provisions with effects to financial years starting on or after 1 January 2012.

The financial expenses-capping rule will limit tax relief for net financial expense to 30% of the operating profit.

The key points of this new rule are as follows:

- The restriction applies to any debt, including intra-group and third party debt.
- The basis of the 30% limitation is applied to the accounting operating profit after deducting (i) depreciation of fixed assets, (ii) subsidies for non-financial assets and others, (iii) impairment and transfer of fixed assets, and adding (iv) financial income from certain equity instruments.
- The net financial expense of the year up to EUR 1m shall be treated as tax deductible. This means that the 30% capping only applies to amounts exceeding the EUR 1m threshold.
- The EUR 1m minimum threshold should be reduced proportionately for tax periods of less than 12 months.
- Financial expenses disallowed can be carried forward for 18 years, increasing the interest expense in the subsequent years, which will be subject to the 30% limit.
- If financial expenses do not reach the 30% breakdown, the difference may be carried forward to the following five years for tax deductibility purposes.
- The financial expense capping-rule will not be applicable to banks and insurance entities.
- This new rule does not preclude the application of the transfer pricing provisions to related party transactions.
- The new law establishes specific provisions for tax unities.
- The limitation is not applicable in the period when the entity is extinguished.

On the other hand, financial expenses derived from intra-group debt used to fund the acquisition of interests in entities from other group companies, or for equity contributions to group entities, will not be treated as tax deductible unless such transactions are business driven.

## Profit participating loans

The participating loans may be considered a variety of subordinated loans, which are those by virtue of which the creditor expressly waives their priority in rank for the benefit of other creditors. Participating loans will be deemed as accounting net worth regarding capital decreases and winding-up of companies for the purposes of the mercantile legislation.

According to Royal Decree Law of 7 June 1996, profit participation loans must necessarily have the following features:

- The loans must provide to the investor a variable interest determined on the evolution of the activity of the business. The criteria to determine the said evolution may be profits, level of revenues, net equity of the borrower or any other

criteria established by the parties linked with the evolution of the borrower business activity.

- Early repayment must be penalised if agreed to by the parties. On the other hand, the anticipated amortisation of the participating loan will require an equivalent increase of the net equity of the company.
- Spanish company law subordinates creditors of participating loans to all common creditors, except the shareholders of the company when such company is liquidated.

Additionally, it is essential that there must exist an obligation that the borrower repay to the investor the funds granted, in order to determine the loan's nature as debt and not as equity.

In the case of profit participation loans granted by a non-resident-related entity, financial expenses capping rules would also apply, and the fixed and variable interest paid by the Spanish subsidiary or PE should meet the arm's length principles to preserve the interest's deductibility and be duly documented.

In this respect, it must be noted that, participating loans are considered as equity for purposes of debt/equity balance. Therefore, they represent a useful tool to rebalance debt/equity ratios for commercial purposes.

### Subordinated loans

Although commonly used by banks and credit entities, loans referred to any other particular issue, different to the evolution of the business as a whole, are not expressly regulated in Spanish legislation. Therefore, we should attend standard rules for its deductibility (market rates, financial expenses capping rules, tax-havens regime, transfer pricing).

### Stamp duty on real estate mortgages

When a mortgage loan is entered into in order to finance property, a stamp duty is levied at a rate of 0.1% to 1.2%. No stamp duty is levied on any other kind of loans, even participating loans or any other kind of debt instrumented in securities, provided that they are not secured by a mortgage.

## Real estate financial leasing

### *Legal aspects*

Leasing contracts are regulated by the Law of Discipline and Intervention of Credit Entities, or *Ley de Disciplina e Intervención de las Entidades de Crédito*, which defines these types of contracts. These types of contracts can be used both for personal property and real estate.

According to this type of contract, the financial leasing entity owner of the premises or plot leases it to another person, and gives that person an option to buy at the end of the term of the lease. The contract discounts from the final price the rents already paid by the lessee in cases where the lessee exercises its option to buy.

This type of contract can be recorded at the Land Registry to have validity before third parties.

The accounting treatment for the lessee of a lease with a purchase option will depend on whether the purchase option is reasonably expected to be executed or not, according to the economic conditions of the lease contract.

Only when the purchase option is reasonably expected to be executed by the lessee, will the special accounting rules applicable to the lessee coincide with what is commonly known as a finance lease.

Otherwise, if the purchase option is not reasonably expected to be exercised by the lessee according to the economic substance of the agreement, the lease will have to be registered by the lessee according to the rules corresponding to standard renting.

Under Spanish corporate tax legislation, in a leaseback operation the transferred asset will continue under the same depreciation regime as before the transfer, as if the transfer had not taken place.

## *Tax aspects*

### *Income tax*

#### *Resident or non-resident with a Spanish PE*

The part of the leasing instalments which correspond to the recovery of the cost of the goods will be considered as a tax-deductible expense for the lessee, except if the contract covers lands, sites or other non-depreciable assets. The lessee will likewise obtain tax relief from the financial charge paid to the lessor entity.

The amount of this tax deduction may not exceed the result of applying twice the straight-line depreciation coefficient that corresponds to the leased assets in accordance with the official approved depreciation tables. Accordingly, the leasing tax regime provides an accelerated depreciation regime, consisting of double the standard depreciation. For companies with a medium or reduced size, the accelerated regime may rise to triple the standard depreciation corresponding to the asset.

In order to enjoy this regime, the leasing contract must fulfil the following requirements:

- The leasing contract must be carried out with a leasing financial entity as defined in the Law of Discipline and Control of Credit Entities.
- The leasing contract must have a minimum term of two years when they cover movable goods, and of ten years when they cover real estate or industrial establishments.
- The financial leasing instalments must be expressed in the respective contracts in such a way that they differentiate between the part that corresponds to recovery of the cost by the lessor entity and the financial charge required by the said entity.
- The annual amount of the part of the leasing instalments corresponding to recovery of the cost must remain equal or increase throughout the contractual period.

#### *Non-residents without a Spanish PE*

Payments made by a Spanish resident lessee to a non-resident lessor without a PE in Spain, for the lease of real property, under both operating and finance leases, will be subject to withholding tax in Spain. This withholding tax is at the general rate of 24% established for non-residents (24.75% in 2012-2013).

However, if the lessor were deemed to have a PE in Spain in connection with the leasing activity, the above-mentioned payments would be subject to the general corporate income tax rate of 30%, corresponding to resident taxpayers.

### VAT

As a general rule, any leasing of assets –residential excluded- carried out by VAT taxpayers will be subject to VAT at the general rate of 18% (21% effective from 1 September 2012). In this case, the lessor entity will be required to charge VAT to the buyer.

VAT will accrue when the periodic instalments became binding, on the amount of the instalment in question.

## Managing Spanish real estate

### *Corporate income tax: Resident entities and non-residents with a PE*

Resident entities and non-resident entities with a PE are taxed, in general terms, at a 30% rate on the net income, which is calculated following the principles of the Spanish accounting plan.

In particular, the following expenses are tax-deductible if properly documented:

- Interest expenses, provided that the financial expenses capping and transfer pricing rules are respected. (PE cannot deduct interest paid to its foreign head office.)
- Operating expenses
- Maintenance expenses
- Property management expenses
- Property valuation fees
- Legal fees
- Tax advice
- Audit fees
- Management fees, provided that a prior written agreement exists, showing the method of distribution of the expenses under rational criteria
- Capitalisation of expenses and interest incurred in acquiring the property

Other expenses in addition to the acquisition price, such as those arising from demolition, insurance, installations, etc., incurred prior to the entry in operating conditions of the property, can be considered part of the acquisition price, and amortised, instead of considered expenses.

Furthermore, interest related to the acquisition of the real estate, accrued up to the same moment, can also be capitalised.

### Tax depreciation regime of real estate assets

With the exception of land, and the capitalised expenses related to land, most tangible and intangible fixed assets are depreciable for Spanish resident companies, foreign companies acting under a PE, and both national and foreign individual entrepreneurs. However, the depreciation rules as described below do not apply to property held as inventory.

The tax depreciation method generally used for building depreciation is the straight-line method. The original acquisition costs, i.e. the acquisition cost itself plus related expenses, such as registration duties, brokerage fees, notary's fees, architect's fees, betterment, etc. are the basis for depreciation. As a general rule, 2% is the straight-line depreciation rate acceptable for commercial properties such as office buildings; 3% for industrial properties. This rate can be doubled if the property is acquired already used, or other rates can be used if an agreement is reached with the tax authorities. However, if it can be substantiated that the useful life of the property is shorter, a higher depreciation rate may be applied. This is normally achieved by means of special depreciation plans to be agreed with the Spanish Revenue.

Plants and machinery can be depreciated at a higher rate, where they can be considered as a differentiated part of the immovable property. These items are considered as such when they can be separated from the property with no major alteration of the latter.

Costs and expenses derived from the acquisition, such as transfer tax, or notary fees, for instance, can be, generally, computed as acquisition value, and therefore depreciated as well.

### Impairments of real estate assets

When the market value of a property, regardless of whether it is considered as a fixed asset or inventory, falls below its acquisition price, or production cost, the accounting value can be adjusted with the pertinent provision, if reversible. Such an adjustment is also considered as tax-deductible, provided that it is duly recognised in the annual accounts, and the difference between acquisition/production value and market value at the end of the financial year can be proved to the Spanish tax authorities.

### Personal income tax

As mentioned previously, income derived from the letting of property in Spain held by individuals is subject to taxation in Spain, but the basis depends on the consideration of individuals as resident or non-resident in Spain.

Income from immovable property obtained by a resident individual will be subject to Spanish personal income tax at a maximum progressive rate of 52% in 2012-2013.

In the case that real estate income, could be considered as business earnings, corporate tax rules should be applicable.

### Withholding tax on rents

Income obtained from the lease of urban property is subject to withholding, in principle, and the lessees are required to make the relevant withholding of 19% from the rent paid (21% in 2012-2013). However, the lessee will not be required to withhold any amounts from this income if any of the following requirements are met:

- The annual rent paid by the lessee to the lessor does not exceed EUR 900.

- The rent is paid by a company for the renting of a dwelling at the disposal of its employees.
- The lessor is obliged to pay a business tax, as explained below, on professional and business activities. This would be the case when the cadastral value of the leased property is equal to or greater than EUR 601,012.10. In this case, the lessor must prove such circumstances to the lessee.
- The rents are due to financial leasing contracts of urban properties according to the Law of Discipline and Intervention of Credit Entities.

### *Non-resident entities without a PE*

Non-resident entities without a PE are taxed, accrual by accrual, at a 24% rate on certain net income (24.75% in 2012-2013).

### **VAT**

The letting, financial leasing and granting of surface or rights *in rem* on commercial property, such as office buildings, shopping centres, business facilities, etc. is subject to Spanish VAT at the general rate of 18% (21% effective from 1 September 2012).

However, the letting of property for housing purposes is exempt from VAT.

In cases where a VAT taxpayer lets different types of property so that they carry out both VAT-able and VAT-exempt letting of property, the partial deduction rule regime will be applicable.

Spanish VAT due on supplies and services rendered by non-established VAT taxpayers to an established Spanish VAT taxpayer is levied upon the established Spanish VAT taxpayer recipient of the supply or service. This is the reverse charge rule.

### **Business tax**

Any business developed in Spain is subject to business tax, levied on a yearly basis. The business tax cost will depend on the specific activity carried out by taxpayers. Office/commercial facilities renting activity tax charge is 0.10% of the cadastral value of the leased surface within the national territory. If the total cadastral value is lower than EUR 601,012.10, no business tax shall be charged under this concept.

Taxpayers with an annual turnover under EUR 1m (according to the last corporate income tax return filed) and individuals are tax-exempt. In addition, the first two years of activity are also exempt.

Business activity tax is deductible for corporate tax purposes.

### **Real estate tax**

Real estate tax is levied on an annual basis and the tax rates may range from 0.4% to 1.10%, applicable to the cadastral value of urban properties, and 0.3% to 0.9%, applicable to the cadastral value of non-urban properties. However, such rates are increased or decreased by the local authorities, depending on the specific location of the property.

The taxpayer of this tax is the owner. Notwithstanding the above, this tax is commonly charged to the tenant if so agreed. Real estate tax is deductible for corporate tax purposes.

## Special tax on real estate owned by non-residents

A 3% tax is levied on a yearly basis on the cadastral value of real estate owned by non-residents. This value is reviewed periodically.

However, this tax is not levied under certain circumstances, as described below.

- When the properties are owned by listed companies on official secondary stock markets.
- When the properties are owned by entities entitled to benefit from a tax treaty with a clause of exchange of information, provided that the ultimate individual owners of the properties are either entitled to benefit from a tax treaty with a clause of exchange of information or resident in Spain. Such circumstances will have to be proved through appropriate tax residency certificates.
- When the properties are owned by foundations and non-lucrative entities registered in a country with a tax treaty with a clause of exchange of information entered with Spain.
- When the properties are owned by foreign states, public institutions or international bodies.
- When the properties are owned by non-resident entities that develop in Spain an economic exploitation different from the mere leasing of the real estate.

This tax does not apply when the real estate is owned by a Spanish company, even when this company is totally owned by non-residents. It is open to discussion if the application of this tax to EU companies is compatible with EU Law.

It should be noted that a bill under discussions is proposing that all entities would be exempt from this tax with the exception of those entities resident in certain prescribed jurisdictions.

## Transferring real estate

### *Legal aspects*

#### The transfer of a real estate property by a non-resident

The transfer of real estate property by a non-resident needs to meet the same conditions and formal requirements as a transfer by a resident. Accordingly, there are two different formal ways to accomplish a transfer. The first is by private contract, effective only between the parties, taking into account that private contracts cannot be registered at the Land Registry. The second is by a public deed granted before a Public Notary to be later registered at the Land Registry, which is fully effective before third parties. For this reason, it is recommended that parties follow this second option.

These types of contracts must include all legal requirements established in the civil code for the transfer of property.

According to the Royal Decree 9/2005 of 14 January 2005, concerning soil pollution, when the transfer of a property (or the transfer of a right over a property) is granted by means of a public deed and potentially polluting activities have taken place in the transferred property, the owners will be obliged to declare this fact in such deed.

Likewise, when an administrative decision has been adopted stating that a specific property is polluted, this decision will have to be stated in the Property Registry.

On the other hand, and also when the transfer of property is granted by means of a public deed, pursuant to the legislation regarding the prevention of money-laundering activities, the means of payment and the data concerning the origin of the funds (account number, cheque, etc.) shall be stated in the Public Deed and a proved copy of the bank cheque or accreditation of the money transfer (or any other kind of money order) will be enclosed to the deed.

### **The transfer of shares in a non-resident real estate company**

The transfer of shares in a non-resident real estate company does not imply the transfer of real estate assets, because there is only a change of partners. For this reason, it is not necessary to celebrate in Spain a private contract or to grant a public deed of transfer of real estate property. The owner of the properties recorded at the Spanish Land Registry will be the same after the purchase of shares of the real estate company.

## *Tax aspects*

### **Capital gains taxation**

#### *Resident entities*

Capital gains realised by a Spanish resident company on the transfer of Spanish property are subject to Spanish corporate tax. Capital losses realised on the transfer are fully deductible. The capital gain or loss realised on the disposal of the property is calculated as the proceeds less the tax book value of the property, i.e. historic cost less tax depreciation, taking also into account the relevant inflation adjustments.

The current term for tax loss carryforward is 18 years. Newly incorporated companies can compute such term from the first tax period in which profits are obtained.

The capital gains derived from the transfer is subject at the standard rate of 30%. However, it may be reduced to an effective 18% tax rate through a 12% tax credit, provided that the property is considered a business asset rather than inventory, and the company meets the reinvestment conditions established by the law. These conditions, among other circumstances, require the reinvestment to be made within a term of one year prior to the disposal of the property or three years after the said disposal.

#### *Resident individuals*

Under Spanish personal income tax rules, the amount of the capital gains or losses shall be determined by the difference between the acquisition and transfer values, taking also into account the relevant inflation adjustments, in the case of capital gains stemming from the disposal of real estate.

Capital gains obtained in the transfer of real property are taxed at a flat rate of 19% (21% on the amount exceeding the EUR 6,000 threshold). For years 2012 and 2013, rates have been increased (in tranches): 21% for gains up to EUR 6,000, 25% between EUR 6,000 to EUR 24,000, 27% for gains above EUR 24,000).

Furthermore, the taxation of capital gains arising in connection with assets bought before 31 December 1994 can be reduced, depending on the acquisition date.

### *Non-resident entities and individuals*

Transfers of Spanish properties by a non-resident entity without a PE are subject to a 19% tax on the capital gain (21% in 2012-2013).

If a PE exists, capital gains would be added to the non-resident income taxable base, and netted against expenses and capital losses, if any.

Under Spanish domestic legislation, capital gains derived from the disposal of Spanish companies, the main assets of which consist of real estate, are taxable in Spain at a 19% rate (21% in 2012-2013). However, under certain tax treaties, such taxation can be avoided.

This treatment is also applicable to the sale of participation on real estate funds or companies.

Under both direct and indirect investment structures, the taxation of capital gains obtained by non-resident individuals in connection with assets bought before 31 December 1994 can be reduced, depending on the acquisition date of the asset.

### *Special regime for mergers, spin-offs, contribution of assets and exchange of securities*

There is a special tax-free regime available when transferring properties, or real estate companies, as a result of some corporate operations, such as mergers, spin-offs, contribution of assets and exchange of securities.

For these cases, it is required in general terms that the acquiring entity is a Spanish-resident entity, and it is forcedly to be notified to the Spanish tax authorities.

It should be noted that Spanish law goes further than EU disposals regarding neutrality in corporate operations, and grants the regime also to mere contributions in kind made by a non-resident to a Spanish-resident company.

As a result, it is also available for planned structures in which subsequent transferring of shares, instead of properties, is preferred, provided that the operation as a whole does not attempt against the corresponding anti-abuse, such as fraud or tax evasion, provision.

### *Special 3% withholding on real estate transfers*

When a non-resident without a PE in Spain is transferring a property located in Spain, the acquirer, regardless of whether they are resident or not, will become obliged to withhold 3% of the price, on the account of the transferor's income tax.

If the property is transferred by an individual, a reduction of taxation will be applicable if it is acquired before December 1994.

This 3% withholding does not apply on the transfer of the shares of Spanish real estate companies made by non-resident shareholders.

### *VAT/real estate transfer tax*

The same comments included in the section '*Direct purchase of assets – Tax aspects*' are applicable here in connection with the indirect taxation of assets.

### **Revision period for VAT deduction regarding real estate assets**

Under Spanish VAT legislation, a property is subject to a so-called revision period. The revision period is ten years, i.e. the calendar year in which the property is put into use and the subsequent nine calendar years. In the year in which the property is put into use, the VAT will in principle be recoverable according to the ratio between the turnover from VAT-able supplies and the total turnover of the taxpayer.

At the end of each following year a comparison must be made between that year's ratio and the ratio of the acquisition year. If the ratios differ, either additional VAT payment must be made, or a VAT refund will be received by the owner of the property. However, if the ratios differ by 10% or less, no additional payments will be made. When property is transferred during the revision period, a VAT adjustment may be required. For that purpose, 10% of the original VAT paid is notionally allocated to each year of the revision period.

Regarding the VAT consequences of the transfer of the property during the revision period, the following rules apply.

- If the transfer is not subject to VAT (with the exception of the transfer of a going concern), then a legal fiction assumes that the property has only been used by the seller for tax-exempt activities during the remaining part of the revision period. The input VAT, at an amount of 10% per year, allocated to this remaining period, cannot be recovered by the seller. If this VAT has already been recovered by the seller in previous years, a one-time adjustment payment must be made by the seller to the tax authorities for the remaining part of the ten-year period.
- If the transfer is subject to VAT, then a legal fiction assumes that the property has been used by the seller for taxable activities during the remaining part of the revision period. The input VAT, at an amount of 10% per year, allocated to this period can be fully recovered by the seller.

Regarding the ten-year revision period, a new computing will start for the buyer of the property, following the VAT-able transfer of a property.

### **Municipal tax on increase in value of urban land**

This local tax will accrue upon the transfer of urban land. The taxpayer is the seller. The economic consequences of this tax could be relevant, depending on the date of acquisition of the land transferred.

The maximum tax rate will be 30%, depending on the municipality where the real estate is located. This tax rate is applicable on the deemed increase in value calculated on the cadastral value of the land taking into account the coefficients included in the tax ordinances. The tax on increase of value of urban land is deductible for corporate tax purposes.

### **Sale of shares in Spanish resident entities**

Under Spanish domestic legislation, capital gains obtained by non-residents from the disposal of shares of Spanish companies for which their main assets consist of real estate are taxable in Spain at a 19% rate (21% in 2012-2013). However, under certain tax treaties, such as with the Netherlands, the UK, and Austria, for instance, such taxation can be avoided.

## Conclusion

As in any other investment, the fixing of an optimal investment structure for real estate acquisition, exploitation or transfer will depend on the specific objectives of each investor.

Before investing in Spanish real estate, it is highly advisable for the investor to check the burdens on the property, and whether it is eligible for the use towards which it is intended.

Obviously, the optimal solution might vary from passive to active investments, from long-term to short-term expectations, or even depending on the residence of the investor or the financial tools available.

Apart from direct taxation considerations, some other very different aspects should be borne in mind prior to investing in Spanish property, such as the following:

- VAT recovery
- Possibility of option to VAT if VAT exempted
- Transfer tax
- Taxation on share deals, when acquiring or transferring
- Financial expenses capping rule
- Transfer pricing
- Repatriation of funds

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# *Real Estate Going Global St. Maarten*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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**All information used in this content, unless otherwise stated, is up to date as of 25 June 2012.**

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# Real Estate Tax Summary – St. Maarten

## General

A foreign corporate investor may invest in St. Maarten property directly or through a local (e.g. a limited liability company [*naamloze vennootschap* or N.V.] or private limited liability company [*besloten vennootschap* or B.V.] or non-resident company or through a partnership.

Non-resident companies receiving income from real estate located on St. Maarten are subject to the same tax rates with regard to the rental income as local companies.

## Rental income

Companies are subject to the standard flat corporate tax rate of 34.5%.

Local and non-resident companies and partnerships owning St. Maarten property are allowed to deduct interest expenses (on loans borrowed from third parties and banks or affiliated companies) and property-related costs from their taxable income. They are also allowed to deduct the majority of other types of business costs including acquisition costs. Certain expenses, such as architect's fees and refurbishment costs incurred during construction, cannot be deducted when incurred and must be added back to the acquisition price of the property.

There is no withholding tax (WHT) on tax-deductible interest on loans in St. Maarten. However, in case of a mortgage loan, the interest will be taxed in St. Maarten as income of the lender. In case of a loan without mortgage the interest will not be taxable in St. Maarten.

## Thin capitalisation rules

There are few restrictions in St. Maarten with regard to the deduction of interest paid to related parties, as long as the loan is based on arm's length conditions. It is important to have a written contract that includes a repayment scheme and the term of the loan.

Interest on a loan granted by a related St. Maarten exempt company (*vrijgestelde vennootschap*) is not deductible insofar as the loan is higher than three times the net equity of the borrower.

## Depreciation

Property should be capitalised against the historic cost price (i.e. including acquisition costs). An annual depreciation charge on buildings (exclusive of land) ranging from 2% to 3.3% is in general accepted by the tax authorities. Accelerated depreciation is allowed for one-third of the acquisition price of fixed assets, including buildings.

In case of extensive maintenance, the expenses may not be deducted when incurred, but must be added to the acquisition price. In case the maintenance regards a specific component of a property, such as a façade, the heating system, or the roof, this may be booked individually and may be depreciated at a higher rate than the regular 2% to 3.3%. Accelerated depreciation is possible up to 1/3 of the acquisition price.

## Investment deduction

Companies are entitled to an investment deduction regarding investments in buildings (exclusive of land). In case of residential real estate the deduction is only applicable when renting out is part of the normal course of business of the company. The investment deduction amounts to 8% of the investment if an existing building is acquired, and 12% of the investment if a new building is acquired, or an existing building is improved. The investor is entitled to the deduction in the year of investment and in the following year, so that the total deduction amounts to 16% or 24% of the investment.

If, however, the building is sold within 15 years after the beginning of the year of investment, a disinvestment addition will be added to the taxable profit of the year of sale and the following year. The disinvestment addition will be computed as 8% (or 12%) of the sales' price. However, the addition will never be computed on an amount higher than the price of acquisition plus later improvements. There is no real estate tax on St. Maarten.

## Fiscal incentives

A company that engages in development of land in St. Maarten, whereby large plots that lie fallow will be developed by laying out roads and construction of buildings, may be granted an exemption for profit tax on profits realised through the sale of the developed land. The investor will only be eligible for the aforementioned incentive if the total investment (excluding the investment in land) amounts to at least ANG 2m (approximately USD 1.1m).

## Capital gains on the sale of property

Companies are subject to profit tax on realised capital gains at the ordinary tax rate. Taxation on capital gains realised on the sale of St. Maarten property can be deferred by creating a so-called 'replacement reserve'. The property that has been sold must in that case be replaced by a comparable asset within (in principle) four years. The capital gain should be deducted from the purchase price of the newly acquired property, resulting in a lower depreciation charge in future years.

## Other relevant taxes

### *Transfer tax*

The acquisition of legal title to St. Maarten property is subject to 4% transfer tax (*overdrachtsbelasting*).

## ***Turnover tax***

A 5% turnover tax (*omzetbelasting*) is levied in connection with the sale of real estate, if no transfer tax is due. The rent of real estate is also subject to the 5% turnover tax unless the property is the home and principal residence of a resident of St. Maarten.

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# ***Real Estate Investments – St. Maarten***

## **General**

### ***Introduction***

This guide comprises an overview of the tax and legal aspects relating to the acquisition of commercial real estate in St. Maarten. It is not intended to be comprehensive and consequently should only be relied on as an introduction to general matters relating to St. Maarten property law and tax.

The tax aspects are considered with respect to investments made by corporate investors under the ultimate control of non-resident corporate investors. We have also included some key information on non-trading investments realised by individuals.

### ***Foreign investment control***

There is no restriction on the purchase and sale of real estate which constitutes a foreign direct investment in St. Maarten. Non-residents may also freely incorporate a company in St. Maarten. No formality is required to acquire a company that owns investment property or has a real estate activity.

## **Direct investments**

### ***Ownership***

Ownership of a property is the right to enjoy and use of the property in the most absolute manner, provided the use is not prohibited by laws or regulations (freehold). Leasehold rights which confer on the tenant a real estate interest also exist but are quite rare and are often land owned by the Government. It is possible for the bare ownership (*bloot eigendom*) to vest with one owner and the usufruct (*vruchtgebruik*) that gives the right to possession or the income, to vest with a different owner.

Any sale of real estate, whether freehold or leasehold, must take place through a notary public.

### **Freehold**

A person owning the freehold of a property (*volle eigendom*) is the owner in perpetuity. They may use the property as they please, as long as the law does not prohibit it.

Subject to exceptions, they own the land and everything above and below it, including all buildings and vegetation.

### **Timeshare**

It is possible to buy and sell timeshare units. A property (an apartment or a house) will in most cases be sold in units of one week. The timeshare owner is entitled to the use of his real estate during that specific period.

## Deed of sale

The deed of sale must be executed before a notary. The deed of sale will identify the parties and the property and set out the T&C of the sale.

## Formalities

When the deed has been executed, the notary public will lodge a copy with the Land Registry for registration and arrange for any outstanding mortgages to be removed.

## Acquisition costs

Unless otherwise agreed, the buyer bears all acquisitions costs, including the notaries' fees and expenses, the Land Registrar's fees and the registration duty.

## Tax aspects

### Taxation of the acquisition of real estate

Either turnover tax or transfer tax will be payable on the sale or purchase of real estate in St. Maarten.

### Transfer tax

Transfer tax is payable in case real estate is sold. It is calculated on the purchase price. Unless the parties agree otherwise, the cost of the transfer tax is borne by the buyer.

If the tax inspector considers that the actual market value of the property is higher than the price or the market value declared, he can levy transfer tax on the actual market value.

The transfer tax is fully tax deductible, either as expenses or by way of depreciation allowances where transfer tax is capitalised.

### Turnover tax

Turnover tax is payable in case the transaction is exempt from transfer tax. This may inter alia be the case when the owner of real estate sells the economic ownership but does not transfer the legal ownership.

### Taxation of income and capital gain

Income from, and capital gains realised on the sale of, real estate in St. Maarten are taxable in St. Maarten, whether a St. Maarten resident company or a non-resident company receives them. On the other hand, a non-resident corporation will not be taxed with regard to a capital gain on the sale of shares in a company that is resident on St. Maarten. In case a resident company realizes a capital gain on the sale of such shares this will in most cases be tax exempt under the participation exemption.

### Permanent establishment in St. Maarten

In principle, the ownership of a St. Maarten property by a non-St. Maarten company does not in itself constitute a permanent establishment (PE) in St. Maarten.

Nevertheless, the direct holding of St. Maarten properties may constitute a PE when one of the following criteria is met:

- The non-St. Maarten company carries on part of its activities in St. Maarten through a fixed place of business.

- The non-St. Maarten company carries on activities in St. Maarten through a dependent agent acting on its behalf and which has an authority to conclude contracts in the name of the company (e.g. conclusion of lease agreements).

Should the St. Maarten property constitute a PE, the net profit would be subject to profit tax. The net after-tax profit may be distributed freely, as St. Maarten does not levy a branch tax.

### Corporate income tax

The taxable rental income corresponds to the gross rental income less deductible expenses both determined on an accrual basis, whether realised directly, or through a given St. Maarten vehicle.

If the investment is realised through a corporate structure the income is subject to St. Maarten corporate tax. The standard rate of corporate tax is 34.5%.

When the investment is realised through a partnership type company which is not liable to corporate tax, the taxable income is determined at the level of the company, but the burden of tax lies in the hands of the shareholders.

### Personal income tax

When a taxpayer holds a property directly or through a tax transparent company, the taxable rental income corresponds to cashed rental income less deductible expenses, unless the leasing of the property does not constitute a business. If the property does not constitute a business the cashed rental income is taken into account at 65%. The only expenses that may be deducted are expenses that are normally for the account of the user, such as cleaning, garden maintenance, the user's electricity bill. Expenses with regard to maintenance or other expenses that normally are for the account of the owner are not deductible except for interest paid on a loan taken out to acquire the property.

The net rental income received is subject to rates ranging from 0% to 47.5% (for income received in 2012).

## Purchase of a real estate company

### *Legal aspects*

Unlike the case of a direct real estate purchase, the intervention of a notary public is not mandatory. The seller and buyer typically instruct their usual lawyers and other advisers to advise them in connection with the deal.

### *Tax aspects*

The transfer of shares is in principle exempt from corporate income tax based on the application of the participation exemption and in case the seller is a non-resident shareholder who had not been resident on St. Maarten for at least ten years.

### Direct tax liabilities

Contrary to an asset deal scenario where the purchaser does not bear any tax liability for debts preceding the purchase of the property itself if the vendor is in default, in a share deal scenario the purchaser will inherit all current or pending tax liabilities which may exist at the level of the target company.

**Consequently, as part of a due diligence exercise, the purchaser should carry out a tax review of the company before the purchase and negotiate a price discount and/or a tax warranty in order to protect his interests.**

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# *Real Estate Going Global Sweden*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2013*

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All information used in this content, unless otherwise stated, is up to date as of 9 January 2013.

# Real Estate Tax Summary – Sweden

## General

A foreign corporate investor may invest in Swedish property directly or through a local company (i.e. *aktiebolag*, or AB), a non-resident company, or through a partnership (i.e. *handelsbolag/kommanditbolag*, or HB/KB).

Foreign investors frequently invest in Swedish property through either a resident or a non-resident holding company structure, e.g. a holding company owning shares in one or more subsidiary companies.

## Competitive corporate taxes

As of 1 January 2013, the Swedish corporate income tax rate has been reduced from 26.3% to 22%. The effective tax rate may be lower due to the possibility of deferring taxation of profit. Computation of taxable income is based on statutory accounts, to which certain adjustments are made for tax purposes. Interest expenses on funds borrowed from, e.g. banks or affiliated companies (see below for limitations), and property-related expenses are tax-deductible for resident and non-resident companies and partnerships owning Swedish property.

There are no thin capitalisation rules in Sweden. However, Sweden has imposed new interest stripping restrictions as of 1 January 2013. Please see below section '*Interest stripping limitations*'.

## Group consolidation

Each company within a group constitutes a separate taxable entity. The group, as such, is not taxed. However, the group relationship is taken into account in various ways. The most obvious example is the special tax regime concerning group contributions. Group contributions entail a straight transfer of profits between two group companies, a transfer that is deductible for the transferor and taxable for the transferee. Such transfers are reflected as year-end accruals in the annual accounts of both companies, and are executed by way of transfer of funds. The most important condition for qualifying for group tax relief is that more than 90% of the common ownership has to have existed for the entire fiscal year, or since either of the two companies was originally incorporated, should incorporation have taken place in the income year during which the group contribution is passed.

## Tax allocation reserve

Swedish tax legislation offers a general option to set up a reserve, which can best be described as a tax allocation reserve, in addition to an excess depreciation reserve. This option is intended, e.g. to allow companies the possibility to carry back losses to offset previous years' profits, since Swedish tax legislation does not contain a specific loss carry back provision. The reserve is based on a company's annual taxable income.

One-quarter of the taxable income may be appropriated to this reserve. A particular year's allocation to the reserve can be released at the discretion of the company, e.g. to cover a net operating loss. The reserve must however be released to taxable income at the latest in the sixth taxation year after the taxation year when it was added to the reserve. As a result, a company using this option will be able to carry on its balance sheet an untaxed income reserve, equal to the sum of one-quarter of each of the last six years' taxable income. A taxable income, amounting to 72% of the government borrowing rate at the year prior to the financial year, is calculated, based on the ingoing balance of the reserve each year. The government borrowing rate at the end of November 2011 was 1.65%.

## Interest stripping limitation

Interest paid on a loan at a rate that is markedly above the market interest rate may be treated as a deemed dividend distribution in respect of the excess portion.

Since 1 January 2009, regulations limiting interest deduction apply to certain debts between affiliated entities. The current restriction from 2009 denies a tax deduction for interest payments on intra-group loans related to the acquisition of shares from an affiliate, unless either; the creditor is taxed on the interest at a rate of at least 10% in a theoretical test where the interest income is the only income for the creditor (10% tax test), or it is shown that the share transfer as well as the debt are undertaken for commercial reasons. In spite of the introduction of these regulations it became apparent, that there remain substantial opportunities to avoid corporate taxation in Sweden through tax planning on the basis of interest expenses. Therefore has the Swedish Parliament imposed new rules, which will come into force as of 1 January 2013.

The new rules extend the scope of the current restrictions for interest deductibility to apply in respect of interest expenses on any loan within an affiliated group, whatever the purpose of the loan arrangement.

A minimum 10% tax test at the true creditor level, i.e. the person entitled to the interest, will still allow interest deduction (measured as if the interest had been the sole income), however not if the achievement of considerable tax benefits for the group was the main reason behind the debt structuring.

Interest within an affiliated group is still deductible by companies such as life insurance companies and pension funds to the extent the interest rate does not exceed 250% of the average government borrowing rate the year before the income year.

Commercial reasons for the loan is still also an alternative test for allowing deduction, but only if the creditor is resident within the EEA or in a tax treaty jurisdiction with which Sweden has a full tax treaty.

For internal share acquisitions, the commercial reasons test requires both the share transfer and the debt to be based on commercial reasons.

In line with the new rules, the scope-extension to any internal loan, whatever its purpose, might drastically increase the applicability of these restrictions, to not only loans for debt push-downs (internal share transfers), but also to external acquisitions of shares, as well as regular financing for acquisition of businesses or assets, or just for

cash needs. As the new restrictions apply for interest accruing in 2013, they might naturally affect also many existing, old loans.

## Depreciation

Property should be carried at its historical cost. In Sweden, an annual depreciation rate of between 2% and 5% is allowed for tax purposes in respect of buildings, excluding land. The depreciation rate for tax purposes does not have to correspond with the book depreciation.

## Withholding tax

There is no withholding tax on interest in Sweden and there is no withholding tax or branch profits tax applicable to PEs operating in Sweden. Dividends distributed by a resident company to a foreign company are exempt from withholding tax, if the latter company would be exempt from taxation on a received dividend would it have been a company resident in Sweden, i.e. dividends received on unlisted shares, or if the shares are listed, a participation of at least 10% of the voting power and a holding period of at least 12 months is required. Should a company not qualify for the exemption, a 30% withholding tax applies. However the withholding tax rate can be reduced according to a double tax treaty concluded between Sweden and the other country.

## Real estate transfer tax

As of 1 January 2011, the direct acquisition of legal title to Swedish property is, for legal entities, subject to 4.25% real estate transfer tax. The basis of the transfer tax shall be constituted by the higher of the purchase price and the tax assessment value of the real property at the time of the acquisition. Sale of shares in a real property company/partnership is not subject to transfer tax.

## Loss carryforward

Tax losses can be carried forward indefinitely by a Swedish AB. The loss carryforward may be lost if the company is liquidated, takes part in a merger or in another way is subject to a change in ownership. Losses carryforward will not be lost if the actions taken only are a matter of internal reorganization. The tax losses can be set off against taxable income in other Swedish group companies through a group contribution, provided that the companies have the same ultimate parent who holds more than 90% of the shares.

## Value added tax (VAT)

Sales and permanent letting of properties and premises are generally not subject to VAT. However, it is possible to opt for voluntary registration for VAT purposes regarding letting of business premises, provided that the business conducted on the premises is subject to VAT. Any changes regarding the use of areas where the lessor has opted for VAT must be reported to the tax agency.

According to the Swedish VAT Act, VAT adjustment documentation should be issued by the seller to the buyer when a property is sold through a direct transfer. Where a property is transferred through the sale of the company holding the property there is no such obligation. The VAT adjustment documentation should e.g. include certain information regarding the investments made on the property during the past ten years and information regarding the seller and the buyer.

Adjustments of input VAT should be made if the use of premises where an investment has been made, changes from VAT-able to non-VAT-able or vice versa. The VAT adjustment could as a result either imply that the owner of the property is granted additional deductions of VAT or that the owner of the property is liable to repay previously recovered input VAT.

Input VAT on transaction costs could under certain conditions be recovered. Assuming that the company bearing the costs conducts business activities subject to VAT and that the costs are related to a transaction subject to VAT or to the VAT-able business in general, input VAT could be recovered. Input VAT attributable to the purchase of a property could as a result be recovered to the extent the property is used in a VAT-able business. Regarding input VAT pertaining to costs incurred in the process of purchasing a company, recovery could be possible provided that the acquired company will be part of the buyer's VAT-able business.

According to a government inquiry from 2009, the above described exemption regarding letting of properties could be abolished. Hence, the letting of properties, except residential premises, would be subject to 25% VAT, irrespective of the nature of the business conducted on the premises. This will effect lease agreements that are currently not subject to VAT.

The Swedish Supreme Administrative Court ruled (27 April 2011) that real estate broker's services are VAT-exempt when property is sold via a corporation, the reason being that the services supplied are relating to sale of shares and not sale of property. The ruling is applicable when the structure of the real estate transaction via a corporation is agreed prior to the sale.

According to the Swedish Tax Agency's Guidelines, VAT pertaining to real estate broker's costs incurred when a property is sold is not deductible, the reason being that the real estate broker's services are relating to sale of real estate, which is VAT-exempt.

## Other relevant taxes

A person owning real property at the beginning of the income year is liable to pay an annual property tax based on an assessment value, which should equal 75% of the estimated market value of the property. It is common practice that the property tax for the year when a property is sold is allocated between the buyer and seller of a property.

The tax rate is 1.0% for commercial office space and 0.5% for industrial property. The annual property tax on properties for residential purposes is SEK 1,365/flat for financial year 2012 maximised to 0.4% of the assessment value. Should one property consist of different types of premises, then the owner of the property shall pay property tax for each type of premise respectively, in proportion to their share of the total tax assessment value.

# *Real Estate Investments – Sweden*

## *Introduction*

There are no designated fund vehicles in Swedish practice. Accordingly, there is no specific Swedish tax regime for real estate funds. Swedish real estate funds are normally structured in the legal form of limited liability companies (AB's) or limited partnerships (HB's or KB's) either in a pure domestic structure or combined with foreign fund vehicles where the Swedish entities function as holding companies.

## *Purchase of a real estate company*

An AB or HB/KB is the most common alternative used for investments in Swedish real estate. Most objects available for sale on the market consist of property owning AB's or HB/KB rather than “naked” real property. The main reason for this setup is that transactions of the latter kind imply real estate transfer tax at 4.25% of the higher of the acquisition value and the tax assessment value of the property and that there is normally no capital gains taxation when disposing a property holding company.

### *Legal form/tax status*

An AB is a limited liability company with minimum share capital of SEK 50,000. The AB is taxable on its corporate income at 22% (as from 1 January 2013). Unless tax losses are expected, corporate income tax is paid by monthly instalments evenly distributed over the year. The tax assessment is done in the year following the financial year, and the corporate income tax return is filed annually.

An HB and a KB are two types of partnerships that can be incorporated in Sweden. They both follow the same tax and legal regimes, the only difference being that a KB is a limited partnership where one of the partners has a full liability, and an HB is a partnership with joint and several liabilities between the partners. Both types of partnerships are hereinafter referred to as “HB”.

An HB is a legal entity, however not an entity liable to corporate income tax. Instead, the income of the HB is taxed in the hands of the partners.

There is no minimum share capital requirement for an HB.

In recent years, a number of measures have been taken in Swedish tax legislation to obtain an equality in taxation between an AB and an HB. Due to this, there is no longer any immediate difference between the two which would motivate one structure over the other. Participation exemption regulations also fully apply to Swedish HB's. Moreover, the corporate income with the HB is assessed in a similar way as is done in an AB. The only major difference being that the profits of the HB is taxed in the hands of the partners.

The taxable income is assessed in the hands of the HB, which means that the HB is liable to file an income tax return. As previously mentioned the taxable income is taxed in the hands of the partners and distributed to them in accordance with their partnership share in the HB. However, items such as property tax, real estate transfer

tax and social security fees – to the extent the HB has employees – shall be paid by the HB.

Foreign partners of a Swedish HB directly holding real estate will always be liable to Swedish tax for the income arising in the partnership.

### *Distribution of dividends*

Dividends received by a resident limited liability company from another resident company are normally exempt from taxation. Dividends received on unlisted shares held as fixed assets are tax-exempt. Dividends received on shares held as current assets are taxable. Dividends received on listed shares are exempt from taxation, provided that the total shareholding constitutes at least 10% of the voting power in the distributing company, and the company has held, or intends to hold, the qualifying shareholding for at least 12 months. For dividends received in respect of shareholdings in foreign companies, an additional requirement has to be met. The distributing company must be subject to a local tax regime that is similar to the Swedish corporate tax regime. If the distributing company is resident in a country with which Sweden has concluded a tax treaty, then the condition of similar taxation in most cases will be regarded as fulfilled. In addition, a tax exemption on dividend distributions may be available under a tax treaty, if an exemption is not available under domestic law. Dividends distributed by a resident company to a foreign company are exempt from withholding tax; if the latter company would be exempt from taxation on a received dividend would it have been a company resident in Sweden.

### *Capital gains on the sale of shares in a real property company*

In Sweden, the sale of shares in a company whose assets mainly comprise Swedish real estate is not treated as the sale of the real property owned by the company. Companies are normally not taxed on any capital gains realised on the sale of shares. To qualify for an exemption for capital gains taxation, the shares either have to be unlisted or, if they are listed, the owner has to have access to at least 10% of the voting power. If the shares are listed, the disposing company must have held the shares for at least 12 months. Further, non-resident companies could only be subject to tax on capital gains realised on the sale of shares in a real property company, if the shareholder is carrying on an active trade or business in Sweden through a permanent establishment (PE), and provided that the shares are held as part of the business conducted in Sweden.

Also capital gains on the disposal of shares in Swedish partnership are not subject to taxation for a limited liability company, but embraced by the Swedish participation exemption regime. Consequently, any loss on disposal of such shares is not tax-deductible. This new regulation also implies that a partnership's capital gains on disposal of shares in a limited liability company or dividends received by a Swedish partnership are not subject to taxation with the partnership or the partnership shareholder.

The exemption for capital gains taxation mentioned above applies only if the shares are regarded as capital assets in the hands of the shareholder. If the shareholder is considered to pursue a business in trading shares or real estate, the shares may be considered as stock assets and hence taxable if disposed. Consequently, it is important to assess the tax treatment before any disposal.

## VAT

From a Swedish VAT perspective, a sale of a company holding a property is exempt from VAT. Thus no VAT will be levied on the purchase of the shares in the company. Any existing VAT registrations as well as the rights and liabilities to adjust investment VAT in case of any change of use of the property will follow the company.

A purchase of a company holding a property implies that the purchaser inherits all responsibilities regarding the VAT treatment for the previous six years.

## Treaty status

There are tax treaties in place between Sweden and more than 80 countries. A Swedish AB is the most common legal entity and as such all double tax treaties are applicable to an AB. Considering that an HB is a partnership and that it is taxed in the hands of its partners, the application of double tax treaties is subject to a case-by-case analysis.

## Direct investment in Swedish real estate

### Real estate transfer tax

Direct acquisition of legal title to Swedish property is, for legal entities, subject to 4.25% real estate transfer tax. The basis of the transfer tax shall be constituted by the higher of the purchase price and the tax assessment value of the real property at the time of the acquisition. Sale of shares in a real property company/partnership is not subject to transfer tax.

### Tax status

Non-resident companies owning Swedish property are taxed on the net rental income in Sweden at the corporate income tax rate of 22% (as of 1 January 2013).

Non-resident companies owning Swedish property are allowed to deduct from their taxable income interest expenses on funds borrowed from, e.g. banks or affiliated companies (see below for limitations), and property-related expenses.

### Withholding tax

There is no withholding tax or branch profits tax applicable to real estate holdings or PEs operating in Sweden.

### Capital gains on the disposal of Swedish real estate

Both resident and non-resident companies that own Swedish property are subject to Swedish corporate income tax at the ordinary rate of 26.3%, on any capital gains realised on the sale of real property. All of the income of a corporation is taxed as business income. However, capital losses on real property can only be offset against capital gains on such assets, realised by the company or any other group company. Losses on real property that cannot be used to offset profits in the same financial year may be carried forward and deducted against future gains on real property.

## VAT

Sale of a property is generally exempt from VAT in Sweden. However, as mentioned above a property-owner may opt for VAT liability regarding permanent letting of business premises to a business liable for VAT. In order to be granted VAT liability,

**an application for a VAT registration must be submitted to the Tax Agency prior to or at the latest on the day when the letting commences.**

**When a property is acquired that is subject to voluntary VAT registration, the VAT registration will be transferred to the new owner. However, both parties are obliged to submit a notification regarding the purchase of the property at closing. The purchaser will receive a message from the Tax Agency saying that it is registered for voluntary VAT. Furthermore the purchaser has to be registered for VAT purposes in Sweden.**

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# ***Real Estate Tax Summary – Switzerland***

## **General**

A foreign investor is allowed to invest into Swiss real estate property directly or through a local or a non-resident company if such property is used for permanent business purposes. Restrictions apply for Swiss residential properties.

Real estate funds in Switzerland are often structured in the form of a FCP (contractual fund) as well as in the form of a SICAV (investment companies with variable capital). Both forms need to be approved by the Swiss Financial Market Supervisory Authority FINMA. Both investment fund structures can be listed at SIX (Swiss stock exchange) and can be used for direct or indirect real estate investments. Neither a FCP nor a SICAV is in principle subject to Swiss income tax. However, if the fund invests directly into real estate, the net real estate income is taxed at the level of the FCP or SICAV. Distributions of a Swiss fund are in principle subject to 35% Swiss withholding taxes (WHT). However, for Swiss funds with direct investments in Swiss real estate no Swiss WHT applies on distributions of real estate income.

## **Corporate income taxes**

Resident companies are subject to Swiss Corporate income tax (CIT) on their taxable profits generated in Switzerland. CIT is levied at federal, cantonal and communal level. Foreign sourced income attributable to foreign permanent establishment (PEs) or real estate property located abroad is excluded from the Swiss tax base and only taken into account for rate progression purposes in the cantons that apply progressive tax rates.

Non-resident companies are subject to Swiss CIT if they own real estate property in Switzerland, have loan receivables secured by a mortgage on Swiss real estate property, or deal with or act as a broker of Swiss real estate property. Non-resident companies are taxed on their income generated in Switzerland only.

Switzerland levies a direct federal CIT at a flat rate of 8.5% on profit after tax. Accordingly, CIT is deductible for tax purposes and reduces the applicable tax base (i.e. taxable income). Consequently direct federal CIT rate on the profit before tax amounts to approximately 7.83%. At federal level no corporate capital tax is levied.

In addition to the direct federal CIT, each canton has its own tax law and levies cantonal and communal income and capital taxes at different rates. Therefore, the tax burden of income (and capital) varies from canton to canton. Some cantonal and communal taxes are imposed at progressive rates.

As a general rule, the overall approximate range of the maximum CIT rate on profit before tax for federal, cantonal and communal taxes is between 11.5% and 24.2%, depending on the location of the Swiss real estate.

## Thin capitalisation

Swiss thin capitalisation rules are, in general, only applicable for related parties. In case of a thin capitalisation, related party debts can be treated as taxable equity. A circular letter issued by the Swiss Federal Tax Administration provides for debt/equity ratios as safe harbour rules. The maximum amount of debt for companies that operate real estate is in general 70%–80% of the market value for its real estate assets (depending on the asset).

## Interest deduction

Interest paid on loans from related parties that exceed the above mentioned relevant ratio are not deductible; further these interest may be deemed as a hidden distribution and hence are subject to 35% Swiss Withholding Tax (WHT).

There are no limitations on the financing by independent third parties (e.g. banks) and thus, interest paid to a third party is a deductible business expense.

In addition to the above interest rates paid to affiliated companies or shareholders have to reflect fair market rates. With respect to related parties, the Swiss Federal Tax Administration annually issues safe harbour interest rates to be used on loans denominated in Swiss Francs or foreign currencies.

The corporation may deviate from these safe harbour rates as long as it can prove that the rates used are at arm's length and more appropriate in the present case. The cantons usually follow these guidelines.

## Depreciation

Maximum depreciation rates allowed for tax purposes are issued by the Swiss Federal Tax Administration. There are different rates for commercial buildings, office and bank buildings as well as department stores. Higher depreciation is allowed for tax purposes if the taxpayer can prove that such depreciation is required from a statutory accounting perspective. Some cantons follow the federal guidelines, whereas some cantons apply their own (more liberal) applicable depreciation rates.

## Property taxes/capital gain taxation

With regard to the ownership and the transfer of real estate property in Switzerland property taxes may apply. Dependant on the location of the real estate property, ownership related property taxes are levied at the cantonal and/or communal level or do not exist at all.

In case of the sale of real estate property, real estate transfer tax and taxes on the capital gain may apply.

At the federal level, the capital gain realised on real estate held as business assets is subject to ordinary income tax. At cantonal and communal level, the capital gain realised is either subject to the ordinary income tax (dualistic method) or subject to the real estate capital gain tax (monistic method).

# Real Estate Investments – Switzerland

## Legal aspects

### *Real-estate ownership in Switzerland*

In Switzerland, property is guaranteed by the Federal Constitution. Property law, and the various types of property including real-estate property, are regulated by the Swiss Civil Code ('CC'). The CC differentiates between ownership right and restricted property rights. While the owner of real-estate is free to dispose of it within the limits of the law, restricted ownership rights can be attached to the real-estate property and limit the ownership and the legal control over real-estate.

Ownership rights as well as restricted property rights are recorded by the Swiss federal land register. Although the register is called a federal land register, it is managed by the cantons. Anyone is entitled to inspect the land register. The correctness of the entries in the land register is presumed by law. The argument of being unaware of an entry in the land register has no legal validity.

### *Ownership*

Pieces of real-estate are immovable objects (contrary to moveable objects). Ownership can be held either by a single person as sole ownership, or by several persons together as co-ownership or joint ownership.

### *Sole ownership*

The most comprehensive power of disposal and legal control over real-estate is granted by the sole ownership, which provides the owner with all powers regarding the object with the exception of regulations by law or by contractual agreement. Furthermore, a sole owner does not have to consider the rights of a co- or joint owner.

### *Co-ownership*

Real-estate can be divided into co-ownership shares (*Miteigentum*). Co-ownership is the normal case of collective ownership and implies a division of the property in portions, the so called quotas. Every quota-holder is entitled to use the whole property and each quota may be independently sold or mortgaged. In the case of the sale of a co-owned real-estate share, all other quota-holders have the right of first refusal – unless it is excluded by a contract – in order to increase the percentage of their property. The ordinary maintenance (e.g. the prevention of damages) can be initiated by every single quota-holder; everything that goes beyond the ordinary maintenance needs the consent of all co-owners. The quotas act as a basis for the calculation of the costs for maintenance for each owner. In the event of the sale of the entire parcel, all co-owners must agree unanimously.

The condominium ownership (*Stockwerkeigentum*) is a special kind of the collective ownership, whereas the building is divided into special parts for the exclusive usage of the specific condominium owner. The building itself is registered in the land register, and every condominium with its quota and owner is recorded separately on a different page of the register as well. Each condominium has its own access and separate arrangements such as garages, cellars etc. In the condominium owners' meeting,

the owners meet to discuss expenditures and maintenance issues. The voting powers of the owners depend on the quota they possess. Every part can be sold individually, but it is common to agree on a pre-emption right in favour of all other condominium owners.

### Joint ownership

Real-estate can finally be held in joint ownership (*Gesamteigentum*), where several persons bound together into a community either by legal provisions (e.g. community of property between spouses, family members, heirs) or by contract (e.g. ordinary-, general- or limited partnership). The rights of each joint owner are attached to the whole object and no independent percentage or quota is defined or recorded in the land register. The disposal of a jointly owned object requires the consent of all owners.

### Restrictions of ownership

Ownership rights can be restricted by law or by contract. In the case of direct restrictions, the law obliges the owner to tolerate, refrain or act in a certain way. No special private or official order is required and the restriction does not need to be filed with the land register. Such direct restrictions include for example provisions from the construction law (e.g. the minimal distance from the property line to a building or the maximal height of a building) and from the neighbour law. Indirect restrictions originate by public and private law. They entitle the beneficiary to a claim towards the land owner that can be enforced if certain conditions are fulfilled. That includes restricted property rights (see section *'Restricted property rights'*) and restrictions of disposal (see section *'Restriction of disposal'*).

### *Restricted property rights (beschränkte dingliche Rechte)*

Restricted property rights are grouped into easements on property (*Dienstbarkeiten*), real burdens (*Grundlasten*) and real-estate security interests/liens and mortgages on immovable property (*Pfandrechte*). They can be established by law or by contractual agreement and cause the owner to tolerate, refrain or act in a certain way. A registration in the land register is necessary. If such restricted property rights conflict, the seniority-rule applies and the more recent established right remains invalid.

### Easements on property

Real-estate may be encumbered in favour of another property or in favour of a person. The owner of such an object must permit the beneficiary to exercise certain rights over it or he may not exercise certain of the rights attached to his ownership for the benefit of the beneficiary.

The most common easements on property are the following:

- The right to build (*Baurecht*): The beneficiary has the right to erect or retain possession of a building although he does not own the land. The land remains with the grantor whereas the ownership of the building is with the beneficiary. In other words, the ownership of the parcel itself is separated from the ownership of the building on this parcel. The legal transaction creating such right to build is only valid if done as a public deed. The right to build can be established for a maximum of 100 years and has to be filed with the land register. When the right to build

expires, any existing construction reverts to the landowner and becomes an integral part of the parcel.

- **Usufruct (*Nutzniessung*):** The right of usufruct on property grants the full right of possession and usage of real-estate. It can be limited to certain parts of a parcel or a building. The usufruct ends at the expiry of the term, resignation or death of the usufructuary or at least after 100 years. Since the plain right of ownership remains with the grantor, the usufructuary must preserve the object in its original condition, carry out repairs and renovations of ordinary maintenance and may not dispose of the object itself. The right of usufruct has to be filed with the land register.
- **Right of Residence (*Wohnrecht*):** The Right of Residence is a special case of usufruct which grants the usufructuary to live in all or part of a building. The right of residence is personal and therefore neither transferable nor heritable.

### Real burden

A real-estate charge (*Grundlast*) obligates the owner of an object to take action for the benefit of the entitled beneficiary. The charge needs to be registered in the land register and is only valid for a maximum of 30 years. The liability to perform is restricted to the real estate and not to the owner of the property.

### Real-estate security interests/liens and mortgages on immovable property

Liens and mortgages intend to secure claims and to mobilise the value of the property. Real-estate security interests can be established in the form of a simple mortgage (*Grundpfandverschreibung*) or a mortgage note (*Schuldbrief*). All liens result from the conclusion of a notarised agreement and an entry in the land register. In the cases of the simple mortgage and the mortgage note, the debtor is personally liable. The claim secured by a lien must be exactly defined in its amount and recorded in the land register whereas a simple mortgage allows a claim to be secured even if its amount is not exactly defined. In such a case, a maximum amount is registered in the land register.

### Restrictions of disposal

- **Right of First Refusal (*Vorkaufsrecht*):** On the sale of immovable property to a third party or a transaction with similar effect, the right of first refusal entitles the beneficiary to acquire this object. Unless the duly notarised pre-emption agreement provides otherwise, the beneficiary may purchase the property pursuant to the conditions agreed upon between the seller and the third party. The right has to be exercised within 3 months after having been informed about the transaction. The maximal term of a right of first refusal is 25 years and can be registered in the land register.
- **Right of Purchase (*Kaufsrecht*):** A right of purchase (call option) entitles the beneficiary to acquire an object at any time by unilateral declaration of intent. The parties have to clearly define the object of purchase and the price in a notarised agreement. The period of such an agreement is limited to 10 years and can be registered in the land register.
- **Right of Repurchase (*Rückkaufsrecht*):** The right of repurchase can only be concluded with the former owner, typically in a purchase agreement. According to this right, the former owner is entitled to acquire the object under certain

circumstances. Such agreement has to be notarised, is only valid for a maximum term of 25 years and can be entered in the land register.

## ***Restrictions on the acquisition of real estate by foreigners ('Lex Koller')***

The Federal law on the acquisition of real estate by foreigners, the so-called 'Lex Koller', is aimed at restricting the acquisition of real estate by foreigners in Switzerland. Any violation of the Lex Koller has civil and penal law consequences. In essence, the Lex Koller provides that real estate transactions in Switzerland are subject to prior authorisation (which will not be granted), if each of the following conditions is met:

- The person acquiring real estate is a foreigner within the meaning of the Lex Koller (see section *'Definition of foreigners'*);
- The object of the real estate transaction is a property for which an authorisation is required pursuant to Lex Koller (see section *'No authorisation for commercial properties'*);
- The transaction qualifies as acquisition of real-estate under the Lex Koller (including not only pure acquisition but also similar transactions, such as establishment and exercise of rights of purchase, rights of first refusal or repurchase rights);
- The real estate transaction is not exempted from the authorisation requirement (e.g. subsidized housing).
- The transaction is not captured by the free quota in one of Switzerland's tourist region.

### **Definition of foreigners**

The following individuals are deemed foreigners within the meaning of the Lex Koller:

- Foreigners domiciled abroad;
- Foreigners domiciled in Switzerland, except such persons holding a valid C settlement permit, or citizens of a Member State of the European Union (EU) or the European Free Trade Association (EFTA) and holding a valid EU/EFTA settlement or residence permit (B, C or L permit).

Legal entities and partnerships qualify as foreigners if:

- They have their registered offices abroad (even if they are controlled by non-foreigners or Swiss citizens); or
- They are domiciled in Switzerland but are controlled by foreigners (irrespective of whether they are listed on a Stock Exchange or not).

### **No authorisation for commercial properties**

With respect to the object of the transaction, it is important to note that commercial properties are exempted from the Lex Koller. Hence, a foreign investor is allowed to acquire real-estate in Switzerland if such property is used for permanent business purposes. Examples for such commercial properties include manufacturing premises, warehouse facilities, offices, shopping centres, retail premises, hotels, restaurants, workshops or medical practices. Thereby, it is irrelevant whether real-estate is used by

the acquirer or rented out to a third party in order to pursue a business activity. Commercial properties may also be purchased for investment purposes only.

### Main residence properties

Foreigners domiciled in Switzerland not holding a C settlement permit (but a valid B residence permit) are entitled to purchase a dwelling, i.e. a single-family house or apartment main residence) at their place of residence without prior approval. The main residence must be acquired directly. Further, the purchase of reasonable land reserves (approximately one-third and in special cases up to one half of the total surface area) for expansion in the medium term of an existing or planned business establishment does not require prior authorisation under Lex Koller.

### Acquisition of real estate requiring prior authorisation

In principle, prior authorisation is required for the acquisition of undeveloped land in residential, industrial and commercial zones, though this does not apply if construction works (for main residence or permanent business establishment) commence within approximately one year. However, the construction and lease of residential housing is not regarded as a business activity with the result that the acquisition of such real estate would be subject to the Lex Koller.

A foreigner may acquire a holiday home or a serviced flat in an apartment hotel under certain circumstances and only directly with his own name. The dwelling must be in a place designated by the cantonal authorities as a holiday resort. Every authorisation must be deducted from the annual quota assigned to the cantons for holiday homes and serviced flats.

### Final Remarks regarding Lex Koller

In terms of fiduciary transactions, it should be noted that persons who are, in principle, not subject to Lex Koller (e.g. Swiss citizens) are nevertheless considered foreigners for Lex Koller purposes if they acquire a property that falls under Lex Koller on behalf of a foreigner in a fiduciary transaction. Fiduciary transactions are generally viewed as a circumvention of Lex Koller.

Finally, we would like to draw your attention to the fact that the right to acquire real-estate in Switzerland under Lex Koller does not confer in any way a residence entitlement to the relevant owner. Residence permit are granted solely on the basis of the applicable immigration laws.

### *Secondary residence: new legislation*

On 11 March 2012, the Swiss population voted to accept an initiative which prohibits to the Swiss communes to have a contingent of more than 20% of secondary residence on their area, compared to buildings used as primary residences. This limitation acts as a complete ban for additional authorisations. Every object, whose occupant does not have domicile in the municipality, falls under the new regulation. Owners of secondary residences will still be able to sell their properties as secondary residence in the future but there is no possibility to build new secondary residences if the contingent is exceeded. This holds generally true as from the day the initiative has been accepted. Nevertheless, some cantons tended to still permit the building of secondary residences until the regulation regarding secondary residence has been set into force by the Swiss Federal Council which is the case as of 1 January 2013.

## Regulatory aspects

### *Implications of the Federal Collective Investment Scheme Act*

As of 1 January 2007 the Federal Collective Investment Scheme Act (CISA) entered into force in Switzerland and was partially revised in 2013. Under this Act the range of legal forms available for collective investment schemes was enlarged by transparent fund vehicles such as SICAVs and limited partnerships for collective investments in addition to the already available contractual collective investment schemes.

Real estate funds are subjected to investment restrictions. CISA and the related ordinances define the permitted real estate fund investments. In principle, eligible investments include both direct and indirect real estate investments.

The real estate fund with indirect real estate investments is generally transparent for tax purposes. A real estate fund with direct real estate investments is treated as opaque for the income derived from the real estate investment.

A SICAF on the other hand is regarded as opaque for tax purposes, and is always taxed as a corporate entity. However, it has to be mentioned that there is still no Swiss SICAF in place.

A transparent fund vehicle with a direct holding of a Swiss real estate may achieve a favourable taxation e.g. for Swiss individual investors since the income derived from the Swiss real estate is taxed with a preferential tax rate for income tax purposes at the level of the transparent fund vehicle.

### *Regulatory developments regarding the Federal Collective Investment Scheme Act*

The regulatory authority for the collective investment schemes and the managers of collective investment schemes is the '*Eidgenössische Finanzmarktaufsicht*' (FINMA). With regard to anti-money laundering regulations, various rules apply to investment advisers or non-regulated asset managers, set by each of the different financial industry associations that these advisers are obliged to join (SRO, self-regulatory organisation).

CISA was under partial revision. The amendments particularly pertain to the areas of management, custody and distribution of collective investments. The partial revision which entered into force as of 1 March 2013 being in line with international standards (especially AIFMD) increases the protection of investors and strengthens the competitiveness of Switzerland as a fund location.

Besides the modifications which will apply to every fund, the specific changes which will affect only real estate funds are relatively sparse. Also worth mentioning is that it is not intended for real estate funds to be obliged to implement the Key Investor Information Document (KIID). However, a simplified prospectus has to be issued.

## General tax aspects

### *Rental income*

Net rental income is taxable in Switzerland at the appropriate rate applicable in the canton where the property is situated. Tax rates are determined by taking into account income on a worldwide basis. Taxes are levied at both the federal and cantonal/communal level. This multi-layered tax system means there are no average tax rates, and so taxes can only be calculated on a case-by-case basis. In some cantons, in the case of pure investments in real estate without any real commercial activity, a minimum income tax may be levied.

The net income from property is measured by the excess of receipts over connected maintenance expenses. In addition, the rental value of an owned apartment or house, either occupied or available for occupation, is regarded as income in-kind, and taxed accordingly. Allowable costs include maintenance costs, running costs, third-party management charges, property taxes and interest payments. The federation and some cantons have the option of allowing a lump-sum deduction instead of actual expenses, usually as a percentage of the rental income. Only actual expenditures are accepted as a deduction for properties forming part of business assets. Any excess of expenses can be used to offset other sources of taxable income.

### *Property*

In addition, cantons levy a wealth tax on individuals as a means of taxing unearned income. Some cantons use the market value of the property for this purpose. However, many cantons use an official valuation, which is generally less than market value. A similar tax, i.e. capital tax, limited to the cantonal and communal level, applies to legal entities. Legal entities are taxed on an annual basis on the equity capital of the company and not on the fiscal value of the property.

About half of the cantons also levy an annual immovable property or land tax based on the value of the property. It is paid by both individuals and legal entities and is in addition to the wealth and capital tax. Debts are not deductible. The tax rate varies between 0.03% and 0.3% and is in general calculated on the market value.

### *Depreciation*

Provided it is spread across the expected life time and the real estate qualifies as business asset, depreciation charged in a profit and loss account is generally tax-deductible. Guidelines published by the federal tax authorities, which are usually also used by the cantonal tax authorities, indicate the following rates on a reducing balance basis, i.e. on the book value.

For commercial buildings, office and bank buildings as well as department stores:

- On buildings alone where capitalised separately 4%
- On buildings and land together 3%

For factory buildings, warehouses and workshops:

- On buildings alone where capitalised separately 8%

- On buildings and land together 7%

For hotel and restaurant premises:

- On buildings alone where capitalised separately 6%
- On buildings and land together 4%

The rates are halved if a straight-line method is used, i.e. the basis of depreciation is the origin acquisition value.

### *Capital gains on the sale of property*

As a general rule, taxable capital gain corresponds to the difference between the net amount realised with the sale and the investment value, including the acquisition price and subsequent improvement costs.

At federal level, capital gains realised on private assets are exempt from income taxation, unless the individual is deemed to hold the real estate as a business asset (e.g. when qualifying as a professional real estate broker or if investing in a construction consortium).

At cantonal and communal level, capital gains realised on private immovable property are subject to a special real estate gains tax. In general, a deduction is available, based on the period of ownership. A long-term ownership can reduce the tax to a relatively low level. Where ownership has only been short-term, there is usually a speculation surcharge. The definition of short-term and long-term ownership varies from canton to canton.

At federal level, capital gains realised on business assets are included in profits and are subject to the general profit tax system, which is income tax for individuals or taxes on profits for legal entities. As a result, federal tax is levied in the general way instead of separate real estate gains taxation.

However, at the cantonal level, there are two main alternative ways in which gains on business assets are taxed. First, as applied by most of the cantons, the gains are included in the profits and are subject to profit tax (dualistic method). Secondly, in the remaining cantons, gains are subject to separate real estate gains tax (monistic method) while any recaptured depreciation included in the profit is subject to the general profit tax. This approach is used, for example, in the canton of Zurich.

Generally, capital losses on immovable business assets are deductible for income and profit tax purposes.

Should a capital gain arise on an immovable business asset located in a canton that levies a special real estate gains tax, such gain can generally be offset against business losses (restrictions may apply e.g. in the canton of Zurich). However, capital gains deriving from private real estate can usually not be offset.

Subject to various conditions, the real estate gains tax on the disposal of real estate used for own residential purposes is deferred in many cantons if proceeds are reinvested in other real estate used as main residency in Switzerland. According to the federal tax harmonisation statute, which is compulsory for every canton from 1 January 2001, the gains realised on the disposal of real estate will be exempt if the proceeds are reinvested in a substitute residential building.

## *Capital gains on the sale of shares of real estate company (economic change of ownership)*

If a foreign or a Swiss investor holds an interest in a company qualifying as a real estate company, the sale of all or in general the majority of the ownership rights qualifies as an economic change of ownership and triggers real estate gains tax at the cantonal and communal level. Should a foreign shareholder sell his interest in a real estate company, the Swiss tax authorities may be restricted in levying real estate gains tax under certain double tax treaties since the right of taxation of the gain is allocated to the foreign contracting state. At federal level, an economic change of ownership does not trigger income tax but the buyer inherits a latent tax burden on the difference between the tax base of the real estate (in general this value is equal to the book value) and the sales price of the real estate at the level of the company.

## *Withholding taxes on interests*

Interest payments are generally not subject to Swiss WHTs. However, under several conditions, in the case of collective external financing, e.g. through a bond according to Swiss tax law 35% Swiss WHT is due on interest payments. Furthermore, if the lender (third or related party) is domiciled abroad and the respective loan/mortgage is secured by a Swiss immovable property, the corresponding interest payments are subject to a tax at source (for example 17% for Zurich, i.e. 3% direct federal tax and 14% cantonal and communal taxes). Based on the applicable double tax treaty, Swiss WHTs and tax at source can be reduced or even eliminated.

## *Withholding tax on dividends*

Dividend payments are subject to a 35% Swiss WHT, which can be reduced or eliminated based on the relevant double taxation treaty.

Dividends received by Swiss tax resident corporations are taxable as profit. However, if the recipient owns at least 10% of the shares or if the market value of the recipient's participation amounts to at least CHF 1m, the federal and cantonal/communal tax liability is reduced by the proportion of the net dividend to net profit. The net dividend is the gross dividend less any associated financing and administration costs.

Dividends received by a Swiss tax resident individual are taxable income. At federal level, if the recipient owns at least 10% of the shares, the income realised from the dividends is only partially taxed. If shares are held as business assets, 50% of dividends after allocable cost will be taxed. If shares are held as private means, 60% of dividends will be taxed. Several cantons have also introduced similar rules for cantonal/communal taxes (e.g. canton of Zurich).

## *Loss carryforward*

There are no provisions for the carryback of losses. However, losses can be carried forward for seven years, provided the taxpayer is a legal entity conducting a business and it was not possible to consider these losses when calculating the profits realised in these years. With respect to individuals, losses can be carried forward for seven assessment periods, provided that the taxpayer holds the real estate in its business assets.

### *Thin capitalisation rules*

The thin capitalisation rules are based on an asset test rather than a debt to equity test. The maximum amount of debt for companies that operate real estate is in general 70%–80% of the market value for its real estate assets (depending on the asset). The maximum debt for operation equipment is 50% of the market value. Any debt in excess of this threshold is re-characterised as ‘hidden equity’ and subject to capital tax at the level of cantonal and communal taxes. Any interest paid on hidden equity is regarded as hidden profit distribution and is subject to 35% Swiss WHT.

### *Intra-group loans*

Interest rates used between related parties should reflect fair market interest rates. Interest expenses resulting from rates not reflecting fair market interest rates will be questioned by the tax authorities and are not tax-deductible. To determine the fair market interest rates, the Swiss Federal Tax Administration annually issues safe haven interest rates for related party debt, which is denominated in Swiss francs. For related party debt denominated in other currencies, safe haven interest rates are also published on a regular basis.

### *Real estate transfer tax*

Most of the cantons levy a real estate transfer tax on the transfer of ownership in a property. A transfer of ownership is also given in the case of a purely economic transfer of immovable property such as the transfer of all or the majority of the shares in a Swiss real estate company or the entering and leaving of a partnership owning Swiss real estate. The real estate transfer tax is computed on the purchase price. If the purchase price cannot be determined or appears arbitrary or unusually low, the market value is decisive. The rates vary between ca. 0.5% and 3.5%. Although in special cases the real estate transfer tax can be set at a lower rate or not be levied at all. Generally this tax is borne by the acquirer. In some cantons it is divided between the seller and the acquirer. Usually real estate transfer tax is not covered by double tax treaties.

A land register and a land public fee at cantonal level on the transfer of immovable properties situated within the relevant canton or commune are also due.

### *Value added tax (VAT)*

The sale or rent of immovable property is in principle a VAT exempt supply without credit. In principle, no input VAT can be deducted on direct investment costs or other directly attributable costs.

The seller or the renter of immovable property may fully or partially opt for the taxation of the sale or rent under the condition that the immovable property is not used by the recipient exclusively for private purposes. In this case input VAT can be fully or partially recovered on direct investment costs or other directly attributable costs.

The standard VAT rate in Switzerland is 8%.

The value of the land is not subject to Swiss VAT. There are no negative VAT consequences for sale or rent of land (i.e. no input VAT restrictions applicable). In connection with the construction of buildings, there is a new practice published by the FTA which will come into force on 1 July 2013. As of 1 July 2013 the following has to be considered (excluding value of the land):

- In case purchase contracts, pre-purchase contracts and/or contracts for work and labour are closed prior to the start of the construction, the supply of real estate is a taxable supply. (In case the civil law requires a notarisation, the contracts are only deemed to be closed in case the notarisation is done).
- In case purchase contracts, pre-purchase contracts and/or contracts for work and labour are closed after the start of the construction, the supply of real estate is exempt from VAT without credit. The full or partial option to tax for the real estate supply is possible in case the real estate is not used by the recipient exclusively for private purposes.

In case the construction of the building started or will start between 1 January 2010 and 30 June 2013, there is a choice to either apply the old practice or the practice as of 1 July 2013.

The following three issues have to be considered in Switzerland when applying the old practice (still in place until 30 June 2013):

- The building site is owned by the constructor. In case of several requirements being met, the supply of the real estate is exempt from VAT without credit (option to tax possible on the building in case not used by the recipient exclusively for private purposes). If the requirements are not met, the construction of the building would become a taxable supply of goods.
- The building site is owned by the 'buyer'. The supply qualifies as a 'construction contract' and therefore qualifies as a taxable supply of goods.
- The building site is owned by a third party, which is not associated with the constructor. In this case, the construction of the building is treated as a taxable supply of goods.

The distinction of the possibilities is complex. It is also important that the VAT qualification is considered in the planning phase.

## Swiss real estate funds

### *General*

A real estate fund is a 'collective investment scheme' and can appear in different forms. Swiss real estate can be held directly or indirectly by a SICAV (investment companies with variable capital), a SICAF (investment companies with fixed capital), a contractual collective investment fund (FCP or *vertraglicher Anlagefonds*) and a KGK (limited partnership for collective capital investments). Currently, there are no Swiss SICAFs holding real estate. Swiss KGKs holding real estate investment are very rarely authorised by the Federal Financial Market Supervisory Authority (FINMA). Furthermore, Switzerland does not have a REIT regime. Hence, the subsequent comments are mainly based on the legal forms of SICAV and FCP.

### *Tax aspects*

Collective investment schemes are generally considered transparent for Swiss tax purposes. The only exemptions are the SICAF (which is regarded as a taxable entity) and collective investment schemes (such as SICAV and FCP) holding direct Swiss real estate investments.

Generally, FCPs and SICAVs are considered as transparent for Swiss tax purposes. An exception to this rule occurs where a generally transparent Swiss (and foreign) collective investment scheme directly holds Swiss real estate. In such a case income derived from Swiss real estate is subject to a preferential statutory income rate for direct federal taxes of 4.25% and in the most cantons of Switzerland to a preferential statutory income rate for cantonal and communal taxes (e.g. City of Zurich 9.18%). Both taxes are levied at the level of the collective investment scheme. We note that certain criteria need to be met in order to benefit from the special tax regime as a collective investment scheme. The fund should own at least 10 real estates. Further, the general requirements for the recognition as collective investment schemes apply, i.e. there should be several investors.

In case of indirect Swiss real estate investment held by a special purpose vehicle (SPV) the net real estate income is subject to ordinary statutory income taxation (8.5% direct federal taxes and cantonal and communal taxes, e.g. City of Zurich 18.36%) at the level of the SPV. Furthermore, the SPV is subject to annual capital taxes on cantonal level.

Depending on the canton where the real estate is located, capital gains realised by the sale of a real estate held by the fund directly or indirectly might be taxed differently at federal and cantonal and communal level, i.e. in certain cantons capital gains realised on immovable property are subject to a special real estate gains tax regime (monistic method) instead of ordinary income tax (dualistic method). In general, a deduction is available, based on the period of ownership. A long-term ownership can reduce the tax to quite a low level. Where ownership has only been short-term, there is usually a speculation surcharge. The definition of short-term and long-term ownership varies from canton to canton. At federal level, capital gains realised upon the sale of a real estate are subject to income tax.

For Swiss real estate funds with direct real estate investments no Swiss WHT applies on distributions of real estate income. In case of income from indirect real estate investments and/or other income, distributions (dividend income and/or interest) are subject to a 35% Swiss WHT. Distributions of capital gains are not subject to withholding tax as long as the capital gains are distributed by a separate coupon or are separately disclosed.

The issuance and redemption of shares of Swiss collective investment funds with direct or indirect real estate investments is exempt from Swiss securities transfer tax.

In the case of a purchase, sale or transfer of Swiss fund units with direct or indirect real estate investments (secondary market transactions) through a Swiss securities dealer (e.g. Swiss bank), Swiss securities transfer tax of 0.15% on the remuneration will be levied, which in general has to be borne equally by the seller and purchaser. Certain exemptions might be possible (e.g. exempt investors).

Usually, the Swiss fund vehicle has no access to treaty benefits. Exceptionally, a collective investment scheme may have access to treaty benefits on behalf of its Swiss investors and for the amount relating to the Swiss investors. Switzerland has entered into several mutual agreements with its treaty partners which allow the fund to reclaim foreign withholding tax for their Swiss investors.

Swiss fund vehicle have no access to EU Directive benefits.

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# *Real Estate Going Global Taiwan*

*Tax and legal aspects of  
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All information used in this content, unless otherwise stated, is up to date as of 20 June 2012.

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## ***Real Estate Tax Summary – Taiwan***

Foreign entities (including individual and company) are permitted to purchase real estate in Taiwan, subject to prior government approval. This approval is country-specific in that the particular country should provide a reciprocal approval for Taiwanese nationals and Taiwanese companies to invest in that country.

Generally, foreign investors are allowed to acquire or lease real estate property in Taiwan such as places of residence, office buildings, shops and factories. If the real estate is acquired for infrastructure, agricultural and animal husbandry projects, foreign investors are required to obtain approval from the competent central authority for the planned investment. The central authority approval, together with other relevant documents, should be submitted to the municipal or county (city) government for approval.

From August 2002, qualified investors from the People's Republic of China (including individuals, companies and institutions) are also eligible to invest in Taiwanese real estate (subject to various restrictions and approvals).

With an aim to curb real estate speculation, the government has introduced the Selective Goods and Services Sales Tax (commonly referred to as Luxury Tax). A tax rate of 10% to 15% will be applied on real estate properties purchased not for self-use and sold within two years and has been in effect starting from 1 June 2011.

# *Real Estate Investments – Taiwan*

## Holding structures

Foreign investors generally hold Taiwanese real estate using either a Taiwanese corporation (i.e. a resident company in Taiwan as discussed below) or a Taiwanese branch of a foreign corporation.

## Income tax

The income tax regime in Taiwan is divided into the consolidated personal income tax for individuals, or the individual tax, and the profit-seeking enterprise income tax for business enterprises, or the corporate income tax. The term business enterprise refers to any entity that engages in business activities, or has a profit-seeking motive as one of its purposes. Under the imputation, or unitary, tax system, individual resident shareholders are able to claim tax credits from the respective business enterprise tax paid against their individual tax liabilities.

Individuals, irrespective of whether they are residents of Taiwan, are subject to income tax on Taiwan-source income, only under the Income Tax Act (ITA). The residence status determines how an individual will be taxed on Taiwanese source income and whether the Alternative Minimum Tax (AMT) will be applied. A resident individual is subject to marginal rates (ranging from 5% to 40%), with entitlement to personal exemptions and deductions. Non-residents are generally subject to withholding tax on gross income without any personal exemptions or deductions allowed.

A resident company in Taiwan is subject to income tax on its worldwide income. The prevailing corporate income tax rate is 17% effective from 2011. A company is deemed to be a resident for income tax purposes if it is incorporated or established under Taiwanese company law, regardless of whether it is owned by foreign or local investors, or jointly by both. Similarly, a resident foreign company generally refers to a company incorporated in a foreign jurisdiction that has a permanent establishment (PE) (a fixed place of business or a business agent) in Taiwan. Resident foreign companies are subject to income tax at the same rates as Taiwanese resident companies on their Taiwan-source income (but not on their worldwide income), and are also subject to AMT. Non-resident foreign companies are subject to withholding tax on the gross amount of their Taiwan-source income. Under certain circumstances, a non-resident foreign company may apply for a tax refund and deduct costs and expenses from the gross revenues in calculating the final taxes due.

## Alternative Minimum Tax (AMT)

The AMT, which is effective on 1 January 2006, applies to both resident enterprises and resident individual taxpayers. Under the Income Basic Tax Act (IBTA), taxpayers are required to calculate and report their 'alternative minimum taxable income' (see below) together with their same year regular income. If the regular tax is greater or equal to the AMT, the regular tax must be paid. Conversely, if the regular tax is less than the AMT, the taxpayers pay the AMT instead.

## AMT

(Alternative Minimum Taxable Income – AMT Exemption) x AMT Rate.

	AMT rate	AMT exemption limit
Business enterprises	10%	TWD 2,000,000
Individual	20%	TWD 6,000,000

The aim of the AMT is to preserve a tax revenue basis. As such, revenues exempted from income tax assessments such as capital gains from securities transaction etc. as regulated under ITA or other laws would need to be added back when calculating AMT. Notably, offshore income of Taiwanese individuals will be included in AMT calculations beginning 1 January 2010.

## Transfer pricing

Article 43-1 of the ITA addresses the adjustment of income necessary for profit-seeking enterprises in Taiwan with respect to non-arm's length controlled (related party) transactions. When filing income tax returns, profit-seeking enterprises engaged in related party transactions that do not fall within the 'safe harbour' rules established by the Ministry of Finance (MOF) should disclose information on their controlled transactions in the tax return and prepare a transfer pricing report. If the dollar amount of the related party transactions fall below the safe harbour rule thresholds, the taxpayer may choose to replace the transfer pricing report with other evidentiary documents that may sufficiently provide proof that the pricing of the transactions are at arm's length.

## Rental income

Rental income is assessable and taxed at a fixed rate of 20% for companies (i.e. rental income shall be a component of regular corporate income tax). In addition, the rental income shall also be subject to a 5% value added tax.

Respective individual marginal income tax rates (ranging from 5% to 40%) are assessed on rental income received by resident individuals. The rental income of resident foreign individuals and local resident individuals are taxed on a deemed profit basis if the cost of such rental is difficult to establish.

## Capital gains on sale of property

Currently, the gain on sale of land is exempt from income tax. However, the gain is subject to land value incremental tax (LVIT) at rates ranging from 20% to 40% on the incremental value (i.e. the gains), based on the government announced value.

The gain from the sale of non-land real estate (e.g. buildings) by a profit-seeking enterprise should be included as taxable income of the current year, which is taxed at the standard corporate tax rate of 17%. The gain on sale of the building is determined, based on the difference between the sales price and the net book value.

When the sales price of real estate is not differentiated between land and building in the sales agreement, the sales price for building for taxation purposes shall be determined based on apportioning its value in relation to land based on relevant government-assessed present values. Also, even if sales prices of the land and building are separately indicated in the sales agreement, if the sales prices of land and building are deemed to be unreasonable, the appropriate price for the building may also be adjusted by the Taiwanese tax authorities.

## Interest expense

Interest expenses are allowed as deductions from rental income for corporate income tax purposes if the interest expenses are related to the principal and ancillary operations. The deduction of interest expenses on related party loans is subject to Taiwanese transfer pricing regulations (see *Transfer Pricing* section above).

In January 2011, Taiwan introduced the thin capitalisation rule in the revised Article 43-2 of the Income Tax Act. From 2011 onwards, deductible interest expense on intercompany loans is capped at a prescribed intercompany debt-to-equity ratio at 3:1. The new rule generally applies to profit-seeking enterprises, except banks, credit cooperatives, financial holding companies, bills finance companies, insurance companies and securities companies.

Certain costs must be capitalised and are depreciable. An example of such costs includes interest incurred on loans used to finance the construction of a building. Interest incurred for purchase of land before title transfer is effected shall be capitalised.

Further, upon implementation of the Rules Governing Allocation of Costs, Expenses and Losses Related to Tax Exempt Income, interest expenses relating to tax-exempt income may no longer be deductible from taxable income. For example, since gains on the sale of land are not included in corporate income tax, interest expenses in relation to the purchase of land are subject to restrictions for tax deduction purposes (based on complicated formulas).

Payment of interest to resident individuals or profit-seeking enterprises on loans used to finance the construction of a building and acquisition of land is subject to withholding tax at a rate of 10%. A 20% withholding tax is applied to non-residents and profit-seeking enterprises having no PEs in Taiwan. No withholding tax is imposed on interest paid to local banks.

## Depreciation

Depreciation of fixed assets is calculated, based on the useful lives prescribed in the Table of Service Lives of Fixed Assets. The methods of depreciation allowed under the current tax regulations are straight-line, sum-of-the-years-digit, fixed-percentage on diminishing book value, production unit or working-hour methods.

## Loss carryforward

Starting from 2009, net operating losses can be carried forward for a maximum period of ten years by virtue of Article 39 of the ITA (which was recently increased from a maximum period of five years).

## Land tax

Land is subject to annual land tax based on its government-assessed value. Currently, there are two different rates applied to the assessed value. The first rate is the regular progressive tax rate ranging from 1% to 5.5%, depending on the starting cumulative value (SCV) of the said land. The second rate is a special privileged rate applicable to various types of land and ranges from 0.2% to 1%.

## House tax

Buildings are subject to house tax and the tax is imposed on the taxable present value of buildings announced by the government on an annual basis. The applicable tax rates range from 1.2% to 3%, depending on the classification of each property.

## Deed tax

Deed tax is imposed on transactions that involve purchases and sales, acceptance of Diens, exchanges, bestowal or partition of, or on, immovable property, or acquisition of ownership of immovable property by virtue of possession. Immovable property refers to both land and land fixtures. However, if land is located in an area where Land Value Incremental Tax (LVIT) is assessed, no deed tax shall be imposed, so deed tax is collectible, in effect, only on land fixtures such as buildings.

The applicable tax rates range from 2% to 6%, depending on the classification of each deed. Specifically, deed tax on activities in relation to sales and acquisitions is 6% on the government-assessed value of the property.

## Stamp tax

Stamp tax is imposed on deeds or contracts for sale, gratuitous transfer, partition or exchange of real estate or pledge of lien on real estate to be submitted to government agencies for registration. The current tax rate is 0.1% of the government-assessed present value of real estate.

## LVIT

LVIT is levied on the increased value of land upon the transfer of legal title of land and borne by the seller. The tax liability is calculated based on the published present value promulgated annually by the government. The tax rates for LVIT are as follows if the land is held for less than 20 years:

- For value increase of less than 100% of the previous published present value, LVIT shall apply at the rate of 20% on the increased value.
- For value increase of more than 100% but less than 200% of the previous published present value, LVIT shall apply at the rate of 30% on the increased value falling within this range.
- For value increase of more than 200% of the previous published present value, LVIT shall apply at the rate of 40% on the increased value falling within this range.

The present value of land is assessed and published annually, taking into consideration such factors as the development of each geographic district and inflation rate.

## VAT on sale of property

VAT is exempt on the sale of land. A 5% VAT will be assessed on the sale of buildings.

## Real Property Securitisation

In July 2003, the Real Property Securitisation Law (RPSL) was officially promulgated with a view to revitalise the real estate market, heighten the liquidity of real estate, and bring greater diversity to the securities market. The RPSL provides two possible methods to securitise real properties, namely 'real estate investment trust' (REIT), and 'real estate asset trust' (REAT). In 2009, the RPSL was amended to introduce concepts of real estate development trust.

Effective since 1 January 2010, income distributed to the beneficiary certificate holder of the REIT or REAT shall be subject to the following withholding tax treatment:

- 10% withholding tax for resident companies (interest income to be consolidated in corporate tax return) and 10% final withholding tax for resident individuals.
- 15% final withholding tax for non-resident companies and non-resident individuals.

## Tax implications of repatriation of income

Corporate dividends on after-tax profits paid to foreign investors are generally subject to a 20% Taiwanese withholding tax. This withholding tax may be reduced if the foreign shareholder is a tax resident of a country with an implemented tax treaty with Taiwan. Foreign investors that invest in Taiwanese real estate using the Taiwanese branch of a foreign corporation are not subject to Taiwanese withholding taxes on repatriation of after-tax profits to the foreign head office (i.e. there is no branch profits tax in Taiwan).

## Introduction of Selective Goods and Services Sales Tax ('Luxury Tax')

With an aim to curb real estate speculation, the Taiwan Legislative Yuan passed its third reading of the Selective Goods and Services Sales Tax Act today. A tax rate of 10% to 15% will be applied on real estate properties purchased not for self-use and sold within two years. A tax rate of 15% will be levied on the actual sales price (including VAT) of real estate sold within one year of purchase and a tax rate of 10% will be levied on properties sold within two years of purchase. The Luxury Tax has been in effect since 1 June 2011.

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# Real Estate Tax Summary – Thailand

## General

Ownership of land is generally not open to non-Thai nationals. Foreign investors may directly invest in certain property in Thailand such as condominiums, or may structure investment in land and/or buildings through a local company or property fund. Companies granted investment promotion privileges by the Thailand Board of Investment (BOI) may be permitted to own land.

## Rental income

Real estate investment or development companies are generally subject to Thai corporate income tax at 30% on net taxable profits. The rate is temporarily reduced to 23% for accounting periods beginning on or after 1 January 2012 and will be further reduced to 20% for two accounting periods beginning on or after 1 January 2013. After 2014, the general statutory rate at 30% will be applied unless the reduction of the rate is extended.

Small or medium-sized enterprises defined as companies or partnerships with paid-up capital on the last day of the accounting period not exceeding THB 5m and with income from the sale of goods and the rendering of services within the accounting period not exceeding THB 30m, are also subject to reduced rates of tax as follows:

Net profits	Tax rate
THB 0 – 150,000	Nil <sup>1</sup>
THB 150,001 – 1,000,000	15% <sup>2</sup>
THB 1,000,001 or more	23% <sup>3</sup>

- Exemption or reduction in corporate income tax rate is also available for certain real estate activities under privileges granted by the BOI.

Rental income and other income derived from real estate in Thailand are taxable. Expenses incurred wholly and exclusively for the purpose of the business are deductible, except those specifically listed in the corporate income tax law, e.g. excessive entertainment expenses and artificial or fictitious expenses.

There is no required debt/equity ratio for tax purposes. Interest on a loan used to finance the acquisition of a real estate property is deductible from the date the acquired asset is ready for use in business.

<sup>1</sup> For accounting period commencing on or after 1 January 2012.

<sup>2</sup> For accounting period commencing on or after 1 January 2012.

<sup>3</sup> The reduced rate of 23% is applicable for one accounting period which begins on or after 1 January 2012 and will be further reduced to 20% for the following accounting period which begins on or after 1 January 2013.

Interest incurred on the acquisition or construction of real property before the property is ready for use must be capitalised as part of the cost of the asset, and may be depreciated once the asset is ready for use in business. The interest is then depreciated over the life of the asset and subject to the depreciation rates prescribed below.

A market rate of interest must be charged on intercompany lending between Thailand resident companies.

There is no group taxation in Thailand.

## Depreciation

The rate of depreciation for capital expenditures is 5% for buildings, 20% for machinery and other assets and 10% for lease rights, or over the leasing period for leases of definite duration. The depreciation rate will be calculated based on the acquisition cost value.

A revaluation of assets will have no effect for tax purposes. Any write-down in the value of assets will not be tax-deductible. Any increase in the value of assets will not be taxable.

Land cannot be depreciated.

## Capital gains on the sale of property

The gain derived from the sale of property is taxed as ordinary income.

## Withholding tax on dividends

Dividends distributed by a local company to its foreign shareholders are subject to a dividend withholding tax at 10%. This rate is not reduced under any of the double taxation treaties concluded by Thailand.

## Loss carryforward

Net losses may be carried forward over five consecutive years. No carryback of losses is allowed.

Extended loss carryforward is available under privileges granted by the BOI. Under privileges granted by the BOI, losses can be carried forward for five years from the end of the tax holiday period. There is no requirement to first offset such losses against profits generated during the tax holiday.

## Real estate transfer tax/other taxes

Transfer of real property is subject to a property transfer fee, and stamp duty or specific business tax.

The standard transfer fee is 2% of the government assessed value of the property.

Stamp duty of 0.5% of the transfer value is payable except where the seller is subject to a specific business tax.

Specific business tax of 3.3% is payable on the transfer value on transfer of real property.

In certain circumstances, the transfer of real property is not subject to specific business tax if the seller is an individual, including:

- The seller has owned the property more than five years before the transfer.
- The seller transfers the real property to a legal heir or an heir by a will.
- The seller transfers the real property to a legitimate child, but not including an adopted child.
- The seller transfers the real property without consideration to a government agency.

In order to permit funding arrangements that are compliant with Sharia law, as of 30 December 2005, the transfer of land or property to a purchaser under a hire-purchase agreement with the Islamic Bank of Thailand is exempt from stamp duty and specific business tax (SBT).

In addition, a transfer of real property is not subject to the SBT if the property is sold to, or sold by, the Property Loan Management Organisation, or limited companies set up by financial institutions under the law in order to manage property loans with the approval of the Bank of Thailand, or the property is sold by the Property Fund (Type I fund), Property Fund for resolving financial institution problem (Type II fund), or Property and Loan Fund (Type IV fund).

The buyer of property which is a corporate entity must deduct from payment made to a seller which is a corporate entity, 1% on account of corporate income tax. The tax can be credited against the income tax of the seller.

## Other relevant taxes

House and land tax is payable by owners of a house, building, or structure and land, which is rented or otherwise put to commercial value. The rate is 12.5% of the assessed annual lease value of the property.

Stamp duty is levied at the rate of 0.1% on the rental value over the period specified in a lease contract.

Local development tax is based on the value of land (excluding improvements) and ranges from 0.25% to 0.95%. Land considered 'idle' is subject to tax at twice the standard rate.

## Value added tax (VAT)

The current rate of VAT is 7%.

Leasing or selling of immovable property is exempt from VAT. Consequently, a real estate lessor may not recover input VAT incurred in business, including VAT incurred in the construction of real property.

If the company also engages in business subject to VAT, such as the provision of services or lease of movable property, it may be able to partially recover VAT arising on the construction of real property.

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# Real Estate Tax Summary – Turkey

## General

According to article 35 of Land Registry Law numbered 2644 (the “Law”), in principle, foreign individuals may acquire immovable assets. Before 18 May 2012, such acquisition was subject to the conditions provided under the Law. The respective conditions were as follows:

- Existence of Reciprocity between Turkey and the respective country of the individual wishing to acquire real estate; (both de jure and de facto);
- The total size of the real estate acquired or in which an interest is acquired will not exceed 2.5 hectares; and
- The total size of real estate to be acquired in one city will comply with any restrictions on size imposed by the Council of Ministers for that particular city.

On the other hand, Law amending the Land Registry Law has been published in the Official Gazette dated 18 May 2012 and numbered 28296. (“Amendment”) With the Amendment;

- The Reciprocity principle provided under article 35 of the Law has been abolished. Therefore, foreign individuals may acquire real estates in Turkey without complying with the Reciprocity principle as of 18 May 2012. The Council of Ministers is the competent authority to determine the nations of whose citizens may acquire real estate in Turkey; and
- The area threshold provided under article 35 of the Law has been expanded. With the Amendment, the total size of the real estate acquired or an interest acquired by the foreign individual has been limited to 30 hectares nationwide and 10% of the district where the real estate is located.

In principle, foreign legal entities are not allowed to acquire real estate in Turkey. The only type of foreign legal entity that might acquire real estate in the country is a foreign trading company. Other foreign legal entities, such as charities, foundations, societies and funds are not allowed to obtain real estate.

Furthermore, foreign legal entities incorporated under the laws of a foreign country may acquire real estates in Turkey, only if such acquisition is allowed under the specific laws, i.e. Petroleum Law, Tourism Encouragement Law.

On the other hand, establishing a company that will be resident in Turkey in order to acquire real estate or limited real right is also subject to some restrictions according to article 36 of the Land Registry Law. Companies established in Turkey by foreign investors are deemed to be Turkish companies, but their acquisition of real estate and limited real rights in Turkey have been restricted by the decision of Constitutional Court on 11 March 2008 to cancel article 3(d) of the Foreign Direct Investment Law, which offered equal terms and conditions in acquiring real estate to both (i) a national

company with a domestic capital and (ii) companies established in Turkey by foreign investors.

According to article 36 of the Law, companies established in Turkey by foreign investors may acquire and use real estate ownership or limited real rights, in order to achieve objectives set out in their articles of association. The same principle applies to a transfer of the real estate to another foreign capitalised company established in Turkey, or in a case where a national company with domestic capital owning a real estate becomes a foreign capitalised company by means of a share transfer transaction.

Real estate acquisitions by these types of companies in military forbidden zones, security zones as well as in strategic zones are subject to the permission of the Turkish General Staff or commandership to be authorised by the General Staff, whereas such acquisitions in private security zones are subject to the permission of the relevant local governorship. Permission depends on how well the acquisition is seen to conform to the country's safety and the company's scope of activity. The decision is therefore taken by a commission appointed within the governorship representing the relevant administrations.

Article 36 also provides that any acquisition made in contravention of the Law will be liquidated by the Ministry of Finance, unless the owner liquidates the respective real estate within the given time limit by the Ministry of Finance. It is worth noting that the owner will be paying in cash after the liquidation process. Finally, a regulation has been issued by the Ministry of Public Works and Settlement, which regulates the terms and conditions of real estate acquisition by foreign capitalised companies within the framework of article 36 of the Land Registry Law.

## Taxation of rental income

### *Corporation tax*

Net rental income acquired by resident corporate entities is taxable in Turkey. Rental income acquired by corporate entities is included in the annual corporate income tax return, and is subject to 20% corporate tax.

### *Dividend withholding tax*

Dividends when distributed to non-residents or individual shareholders are subject to withholding tax at the rate of 15%. The rate may be reduced by virtue of bilateral treaties.

### *Determination of tax base*

#### **Tax deduction**

Property-related costs such as repair and maintenance, insurance and interest are tax-deductible.

Taxpayers are free to include in the cost expenses for public notaries, court fees, assessments, commissions, and public announcements as well as for Real Estate Purchase Tax, or they can be considered as an expense in the determination of income.

#### **Expenses included in the cost of real estate**

Expenses arising from the purchase and demolition of an existing building and the levelling of its site are included in the cost, supplementary to the purchase price.

According to article 272 of the Tax Procedural Law, expenses incurred in expanding real estate or increases in commercial worth (but excluding expenses for normal maintenance, repairs, and cleaning) are added to the cost of the real estate.

### Depreciation

The applicable depreciation rates are between 2% to 10% for different types of buildings. However, all companies and those real persons who are obliged to keep their statutory books and financial tables on a balance sheet basis can apply the declining balance method for depreciation. This means that the 2% to 10% depreciation rate becomes 4% to 20%. But, even with this method, the depreciation period cannot be shortened compared to the normal method.

Vacant land is not depreciable.

## Taxation of capital gains

### *Taxation of capital gains derived by resident corporations*

Profits of corporate taxpayers stemming from the sale of assets are included in the corporate tax base of the company and taxed at the normal corporation tax rate at 20%. There is no separate capital gains taxation.

In calculating the net capital gain by corporations, a special corporate tax exemption regulated under article 5 of Corporate Income Tax can be used to eliminate taxation. However, this tool cannot be used by companies whose main or regular activity is property trading and/or leasing.

In accordance with this exemption, 75% of the capital gains derived from disposal of property are exempted from corporate tax provided that the property is held for at least two years. In order to benefit from this 75% capital gains exemption, the sales profit must be booked in a special reserve account for at least five years. The exemption will be applied in the period that the sale takes place. If the sales revenue is not collected within two years, or the related profit is withdrawn from the special reserve account, or transferred to any account apart from the paid-up capital, the taxes not accrued on time will be claimed back with penalty.

Please note that distribution of that income in any way or liquidation of the company within five years will lead to full taxation.

Please note that the seller is also exempt from stamp tax under the above-mentioned corporate tax exemption.

VAT exemption is also applicable for the sale of properties held for at least two years according to the VAT Law. Again this VAT exemption will not be applicable if the main or regular activity of the seller company is real estate trading. (Property sales by individuals not involved in any commercial activity are exempt from VAT.)

### *Taxation of capital gains derived by non-resident corporations*

In principle, capital gains of non-resident entities from disposal of real estate are taxable in Turkey since real estate is located in Turkey.

Capital gains are calculated as the positive difference between the sales price and the acquisition cost. Acquisition cost is indexed with monthly inflation rates for determination of net capital gains. The cost adjustment can only be made if the wholesale price index is at least 10%.

Net capital gains calculated as such are subject to corporate tax and dividend withholding tax as discussed above. Note that the bilateral tax treaty provisions do not limit Turkey's right to tax capital gains from disposal of real estates.

### *Taxation of capital gains by individuals*

Capital gains of individuals from the sale of property are exempt from income tax, provided that the related property has been owned for at least four years (for the properties acquired after 1 January 2007– five years).

Capital gains are calculated as the positive difference between the sales price and the acquisition cost. Acquisition cost is indexed with monthly inflation rates for determination of net capital gains. The cost adjustment can only be made, however, if the increase in the producer's price index is at least 10%.

Furthermore, capital gains of individuals derived from the disposal of real estate property will not be taxed if the gross amount of such income does not exceed TRY 8,800 (approximately EUR 3,750 under the current exchange rate).

Capital gains calculated as such are taxed at progressive tax rates varying between 15% and 35%.

## Real estate related taxes

### *Value added tax (VAT)*

Under the Turkish tax system, liability for VAT arises:

- when a person or entity performs commercial, industrial, agricultural or independent professional activities within Turkey.
- when goods or services are imported into Turkey.

VAT is levied at each stage of the production and the distribution process. Although liability for the tax falls on the person supplying or importing the goods or services, the real VAT burden is borne by the final consumer. This result is achieved by a tax-credit method where the computation of the VAT liability is based on the difference between the VAT liability of a person on his sales (output VAT) and the amount of VAT they have already paid on their purchases (input VAT).

Buying and selling of real estate is subject to Turkish VAT at 18%. However, there are certain VAT exemptions applicable for real estates. Available exemptions are listed below:

- selling of real estate by resident corporations that have held the property for at least two years (Note that this exemption is not valid for companies whose main or regular activity is property trading),
- selling of real estate by individuals who are not estate agents,

- delivery of offices and factories that are built in Organised Industrial Zones or Small Industrial Villages,
- selling of real estate property by the State.

Additionally, the sale of houses with a total surface area equal to or less than 150 square metres and delivery of houses to housing cooperatives are subject to VAT at the rate 1%.

VAT, if incurred by non-resident companies, cannot be offset or recovered, and should be considered as part of the cost.

### *Title deed fee*

The acquisition of legal title to Turkish property is subject to 1.65% title deed charge on the higher of property tax value or the transaction amount. The same charge will apply when the property is sold. This charge is applied separately for buyer and seller. As a result, the total title deed charge over the property that has to be paid would be 3.3%.

### *Stamp tax*

Stamp tax is calculated over the sales price of the real estate property indicated in the asset purchase agreement (if any) at a rate of 0.825% with a ceiling of TRY 1,379,775.30 (approximately EUR 592,000 under current foreign exchange rate; subject to annual revaluation) for the year 2012. Note that each and every signed copy of an agreement is separately subject to stamp tax.

### *Property tax*

Property tax is levied on the owner of real estate at 0.2% on buildings. If the buildings are used for residential purposes it is reduced to 0.1%. For newly constructed buildings, however, this tax cannot be lower than the property tax of the land on which it is built. In a few cases, such as retirement homes, the tax rate is 0%. Also, the property tax rate for development land is 0.1%, whereas the rate for arable land is 0.3%.

Furthermore, the effective property tax rates are increased from 0.1% to 0.2% for residences and from 0.2% to 0.4% for other buildings that are within the borders of metropolitan areas.

## **Real estate investment companies (REICs)**

Real estate investment companies (REIC) are defined by the Capital Markets Board of Turkey as capital market institutions that invest in real estates and capital market instruments based on real estates, real estate projects and rights based on real estates.

REICs may be established for a limited time to undertake a certain project, for a limited or unlimited time to invest in certain areas or for a limited or unlimited time without any limitation of purpose. Furthermore, REICs may be constituted by way of establishing a new company as a REIC, or existing companies can be converted into a REIC, at least 25% of whose shares should be offered to the public upon their establishment/conversion within three months, regardless of their initial paid-in

capital as of 2012. The minimum paid-up capital requirement for a REIC is TRY 23.75m.

### *Taxation of a REIC*

Profits generated from the activities of REIC are exempt from corporate tax and the dividend withholding tax rate is 0%.

The transactions of REICs are, however, subject to VAT and most other transfer taxes.

### *Taxation of investors receiving dividends from a REIC*

Although dividend distributions to individual and non-resident shareholders of Turkish companies are currently subject to dividend withholding tax at the rate of 15% in Turkey (double tax treaty provisions are reserved) since the withholding tax rate is determined as 0% for REICs by the Council of Ministers, dividend distributions to individual and non-resident shareholders of the REICs currently have no dividend withholding tax burden at all.

#### **Dividends received by resident corporations**

Since REICs are exempt from corporate tax 'participation exemption' is not applicable for the dividends received from REICs. So, dividends received by corporations in Turkey from REICs are subject to corporation tax. And then, if distributed to non-resident companies or individuals, those distributions are also subject to dividend withholding tax in line with local regulations.

#### **Dividends received by non-resident corporations**

Taxation of dividends in the hands of a non-resident corporation depends on the tax treatment of the country of residence.

#### **Dividends received by resident individuals**

Resident individual shareholders of REICs are obliged to declare half of the dividends received from REICs if half of the dividends received are higher than the declaration limit (approximately EUR 10,000 for the year 2012). Declared income will be subject to income tax at the progressive rate between 15% and 35%.

#### **Dividends received by non-resident individuals**

Taxation of dividends in the hands of non-resident individuals depends on the tax treatment of the country of residence.

### *Taxation of capital gains from disposal of REIC shares*

#### **Capital gains received by resident corporations**

The capital gains derived from the sale of REIC shares by resident legal entities is to be included in the corporate income and will be subject to corporate tax. However, the corporate tax exemption method can be used to minimise the tax burden on the sale of shares.

### Capital gains received by non-resident corporations

Since REICs are public companies, capital gains derived from the sale of shares in the Istanbul Stock Exchange by non-resident legal entities that do not have a permanent establishment (PE) in Turkey will be subject to taxation via withholding tax. The current rate of 0% withholding tax is applicable for the capital gains received by non-resident corporations and that tax will be the final tax for those companies.

Capital gains from the sale of non-listed Turkish company shares by non-resident corporations that do not have a PE in Turkey are to be declared after the application of cost adjustment (adjustment of the original cost with the wholesale price index except for the month in which the shares are sold if the total increase in WPI is more than 10%), within 15 days following the sale of shares, through a special corporate tax return and be taxed at standard corporation tax rate. Additionally, a dividend withholding tax will be applied on the net gains. But, since most of the double tax treaties prohibit Turkey's taxation right on these capital gains, depending on the holding period of the Turkish company shares, it is strongly advised that examination of double tax treaties be made before these transactions are made.

### Capital gains received by resident individuals

Since REICs are public companies, capital gains derived from the sale of shares in the Istanbul Stock Exchange by resident individuals will be subject to taxation via withholding tax. The current rate of 0% withholding tax is applicable for the capital gains received by resident individuals and that tax will be the final tax for those individuals.

### Capital gains received by non-resident individuals

Since REICs are public companies, capital gains derived from the sale of shares in the Istanbul Stock Exchange by non-resident individuals, will be subject to taxation via withholding tax. The current rate of 0% withholding tax is applicable for the capital gains received by non-resident individuals and that tax will be the final tax for those individuals.

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# *Real Estate Going Global Ukraine*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 17 August 2012.

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# *Real Estate Tax Summary – Ukraine*

## **Legal considerations**

A foreign investor may purchase Ukrainian property either directly or through a local company. However, there is a requirement for foreign individuals to rent out premises in Ukraine via a Ukrainian legal entity or a private entrepreneur acting as their agents.

Foreign individuals and legal entities may acquire only a non-agricultural land plot, which is attached to the real estate object. Non-residents may lease land for up to 50 years. Ukrainian company or individual may only purchase up to 100 ha of agricultural land.

## **Taxation of rental income**

Profits earned from renting out real estate by a resident company or via a non-resident's permanent establishment are taxable in Ukraine at the standard corporate tax rate, which is set at the level of 21% for 2012, 19% for 2013 and 16% for 2014 and onwards.

Rental income received by a non-resident from Ukraine is subject to 15% Ukrainian withholding tax.

Individuals' income from renting out property is taxed at the standard 15%/17% rate.

Lease of a building, premises and privately owned land is subject to 20% VAT (17% from 2014). Lease of state-owned land is exempt from VAT, if the lease payments are due to the state or local authorities.

## **Sale of property**

Capital gains from the sale of property by a resident or a non-resident's permanent establishment are subject to corporate profit tax at the standard CIT rate.

Under Ukrainian domestic law, income realised by a non-resident from sale of real estate located in Ukraine is subject to 15% withholding tax, unless otherwise is provided by relevant double tax treaty.

Ukrainian individuals' income from sale of real estate (including incomplete constructions) is subject to personal income tax at 5%, which can be reduced to 0% in certain cases. Income of non-resident individuals is subject to tax at 15%/17% tax rates.

The transfer of real estate attracts stamp duty at a rate of 1% of the contract value. The duty is payable by either the seller or the buyer, depending on the agreement between the parties to the transaction.

Special Pension Fund charge of 1% applies to purchase of real estate by individuals and legal entities.

Supply of buildings or premises is subject to 20% VAT. VAT exemption is available for supplies of housing at the secondary market.

The supply of land is exempt from VAT, except where the value of the land is included in the value of the real estate according to Ukrainian legislation.

## Thin capitalisation rules

Ukrainian tax legislation does not contain thin capitalisation rules in their generally known principles. Instead, there is a limitation on tax deductibility of interest on loans received from related parties. The restriction is applicable to the companies, which capital for at least 50% belong to non-residents, and is calculated as the interest income received by the taxpayer in the reporting period plus 50% of the taxable profits (excluding interest income).

## Beneficial ownership

From 1 January 2011, the Ukrainian Tax Code introduced the 'beneficial ownership' test that needs to be satisfied in order to claim exemption/reduced WHT rate based on the relevant double tax treaty.

# *Real Estate Investments – Ukraine*

## General

The global financial and economic crisis has caused dramatic changes in Ukraine's property market. After a couple of years of exponential and profitable growth, Ukraine's property market has started to stagnate. Due to the difficulties with securing foreign debt funding and the economic downturn, lots of real estate projects have been frozen or offered for sale. Many real estate advisers foresee a new wave of mergers and acquisitions (M&A) in the market in the near future, where cash-rich market players would take over their weaker rivals.

## Legal requirements

Under Ukrainian law, no special permits or licences are generally required for a foreign investor to purchase buildings (premises) located in Ukraine.

According to a controversial provision of the Tax Code, a foreign individual, in order to be able to lease out real estate, should appoint a Ukrainian legal entity or a private entrepreneur to act as its agent.

Effective as of 1 January 2002, foreign individuals and legal entities may acquire only non-agricultural land within territory of settlements or outside territory of settlements where land is attached to real estate. Non-residents can lease the land for up to 50 years.

Agricultural land cannot be owned by foreign citizens, stateless persons, foreign legal entities, or foreign states. Until 1 January 2015 Ukrainian individuals and legal entities may own only up to 100 ha of agricultural land.

Until 1 January 2013 the law prohibits: (i) contribution of ownership share for the land plot into the share capital of legal entities; (ii) sale of the state and municipal agricultural land, and (iii) disposal and change of the designated purpose of the land plots used for agricultural commodity production and private agricultural household.

A foreign legal entity may purchase state land subject to a resolution of the Cabinet of Ministers of Ukraine and consent of the Ukrainian Parliament. A foreign legal entity may also purchase municipal land from a relevant municipal council, subject to the consent of the Cabinet of Ministers of Ukraine. To purchase state or municipal land, the foreign entity must set up a commercial representative office in Ukraine.

As a general rule, state and municipal land should be sold or leased via a public land auction. The procedure of conducting land auctions has not been yet established by the law. There are certain exceptions to the mandatory land auction rule: the acquisition of land plots under objects of immovable property owned by legal entities and individuals, as well as the acquisition of land plots for the construction and maintenance of transport and energy infrastructure (e.g. roads, airports), the construction of social housing, objects that serve the municipality (e.g. waste processing plants, heating stations, etc.), the complex reconstruction of old residential districts and some other cases.

State registration applies to contracts for:

- Sale of real estate.
- Lease of buildings (premises) for a period of three years or more.
- Lease of land.

Land reform is in the list of priorities of the Ukrainian government for 2012 and is generally aimed at establishing a transparent land circulation. However, the draft legislation establishes significant limitations:

- Agricultural land cannot be purchased by any legal entity (either foreign or Ukrainian). Only Ukrainian individuals, the state, the state land bank and municipalities are entitled to buy agricultural land;
- Size limitations of land leases are introduced: one person (together with affiliated persons) may lease up to 100,000 ha of agricultural land, but not more than 10% of the agricultural land in each district (*rayon*);
- Companies may need to be registered in each district (*rayon*) where leased land plots are located.

Development and construction procedures have been changed in 2011. The main focus of such changes is simplification of the permitting procedures.

The introduction of the new rules regarding real estate title registration was postponed until 2013.

Foreign direct investments are subject to voluntary state registration.

## Taxation of rental income

Where the foreign owner of real estate receives rental income from a Ukrainian resident or a non-resident permanent establishment (PE), the lessee is obliged to collect from the rental fee and remit to the state 15% withholding tax (WHT), unless the relevant double tax treaty provides otherwise.

If a PE is deemed to exist, then it is subject to broadly the same taxation regime as a Ukrainian-resident entity.

Profits earned from renting out real estate by a resident company or via a non-resident's PE are taxable at the standard corporate tax rate, which is set at the level of 21% for 2012, 19% for 2013 and 16% for 2014 onwards.

## Deductible expenses

Under general tax regulations, all expenses incurred by entities in respect of their business activities are deductible for corporate profit tax purposes, except for certain expenses specified as non-deductible by the Ukrainian Tax Code. Value of land is normally not deductible for corporate profit tax purposes.

## Interest

Generally, interest is a deductible expense if incurred for business purposes. However, where the borrower's capital for at least 50% belongs to non-residents and the interest is payable to non-residents (and related entities) that have holding in the borrower's capital, deductibility of the interest expense is limited for the Ukrainian borrower. The restriction is calculated as a maximum deduction available for a particular reporting period, and any interest paid that is non-deductible as a result of the restriction may be carried forward indefinitely for deduction in future reporting periods. The restriction is calculated as the interest income received by the taxpayer in the reporting period plus 50% of the taxable profits (excluding interest income).

Interest expenses on loans incurred by a Ukrainian company for the purposes of creation of qualifying assets in accordance with the Ukrainian accounting standards will not be directly deductible, but rather capitalised for subsequent depreciation.

Withholding tax on interest payable by a domestic borrower to a non-resident creditor is levied at the rate of 15%, unless the relevant tax treaty for the avoidance of double taxation provides otherwise.

From 1 January 2011, the Ukrainian Tax Code introduced the 'beneficial ownership' test that needs to be satisfied in order to claim the exemption/reduced WHT rate based on the relevant double tax treaty. Therefore, back-to-back and similar financing structures need to be thoroughly structured in order to ensure they are tax-efficient under the new rules.

## Thin capitalisation

Ukrainian tax legislation does not contain thin capitalisation rules in their generally known principles. Instead, there is a limitation on tax deductibility of interest on loans received from related parties (see the previous section).

## Depreciation

According to the Tax Code, tax depreciation rules are aligned to financial accounting rules with some modifications.

All non-current assets are classified into 16 classes of fixed assets, including separate sub-classes for land, buildings and constructions. Taxpayers are allowed to choose a depreciation method per class of assets. There are a number of depreciation methods available, including straight-line and reducing balance. The Tax Code sets a minimum period of useful life per class of assets for tax purposes.

The indicative annual depreciation rate for buildings under the straight-line method is up to 5% and under the reducing balance method is up to 16%. Value of land is normally not subject to depreciation.

## Repair and renovation

Repair or renovation costs are generally capitalised and depreciated. However, a limited amount of expenses related to fixed asset repairs or renovation (up to 10% of the book value of a building) can be deducted in the current reporting period for corporate profit tax purposes.

## Loss carryforward

Ukrainian tax legislation provides for tax losses to be carried forward indefinitely. In the past (2004–2007), the annual Budget Laws continuously introduced restrictions on loss carry forward, making utilisation of tax losses available for one year only. In 2010, taxpayers were allowed to deduct only 20% of tax losses accumulated as of 1 January 2010.

In 2011 the Tax Code did not provide any restrictions for utilisation of the tax losses of previous periods. However, there were many cases in 2011, when the tax authorities applied fiscal approach and disallowed deductibility of the losses originated before 2011 for the tax purposes. These resulted in many disputes with the tax authorities and court litigations.

According to the recently introduced changes to the Tax Code, entities that received revenue for 2011 of UAH 1m or more are allowed utilise tax losses accumulated as at 1 January 2012 during 2012-2015 in equal 25% instalments. Any losses that remain unutilised as at 31 December 2015 should be available for utilisation in future periods. The above limitation does not apply to entities with 2011 revenues of less than UAH 1m.

## Withholding tax on dividends

Payment of dividends to non-resident shareholders attracts a WHT at the rate of 15%, unless the relevant tax treaty for the avoidance of double taxation provides otherwise.

## Value added tax (VAT)

The supply of buildings or premises is subject to 20% VAT. VAT exemption is available for supplies of housing at the secondary market.

The supply of land is exempt from VAT except where the value of the land is included in the value of the real estate according to Ukrainian legislation.

Lease of a building, premises and privately owned land is subject to 20% VAT. The lease of state-owned land is exempt from VAT, if the lease payments are due to the state or local authorities.

The VAT rate will be reduced to 17% from 2014.

## Capital gains on the sale of property

Capital gains realised by the local corporate entity on the sale of buildings is calculated as the difference between the sales price of the building and its net book value.

Capital gains on the sale of land by the local entity is computed as the difference between the sale price of land and the purchase price of land increased by the inflation coefficient, if an annual inflation rate for the relevant calendar year exceeds 10% annually.

Income from the sale of buildings or land should be determined, based on the contractual price but not less than the market price.

The gain should be included in the local entity's taxable income for the given reporting period, and can be reduced by the entity's deductible expenses and losses brought forward from previous tax periods. Losses incurred on the sale of land are ignored for tax purposes.

Under Ukrainian domestic law, income realised by a non-resident from sale of real estate located in Ukraine is subject to 15% WHT. Some double tax treaties concluded by Ukraine limit Ukraine's taxing rights in such transactions to capital gains.

Profits earned by a foreign shareholder on the sale of shares in a Ukrainian company to a Ukrainian resident entity or a PE of a non-resident entity are subject to a 15% WHT, unless otherwise provided by the relevant tax treaty.

## Personal income tax

For tax-resident individuals, a 0% rate applies to proceeds received from the disposal of a house, a flat, a cottage (including attached land), or a plot of land within the limits set by the Ukraine's Land Code, if it is the first disposal for a year and the asset was in the individual's possession for more than three years. A 5% rate applies to subsequent sales during a year of immovable property indicated above or disposal of other types of property including construction in progress.

The income from sale by tax residents of immovable property located abroad is subject to a standard 15%/17% rate (in 2012, 15% applies to income up to UAH 10,730 per month and 17% to income exceeding UAH 10,730).

Personal income tax of 15%/17% is due on disposal of immovable property situated in Ukraine by a non-resident individual.

The tax should be paid prior to the notarisation of the sale agreement.

For personal income tax purposes, income from disposal of immovable property cannot be lower than the 'valuation price' determined by the valuator authorised to perform valuation of property according to the law. The valuation certificate must be provided to the Notary.

According to the Tax Code, an individual's contribution of real estate to the share capital of a legal entity is considered as a sale of such property for personal income tax purposes.

Rental income received by an individual is subject to personal income tax at the standard 15%/17% tax rate. The taxable income is determined, based on contractual fee, but should not be lower than the minimum rental fee determined according to the methodology established by the Cabinet of Ministers of Ukraine.

A business entity that rents real estate from an individual is obliged to withhold 15%/17% tax from rent payments unless an individual is registered as a private entrepreneur.

## Real estate transfer tax

The transfer of real estate attracts stamp duty at a rate of 1% of the contract value. The duty is payable by either the seller or the buyer, depending on the agreement between the parties to the transaction.

For the buyer, whether corporate entity or individual, purchase of real estate (except for land plots) attracts a pension fund charge at the rate of 1% of the real estate value.

The Civil Code requires mandatory notarisation of contracts for lease of buildings/premises for a period longer than three years. The stamp duty is 0.01% of the contract value, but no more than approximately USD 110.

Contract for lease of land must be notarised, which attracts stamp duty at the rate of 0.01% of the land value determined under the guidelines established by the Cabinet of Ministers of Ukraine. In the absence of the land valuation, the stamp duty is 1% of the contract value.

The sale of shares in a Ukrainian company is not subject to stamp duty or any other transfer taxes.

## Land tax

Land tax is levied on owners and users of land. The tax rate depends on the nature and location of the land.

## Property tax

From 1 January 2013, local tax on residential real estate properties will be payable both by individuals and legal entities – owners of residential real estate.

The tax base is the living space of a residential real estate object. For individuals the taxable base may be reduced by 120 square metres for apartments and by 250 square metres for a dwelling house. This reduction is granted once per calendar year and applies to the object in which the individual is registered or, at his/her choice, to any other residential real estate object owned by such individual.

The fixed rate per square metre is set as a percentage of the minimum salary established by the law as of 1 January of the respective tax year:

- 1% for apartments, the dwelling space of which does not exceed 240 square metres, and houses, the living space of which does not exceed 500 square metres;
- 2.7% for apartments, the dwelling space of which exceeds 240 square metres, and houses, the living space of which exceeds 500 square metres.

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# ***Real Estate Investments – United Kingdom***

## **Preface**

In recent years, property investors and developers have become much more international in their outlook. Property has effectively become part of the global marketplace. However, the tax and legal systems that apply to property transactions differ with every jurisdiction, and players in this market need to understand the local implications of their proposed transactions. Otherwise, what looks like a great opportunity on a pre-tax basis may turn out to be a post-tax disaster.

This guide has been prepared by the Real Estate teams of PricewaterhouseCoopers LLP (PwC) and PricewaterhouseCoopers Legal LLP (PwC Legal), to provide an introduction to the UK tax and legal regimes that apply to real estate investors. After a general overview for UK and overseas investors, the guide covers the direct tax aspects of disposals and developments, VAT, transfer duties and other real estate taxes. A legal summary and glossary of legal terms are included at the end of the guide and reference is also made from time to time to relevant legal issues throughout the guide.

The UK is divided for the purpose of pure real estate law, as opposed to tax law, into a number of jurisdictions, the most important being England and Wales together (the largest), Scotland and Northern Ireland. Although the legal systems of these jurisdictions have much in common, they do have substantial differences in the formalities required for the transfer of real estate and some aspects of their substantive law. It is therefore important when dealing with real estate assets in the UK to ensure that legal assistance is provided by someone qualified to advise in the relevant jurisdiction. The remainder of this guide, insofar as it comments on any legal aspects of real estate investment, is concerned with the position specifically in England and Wales, although many of the comments will also apply to the other jurisdictions.

The Scotland Act enacted on 1 May 2012, includes powers for the Scottish Parliament to set a rate of income tax in Scotland higher or lower than the UK rate. This is expected to start from 6 April 2016.

The Scottish government has published a consultation document on a proposed new land and buildings transaction tax to replace stamp duty land tax in Scotland from April 2015.

## **Introduction**

There have been a number of changes affecting the taxation of real estate in recent years.

A number of changes have also been included in Finance Bill 2012, but as of June 2012 have not yet been enacted. Where relevant, reference to these proposed changes has been made below.

Additionally, consultations have been announced on a number of areas including the following:

- A proposal to introduce a General Anti-Abuse Rule (GAAR) targeted at artificial and abuse tax avoidance which would come into effect in 2013.
- A proposed annual charge on residential dwellings valued at over GBP 2m owned by certain non-natural persons (broadly companies, partnerships, including companies and collective investment vehicles).
- The extension of Capital Gains Tax (CGT) to the disposal by certain non-resident non-natural persons of residential dwellings where the consideration on disposal exceeds GBP 2m, interests in such dwellings, or the entities in which they are held. No changes are proposed to the taxation of other residential property, or non-residential property.

## Investment in real estate directly by non-resident investors

### *UK tax on rental income*

Non-residents who receive rental income from direct investments in UK real estate are typically subject to UK tax under the income tax regime.

A corporation that is not resident in the UK for tax purposes, and not carrying on a trade in the UK through a permanent establishment (PE), is subject to basic rate UK income tax at 20% on net income from the rental business. Most other types of organisations, with the exception of certain types of trusts, are taxed in the same way.

An individual is subject to basic rate income tax at 20% on net taxable income up to GBP 34,370, and then to higher rate income tax at 40% on net income falling between the limits of GBP 34,371 to GBP 150,000. An additional rate of 50% applies (reducing to 45% in 2013/2014) on net taxable income in excess of GBP 150,000.

A special rate of income tax of 50% (reducing to 45% in 2013/2014) is applicable to certain non-resident trusts, where income is accumulated or is payable at the discretion of the trustees. The taxation of trusts is a specialised area and is not covered in this guide.

### *Ownership of real estate*

There are no significant legal differences in the way that corporations and individuals, UK resident or otherwise, may hold real estate in the UK. However, no more than four persons, whether individuals or corporations, may be registered as owners of real estate at the Land Registry (except where the land is vested in trustees for charitable, ecclesiastical or public purposes where there is no limit on the number of trustees).

Real estate law recognises two distinct kinds of ownership. These kinds are absolute, or legal ownership, and, under trusts or similar arrangements, equitable or beneficial ownership.

Real estate can be owned either absolutely and for an unlimited duration, as freehold, or may be rented from another person under a lease for a specified period, as leasehold. There are no limits on the length of a lease, but the length chosen may have other consequences. Both a freehold and a leasehold owner may create leases of their property provided that, in the case of a leasehold owner, the terms of the owner's own lease permits such dealings, and that the new lease created, as sublease, is shorter than the owner's own lease. For greater detail see section '*Legal summary and glossary of terms*'.

### *Basis of assessment*

The period of assessment is the tax year that runs from 6 April of one year, to 5 April of the following year. Rental income is taxed by reference to the profits of the UK rental business.

The results of this business are determined in accordance with commercial accounting principles. All rental income is aggregated and taxed on an accrual basis. Expenditures, including interest, are deductible on the same basis as expenditures relating to a trade (see section '*Allowable expenses*').

Where tax has not been deducted at source from rental receipts (see section '*Withholding tax and self-assessment*'), a non-resident landlord will be required to make two payments on account of income tax based on the previous year's tax liability. The first instalment is payable by 31 January during the year of assessment, and the second instalment is payable by 31 July following the year of assessment. Any balance is payable by 31 January following the year of assessment.

Rent under commercial leases in the UK is normally paid in quarterly instalments on 25 March, 24 June, 29 September and 25 December, known as the traditional quarter days. Sometimes the modern quarter days of 1 January, 1 April, 1 July and 1 October are used instead. In residential leases, or leases of serviced accommodation, rent is normally paid monthly or weekly.

Rent payments are most frequently made in advance of the period to which they relate.

### *Withholding tax and self-assessment*

Where a non-resident landlord applies to HMRC, and that application is successful, the landlord will become subject to UK income tax under the self-assessment regime. By so applying, the landlord will undertake to comply with UK tax law, and submit tax returns in accordance with that law. In return, the non-resident landlord will be entitled to receive rental income gross. If no application is made by the non-resident landlord, or where an application is made but rejected, tax will be withheld at source from rents paid to the landlord. Where the tenant pays rent directly to the non-resident landlord, the tenant will deduct basic rate income tax at 20% from the gross rent payable, less any deductible expenses paid by the tenant. Where rental income is paid via a registered agent, the agent will similarly deduct basic rate income tax from the gross rent payable, less any deductible expenses paid by the agent. In both instances the payer, whether a tenant or registered agent, must be reasonably satisfied that the expenses paid are deductible under the Taxes Acts (see section '*Allowable expenses*' below), and no relief can be given for expenses, for example interest paid directly by the landlord.

Where an agent or tenant withholds income tax, this must be accounted for and paid to HMRC on a quarterly basis. The agent or tenant must then provide the non-resident

landlord with a certificate showing gross income, expenses paid and tax deducted from that income. An annual return must also be submitted by the agent or tenant to HMRC disclosing the following details:

- The landlord.
- Gross income derived from the properties.
- Expenses paid by the agent or tenant out of that income.
- The resulting net income and income tax deducted during the period.

Any tax deducted at source is used to offset the landlord's UK tax liability, and any excess will be repaid by HMRC once that liability has been agreed upon.

### *Tax returns where rent is received under deduction of tax*

A non-resident corporation is not obliged to file an income tax return, or notify HMRC of its investment in UK real estate. However, as noted above, a non-resident landlord can elect to file a tax return, and it will usually be to the landlord's benefit to do so in order to receive rental income gross, and claim relief on all relevant expenditure.

A non-resident individual is required to notify HMRC if they are chargeable to UK tax at the higher rate within six months of the end of the year of assessment in which the chargeable income arises. In the past, HMRC has not generally attempted to claim the excess of the higher rate tax over the basic rate withholding tax. However a non-resident individual can only claim deductions in addition to those paid by the agent, or tenant, as described in the section 'Withholding tax and self-assessment' above, against the rental income if the individual submits a tax return to HMRC. In this case, the individual will be assessed at the higher rate of 40% or the additional rate of 50% (it is proposed the additional rate will reduce to 45% in 2013/2014) on the appropriate proportion of their net income.

### *Allowable expenses*

Most expenses incurred in the rental business, other than those of a capital nature, are deductible, provided they are incurred wholly and exclusively for the purposes of the UK rental business. These will include items such as agent's fees, insurance, advertising, repair and maintenance costs, and will be shown as deductions when computing profits in the annual tax return where this is submitted.

Some of these expenses may be recoverable by a landlord from its tenants through a service charge. The extent to which this is possible will depend on the service charge provisions that the landlord and the tenant have negotiated and agreed upon. While tenants will generally accept that they must reimburse the landlord's costs of insurance and repair, they are unlikely to agree to pay advertising fees. Management costs may be recovered, although often only limited amounts. In leases of investment properties, landlords must try to recover as much of their expenditure as possible to ensure that the leases they are granting are acceptable in the investment market (see section '*Institutional leases*' below).

## *Interest payments*

Interest is in principle deductible on an accrual basis where the interest is paid wholly and exclusively for the purposes of the UK rental business.

However, under transfer pricing legislation, a limitation will apply where interest is paid to, or is guaranteed by, a connected party. In those circumstances, relief for interest will, broadly speaking, be limited to an amount equal to the interest that would be payable on the largest loan that could have been obtained from an unconnected lender without a guarantee. The transfer pricing provisions also apply to cases where a number of otherwise unconnected persons act together in relation to the financing of a company, and collectively these persons would be capable of controlling the company.

Where loan interest is paid to a non-UK resident, 20% withholding tax should be deducted by the payer if the loan has a UK source, unless advantage can be taken of a double tax treaty to reduce or eliminate the withholding tax. Current HMRC practice in this area suggests that interest paid by a non-UK borrower will not usually have a UK source, unless the borrowing is primarily enforceable in the UK. Where the borrowings are from non-resident-related parties, and exemption is claimed under a treaty, some of the interest may be excluded from treaty protection under thin capitalisation provisions.

Subject to overriding market conditions at any particular time, real estate finance is generally readily available in the UK. Lenders will require professional, independent valuations and the creation of a fixed security, i.e. a mortgage, over the property concerned. Other security may also be needed, commonly the payment of rental income into a blocked bank account. The mortgage is likely to impose obligations on the borrower to repair and insure the property, and restrictions on its ability to develop or lease the property. If the borrower fails to make the payments due to the lender, or breaches the provisions of the mortgage, the lender has a number of remedies, including the ability to sell the property itself.

## *Depreciation (capital allowances)*

Depreciation is not generally deductible. However, capital allowances can be deducted as an expense of the rental business in relation to qualifying expenditure on certain types of buildings, and on plant and machinery in buildings, at the following rates:

- A 18% allowance a year, using the reducing balance method, on plant and machinery in industrial or commercial buildings.
- A 8% allowance a year, using the reducing balance method, on plant and machinery that has an expected economic life when new of at least 25 years.
- A 8% allowance a year, using the reducing balance method, for certain listed plant and machinery that are 'integral features' of buildings and structures, comprising heating and hot water systems, ventilation and air conditioning; electrical systems (including lighting); cold water systems; lifts, escalators and moving walkways; and external solar shading.
- A 100% first year allowance (FYA) is available on certain eligible expenditure, including environmentally beneficial plant and machinery, and designated energy-saving technology and products. A tax credit is also available to encourage start-up and other loss-making companies, at a rate of 19% of the loss surrendered, within prescribed limits.

- An annual investment allowance (AIA) provides individuals, certain partnerships and companies with an annual 100% allowance for the first GBP 25,000 of expenditure on plant and machinery (other than cars). One such allowance is available to each individual business or corporate group.
- A 100% business premises renovation allowance for expenditure on the conversion or renovation of certain business properties which have been vacant for at least one year and lie within a designated disadvantaged area.
- A 100% FYA from April 2012 for plant and machinery expenditure incurred by companies in respect of a trade (i.e. not property investors) in a limited number of designated Enterprise Zones.

The rates of allowance and basis of calculation will usually be different for expenditures on second-hand buildings. Where available, these allowances will be deducted from the net income of the rental business. Capital allowances are not available for expenditures on fixtures in dwelling houses, although a wear and tear allowance of up to 10% of rental receipts from furnished lettings may be available.

Special rules on fixtures acquired second-hand, introduced from April 2012, require a buyer and seller to enter into elections in order for allowances to pass to the buyer. From April 2014, in certain cases a buyer may not be able to claim allowances if the seller has not ‘pooled’ the expenditure. Transitional rules apply until April 2014.

In order to ensure that the capital allowances position is as favourable to an investor as possible, it is advisable to include provisions about capital allowances in the documentation effecting the sale, purchase or lease of the real estate concerned.

Under certain long funding leases, a complex definition that includes both finance leases and operational leases, the inherent capital allowances entitlement belongs to the lessee, as opposed to the lessor, in respect of leased plant or machinery. However, in the case of property such as offices and retail premises which include items of background plant or machinery, such as central heating and air conditioning, the legislation will not normally apply where this plant or machinery is leased as an incidental part of a typical property lease.

In addition, in the case of some properties, there might be a small amount of plant or machinery that does not fall within the background plant or machinery exemption, but is nevertheless exempted under certain *de minimis* conditions.

While not strictly a capital allowance, contaminated land remediation relief is available to companies subject to corporation tax incurring qualifying expenditure. Provided the relevant conditions are satisfied, the legislation entitles a company carrying on a trade or property business to claim an additional 50% relief for ‘qualifying land remediation expenditure’ allowed as a deduction in computing its profits.

The relief is given as a deduction in the company’s trading or property business income computation for the accounting period in which the qualifying land remediation expenditure is allowed as a deduction.

Where a company incurs a loss and is unable to benefit from a further deduction for land remediation relief, a qualifying land remediation loss, that company may receive a payable tax credit in exchange for any qualifying land remediation loss surrendered to

the Exchequer. The land remediation tax credit is equal to 16% of the qualifying land remediation loss surrendered.

### *Losses*

Where an investor incurs a loss on the rental business after deducting interest and capital allowances, the loss will be available to be carried forward and applied against future profits of the rental business without time limit.

### *Permanent establishment*

A non-resident company will only be subject to UK corporation tax if it carries on a trade through a permanent establishment (PE) in the UK (see section *'Tax treatment of disposals'*). A non-resident company that acquires UK real estate as a long-term investment to obtain rental income and long-term capital appreciation would not normally be considered to be carrying on a trade in the UK.

If a non-resident company carries on trading activities elsewhere in the UK, then it may be preferable for it to invest in UK real estate via a separate company.

A non-UK company will not be resident in the UK for tax purposes unless it is managed and controlled in the UK. This will not normally be the case if the majority of the directors of the company are resident outside the UK, and they hold their board meetings outside the UK.

## Investment in real estate via a local company

### *Assessment of UK rental income*

For UK resident companies, rental income from UK real estate is chargeable to corporation tax. The income is calculated in the same way as for income tax (see section *'Basis of assessment'*) but is calculated for the accounting period of the company (see section *'Period of assessment'*). However, relief for interest is given separately (see section *'Interest payments'*).

Rental losses may be used to offset other profits of the company. Any excess may be used to offset other group companies' profits. Any losses unrelieved in the year are normally carried forward against future profits of the company without time limit. Losses may not be used for offset or carried forward where they arise from any part of the business that is not conducted on a commercial basis.

In addition to the expenses deductible from rental income, a UK company that invests in real estate may deduct the expenses of managing its portfolio of investments, and interest payments and related costs. The expenses can be deducted from any income or gains earned by the company. Any excess expenditure can be carried forward without time limit to be used to offset income and gains earned in future accounting periods.

Profits on foreign lettings are calculated in the same way as UK lettings, but are assessed separately. Losses on foreign lettings can only be carried forward against future profits on foreign lettings.

## *UK tax on rental income*

A company resident in the UK will be subject to UK corporation tax on its net income at the normal corporation rates which, for the year 1 April 2012 to 31 March 2013, are as follows:

- Taxable profits not exceeding GBP 300,000 – 20%
- Taxable profits between GBP 300,001 and GBP 1,500,000 – marginal rate of 25%
- Taxable profits exceeding GBP 1,500,000 – 24%

The profit limits are divided by the number of companies that are associated with the taxpayer company, plus one. For example, if a company has two associated companies, the upper threshold is reduced to GBP 500,000. Broadly speaking, companies are treated as associated if they are under the control of the same person or persons. The definition of associated companies is not restricted to UK resident companies, but dormant companies are excluded.

A further 1% reduction is proposed in the next year, resulting in a main rate of corporation tax rate of 23% (as opposed to the 24% previously announced) in the financial year commencing 1 April 2013, with a further reduction to 22% in the financial year commencing 1 April 2014.

## *Period of assessment*

The period of assessment will be the same as the company's accounting period, so long as this period does not exceed 12 months. If the accounting period exceeds 12 months, then it will be split, for tax purposes, into two separate periods, with the first period consisting of the first 12 months of the accounting period, and the second period consisting of the remainder of the accounting period.

## *Corporation tax self-assessment (CTSA)*

The corporation tax self-assessment (CTSA) regime took effect for accounting periods ending after 30 June 1999. Some of the significant features of CTSA are outlined below.

## *Taxpayer's duty to assess tax*

Under CTSA, the burden of correctly assessing a company's tax liability rests with the taxpayer. A tax return will constitute a clear statement that the amount shown on a self-assessment is the correct amount of tax payable, rather than an opening position in negotiations.

A tax-geared penalty of up to 100% will apply to negligent submission of incorrect returns. Where an Inland Revenue enquiry identifies adjustments to a company's self-assessment, if a company is not able to show that it had nevertheless exercised reasonable care in assessing its tax, it may face a negligence penalty.

## *Quarterly payments*

Large companies, broadly those with taxable profits exceeding GBP 1,500,000 in line with the threshold for determining the application of the top rate of corporation tax (see section '*UK tax on rental income*'), are required to pay tax by quarterly instalments. Instalments are based on estimates of the current year's tax position, and are due in the 7th, 10th, 13th and 16th months following the start of the accounting

period. Interest will be charged on underpaid quarterly tax, and penalties can apply in some cases. This system is being introduced in stages over three years.

The GBP 1,500,000 threshold referred to above is reduced to take into account associated companies in the same way as that described above. There are special rules where companies cross the large company threshold.

### *Documentation*

Under CTSA, taxpayers have a statutory duty to keep and preserve such records as may be needed to enable companies to deliver a correct and complete return. The definition of the records required is extensive.

Corporation tax continues to be payable nine months and one day after the end of an accounting period for those companies with taxable profits not exceeding the large company threshold.

### *Interest payments*

Interest is deductible on an accrual basis. Where the loan is undertaken for the purposes of a property trade, the interest will be deducted as a trading expense of the company. Where the loan is entered into for non-trading purposes, such as investment, the interest will be relieved against other income earned in the period. Where the interest payable exceeds taxable income of the period, it can, subject to certain limitations, be relieved against interest receivable in the preceding year, surrendered in the year to other group companies as group relief, or carried forward for set-off against future income indefinitely. See section '*Trading in real estate*' for a discussion of the distinction between trading and investing in real estate.

Under transfer pricing rules, interest paid to, or guaranteed by, a non-resident parent or related person, will only be deductible where the rate of interest and the amount of the debt are on an arm's length basis. Where interest is payable to a non-resident person who is not within the scope of UK corporation tax in respect of the interest receipt, previously it must have been paid within 12 months of the end of the period in which it accrues, otherwise relief is deferred until the interest is paid. New legislation was enacted during 2009, which can allow a tax deduction on an accruals basis. However, there are still circumstances where a deduction will only be available once interest has been paid.

### *Capital allowances*

The rules for deducting capital allowances are generally the same as those set out above in relation to income tax.

### *Repatriation of profits*

Dividends paid by UK resident companies are not subject to any withholding tax under domestic tax law, with the exception of dividends paid by REITs (see '*UK real estate investment trusts (REITs)*').

### *UK real estate investment trusts (REITs)*

Real Estate Investment Trusts (REITs) are a type of tax transparent property investment vehicle in the UK, similar to certain types of property investment vehicles in other countries (e.g. US real estate investment trusts). Companies meeting the requirements have been able to join the regime on or after 1 January 2007.

The conversion charge for companies joining the REIT regime will be abolished with effect from the enactment date of the Financial Act 2012.

### *Key features of a REIT*

There are a number of requirements to be met by companies in order to qualify as a REIT. In particular:

- The regime is open to companies resident in the UK, which are publicly listed on a recognised stock exchange (which under changes not yet enacted now includes AIM and certain overseas exchanges).
- For new REITs under changes not yet enacted, there is a grace period of three accounting periods (up to three years) for the shares to be admitted to trading on a recognised stock exchange. If the company or group is not listed at the end of the third accounting period it is deemed to have left the REIT regime at the end of the second accounting period.
- The company must not be 'close' (i.e. in broad terms not controlled by 5 or fewer persons) or an open-ended investment company. Where a new REIT is formed it can be 'close' for the first three years. If it remains close at the end of three years it leaves the REIT regime at the end of year three.
- Under changes not yet enacted, the rules in defining whether a company is 'close' for REIT purposes are relaxed and shares held by qualifying institutional investors (including charities, sovereign wealth funds, pension funds and authorised unit trusts) are disregarded.
- The company must only have one class of ordinary shares in issue and the only other shares it may issue are non-voting fixed-rate preference shares which may be convertible into shares or security.
- The company must not be a party to a loan that carries excessive interest or interest dependent on the results of the company's business, or provides for repayment of an excessive amount.
- There is a requirement that the majority (at least 75%) of the REIT's activity relates to a qualifying property rental business, by reference to both its total income and assets. For the purpose of the assets test, under changes not yet enacted all cash (and certain cash equivalents e.g. gilts) are now good assets.
- There is a requirement to distribute (subject to company law requirements) 90% of the profits (as defined) of the property rental business arising in the accounting period, by way of dividend, on or before the corporation tax return filing date for the accounting period. Since 16 December 2010 it has been possible to satisfy the distribution requirement by the payment of a stock dividend.

### *Tax treatment of a REIT*

Key aspects of the taxation of REITs include the following:

- Companies that meet the REIT eligibility criteria as set out in legislation will not pay corporation tax on qualifying property rental income or qualifying chargeable gains that relate to the ring-fenced business.

- With certain exceptions basic rate tax (currently 20%) will be withheld on the distribution paid to investors out of the profits of the tax-exempt business, subject to the provisions of any relevant double tax treaty, which may enable all or part of the withholding tax to be reclaimed. There is no provision for reduced treaty rates to be applied at source.
- The REIT is subject to an interest-cover test (as defined) on the tax-exempt part. Failure of this test will result in an additional tax charge rather than exclusion from the regime. 'Finance costs' for the purposes of this test did include all debt costs including swap break costs which often led to breaches. Following FA 2012 finance costs are to be limited to interest. However, discussions are on-going with Government to ensure that finance costs would include swap fees.
- Where dividends are paid to a company who holds more than 10% of the share capital, dividends or voting power, the REIT itself may be subject to an additional tax charge, depending on how the holding is structured. The purpose of this is to prevent a loss of UK tax revenues as a result of a potential reduction in the withholding tax rate available to such investors under the relevant double tax treaty. In practice REITs may mitigate this charge by taking various steps to avoid the payment of such dividends, which may result in restrictions imposed on such investors.

### *Tax treatment of investors in a REIT*

- A distribution from the tax-exempt profits of a REIT will be taxable as property income (in the case of a shareholder, chargeable to corporation tax) and as profits of a UK property business (in the case of a shareholder, chargeable to income tax). In the case of a non-resident shareholder, a liability to tax will be calculated as if that shareholder were a UK resident, subject to the presence of any relevant Double Tax Treaty.
- Shareholders are not entitled to a tax credit on receipt of the distribution but any income tax deducted may be repayable in appropriate circumstances.
- The receipt of a distribution from the tax-exempt business of a REIT is treated as a separate business from any other property income or UK property business that the shareholder may have but receipt of distributions from different REITs are treated as receipts of the same business.

## Property authorised investment funds (PAIFs)

Property authorised investment funds (PAIFs) were introduced from 1 April 2008.

Although in some respects they are similar, PAIFs differ in a number of ways from REITs. They are established as open-ended authorised investment funds and are non-UCITs retail schemes (NURS). Although the practical uptake has been slow, PAIFs may in the future play a major role in developing the real estate market. They introduce a new dimension, effectively an unlisted REIT, which puts the UK on a similar footing to the US and other jurisdictions that benefit from this status. It means that investment in a PAIF would be similar to direct investment in property.

Like a REIT, a PAIF is a tax-free property investment vehicle, so that tax is not levied on property income in the vehicle itself, but on the end investor, thereby offering, for the first time, tax-efficient investment in property for exempt investors through an authorised investment fund. However, like REITs, non-exempt investors will be subject to a 20% withholding tax on their property income distributions.

## Disposal of real estate

### *Legal considerations*

Although the residential market is highly regulated in the UK, mainly as a result of past social policy, the commercial market is relatively flexible, and the majority of real estate can be transferred quite easily under a system that requires the registration of most property interests (at a central Land Registry).

While a lease may offer potential flexibility in terms of assignment and the creation of subleases, there are a number of issues particular to the UK that need to be taken into account when considering disposals of leasehold, as opposed to freehold, real estate.

First, on disposal of the leasehold property, the selling tenant may remain liable for the performance of the covenants in the lease, including the covenant to pay the rent, because of complex enforcement arrangements that arise in this context under English law. In other words, the lease is a contract that may create a link so durable that its disposal may not relieve the selling tenant of its responsibility for the performance of its original leasehold obligations (which the landlord will seek to enforce if the new tenant defaults). The original (or in newer leases, only the previous) tenant is effectively rendered an insurer of the lease, which means that it must take care to dispose of its interest in the lease to a reliable and creditworthy person. It is therefore important to consider this potential liability when considering the contingent liabilities of a company that has had previous dealings with leasehold property in England and Wales.

Landlords may therefore look to former tenants for recourse in place of a current tenant who is insolvent.

Secondly, if a tenant's automatic statutory right to a new lease is specifically not excluded when a lease is granted, the tenant may, if it remains in occupation and uses the real estate for the purposes of a business, remain in the property at the end of the lease and request a new lease. The landlord may be able to resist this if it can prove that it requires the real estate for certain limited purposes, e.g. its own use, or intends to redevelop it, or is willing to relocate the tenant.

Thirdly, the permission of the landlord may be required before a tenant can dispose of leasehold real estate.

Greater detail is given in the last section '*Legal summary and glossary of legal terms*'.

### *Tax treatment of disposals*

The motive for acquiring and holding UK real estate is of paramount importance when determining the UK tax consequences of a disposal. The motives of an investor investing in UK real estate can be split into three main categories.

- The real estate is acquired and held as an investment to generate rental income and long-term capital appreciation.
- The real estate is acquired and used by the owner to carry on a trade other than one of real estate dealing/development.
- The real estate is acquired with the principal object of realising a gain from a disposal of the real estate.

Gains made on disposals under the first two situations above are taxable as chargeable gains. A non-resident investor will not be subject to UK tax on chargeable gains unless the investor carries on a trade in the UK through a PE, and the real estate is connected with, or held for the purposes of, the PE. However, where a non-resident company is controlled by five or fewer individuals, and if any of those individuals are UK-resident, then their share of the gain will be taxable in the UK.

The taxation of gains by UK residents, other than companies, is outside the scope of this summary. Chargeable gains realised by a UK company are subject to UK corporation tax at the normal corporation tax rates (see section *'UK tax on rental income'*). Where a non-resident company carries on a trade through a PE in the UK, chargeable gains realised on the assets of its PE are also subject to corporation tax.

Capital losses made on disposals of real estate can only be used to offset chargeable gains made in the same period or future periods. Excess capital losses can be carried forward without time limit. The offset of capital losses against chargeable gains may be restricted in certain cases, e.g. where a loss arises on a connected party disposal or where there is no real commercial disposal, and where there has been a change in the ownership of the company.

### *Trading in real estate*

Gains made on disposals, where the real estate is acquired with the principal object of realising a gain from a disposal of the real estate, are taxable as trading profits. If the owner is a UK company, then the profits will be subject to UK corporation tax at the normal rates (see section *'UK tax on rental income'*).

Trading profits earned by a non-resident owner are only subject to UK tax if the owner carries on a trade through a PE in the UK, subject to corporation tax, or exercises a trade in the UK subject to income tax.

If the non-resident owner does not trade in the UK, but this third situation applies, a situation that is unusual but possible, then the UK tax authorities might be able to use UK anti-avoidance provisions to tax the profit on disposal. Tax treaties with certain countries probably prevent the UK tax authorities from being able to apply the legislation, but this would depend upon the exact circumstances of the case.

When deciding whether real estate was acquired for investment or trading purposes, a number of factors are taken into account, among the following:

- Length of period of ownership.
- Amount of rental profit derived from the real estate.
- Method of financing.

- Other activities carried out by the taxpayer.
- The taxpayer's motive.

If the real estate is acquired as a long-term investment, then this should be made clear in any documents that record the acquisition decision, e.g. minutes of directors' meetings.

The evidence should make it clear that the real estate was acquired for its income producing potential as well as capital appreciation.

If the acquisition of the real estate is financed partly by loans, then the loans should be of a long-term nature. If the interest payable equals or exceeds rental income in early years, there should be forecasts which show that, say, after the next rent review, rental income will exceed interest and other costs.

If the real estate is held for five years or more, then this period of ownership will usually indicate an investment rather than trading transaction. Longer periods of ownership would be a stronger indication of an investment intention, but the period of ownership alone is seldom conclusive.

If the owner carries on a mixture of real estate trading and investment, then it is preferable for the UK investment activities to be carried on in a separate company that does not carry on any real estate trading activities.

### *Capital allowances*

A disposal will often lead to a recapture of capital allowances previously claimed by the seller.

The purchaser and seller of a building may formally elect how much of the purchase price will be attributable to the plant and machinery within the building. Following changes effective from April 2012 it is likely that an election will be made in most situations. This joint election must be made within two years of the date of disposal of the property.

### *Computation of chargeable gains*

Chargeable gains are calculated as the excess of disposal proceeds, net of incidental costs of disposal, over the base cost of the chargeable asset. The base cost will include the original cost of acquisition, any incidental costs relating to the acquisition, enhancement expenditure and indexation allowance, which is calculated by reference to the rate of inflation during the period of ownership. For example, if real estate is acquired for GBP 10m, sold three years later, and the UK retail price index increases by 10% during the period, the indexation allowance would be GBP 1m.

The indexation allowance can only reduce a capital gain to nil. It cannot create or increase a capital loss.

### *Rollover opportunities*

Chargeable gains, arising on real estate where the real estate is acquired for a business other than real estate dealing/developing, can be rolled over against new qualifying acquisitions within certain time limits, so long as the new asset is also used by the owner for the purposes of a trade. Depending on the nature of the new acquisition,

the tax cost of the new asset may be reduced by the chargeable gain arising on the old asset, or the gain may simply be deferred for a number of years.

### *Sale of shares in a UK real estate company*

Gains made on the sale of shares in a UK real estate company by a non-resident investor, who is not carrying on a trade in the UK through a PE, will normally be exempt from UK tax. However, anti-avoidance provisions can treat the gain as income in certain circumstances where the underlying property has been acquired or developed with a trading motive.

A buyer of any substantial shareholding in a UK company holding real estate is highly likely to require a thorough investigation of the title to the real estate before completion. This is standard practice, and is in addition to the buyer's usual due diligence exercise in relation to the company. Some leases provide that a change of control in a company could trigger a pre-emption right in favour of a third party or may require landlord's consent.

## Real estate development

### *Investment or trading?*

Although real estate development may often be considered to be a trading activity, that is not the case where real estate is developed in order to be held as an investment. The normal rules that distinguish trading from investment will apply (see section '*Trading in real estate*').

If real estate is developed by the entity that intends to hold it as a long-term investment, there should be no taxable development profit in the UK.

### *Contracts and warranties*

Real estate development will normally involve the owner of the real estate, either alone or in conjunction with a joint venture partner, employing a contractor to carry out the works required. There are various recognised structures for development projects each of which has its own set of risks/benefits.

The contractor may itself undertake all aspects of the construction of the project, or may subcontract certain aspects, such as design or structural engineering. Alternatively, the owner may appoint the contractor for the sole task of construction, and the owner may appoint other professionals needed. Whatever arrangement is chosen, a duty of care as to the quality of construction work carried out, or professional services provided, will be needed in favour of the owner from many of those involved in the project team. Warranties containing the duty of care will be needed in favour of financiers of the project, who may also want security over the project assets, and the first tenants of the property. These collateral warranties enable the holder of the warranty to claim compensation from a contractor or professional who breaches their duty under the warranty, and it would be usual to require the contractor or professional to have sufficient indemnity insurance in this respect.

### *Planning controls*

Most material work and development to real estate, including change of use, requires a statutory consent known as planning permission. This is granted, usually, by the relevant local municipal authority, and once granted, is for the benefit

of the property concerned, not for the original applicant. Planning permission for development will usually be conditional upon the works being started within three years. Failure to comply with enforcement action taken by the planning authority can amount to a criminal offence, and an owner or occupier of offending premises can be liable, even if the breach of control was committed by a previous owner.

There is a short period after the grant of planning consent for review, but, subject to this, once granted, planning permission cannot be revoked.

Sometimes planning authorities require some planning applicants to enter into other ancillary obligations that benefit the wider community, such as provision of a roadway or sports facility.

### *Pre-let agreements*

Before beginning a development, a developer may enter into a pre-let agreement, by which a tenant will agree to take a lease of the new property on agreed terms, subject to the development being completed. These agreements cannot usually be terminated by the tenant, provided the agreed works are completed within the pre-agreed period. They are therefore very attractive to the developer investor.

### *Institutional leases*

If the real estate is held as a long-term investment, and leased out to generate rental income, the owner should ensure that any such lease is in a form that is acceptable in the UK market to institutional investors. What will constitute an institutional lease varies according to market conditions. However, it is generally accepted that the lease should be more than ten years, and the annual rent payable should represent a market rent subject to regular upwards-only reviews. Upwards-only reviews aim to take rent to the highest point in the market, and not let it subsequently drop. The tenant should have full repairing and insuring obligations, and its ability to deal with the lease by outright disposal or the creation of subleases should be restricted (to ensure the quality of the tenant is maintained). The owner must be able to recover anything it spends on the property by way of comprehensive service charge provisions, so that the rent it receives is not reduced by having to pay any expenses in relation to the property.

### *Development profits*

Where it is not clear that real estate is being developed for the purpose of long-term investment, it may be very difficult for a non-UK resident developer to avoid having a taxable presence in the UK.

Real estate development profits will be liable to UK tax in three main circumstances.

- When a developer who can claim the benefit of an appropriate double tax treaty has a PE in the UK, which is involved with the development.
- When a developer who is not protected by a double tax treaty is trading in the UK whether or not through a PE.
- When a developer acquires or develops real estate in the UK with the sole or main object of realising a gain from disposing of the land.

The meaning of a PE is similar to that of a branch or an agency, but many treaties specifically include a construction site that lasts for more than 6 or 12 months. An agent

or adviser who has and habitually exercises authority to negotiate or conclude contracts in the name of the developer will usually cause the developer to have a PE in the UK. Many double tax treaties also give protection against the circumstance set out in the third circumstance above.

It is therefore clear that it will be very difficult for a non-UK developer to avoid tax on a UK property development, unless the non-UK developer can claim the benefit of a double tax treaty exemption for a short-term construction site, and also avoid having an agent in the UK.

## Value added tax (VAT)

### *Introduction*

Value added tax (VAT) at 20% is payable by UK and non-resident investors on the cost of many goods and services purchased in the UK. VAT at 20% is also chargeable by UK and non-resident investors carrying on a business in the UK, who make taxable supplies of at least GBP 77,000 a year. A business can register voluntarily if the taxable turnover is below this figure. A property developer or investor can also register for VAT on the basis of clear intentions to make taxable supplies in the future – this facilitates recovery of VAT on initial investment appraisal, acquisition and development costs at an early stage. Investing in UK real estate and charging rent is considered to be carrying on a business in the UK for VAT purposes, although these supplies are not always subject to VAT.

### *Types of supply*

Essentially, there are four different liabilities of supplies for VAT purposes.

- For standard-rated supplies, the supplier charges VAT at 20%, and can recover VAT charged on supplies received that directly relate to the standard-rated supply made by supplier.
- For reduced rate supplies, the supplier charges VAT at 5% and can recover VAT on supplies received that directly relate to the reduced-rated supply. The reduced rate relates to domestic fuel and utilities, and certain works related to renovating and converting buildings for use as dwellings.
- For zero-rated supplies (equivalent to the EU exempt with right of refund), the supplier does not charge VAT on supplies, but still recovers VAT charged on supplies made to it that directly relate to the zero-rated supply made by it.
- For exempt supplies, the supplier does not charge VAT, and cannot recover VAT on supplies directly related to the exempt supply.

Certain supplies, broadly speaking exported services, are outside the scope of VAT, with or without right of recovery of the VAT on related costs. For practical purposes, such supplies can be treated as zero-rated or exempt, respectively. The main exception to this rule within the property sector is any services that relate to land situated in the UK, which remain within the scope of UK VAT, regardless of where the recipient of those services is established. Examples of this would be property valuation and surveys, estate management services and physical work performed on real estate in the UK, which would all be subject to VAT at the standard rate of 20%.

Some transactions may fall outside the above categories, as they do not constitute supplies for VAT purposes, for example transfers of property development or investment businesses as going concerns (specific conditions need to be met for the transfer of real estate to be seen as the transfer of a going concern), dilapidations payments, dividends and planning gain improvements.

### *Real estate supplies*

The sale or grant of an interest in real estate is generally exempt from VAT, with the supplier having the option to charge VAT at the standard rate on supplies of commercial real estate. The major exception to this is the sale of the freehold interest in new (less than three years old) commercial buildings, which is automatically standard-rated, along with some other leases and lettings in relation to transactions such as car parking, and hotel and holiday accommodation. Most building work is standard-rated, but the construction of new dwellings and of certain buildings intended to be used for qualifying charitable or relevant residential purposes is zero-rated. Certain alterations to protected buildings to be used for qualifying residential purposes are also zero-rated.

VAT is chargeable on supplies of real estate as follows.

Transaction Type	VAT Treatment	VAT Rate
Construction of residential buildings.	Zero-rated	Nil
Approved alterations to listed residential buildings.*	Zero-rated	Nil
Qualifying conversion and renovation works on residential buildings.	Reduced rated	5%
All other works on residential buildings.	Standard-rated	20%
The first-time sale, including leases exceeding 21 years (in Scotland, leases of no less than 20 years ) of:		
(a) a new residential building by the person who constructed it	Zero-rated	Nil
(b) a substantially reconstructed listed residential building by the person who substantially reconstructed it	Zero-rated	Nil
(c) a residential building converted from a commercial building or a renovated residential building, which has not been used as a residential building for at least ten years	Zero-rated	Nil
Sale (other than the first sale) of a residential building	Exempt	Nil
Other leases in residential buildings	Exempt	Nil
Construction of non-residential buildings	Standard-rated	20%

Transaction Type	VAT Treatment	VAT Rate
Repair and maintenance of any buildings	Standard-rated	20%
Sale of freehold interest in a new non-residential building	Standard-rated	20%
Sale of an existing (i.e. not new) non-residential building	Exempt/Standard-rated	Nil/20%
Grant of a lease in a non-residential building	Exempt/Standard-rated	Nil/20%

\*Changes are proposed to take effect from 1 October 2012 to the zero-rate which applies to works on listed buildings.

For these purposes, a non-residential building is treated as new until it is three years old, counted normally from practical completion. In addition, there are certain categories of leasing and letting, such as the right to park cars, accommodation in hotels, etc., which are excluded from exemption and are, as a result always standard-rated. Changes are expected to be introduced with effect from 1 October 2012 which will mean that supplies of self-storage will automatically be subject to VAT at the standard rate.

### *Option to tax*

Once a building has been subject to an option to tax, all rents and sales proceeds generated by that building are usually subject to VAT at 20%, although the option to tax may be revoked within six months subject to certain conditions or after 20 years, subject to permission being granted by the tax authorities. The principal exception is where the transaction amounts to a transfer of a business as a going concern, for example if the building is sold fully or partly let. However, permission is needed for the option to tax to be exercised where the landlord has previously made exempt supplies of that property. Without this permission, any option to tax, exercised, will be invalid.

Anti-avoidance provisions may also serve to disapply (suspend) an option to tax in relation to the grant of an interest in a building, where it is a capital item subject to adjustment under the Capital Goods Scheme and is used for exempt purposes to a significant degree (greater than 20%) by a person in occupation, and that person meets any of the following conditions:

- That person is the person who developed/purchased the building and the grant of the interest is a sale/lease and leaseback.
- That person provided finance for the development/purchase of the building.
- That person is connected to someone who satisfies either of the above tests.

If an owner of a non-residential building exercises its option to tax, it will be able to recover VAT charged on supplies made to it that directly relate to the real estate after the date of the election. Some input tax, or a proportion of it, incurred before exercising the option to tax may also be recoverable. The owner will have to charge VAT on rent and on the sale proceeds arising out of the disposal of the commercial real property. This will not be regarded as disadvantageous to either the tenant or purchaser if they

are able to fully recover the VAT. Most business tenants can fully recover the VAT payable on rent. The major types of business tenants who cannot recover VAT are those engaged in banking, insurance, other types of financial services, and the education and health sectors. For these tenants, VAT charged on rent represents an additional cost. Careful planning is required to minimise the adverse effects of VAT. Where an investor does not opt to tax a building and receives exempt rent, the VAT charged on related expenses may not be recovered.

Residential/domestic buildings can never be subject to the option to tax, and so the sale and leasing of such properties is generally exempt. The only exception is the first-time sale of the freehold interest and leasing on leasehold terms exceeding 21 years (in Scotland, leases of not less than 20 years) of new and certain converted, or qualifying listed, residential/domestic property by the developer, which is taxable at the zero rate. This means that VAT incurred by such developers can be recovered in full, subject to some limited constraints.

### *Other issues*

The VAT treatment of service charges depends on the nature of the service being supplied, and whether the building is commercial or residential. The general rule of thumb is that service charges for general upkeep of the premises or estate generally and the common parts are additional rent, the VAT liability of which follows the liability of the rent itself. Any service charges for services provided into the tenant's demised area are taxed according to its natural liability. For example, cleaning in a tenant's offices in a commercial property will be standard-rated.

It is also common practice for landlords to offer incentives to tenants to take new leases. Cash offered is called a reverse premium and can be held to be consideration for a service provided by the tenant to the landlord if the latter obtains clear benefits in return. For example the payment could be a contribution towards certain works being carried out by the tenant, or the tenant agrees to upgrade or improve the building.

Other benefits might be that the tenant agrees to be an anchor tenant and so allow its name to be used in advertising. A service of this nature provided by a business tenant is generally liable to VAT at 20%. Such VAT will be recoverable if the landlord has opted to tax, otherwise it will be a cost. Other forms of tenant incentives include rent-free periods and rent reductions. As for reverse premiums, if they are linked to a tenant providing benefits, VAT may also be due on the value given by any rent waived.

However, reverse premium, rent-free periods or rent reduction given to tenants for taking the lease on standard terms are NOT likely to be regarded as consideration for any supply by the tenants and no VAT will be due.

Irrecoverable VAT will be allowed as a deduction in computing taxable income in the UK, only if the item on which the VAT was charged is allowed as a deduction in computing taxable income.

A foreign resident investor will have to register for VAT if their UK taxable supplies exceed the current threshold of GBP 77,000 a year. It will usually be possible for an overseas investor to register for UK VAT from their foreign business address, but if they have no business establishment in the UK, it may be convenient to appoint a VAT agent in the UK.

## Transfer taxes

### *Stamp Duty Land Tax (SDLT), Stamp Duty and Stamp Duty Reserve Tax (SDRT)*

SDLT replaced stamp duty on real estate transactions from 1 December 2003. SDLT is payable on land transactions at the rate of 4% of the VAT-inclusive consideration if it exceeds GBP 500,000, with reduced rates where the consideration is less. For residential transactions of GBP 1m to GBP 2m SDLT is payable at the rate of 5% and for residential transactions in excess of GBP 2m SDLT is now payable at the rate of 7%. The acquisition of individual residential dwellings priced over GBP 2m by a company or non-natural person is subject to SDLT at 15%. SDLT is payable on the grant of a lease on any premium at the same rates. In addition, SDLT is payable at a rate of 1% on the net present value of the total rent under a lease.

Special rules apply where the transfer or grant is for unascertainable consideration, for other property, or to a connected company.

Reliefs are available for certain intra-group transactions and reconstructions but these are subject to various anti-avoidance provisions and in particular relief is only available where the transaction is effected for bona fide commercial purposes and no tax avoidance is involved.

There is an exemption for the leaseback leg of a sale and leaseback transaction.

There are special rules for charging SDLT where an interest in land is transferred into or out of a partnership, where there is a change in the profit-sharing ratios in the partnership and where an interest in a partnership that owns land is transferred. SDLT is calculated by reference to a proportion of the market value of the land effectively transferred. These rules are complex and specialist advice should be sought.

Where more than one residential property is purchased from the same vendor, the buyer can choose to pay SDLT at a rate determined by the mean value of the properties purchased (subject to a minimum rate of 1%), rather than their aggregate value. (This relief does not apply to residential dwellings that are individually priced at GBP 2m or greater and such properties must be ring-fenced.) In a building comprising multiple dwellings, the price must be allocated to each dwelling in order to determine if the price exceeds GBP 2m.

Stamp duty or SDRT is payable on the sale of shares in a UK incorporated company at the rate of 0.5%.

There is a time limit of 30 days after a relevant transaction in which these taxes should be paid, otherwise penalties and interest for late payment become due. In the case of SDLT, a special Return needs to be submitted with a self-assessment of the tax.

Since 1 December 2003 transfers of assets other than land, stock, or marketable securities and partnership shares are exempt from stamp duty.

In certain circumstances it may be possible to mitigate these charges. Accordingly, specialist advice should always be taken.

## *Registration fees*

A small UK Land Registry fee up to a maximum of GBP 920 per property will be payable on the transfer of registerable land.

## *Other real estate taxes*

### *Business rates*

The only local property tax for commercial real estate is the Business Rates (also known as national non-domestic rate NNDR). This is normally payable by business occupiers, and is not a concern to landlords unless the property is vacant. Residential real estate investors can be subject to council tax, which is levied by local authorities, but again this will normally be a concern only when the dwelling is unoccupied.

The NNDR is based on a multiplier, which is set each financial year (commencing 1 April) by central government. For 2012/13 the standard multipliers are 45.8% for large businesses and 45.0% for small businesses. Large properties are defined as those with a rateable value of GBP 18,000 or above (GBP 25,500 in London).

In addition, from April 2010, the Mayor of London introduced a levy of 2% of rateable value on non-domestic properties with a rateable value of over GBP 55,000 in London. This will help pay for Crossrail, the new east-west train link.

Rates at these percentages of rateable values are charged annually to business occupiers, and since 1 April 2008 they have also been applicable to vacant property.

Rateable value is defined as the hypothetical annual rent that would be payable on the open market under a full repairing and insuring lease. A rating valuation exercise took effect from 1 April 2010, and revaluations take place every five years. Open market rental values in April 2008 form the basis of rateable values that came into effect from April 2010.

Revaluations are usually accompanied by a transitional scheme to lessen the effects of sudden and significant rises in rate bills. The cost of phasing in increases in rate bills is met by limiting the benefits of decreased rate bills by phasing in the reductions.

The five-year transitional scheme from 2010 is self-financing. The scheme seeks to provide an appropriate balance between protecting those who experience larger increases in rates bills and allowing those who enjoy a fall in bills to experience the full benefit as quickly as possible. As a result the cap for large properties experiencing an increase is limited at the rates of 12.5%, 17.5%, 20%, 25% and 25% for the five years and for small properties, 5%, 7.5%, 10%, 15% and 15%. For large properties, reductions in rate bills are capped at the rates of 4.6%, 6.7%, 7%, 13% and 13% and for small properties 20%, 30%, 35%, 55% and 55%. There are no transitional schemes in Wales and Scotland.

The government introduced a small business rate relief scheme for occupiers of a single property in 2005 and have recently extended the level of relief.

The temporary relief measure doubles the usual rate of relief so that ratepayers with rateable values below GBP 6,000 pay no rates at all, while ratepayers with rateable values between GBP 6,000 and not more than GBP 12,000 receive tapered relief from 100% to 0%. There is a buffer zone for qualifying small business properties with

a rateable value between GBP 12,000 and GBP 18,000 who will not contribute to the scheme. Similar schemes operate in Scotland and Wales.

Other forms of rate relief are available on a discretionary basis for partly occupied properties.

If commercial real estate is vacant for up to three months, no rates are payable, and after three months empty rates are payable at 100% of the normal level. Industrial properties, such as factories and warehouses, are exempt from rates for the first six months when unoccupied, and then a 100% empty rates charge applies.

For financial year (commencing 1 April 2012) all unoccupied properties with rateable values of less than GBP 2,600 are exempt from empty rates.

Real estate that is situated in new enterprise zones will receive a rates discount of up to GBP 275,000 in a five-year period.

The Government's new Localism Act gives local authorities new discretionary powers. Currently, local authorities can only give discretionary rate relief in limited circumstances. The Act replaces these with a broad power to grant relief to any local ratepayer but as yet it remains to be seen how they will use this.

There will be new powers from 2013 for local authorities to retain rates for new properties rather than paying the rates over to central government's national rating pool. This may distort local authority decisions to grant discretionary relief.

If the real estate is incapable of beneficial occupation, it can be deleted from the rating list, and no rates are payable. It may be possible to carry out certain measures to render the property incapable of beneficial occupation, but the statutory rules of valuation now require an assumption to be made as to the condition of repair. Therefore, in order to demonstrate that a building is incapable of beneficial occupation, the reinstatement costs would probably have to be uneconomic for the landlord. Nevertheless, extra-statutory practices apply whereby properties that are the subject of refurbishment and redevelopment schemes can be removed from the rating list, and so avoid liability for empty rates.

### *Construction Industry Scheme*

A withholding tax system applies to certain payments made to subcontractors in the construction industry, i.e. the construction industry scheme. Where a real estate owner incurs substantial expenditure on construction operations, typically over GBP 1m a year, the owner may have to withhold income tax at source at 20% on payments made to subcontractors (30% for those subcontractors who are not registered with HMRC or where HMRC is unable to trace their records), unless the subcontractor can produce a relevant exemption certificate.

## **Legal summary and glossary of terms**

### *Introduction*

Real estate law in Scotland and Northern Ireland is different in a number of ways from that in England and Wales, although it is usually possible to adopt similar ownership and security structures.

English and Welsh real estate law uses several technical expressions. A glossary of the most common of these is set out at the end of this summary.

## *Types of land ownership*

Real estate may be held in the following ways.

### **Freehold**

Freehold land is subject to central registration formalities and is the best form of land ownership since it can be owned for an unlimited duration. Freehold land may, however, be subject to rights and restrictions in favour of third parties and leases.

### **Leasehold**

Leasehold land is subject to central registration formalities where the lease is granted for a term of seven years or more or has seven years or more left to run when it is transferred.

Generally, leases fall into two types.

- Long leases are usually for at least 50 years at a nominal rent, usually containing limited restrictions and obligations on the tenant. In many cases the tenant under a long lease will effectively be in the same position as if it owned the freehold interest in the land. Usually a lump sum or premium is paid at the outset.
- Rack, or market, rent leases are where a tenant, who usually occupies the property, holds land for a shorter period. As the landlord has a greater interest in preserving the asset and its income, these leases usually contain more obligations on the tenant's part. The great majority of companies and businesses in England hold property under these leases.

A lease will invariably contain a provision enabling the landlord to end the lease (known as forfeiture) if the tenant is in breach of any of its lease obligations, such as non-payment of rent or where the tenant becomes insolvent, bankrupt, goes into liquidation or administration, or has a receiver or administrator appointed. Forfeiture clauses are subject to a statutory right for the tenant to apply to the court for denial of this remedy, or relief from forfeiture, which would normally be granted, subject to the breach in question being corrected.

It is usual for rack rent leases, but not long leases where a capital sum was paid, to contain a forfeiture clause enabling the landlord to end the lease for non-payment of rent.

### **Commonhold**

There is a further form of ownership established by the Commonhold and Leasehold Reform Act 2002. A commonhold will comprise unitholders (for example residential flat owners, industrial premises on an estate, or detached dwellings in an enclosed community) having freehold title to their individual units and a commonhold association having freehold title to the common parts. This form of ownership is still quite rare.

## *The business tenant's right to renewal*

Unless a special notice is served by the landlord on the tenant prior to the parties entering into a business lease, with such notice being acknowledged by the tenant

in a declaration, a business lease will continue, notwithstanding that the expiry of the term originally granted by that lease has passed. The lease will continue until the landlord or the tenant serves a further notice on the other party, either terminating the arrangement or formally requesting a new lease.

A landlord has certain statutory grounds on which to oppose the renewal of a lease by a tenant. There are seven grounds; the most important of these are the following:

- The tenant's persistent failure to perform its obligations under the lease.
- The landlord's intention to redevelop the property, to the extent that it needs occupation in order to carry out that redevelopment.
- The landlord's wish to occupy the property for its own use.

While a renewal of a lease is being negotiated, a landlord or tenant has the right to make application to the court for an interim increase in the rent. The interim rent is usually the same as the rent determined for the new lease and is payable from six months after the renewal request was made until the date the new lease is finalised between the parties.

## *Environmental considerations*

Environmental issues are an important consideration in property transactions in England and Wales. The prospective purchaser or investor will need to know whether they have a potential liability for the cost of a clean-up of land, and whether contamination is likely to have an impact on the value of the land.

The relevant legislation on contaminated land places a duty on local authorities to inspect land in their particular areas, to identify whether or not it is contaminated. Land is said to be contaminated for the purposes of the legislation if it has substances on, under, or in it, which mean that significant harm is caused, or is likely to be caused, or water is, or is likely to be, polluted.

If the local authority considers that the land is contaminated, it is under a duty to serve a remediation notice on an appropriate person, requiring them to clean up the land. Contamination can be present as a result of both current and historical uses at or near a site, and liability for clean-up can be imposed retrospectively.

An appropriate person will be, in the first instance, the person who caused or knowingly permitted the pollution to occur, i.e. a class A appropriate person. If a class A appropriate person cannot be found then the owner/occupier of the land, for the time being, will be responsible, i.e. a class B appropriate person. Complex rules operate to allocate liability where several parties may be responsible.

Searches can be undertaken to ascertain the degree of risk of contamination, as well as other potential environmental issues such as risk of flooding. In some cases further investigation may be required, and a range of risk management techniques such as insurance may be considered.

It is also increasingly important to consider energy performance and wider sustainability issues. Two key requirements relating to energy performance are as follows:

An Energy Performance Certificate (EPC) must be obtained for all new buildings, and on selling or renting out any building. An EPC provides an A–G energy efficiency rating and recommendations on how to improve the energy rating of the building. EPCs are valid for ten years.

The UK government introduced the Carbon Reduction Commitment Energy Efficiency Scheme (CRC) in 2010 with the aim of improving energy efficiency and cutting emissions. The CRC requires organisations using more than a specified amount of electricity to report annually on energy usage and purchase allowances to cover that usage. The allowance price of GBP 12 for 2012 was set in Budget 2011 and future prices are a matter for the annual Budget process. The scheme also features an annual performance league table. The first league table, for the 2010/11 period, was published on 8 November 2011. For many organisations, energy use within buildings will be a major contributor to their performance under CRC, and this should be taken into account in property management decisions.

The impact of sustainability issues is now often considered in relation to lease provisions, for both new and existing leases, leading to the development of so-called ‘green lease’ provisions.

### *Real estate investment*

Land that is the subject of one or more leases, usually rack rent leases, may be purchased by an investor for the benefit of the income, namely the rent receivable under the leases from the tenants. In this case, the owner will be concerned that the property is wholly or substantially subject to institutional leases.

The principal characteristics of an institutional lease are as follows:

- A term of at least 10 years (but leases are often 20 or 25 years).
- No ability for the tenant to end the lease.
- Rent increases to the current open market rent at regular intervals usually of five years. Any dispute as to a rent increase is settled by an independent arbitrator. Once increased, the rent cannot go down.
- The tenant is responsible for the lease obligations of the next owner and, in leases granted before 1996, for later tenants also.
- The tenant must hand back the property to the landlord at the end of the lease in good repair, with the tenant paying the costs of any works required to put it into that state.
- Restrictions upon the tenant’s ability to sublet or dispose outright of the lease to ensure quality occupation and use.

A landlord under an institutional lease can usually rely on the full rental income, without deduction, from property for its own purposes, for example to repay a loan, without having to lay out any of the income on matters such as repairs or services to the property.

It is also possible to provide for rental income to be paid by tenants directly to a lender, so that such income can be applied directly in repayment of any loan.

## *Real estate development*

### **Construction contracts**

Property may be purchased for development where the owner will build a new building, which will then be sold to a buyer, who intends to occupy and use it for its own purposes, or lease it to tenants under rack rent leases. Usually, developments are carried out under the terms of a building contract that provides for payments to be made periodically to the contractor.

### **Collateral warranties**

It would be usual to take collateral warranties from the contractor and other principal professionals involved in the construction of the development. Warranties for the financier should give the financier the right to take over the development should the borrower fail to meet its loan obligations, creating a duty and liability to the lender. It is usual to require a contractor or professional to take out sufficient professional indemnity insurance cover in this respect.

### **Planning control**

One important factor for a prospective purchaser or investor to consider when buying or investing in property is the impact on the property of planning controls. Planning controls are imposed by statute, but their implementation and enforcement is primarily carried out at the local government level. If a purchaser or investor intends to develop property, either by carrying out building or engineering works, or by materially changing the use of the property, planning permission is likely to be required. If development is carried out without planning permission, the planning authority has power, within certain time limits, to remedy the situation. Failure to comply with enforcement action taken by a planning authority may amount to a criminal offence. An owner or occupier may be liable for breach of planning control, even if the breach were committed by a previous owner or occupier.

Any person may apply for planning permission. The applicant need not necessarily own the land in question, although the owner must be informed of the application. A local planning authority is required to determine the application within eight weeks of the application, or 16 weeks if environmental considerations are involved. The Planning Act 2008 has introduced an independent public body that is responsible for considering and making decisions on nationally significant infrastructure projects.

### **The Community Infrastructure Levy**

The Community Infrastructure Levy is a levy that local authorities in England and Wales can choose to charge on new developments in their area. The money can be used to support development by funding infrastructure that the council, local community and neighbourhoods want - for example new or safer road schemes, park improvements or a new health centre. It applies to most new buildings and charges are based on the size and type of the new development.

## *Finance*

### **Types of finance**

Finance for the purpose of acquiring and/or development of real estate is usually obtained in one or more of the following ways:

- Equity, or direct investment. This may take the form of an unsecured and subordinated loan by an investor or shareholder to the company.

- Bank loan.
- Securitisation/bond issue, which is suitable for very large properties, or portfolios of properties.

### Security

The following types of security are available to the lender:

- A mortgage or charge, giving the lender control over the charged assets and the rights of an absolute owner over property should the borrower default.
- Qualifying floating charge (see section '*Enforcement of security*' below).
- A guarantee, whereby another person or company undertakes to repay the loan if the borrower does not.
- A debenture, which is a mortgage over property and fixed and floating charges over the borrower's other assets.
- A rent account charge, whereby rental income from a property is paid into a bank account which is then charged to the lender.

### Taking security

It would be usual when taking up security to carry out a due diligence exercise comprising the following:

- Investigating and checking the title ownership of the security provider to any land to be mortgaged.
- Checking the constitutional documents of the security provider and borrower.
- Checking the terms of leases to which a property is subject to ensure these are institutional.
- In development situations, checking the terms of construction documentation and any pre-let agreements.
- Undertaking searches at the appropriate registries to check whether there are any prior charges.
- Dealing with completion formalities and registering the security where necessary.

### Enforcement of security

The Enterprise Act 2002 (the Act) came into force on 15 September 2003 and has had far-reaching effects on UK insolvency and security law. Security agreements prior to 15 September 2003 were not affected by the new legislation. The comments below summarise the changes made.

### Lenders

If the borrower fails to meet its loan obligations, then depending on the nature of the security, the lender has the following options:

- Take possession and claim the income under any leases from tenants.

- Appoint an administrator, liquidator or receiver, for company borrowers, or for individual borrowers, trustee in bankruptcy and ultimately sell the property on the open market and use the proceeds of the sale to repay the loan.

A receiver is appointed for the purpose of selling the real estate covered by the security and, until then, managing it, including collecting rental income. A receiver appointed over all a company's assets is known as an administrative receiver. A receiver appointed over part of a person's property is known as a non-administrative or fixed charge receiver, and is subject to increased statutory duties, making this type of receivership more expensive for the lender.

Under the Act, a lender can no longer appoint an administrative receiver unless an exception applies. The exceptions listed include arrangements through which a single project company incurs debts of GBP 50m in which the lender has 'step-in' rights to take control of the project. There is also an exception for urban regeneration projects and public-private partnership projects if the lender in each case has step-in rights.

The Act introduced a new out-of-court route into administration, in addition to the existing court application procedure. A majority of the directors will be able to appoint an administrator after providing notice to lenders. Lenders holding a qualifying floating charge (which broadly means holding a floating charge over the whole business) have the right to appoint an administrator if the security agreement grants this right. The drafting of the security agreement will therefore be of vital importance. The purpose of administration under the Act is to rescue the company, either as a going concern or through returning greater value to the creditors as a whole than would be achieved in liquidation. Lenders no longer have the right to prevent the appointment of an administrator.

A liquidator is appointed by the company itself, or by its creditors, when it wishes to cease business and realise all of its assets. A trustee in bankruptcy will be appointed by the court to realise the assets of an insolvent individual.

### Order of payment for creditors

Following the sale of the assets of the business, the proceeds will be distributed in this order:

- Secured creditors
- Preferential creditors
- Proceeds of ring-fenced assets to creditors as a whole
- Other non-secured creditors.

### Ring-fencing

A specific percentage of the company's net property (which is the net proceeds of property subject to a floating charge) must be set aside by the receiver, administrator or liquidator for distribution to unsecured creditors. In administration, such a distribution is on a *pari-passu* basis among all creditors.

## Preferential creditors

The Act removed the preferential status of Crown debts, such as UK tax and VAT, but preserved them for certain employee obligations including contributions to an occupational pension scheme.

## Secured creditors

Excluding preferential creditors and ring-fenced assets, a security holder is entitled to the sale proceeds of the secured assets ahead of other creditors. The problem arises in administration where the administrator and the unsecured creditors want to delay any sale of assets. Unless the secured creditor's funding is required to continue the business as a going concern, the administrator may continue the business indefinitely if they believe the company can be saved as a going concern or that delaying the sale of assets will increase the return of value to creditors as a group.

## Method of enforcement

Administration is the most frequent method of enforcement under the Act. To benefit from the advantages of the administration procedure and to avoid the disadvantages (i.e. the inability of security holders to resist the appointment of an administrator), security holders may wish where possible to structure transactions so as to benefit from an exception that will allow them to appoint an administrative receiver. It is essential that where a full security package is taken, that it be structured so as to include a qualifying floating charge under the Act.

A qualifying floating charge holder should also consider requiring notice of the company directors' intention to appoint an administrator and grant itself the right to appoint its own administrative receiver or to choose its own administrator during the notice period.

## Glossary of terms

The following expressions are commonly used in respect of real estate law in England and Wales:

<b>Alienation</b>	The transfer of an interest in a leasehold property, which includes an assignment, underletting, charging of an interest or parting with occupation or possession.
<b>Apportionment</b>	The division of a benefit or a liability between two or more parties according to their proportionate interest following an event that occurred during a payment period. For example, where a lease is sold, often rent will have been paid by the seller for a period in advance. On the sale, that part of the rent that has been paid in advance, and which relates to the period after the lease has been sold, will be apportioned. The buyer will in effect reimburse the seller, and both parties will have paid the rent attributable to their period of ownership.

<b>Beneficial interest</b>	The interest in property of the person entitled to the benefit or enjoyment of the property. The beneficial interest is separate from the legal interest, which is the interest of the person who can prove legal title to the property. Legal ownership does not necessarily mean that the legal owner is entitled to the benefit of the property. They may hold the legal interest on trust for the person who is the owner of the beneficial interest in which case the financial rewards of ownership may initially be paid to the legal owner, but they are under a duty to pass them to the beneficial owner.
<b>Best rent</b>	The highest rent that can reasonably be expected by a landlord in the circumstances of a particular case.
<b>Betterment</b>	Any increase in the value of a property as a result of action by the government, either local or national. This could be positive action such as the construction of a new road benefiting the property, or negative as where restrictions are imposed which have the effect of benefiting the property concerned. It can also mean the value added to a property attributable to an improvement.
<b>Break clause</b>	A clause in a lease which gives the landlord and/or tenant a right to terminate the lease before its contractual expiry date.
<b>Building scheme</b>	A development project in which land is laid out in plots and sold to different purchasers or leased to different tenants, all of whom enter into mutually enforceable restrictive covenants with the common seller or landlord.
<b>Capitalisation</b>	The conversion of a series of net receipts over a period into the equivalent capital worth.
<b>Commonhold</b>	Form of land ownership that combines freehold ownership of a single property within a larger development, with membership of a limited company that will own and manage the common parts of the development. Although most likely to be used in relation to residential flats, commonhold is also suitable for houses and commercial developments.
<b>Common land</b>	Land over which the inhabitants of a particular locality enjoy rights in common with the owner of the land, e.g. rights of way and grazing rights.
<b>Completion</b>	The final step in the legal process of transferring ownership of property. It is the point at which the legal documentation evidencing the transfer is signed and dated and when the purchase price for the property is paid.
<b>Consideration</b>	The payment given by one party to a contract to the other, e.g. the price paid by the buyer of a property to the seller.
<b>Contract</b>	A legally binding agreement. A contract for the disposal of an interest in land is unenforceable unless it is in writing, contains all the terms of the contract and is signed by or on behalf of the parties.

<b>Covenant</b>	<p>An obligation undertaken by one party and effected by a deed. Covenants will usually be express, but can also be implied by statute. Covenants can be entered into in relation to freehold land, as freehold covenants, or in relation to leasehold land, as leasehold covenants. If the covenant requires the person giving it to do something, the covenant is referred to as a positive covenant. If the covenant restricts what the person giving it can do, it is said to be a restrictive covenant.</p> <p>Both the landlord and tenant will enter into covenants that will be set out in the lease. The ability and willingness of the tenant to comply with its leasehold covenants is referred to as the covenant strength, so that a tenant of sound standing may be referred to as being a good covenant.</p>
<b>Curtilage</b>	The ground that is used for the enjoyment of a building.
<b>Damages</b>	<p>Money recoverable by a court action by a person who has suffered loss as a result of a breach of contract or a breach of duty. The amount recoverable depends on the basis of the claim. Damages for a breach of contract will be the amount necessary to put the person suffering the loss back into the position that they would have been in had the breach not occurred.</p>
<b>Dilapidations</b>	<p>Items of disrepair that arise because of a breach of repairing covenants on the part of the tenant or landlord. It is usual for the dilapidations for which the tenant is liable to be listed in a 'Schedule of dilapidations', which can be served on the tenant at any time during or within two months of the end of the lease.</p>
<b>Disregards</b>	<p>Items that are disregarded and so not taken into account in assessing the value of the property. For example, a lease will usually list a number of matters that are not be taken into account in assessing the rent on a review, such as the fact that the tenant has carried out some improvements to the property (in this example this is important to the tenant so that it does not pay for both the capital cost of the works and then the increase in rental value).</p>
<b>Easement</b>	<p>A right enjoyed by a person over the – usually neighbouring – land of another, or a right to limit the enjoyment of the owner over their land. For example, a right of way would entitle one party to pass over the land of the other. A right of drainage would give one party the right to allow water to drain from their land on to or through the land of the other. A right to light would restrict one party from doing anything on their land that would hinder the access of light to the property of the other.</p>
<b>Engrossment</b>	<p>The formal and final version of a legal document, prepared by a solicitor for signature, once the contents have been negotiated and agreed.</p>

<b>Fixture</b>	Chattels or goods that have been fixed to the land or building so as to become part of that land or building so that ownership passes with the property. A fixture is different from a fitting, which because of its nature and the purpose and method of fixing to the land or building does not become a fixture. Ownership of a fitting does not pass with the land.
<b>Forfeiture</b>	The right of the landlord to retake physical possession of the land and bring the lease to an end because of a breach of covenant on the part of the tenant.
<b>Headlease</b>	A lease held directly from the freeholder, which may be subject to one or more underleases.
<b>Indexation</b>	The automatic adjustment to a rate, price or payment in line with variations in a specific index, e.g. the Retail Prices Index, usually to maintain the value of an asset in line with inflation.
<b>Land Registry</b>	The government body that records the ownership and interests in all registered land in England and Wales. The register states the registered title number, includes a plan of the property, and will provide full details of the owner of the land and of all registerable rights benefiting the land and to which the land is subject, including if the property is subject to a mortgage or charge.
<b>Latent defect</b>	A defect that is inherent in the design or construction of a building, and which is not immediately apparent and could not be discovered on an inspection carried out on completion of the building works.
<b>Licence</b>	The lawful grant of a right or a permission to do something that would otherwise not be legal or allowed. The person granting the right is called the licensor and the person to whom the right is granted is called the licensee.
<b>Lien</b>	The right to retain possession of the property of another as security for the performance of an obligation, generally the payment of a debt.
<b>Open market value</b>	The price that it might be reasonable to expect to achieve from an unconnected third party for an interest in property at the date of valuation.
<b>Option</b>	A unilateral right created by contract, giving one party the right at some future date either to exercise a right to do something or to require a party to do or not do something.
<b>Outgoings</b>	The costs and expenses incurred by the owner or occupier of a property in connection with its ownership, use, management and maintenance.
<b>Party wall</b>	The wall separating the properties of two adjoining owners, each of which will have certain rights over the wall.

<b>Peppercorn rent</b>	A token rent payable to a landlord under a lease, usually where a premium has been paid for the lease. The existence of a rent, however small, preserves certain rights from the landlord. Usually the rent is of a nominal amount, e.g. GBP 1.00, but could literally be a peppercorn (this term has historic meaning).
<b>Portfolio</b>	Collection of properties or other investments held under one ownership.
<b>Possession</b>	Control over land or buildings, either by occupation and use, or in the case of a landlord, by the right to receive rents, if any, and to exercise the rights and duties in connection with the lease.
<b>Practical completion</b>	The time under a building contract when the building is said to be complete in almost all respects and ready for occupation, save for minor defects that can be put right after the development has been handed over without undue interference or disturbance to the occupier. The surveyor, or other supervising officer, will issue a certificate of practical completion, which is a signed statement confirming that in their professional opinion practical completion has been achieved. Once practical completion has been achieved, the owners of the building take responsibility for it and must insure it. Practical completion also usually triggers the release of funds, commencement of any period of defects maintenance and the commencement of any occupational leases.
<b>Pre-emption</b>	A right of first refusal, whereby if the owner of a property decides to sell, the owner must first offer to sell the property to the holder of the pre-emption right.
<b>Pre-let</b>	A legally enforceable agreement for a letting to take effect at a future date, e.g. on the practical completion of building works.
<b>Prescription</b>	The acquisition of a right by the unrestricted and continuous exercise of that right for a prescribed period of time. For example, the unauthorised use of a particular access route, without objection or interruption, over a period of 20 years (or in some cases 40), gives the person using that access route the right to use it. Similarly, unauthorised possession of property for a continuous and uninterrupted period of 10 years for registered land and 12 years for unregistered land gives the person in possession certain rights of ownership. This is referred to as acquiring title through adverse possession.
<b>Priority of mortgages</b>	Where there are two or more mortgages secured on a property, the order in which they are discharged by repayment to the extent that funds are available on a sale of the property or the default of the borrower.

<b>Quarter days</b>	In England and Wales the days that traditionally are designated in a lease for payment of instalments of rent, being Lady Day – 25 March; Midsummer – 24 June; Michaelmas – 29 September; Christmas Day – 25 December. Local authorities may use 1 January, 1 April, 1 July and 1 October. In Scotland the quarter days are known as term days and are 2 February, 15 May, 1 August and 11 November.
<b>Quiet enjoyment</b>	The right of a tenant to be given possession of the entire property leased to them and to enjoy the property without physical interference from their immediate landlord.
<b>Rack rent</b>	A rent representing the full, or nearly the full, letting value of the property on a given set of terms and conditions.
<b>Sale and leaseback (or lease and leaseback)</b>	An arrangement whereby a freeholder or a tenant sells their interest in a property for an agreed sum, and takes back a lease of the whole or part of the property from the buyer. It is a device usually used to unlock and make available capital invested in a property.
<b>Service charge</b>	The amount payable by a tenant under a lease in respect of the services provided by the landlord.
<b>Surety</b>	A person who offers security for the payment of a debt or the performance of an obligation. A landlord may require a surety, or a guarantor as otherwise known, to guarantee the tenant's obligations under the lease, including the obligation to pay rent.
<b>Surrender</b>	The return of the lease to the landlord by the tenant before the contractual expiration date of the lease. The tenant may have to pay the landlord a surrender premium or price for being able to bring the lease to an end early. Sometimes the landlord wants the lease to be surrendered and will be willing to pay the tenant a premium, known as a reverse premium, for the benefit of having the lease ended and the property returned at an earlier date.
<b>Zoning</b>	<p>The division of an area into zones for particular uses or activities. This may be done, e.g. by a local authority as a part of its planning policy, whereby particular land uses are designated to certain areas of a locality.</p> <p>Zoning is also the method used to arrive at the rental value of a retail space, usually on the ground floor, by dividing up into strips parallel with the main frontage. A different value per unit of space is attributed with each strip corresponding to its relative ability to achieve sales and/or profit. The most valuable space is usually towards the front.</p>

# Municipal tax system in the United Kingdom

## *Business rates*

Local councils levy business rates on the occupiers of all non-domestic property.

Each property has a rateable value, which equates approximately to its annual rental value. Revaluations are carried out every five years with the most recent one taking effect from 1 April 2010.

Since 1 April 2005 there have been two tax rates known as rating multipliers for England. A lower multiplier applies for defined small businesses while a standard multiplier applies to all other businesses. The standard multiplier for 2012/13 is 45.8% of rateable value. This means that a factory with a rateable value of GBP 1m would pay rates of GBP 458,000 a year to the local authority.

In addition, in April 2010, the Mayor of London introduced a levy of 2% of rateable value on non-domestic properties with a rateable value of over GBP 55,000 in London. This will help pay for Crossrail, the new east-west train link.

Owners of vacant non-domestic property currently have to pay business rates on empty offices, shops and industrial premises. The amount payable is 100% of the occupied charge after an exemption period of three months for offices and shops, and six months for industrial property.

From 1 April 2012, an exemption applies to all empty properties with a rateable value less than GBP 2,600.

There are significant opportunities to negotiate allowances, reliefs and exemptions, and to plan for this local tax.

## *Council tax*

Local councils levy a council tax on domestic property such as houses and flats. Each residence is valued according to its market capital value, but the last revaluation was in 1991 and there are no current plans for another.

The capital value is then assigned to one of eight bands, from A to H. Band A is for the lowest value houses, worth less than GBP 40,000. Band H is the highest, for values over GBP 320,000 in England. Wales and Scotland have their own bands.

The local council sets an amount of tax each year for each of the bands. A bill is issued in April, and is payable in ten monthly instalments. There are several reliefs, with the main relief being a 25% discount for adult persons living alone in a house (except for children). There are also provisions for exemption in certain circumstances, for example properties occupied by students.

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# *Real Estate Going Global* United States of America

*Tax and legal aspects of  
real estate investments  
around the globe*

2012

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All information used in this content, unless otherwise stated, is up to date as of 14 July 2012.

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# *Real Estate Tax Summary – United States of America*

## General

A foreign investor may invest in US real property directly, or through a domestic or foreign partnership, limited liability company or corporation.

## Rental income

If a foreign person is not considered to be engaged in a US trade or business with respect to its real estate activities, and does not elect to be so considered, that person will be subject to withholding tax (WHT) of 30%, or a lower treaty rate, on the gross amounts derived from the US real property.

If a foreign person is considered to be engaged in a US trade or business with respect to its real estate activities, or elects to be so considered, it will be subject to regular tax on its US net rental income at a maximum rate for 2012 of 35%. In the case of foreign corporations, an additional tax of up to 30% may apply under the branch profits tax (BPT) provisions.

## Interest

Interest expense is generally deductible in calculating US net rental income. However, deductions for interest on loans made or guaranteed by related foreign persons may be deferred to the extent not paid, or limited if the borrower is considered thinly capitalised. Interest paid, or in certain circumstances deemed paid, to a foreign investor is generally subject to a 30% WHT, or a lower treaty rate. Non-contingent interest paid on portfolio debt from a foreign lender that owns a less than 10% interest in the borrower is not subject to US WHT.

## Depreciation

Residential rental property is generally depreciable on a straight-line basis over 27.5 years. Other real property is generally depreciable on a straight-line basis over 39 years. Land improvements or other components of the property may be depreciable over a shorter period of time. However, costs attributable to land acquisition are not depreciable.

## Capital gains on the sale of property

Net gains from the sale of real property used in a trade or business, and held for more than one year, generally will be considered to be long-term capital gains, provided such property was not considered to be held primarily for sale. A foreign corporation is taxed at a maximum rate of 35% on gains realised on the disposition of US real property, or on the disposition of a non-creditor interest in a US corporation, the assets of which predominately consist of US real estate, i.e. a US real property holding corporation.

For 2012, for individuals, the tax rates applicable to long-term capital gains are 15% for the amount of gain in excess of the original cost with respect to assets held for more than 12 months, and 25% for the amount of prior depreciation taken on the property. The 15% rate is reduced to 0% to the extent the taxpayer's taxable income is taxed at a rate below 15%.

Generally, 10% of the gross sales price is withheld from the disposition proceeds payable to a non-US investor, unless certain exceptions apply, or a certificate for reduced WHT is obtained. A refund of excess WHT may be obtained.

## Dividend withholding tax

Dividends paid by a US corporation to a foreign shareholder are subject to a WHT rate of 30%, or a lower treaty rate. The foreign shareholder can receive a refund of any excess tax withheld by filing a US tax return.

A foreign corporation that invests directly in US real estate may be subject to a BPT of 30%, or a lower treaty rate, on its effectively connected earnings and profits (net of corporate income tax) to the extent not reinvested in certain US assets. The BPT is in addition to the regular corporate tax of up to 35% on the corporation's effectively connected income (ECI). The combined effective rate of income tax and BPT is up to 54.5%. Domestic corporations are not subject to the BPT. Consequently, avoiding BPT is often an important reason why foreign corporations invest in US real estate through domestic corporations.

## Loss carryforward

Effectively connected losses from the operation of a US real property investment by a foreign corporation may offset the foreign corporation's income from other US businesses or effectively connected US real estate investments. The unused operating losses may be carried back two years, and forward 20 years.

Effectively connected capital losses of a corporation may be used only to offset effectively connected capital gains. Unused capital losses may be carried back three years and carried forward five years. Net losses from the sale of real property used in a trade or business are treated as ordinary, and can offset other income.

## Real estate investment trusts (REITs)

A REIT will pay no US income tax if it distributes all of its net income to its shareholders. The maximum dividend withholding rate on REIT ordinary dividends is 30%. Capital gains dividends are generally treated as ECI subject to capital gains tax and WHT. Distributions to a foreign shareholder attributable to gain from the sale of US real property interests will not be treated as ECI if the REIT is publicly traded and the shareholder does not hold more than 5% of the REIT during the year prior to payment of the dividend.

The sale of shares in a REIT by a foreign shareholder will also generally be subject to the capital gains tax provisions. A 30% tax, however, may apply to a non-resident alien present in the US for at least 183 days in the year of sale.

If the REIT is owned 50% or more by US shareholders, and certain other requirements are satisfied, a capital gain from the sale of REIT shares by a foreign shareholder will not be subject to US tax. In addition, if a foreign shareholder owns no more than 5% of the stock in a publicly traded REIT, and certain other requirements are satisfied, a capital gain from the sale of the REIT shares by the foreign shareholder will not be subject to US tax.

## Other taxes

A partnership that has ECI must withhold 35% of the amount of such income that is allocated to a foreign partner. Lower rate of 15% and 25% apply to capital gains of partners that are foreign individuals or trusts under US tax principles.

State and local income, franchise and property, and transfer taxes may also be due.

# *Real Estate Investments – United States of America*

## *Preface*

This guide has been prepared by the PwC's Real Estate team to provide an introduction to the US tax regime that applies to real estate investors. The terms 'foreigner' and 'foreign person' are used in this discussion to describe either a non-resident alien individual (NRA) or a foreign corporation. Also, the terms 'regular tax' and 'net basis tax' refer to the regular federal income tax imposed on US business income. These terms do not include the alternative minimum tax (AMT) that may apply to US business income, or the 30% or lower treaty rate US withholding tax (WHT) imposed with respect to certain US-source, non-business income of a foreign person. Furthermore, the tax planning points and the rules discussed are not appropriate if the NRA becomes a resident of the US. Also, adverse tax consequences can result if the NRA marries a US citizen.

## *Tax planning objectives*

### *Avoidance of US estate and gift tax*

While estate planning is important for all US taxpayers, it is especially important for NRAs that may have a US taxable estate. Many states also impose death or estate taxes. A US real property investment can be properly structured so that no US estate tax will result upon the NRA's death.

### *Minimisation of annual US tax liability*

A foreign person owning and operating US rental real property, or conducting a US real estate development business, will generally be taxable on the net income connected with the US business activity, i.e. US business income, in a manner similar to that of a US citizen, resident or corporation. For 2012, the maximum tax rate for US citizens or residents and for corporations is 35%.

A foreign person receiving passive income from the US, such as interest or dividends, is generally subject to a 30% US gross tax, if treaty relief is not available.

The 30% tax on dividends will generally be assessed when actual distributions are made from a US corporation. Under the branch profits tax (BPT) rules, the 30% tax will generally be assessed on deemed distributions from a foreign corporation holding US real property, whether or not an actual distribution is made. If a corporation pays 35% tax on its income, and the remaining profits are subject to the 30%, the effective tax rate upon remittance to the shareholders is 54.5%, without taking any applicable state and local income taxes into account.

### *Repatriation of earnings as deductible interest*

If a foreign investor can repatriate the US real property's earnings in the form of deductible interest, or other deductible fees, while at the same time avoiding or minimising US withholding tax on such payments, then the corporation's own US income taxes for the current and/or future years can be reduced or eliminated.

### The 30% tax

The objective of repatriating earnings in the form of deductible interest and fees, with reduced or eliminated WHT, is often paramount in a US real property investment structure.

If a US corporation holds the US real property, then a payment of interest by the corporation to a non-treaty investor will generally be subject to a 30% WHT. If a non-treaty investor uses a foreign corporation to hold the US real property, then pursuant to the branch-level interest tax rules (BLIT), the greater of the interest allowable as a deduction or the interest paid by the foreign corporation will generally be subject to a 30% tax.

Despite the 30% tax imposed on the amount of interest paid or deductible, for corporations without treaty relief, the same interest deductions may yield a 35% federal income tax saving. The rate of 35% is the highest marginal US corporate tax rate. In addition, the interest deductions may result in state income tax savings.

### Reducing the 30% tax

Foreign investors from countries with more favourable treaties can take deductions for interest paid to shareholders while reducing or eliminating the 30% tax.

Interest qualifying as portfolio debt interest paid and deducted by the US real property business will be exempt from the 30% US tax. The portfolio debt instruments owned by the foreign persons receiving the interest will also be exempt from US estate and gift taxes. However, to qualify for the portfolio interest exemption, the interest cannot be paid by a corporation or partnership to a person or entity that owns, directly or indirectly, 10% or more of the voting stock of a corporation or of the capital or profits of a partnership issuing the debt. In addition, contingent interest will not qualify for the portfolio debt exemption. Other requirements must also be met for interest to qualify for the exemption.

In situations where a related foreign lender pays a reduced rate of US tax or no tax, the deduction for the interest may be limited under earnings stripping rules. The earnings stripping rules can also apply to interest paid to an unrelated lender, such as a US bank, if a foreign investor guarantees the debt.

In the past, non-treaty investors often used companies incorporated in treaty jurisdictions to reduce or eliminate the 30% tax. However, provisions of the BLIT, and rulings issued by the IRS starting in 1984, severely limit the ability of foreign investors to continue to use these structures.

Regulations allow the IRS to disregard participation by one or more intermediate entities in a financing arrangement for the purposes of determining the manner in which a foreign person will be subject to tax in the US. Specifically, if the financing arrangement reduces the tax imposed on the foreign person, is pursuant to a tax avoidance plan and involves a related party or parties, or an intermediate entity that would not have participated in the arrangement on substantially the same terms absent in participation by the financing entity, the intermediate entity may be disregarded. For purposes of the WHT, these regulations limit a taxpayer's ability to use conduit entities incorporated in treaty jurisdictions to take advantage of reduced WHT rates.

## *Repatriation of earnings as distributions*

The ability to repatriate earnings as distributions from a corporation holding the US real property without incurring the 30% US WHT or BPT is important because the tax can materially reduce the profits to the foreign investor. If the corporation pays income tax on its earnings, and these earnings are subject to the 30% tax upon distribution, the effective tax rate is about 54%.

### **Avoiding the 30% tax**

A treaty investor can reduce or eliminate the BPT or the WHT on dividends, whichever applies. For investors from non-treaty countries, there are only a few ways to avoid the 30% tax on the repatriation of earnings. If the US real property is held directly by an individual, without the use of a corporation, then the 30% tax will not apply. However, without proper planning, the investor could then be subject to US estate tax.

If no distributions are made, or deemed to be made under the BPT, until all US real property owned by the corporation is sold and the corporation is liquidated, then generally the 30% tax will not apply. However, an accumulated earnings tax is imposed on foreign corporations, with US source income, which accumulates earnings beyond the reasonable needs of the business. The tax is imposed at a rate of 15% upon the corporation's accumulated taxable income, which is the corporation's adjusted taxable income, less a dividend paid deduction and the accumulated earnings credit.

### **Minimisation of US taxation through investment in REIT**

A Real Estate Investment Trust (REIT) is a US corporation or business trust that elects to be taxed as a REIT rather than as a US corporation. As a consequence of electing REIT status, a REIT is entitled to deduct from its income, dividends paid to its shareholders. A REIT that distributes all of its income will pay no US income tax, and therefore, its dividends will be subject to only one level of US tax.

To qualify as a REIT, an entity must satisfy specific statutory requirements related to its income, assets, shareholders and distributions, as well as other matters. The most significant requirements include the following:

- 75% of the REIT's annual gross income must come from rents from real property, mortgage interest, gains on the sale of real estate assets and other real estate related income.
- 95% of the REIT's annual gross income must be from the sources described above plus dividends, interest, gains from securities sales and other passive income.
- At least 75% of the REIT's assets at the end of each quarter must consist of cash, receivables, government securities and real estate assets.
- The REIT must have at least 100 shareholders for at least 335 days of each 365-day year, and five or fewer individuals may not own more than 50% of the value of the REIT during the last half of each year.
- The REIT must annually distribute at least 90% of its net ordinary taxable income. (Any undistributed taxable income is subject to tax at the REIT level.)

An ordinary dividend distribution from a REIT to its foreign shareholder is generally subject to the 30% US WHT, unless the tax is reduced or eliminated by treaty. A capital gain dividend from a REIT to its foreign shareholder is generally treated as a gain from

the sale or exchange of a US real estate capital asset for US tax purposes and taxed accordingly. Generally, the Foreign Investment in Real Property Tax Act (FIRPTA) rules requires the REIT to withhold a 35% tax on the distribution. However, an exception to this 35% tax exists in cases where the REIT is publicly traded and the shareholder did not hold more than 5% of the REIT during the year prior to the distribution.

In general, proceeds from the sale of shares in a REIT regularly traded on an established securities market by a shareholder of 5% or less for the prior five years, or shares in a domestically controlled REIT, are exempt from US taxation. A REIT is domestically controlled if less than 50% of the value of the REIT's stock is held directly or indirectly by foreign persons during the five-year period ending on the date of disposition.

### *Additional desirable features for investors with multiple properties*

Where a foreign investor, or group of investors, invests in two or more properties, it is often desirable for them to do the following:

- Limit legal liability solely to the property involved.
- Offset income from one or more properties with the losses generated by others.
- Transfer funds belonging to one corporation to another corporation.

A means of obtaining these features is to form a US consolidated return group. This entails placing each property in a separate US corporation, each owned by a US holding company. The US corporations then elect to file one US consolidated return for federal income tax purposes, reporting the income of all of the companies. Certain states also permit, or require, the companies to file one combined state income tax return.

For most federal income tax purposes, the group is considered one taxpayer and the following general rules apply:

- The companies are jointly and severally liable for the federal income taxes.
- Taxable income and gains of profitable companies in the group are offset by the tax losses of other companies in the group.
- All US corporations owned by the US holding company and meeting an 80% ownership test are required to join in filing as part of the consolidated return group. However, with the consent of the Commissioner of the IRS, a group, may, for good cause, be granted permission to discontinue filing as a consolidated group.
- Gains or losses realised from the sale of a particular member corporation's shares are reported by the parent company, and combined with the taxable income or losses of the other group members in the consolidated return.
- Interest income and expense on loans between group members offset each other and, therefore, are not taxed.
- Taxability of intercompany gains and losses is deferred until the related asset leaves the group.

Alternatively, the objectives achieved through the use of a consolidated group of corporations may be reached through the use of a single corporation that makes each investment in a separate wholly owned limited liability company that is ignored as a separate entity for tax purposes.

Note that a liquidating distribution of earnings from a US holding company to a foreign shareholder may be treated as a taxable dividend if the US holding company has been in existence for less than five years.

## Certain rules for taxing foreigners' US real estate income

The taxation of real estate income of a foreign investor depends on whether the investor actually has, or is considered to have, a business in the US. If so, the taxation depends upon whether or not the income actually is, or is treated as, effectively connected with this business, i.e. effectively connected income (ECI). The computation of taxable income and the applicable tax rates are quite different if the income is not effectively connected with a US business.

### *Defining the terms 'US business' and 'ECI'*

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) provides that gains and losses from the sale or exchange or other disposition of US real property interests, including the stock of a US corporation when the majority of its assets are US real property interests, will automatically be considered ECI, irrespective of whether the US real estate investment constitutes a business to the foreign owner.

### *Facts and circumstances test*

A facts and circumstances test applies in determining whether operating income, such as rental income, is income effectively connected with a US business. For purposes of ease, income effectively connected with a US business is also described as 'business income.'

A foreigner's investment in US real property will generally constitute a US business, as opposed to a non-business or passive investment, if the foreigner is carrying on the management or other operating activities on a regular basis, either directly or through an agent. Therefore, the purchase and subsequent development of a parcel of land for purposes of resale would normally constitute a business. Also, the ownership and leasing of one or more properties could constitute a US business. However, the rental of property on a net lease basis to one or a small number of tenants is generally not considered a US business.

Accordingly, in such cases, the rental income is not considered US business income. In addition, the mere ownership of stock normally does not constitute a business to the shareholder, even if the corporation itself is engaged in a business such as real estate rentals or development. Therefore, dividends received from the corporation do not constitute business income to the shareholder.

If the US investment constitutes a business, it must then be determined whether the investor's different types of income are connected with that business. Generally, US-source income generated directly by the assets used in the business or the activities of the business will be considered US business income. Therefore, the rental income

of foreign investors from their US real estate business will normally be ECI. On the other hand, dividend income generated from stock held in a US company that owns US real property generally will not be considered ECI. The determination of a foreign corporation's non-ECI, and the assets that generate such income, has taken on added significance in view of the branch profits tax, because assets included in the federal income tax return as generating US business income may result in a BPT, if subsequently they are disinvested, i.e. treated as non-effectively connected.

To avoid the uncertainty of the facts and circumstances test, the US tax statute as well as some income tax treaties with the US provide for an election that a foreign investor can make to treat its US real property investments as attributable to a US trade or business.

## *Taxation of US business income*

US business income from US real property is subject to tax at the regular US rates applicable to US taxpayers. The rate schedule applicable to the foreigner's US business income will depend on whether the foreigner earning the income is an individual, corporation or trust, and the characterisation of the income as ordinary income or capital gains.

### **Tax rates**

The maximum individual and corporate regular tax rate for 2012 is 35%. For individuals, the maximum tax rate on long-term capital gains is generally 15% or 25% to the extent of certain prior depreciation deductions. For corporations, long-term capital gains are taxed at the regular tax rate. Nevertheless, it continues to be necessary for corporations to track capital gains and losses because, generally, capital losses can be deducted only against capital gains.

The remainder of this section provides a general discussion of how the US business taxable income from US real property is determined.

No distinction is made between the US business taxable income of foreign corporations and foreign individuals, versus that of US citizens, residents and US corporations because, in determining taxable income, the same rules generally apply to each. Similar rules also apply to trusts, although some additional complexities apply that are beyond the scope of this discussion.

A partnership is not a US taxpaying entity. Instead, the partners, whether they are corporations, individuals or trusts, report their respective shares of partnership income on their US income tax returns.

### **US business gross income**

Generally, all US business income is reportable by foreigners in their US income tax return, in the year received if they are cash basis taxpayers, or in the year earned if they are accrual basis taxpayers.

A regular corporation, whether US or foreign, must generally use the accrual method, unless it meets certain narrow conditions.

US business gross income will generally include US rental income, income from the sales of US real property interests and miscellaneous income, such as interest income on deposits maintained in connection with the US business, or other income, such as from the sale or scrapping of equipment or other assets used in the business.

Special rules apply to US business income earned through direct investments by foreign persons in a US partnership earning US business income. Under these rules, a partnership is generally required to pay a WHT on behalf of the foreign partner equal to 35% of the net business income allocable to the foreign partner. The withholding is available to offset the foreign partner's actual tax liability to be reported on its US tax return. Foreign partners are permitted in certain cases to certify related losses and deductions incurred outside the partnership, which reduce that partner's tax. In addition, the new regulations allow the 35% withholding rate to be reduced in the case of partners who are individuals or trusts, so that the withholding rate more closely matches the actual tax rate applicable to such income.

### Deductions allowed to reduce gross income

Generally, US tax rules permit deductions from gross income for ordinary and necessary business expenses, which generally include depreciation, wages and salaries, repairs and maintenance, property taxes, equipment rentals, accounting and bookkeeping fees, insurance and advertising. Cash basis taxpayers generally deduct their expenses in the year paid, while accrual basis taxpayers deduct them in the year to which they relate.

### Inventories and uniform capitalisation rules

Special income tax rules apply to the accumulation of and accounting for costs incurred by real property dealers and developers, including the costs of land acquisition, development and construction. Dealers are persons who purchase real property for resale frequently and in the ordinary course of their trade or business. Uniform capitalisation rules require that certain indirect costs are accounted for as part of the development cost, and deducted in the year the real property is sold.

Interest expense paid or incurred by real property dealers and developers is also subject to the uniform capitalisation rules.

### Interest expense

Although interest expense incurred in connection with a US real property is generally deductible for US income tax purposes, a deduction may be deferred or completely denied under the following circumstances:

- Interest is subject to the uniform capitalisation rules discussed above.
- Interest is owed at the end of the tax year by accrual basis taxpayers to related parties that use the cash basis of accounting, including foreign parties subject to US withholding tax on a cash basis on the interest income.
- Interest is part of a passive activity loss that is not currently deductible because of certain limitation rules.
- Interest between related parties is in excess of that charged in arm's length transactions.
- Interest is paid on shareholder debt of thinly capitalised corporations, and the IRS considers the debt to be equity.
- Interest is incurred on debt to carry tax-exempt investments.
- The earnings stripping rules, discussed below, may apply.

The earnings stripping rules provide that a corporation's deduction for interest expense will be limited if the following conditions exist:

- The corporation's debt-to-equity ratio exceeds 1.5:1; and
- The corporation's net interest expense exceeds 50% of its adjusted taxable income; and either:
- The payee is a related person that is subject to a reduced rate of tax, or no tax, on the interest income, e.g. where the 30% tax is reduced or eliminated because of a treaty or the portfolio debt rules; or
- The payee is an unrelated person that has obtained a guarantee from a foreign person related to the borrower. This rule does not apply if the interest would have been considered US business income had it been paid to the foreign guarantor.

Adjusted taxable income for this purpose is generally the taxable income of the corporation before any deduction for interest expense, depreciation, amortisation, depletion and any net operating loss.

If a foreign corporation's only business activity is the US real property, the determination of the amount of interest expense allowable as a deduction is fairly straightforward, subject to rules such as those above. The deductible amount should generally be that shown on the books and records. However, if the foreign corporation also has assets that are not connected with a US business, then the corporation's total worldwide interest expense must be apportioned between US business income and other income. An analysis of these rules is beyond the scope of this discussion.

The determination of interest allowable as a deduction by a foreign corporation is also important because the excess of the interest allocable to a foreign corporation's ECI, over the amount actually paid, is subject to a 30%, or lower treaty rate, US tax.

Special rules also apply to the determination of interest expense allowable as a deduction to non-resident aliens (NRAs). With respect to assets owned directly by an NRA, no interest deduction is allowed to the extent it is generated by debt that exceeds 80% of the NRA's US business assets. With respect to partnerships, if the NRA owns less than a 10% limited partnership interest, then no interest expense incurred directly by the NRA is allowable as a deduction. For other partnership interest categories, special look-through rules apply that are beyond the scope of this discussion. Interest expense directly incurred by an NRA may not be allocated to ECI derived by a partnership and allocated to the NRA.

As previously mentioned, in 1995 the US Treasury Department issued regulations in an attempt to prevent the use of conduit entities by foreign persons to avoid or reduce US tax.

## Depreciation

Depreciation has traditionally been one of the primary reasons why many US real estate investments generate losses for US income tax purposes. The number of years over which real property can be depreciated is 27.5 years for residential property, and 39 years for commercial property, including building improvements. Qualified leasehold improvements (generally those that benefit only a specific tenant rather than common areas) placed in service after 22 October 2004 and before 1 January 2010 are depreciated over 15 years. The straight-line method of depreciation must be used for

buildings. Personal property can be depreciated using accelerated methods and shorter lives. Land is generally not depreciable. However, certain improvements to land may be depreciated using accelerated methods.

Longer depreciable lives may be required when property is leased to tax-exempt organizations or for certain specially treated property.

Foreign investment in US real estate also includes investments in natural resource extraction, i.e. mines, oil and gas wells, and farmland. Special rules can apply that permit the deduction of certain costs that otherwise are required to be capitalised.

The depreciation rules differ for purposes of the alternative minimum tax (AMT), thereby possibly requiring foreign corporations to recalculate or keep track of depreciation allowable, and the adjusted tax basis of assets under at least four methods (the method used for books, the regular tax method, the AMT method, and the method used for earnings and profits that is relevant for BPT purposes).

### Expenses paid to and transactions with related parties

A special US tax rule generally prohibits the deduction of interest and expenses, such as service fees, owed or paid to related parties before the related person to whom the payment is owed or made, reports it as taxable income. There are certain exceptions to this rule, which are beyond the scope of this discussion.

Another rule generally disallows the deduction of losses on sales and exchanges between related parties. If the sale or exchange between certain related parties results in a gain to the seller, and the property would be a depreciable asset to the related buyer, the gain, which might normally be considered a capital gain, will generally be treated as ordinary income.

The IRS also has authority to change the taxable income, gain or loss from related-party transactions if it finds that they were not carried out at prices or terms similar to those in transactions between unrelated parties. This pricing requirement is often referred to as the 'arm's-length' pricing requirement for transactions between related parties.

There are other rules dictating the treatment of transactions between related parties, and the definition of related parties under the Internal Revenue Code often varies, at least slightly, with the tax rule that is to be applied. Accordingly, before a related-party rule dictating the US tax treatment of a transaction is applied, a careful check of the applicable related-party definition should be undertaken.

### Gains from the sale of the US real property

Generally, if a taxpayer sells a property, the taxable gain is the difference between the sales price, reduced by expenses of the sale, and the taxpayer's adjusted tax basis in the property. The adjusted tax basis is normally the property's original cost, plus improvements, less depreciation.

Gains from the sales of property by a foreigner often qualify as capital gains and, under certain circumstances discussed below, if they are not connected with a US business, they are exempt from US income tax. However, as previously mentioned, a foreigner's gains and losses from the disposition of US real property, including the sale of stock in a US corporation having 50% or more of its assets in the form of US real property, are always treated as US business income. Foreigners selling their US real property should be aware of the instalment sales rules, the concept of original issue discount, and

the rule requiring that instalment gains originating from years in which the foreigner was engaged in a US business, be reported as US business income in subsequent years, even if the taxpayer is no longer so engaged. Another critical rule requires a 10% FIRPTA withholding tax. (See '*Withholding*'.)

### Instalment sales

Nevertheless, if a foreign investor is not a dealer in real property and at least one payment is received after the year of the sale, a proportionate amount of the gain must be reported as the payments are collected in subsequent years, unless the taxpayer elects out of the instalment method of reporting. There is an exception to this rule if certain recapture provisions apply.

Because the instalment method defers the payment of the US income tax on the gain, it has been a popular means of selling US real estate. However, the instalment method generally cannot be used by dealers of personal property, and dealers of real property for sales in the ordinary course of their trade or business. Certain exceptions can apply with respect to farm property, timeshare rights and residential lots.

An instalment note receivable with respect to which a foreign seller of US real property does not elect to report the entire sales profit and pay the FIRPTA tax in the year of the sale, constitutes a US real property interest. Accordingly, the profit element in each instalment payment received constitutes a taxable FIRPTA gain. If the seller disposes of the note, then generally the entire unreported profit becomes taxable in the year of the disposition. As a result, such foreign sellers are required to file US income tax returns to report the FIRPTA instalment gains, even if they no longer have any other business connection in the year the payments are received.

Special rules apply when instalment obligations are pledged as security for the taxpayer's debt, and when related parties are involved. In addition, an interest charge on the deferred tax may be due with respect to instalment notes totalling USD 5m or more.

### Like-kind exchanges

If certain conditions are met, US real property can be exchanged with no income tax assessed on the appreciation of the exchanged property.

These so-called '1031 exchanges' do not have to be simultaneous, nor do only two taxpayer's need to be involved in the exchange. If an independent party, or intermediary, is properly used, the taxpayer's property can in effect be 'sold' up to 180 days prior to the acquisition of the replacement property in a 'deferred exchange'. It is also possible, through the proper use of an accommodation titleholder, for the taxpayer to 'sell' the property after the new property is acquired, in a reverse deferred exchange. The IRS issued guidance to provide a safe-harbour for taxpayers engaging in reverse deferred exchanges.

Generally, if consideration other than the like-kind properties involved in the exchange is received in the exchange, the taxpayer will be taxable on the gain to the extent of boot received. This non-qualifying exchange property could be in the form of cash, property, or debt relieved. So-called 'boot netting' rules could provide tax relief when both properties in the exchange are subject to debt.

### Original issue discount (OID)

If property is sold with payment of any part of the sales price deferred over six months, i.e. the seller finances the purchase as an instalment sale, and an insufficient amount of interest is charged, then the original issue discount (OID) rules may apply. These rules reallocate the amount of interest on the deferred payments and the capital gain to be reported. Accordingly, the rules are important to foreigners selling or buying seller-financed US real property, because they could force a foreigner to accept unexpected tax results. For example, imputed interest under the OID rules could be subject to the 30% US WHT.

These rules may be applicable to foreigners when either selling or buying US real property. However, certain real-estate-type transactions where privately placed debt is issued for property are exempt from the OID rules.

If the transaction does not qualify for one of the exemptions, then the OID rules will generally apply if all, or part, of the payments are due more than six months after the sale, and either the stated redemption price at maturity exceeds the instrument's stated principal amount, if it has adequately stated interest, or the stated redemption price at maturity exceeds its imputed principal amount, if the stated interest is inadequate.

The imputed interest of the debt instrument is determined by using the applicable federal rate (AFR) at the time the transaction occurs. The AFR is published monthly by the IRS, and is based on the average market yield of short-term, mid-term and long-term obligations. Accordingly, the AFR will vary depending on whether the instrument is short-term, which is three years or less, mid-term, which is over three years and up to nine years or long-term, which is over nine years.

If the stated principal amount of an instrument is less than USD 2.8m, and the transaction is not a sale-leaseback, and the property transferred is not investment credit property, then the discount rate to be used for purposes of these rules is the lesser of 9% compounded semi-annually, or the AFR.

### Cancellation of debt (COD) income

Generally, gross income includes income created from discharge of indebtedness. However, COD is excluded from gross income in certain circumstances including when the debt is discharged in a Title 11 Bankruptcy case, the taxpayer is insolvent, or for taxpayers other than corporations, the debt constitutes qualified real property business indebtedness (QRPBI).

To the extent COD income is excluded pursuant to these exceptions, the taxpayer must make a corresponding reduction to tax attributes such as net operating loss carryforwards, tax credit carryforwards, or the basis of property. Although this attribute reduction is generally required to be done in a specific order, taxpayers may make an election to first reduce the basis of depreciable property before reducing other tax attributes.

Non-corporate taxpayers may elect to exclude COD income resulting from the discharge of QRPBI. QRPBI is defined as debt that was incurred or assumed by the taxpayer in connection with real property used in a trade or business, is secured by such real property and was either incurred or assumed prior to 1 January 1993 or, if incurred or assumed after 1 January 1993 constitutes debt used to acquire or improve real property. To the extent COD income is excluded under the QRPBI exception,

the basis of depreciable property must be correspondingly reduced. Several other potential limitations apply in determining the amount eligible for exclusion as QRPBI.

In lieu of the traditional opportunities for exclusion from gross income, COD income resulting from debt cancellation re-acquisitions occurring in 2009 and 2010 could in some instances be deferred under special provisions enacted in 2009. This provision would provide for a deferral period of up to five years followed by a five-year period of rateable recognition of the income. Special rules provide for acceleration of this deferred income in certain circumstances.

It should be noted that transfers of property in satisfaction of non-recourse debt is considered a sale transaction rather than an event resulting in COD income. In these situations, the determination of whether the debt is recourse or non-recourse is significant in determining the tax impact of the transfer.

### Effective connection of deferred income

Foreigners cannot avoid US income tax by arranging to receive US business income in later years when they are no longer engaged in a US business. In such cases, the deferred income will still be reportable by, and taxable to, the foreigner, if it would have been taxable as US business income at the time the foreigner actually made the sale of the US business assets, or rendered the services to which the deferred income relates. This rule applies to deferred income on instalment sales of personal property used in the US real estate business, as well as to deferred payments of US rental income.

### Credits against the regular income tax on effectively connected income

There are two tax credits pertinent to real estate investments – the rehabilitation credit and the low-income housing credit.

### Taxation of income not connected with a US business

US-source income of a foreigner that is not connected with a US business, such as net lease rental income, is subject to US tax at the rate of 30%, or lower treaty rate, of the gross income. The tax is normally required to be withheld by the payer at the time of payment. This US-source income also often takes the form of interest, including original issue discount interest, dividends from US stocks, royalties and certain capital gains. No deductions for expenses are allowed against income not effectively connected with a US business. A foreigner is not subject to US tax on income from sources outside of the US if the income is not connected with a US business. However, once connected with a US business, a foreigner's income, irrespective of its source, is subject to US income tax as discussed previously. Because the focus of this discussion is US income taxation of foreign investment in US real estate, a broad discussion of the source of income rules is not appropriate. It is important to note, however, that the geographical location from where income is paid, or where it is received, is irrelevant in determining its source for US income tax purposes. Specific source rules normally apply to each different type of income.

Capital gains of a foreign investor, other than from the sale of US real property interests, are generally not taxable if they are not US business income. An exception to this rule applies to a foreign individual who is physically present in the US for 183 days or more during the taxable year. In such cases, US-sourced capital gains from sales occurring before the first day the individual is present in the US during the calendar year is generally taxed at the rate of 30%. Foreign individuals, i.e. NRAs, who spend

183 days or more in the US during the calendar year, will generally be considered US residents for US income tax purposes for that calendar year, starting with the first day of their presence in the US. US residents, like US citizens, are taxed on all their income, both business and non-business, from all sources, both US and foreign, on a net basis. The 30% WHT on gross income does not apply to them. Accordingly, all capital gains from sales after the individual is considered a US resident will be subject to the regular US income tax.

Gains from the sale of US real property interests are not subject to 30% tax, because they are always taxable under FIRPTA as US business income, irrespective of the number of days the foreigner spends in the US. Interest income earned by a foreigner on US bank deposits is also generally exempt from the 30% tax. However, as mentioned previously, if the interest qualifies as US business income, it would be subject to the regular net basis tax. US-sourced interest paid to foreigners that qualifies as portfolio interest is also exempt from the 30% tax. Generally, to qualify for this exemption, the interest must be paid on obligations issued after 18 July 1984, which meet a series of requirements to help assure it is not being paid on obligations held for the benefit of US persons.

### Withholding requirement on fixed or determinable annual or periodic income paid (FDAP)

The foreign investor in US real estate is affected by the 30% WHT, not only with respect to non-business income it receives from US sources, but also with respect to US-source fixed or determinable annual or periodic (FDAP) income payments it makes to other foreigners. The foreign or domestic corporation, and in certain instances, the foreign individual, will usually be considered a withholding agent for purposes of the 30% WHT imposed on US-sourced FDAP income.

Following are some instances where either a foreign corporation or a US corporation used solely to hold a US real estate rental business might be required to withhold the 30%, or lower treaty rate, tax:

- Dividends paid to the foreign shareholders.
- Service fees paid to foreigners for services performed in the US.
- Rents paid to foreign persons for use of property in the US.
- Interest paid to foreign persons.

Failure to withhold the tax on these payments makes the payer liable for the tax and possible penalties.

## *Special rules*

### Portfolio interest exemption

The Tax Reform Act of 1984 eliminated the 30% US WHT imposed on foreign persons on interest qualifying as portfolio interest. The Act also exempted the portfolio interest obligations from US estate tax. Accordingly, if foreign investors, using their own money, can finance US real property and business acquisitions with portfolio interest-bearing debt, they can achieve the following tax objectives.

- The interest paid by the US real property business will be exempt from US WHT.
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- The portfolio debt instruments held by the foreign investors or their entities will be exempt from US estate and gift taxes.
- The interest payments will be deductible by the US business and, therefore, will shelter the property's operating income or gain upon disposition. The deductibility of the interest payments may be limited and deferred under either the passive activity loss rules or the earnings stripping rules.

Foreign investors may find it difficult to structure internal financing to qualify for the portfolio interest exemption. The reason is that portfolio interest does not include interest received by a shareholder or partner owning directly, indirectly, or constructively, 10% or more of the voting interests in a corporation or 10% of the capital or profits of a partnership paying the interest. However, a planning opportunity is available in which the foreign shareholders hold only non-voting stock, while all of the voting stock is held by US shareholders or others not requiring the portfolio debt exemption (such as less-than-10% foreign shareholders). If the 10% ownership hurdle can be overcome, then the rest of the requirements to qualify for the exemption can be met by privately issued debt, as well as publicly issued debt, if the debt is properly structured. With respect to partnerships, the 10% ownership test is applied at the partner level.

The portfolio interest exemption will also not apply to the following:

- Interest received by a bank with respect to credit extended in the ordinary course of its trade or business.
- Interest received by a controlled foreign corporation from a related party.
- Interest that is contingent on the borrower's profits, receipts, cash flow, or property values.

Other general requirements and restrictions, according to the type of debt, are summarised below.

### Requirements for registered form debt

Interest paid to a foreign person on registered form debt will qualify for the portfolio interest exemptions if the following general requirements are met:

- The interest payer, or its agent, receives a statement from the beneficial owner of the interest, or a bank, securities clearing organisation, or other financial institution acting as the owner's agent, that such owner is neither a US citizen nor a US resident.
- The principal and stated interest of the obligation are registered with the issuer, or its agent, and the obligation can be transferred only by the following:
  - Either turning in the old instrument and reissuing it to the new holder, or by issuing to the new holder a new instrument that substitutes for the old instrument;
  - Using a book entry system maintained by the issuer, or its agent; or
  - Turning in and reissuing the old instrument as described above, and also using a book entry method as described above.

Registered form debt is debt that meets the second condition above, including the transferability requirements mentioned. The regulations cover what constitutes registered as to principal and interest, and what is an acceptable book entry system. The statement required of the obligation owner must be made under penalties of perjury, and must also include the name and address of the beneficial owner. However, procedures exist for allowing certain financial institutions to be the registered owners of the obligations as agents for the foreign beneficial owner, so the anonymity of the owner is maintained, and the requirements are met.

### Requirements for bearer debt

Interest from bearer debt, i.e. debt not in registered form, will qualify for the portfolio interest exemptions if the following are true:

- Reasonable arrangements exist to help ensure the debt is issued or reissued only to foreign persons.
- The interest is payable outside the US and its possessions.
- The debt obligations have a legend on them stating that any person holding them will be subject to US tax law limitations.

For purposes of these rules, the place of payment is generally where the payer or middleman completes the actions necessary to effect payment. If the interest payment is made from a US account to a US address, the payment will not be considered made outside the US. The regulations provide additional details regarding these requirements.

### Election to be taxed on the basis of net income

The 30% tax on the gross amount of non-business rents can be quite onerous, especially in the early years of a real estate investment, when the investment often produces a net loss or only a small profit. To remedy this harsh result, a foreigner holding US real property may elect to be taxed on US real estate income as if it were connected with a US business. This election – the net basis election – is available under the US Internal Revenue Code for individuals, as well as foreign corporations, and is not dependent on the existence of an income tax treaty. If the election is made, deductions for ordinary business expenses may be claimed by filing a US tax return. Generally, these deductions will be equal to, or greater, than the gross income from the property in the early years. Accordingly, a foreign corporation making the election may incur little or no tax if it can avoid the BPT as a result of a treaty, or because it always reinvests its earnings in US real properties or other US businesses. The election applies until revoked. However, revocation is subject to the consent of the IRS, unless the revocation is made before the expiration of the statute of limitations for the year with respect to which the election was initially made, usually three years after the return is filed.

### Limitations on the deductibility of passive activity and at-risk losses

Certain investors may be limited in their use of tax losses under the at-risk and passive loss rules. These rules are primarily aimed at preventing individuals and certain closely held and personal service corporations, whether US or foreign, from using tax shelter losses to offset income from other investments or activities.

The at-risk rules generally limit the losses that an effected investor can use to the amount that the taxpayer has 'at-risk' in the investment, which includes the investor's share of any 'qualified non-recourse debt' that is secured by real property.

The passive activity loss rules generally provide that losses from passive activities can offset only income from other passive activities, or gains from the sale or disposition of these activities.

A passive activity is any for-profit or business activity in which the taxpayer or its majority shareholders do not participate materially, i.e. regularly, continuously and substantially. However, rental activities and limited partnership investments are always considered passive activities with respect to the investor, unless the investor is an individual or closely held corporation that meets strict requirements to be considered to be in a real property business. To be so considered, an individual must spend more than 750 hours per year working on real estate activities, and this time must constitute more than half of the individual's work activities. A closely held corporation is considered to be in a real property business if more than half of its gross receipts for a taxable year are derived from real property trades or businesses in which it materially participates. For this purpose, activities of the company's employees will be taken into account only if an employee owns at least 5% of the company.

A special relief provision applies to certain individual investors and permits them to offset up to USD 25,000 of non-passive activity income with losses from rental real estate under the following conditions:

- If they own at least 10% of the property.
- If they actively participate in its operation.
- If their adjusted gross income is less than USD 150,000.

Active participation is a less stringent requirement than material participation.

The passive activity loss of a closely held corporation, other than a personal service corporation, can offset other active business income, but the loss cannot offset portfolio investment income, i.e. interest, dividends, royalties, annuities and gains from the sale of assets generating these types of income. For purposes of the passive activity loss rules, a corporation is closely held if more than 50% of the value of its outstanding stock is owned, directly or indirectly, by five or fewer individuals, even if they are not residents of the US.

### Alternative minimum tax (AMT)

The alternative minimum tax (AMT) is a separate tax calculation that corporations, individuals, estates and trusts must consider if they are subject to the US regular income tax system. The AMT is not a duplicate tax. Instead, the taxpayer pays the higher of the regular income tax calculated or AMT.

The AMT is levied at a maximum rate of 28%, or 20% for corporations, of alternative minimum taxable income. Therefore, one significance it has, is that deductions of taxpayers in AMT-paying situations, to the extent available, result in less tax savings than under the regular tax scheme where the maximum federal rate is 35% for corporations and individuals.

## Tax shelter reporting

A foreign investor who is required to file a US income tax return may be required to disclose participation in certain 'reportable transactions' to the IRS or certain state tax authorities. Significant new penalties may be imposed with respect to failure to disclose, and understatements relating to, certain 'reportable transactions', and the statute of limitations may be extended for certain non-disclosed transactions.

## Branch level taxes

### *Branch-level tax (BLT)*

The branch-level tax (BLT) consists of two primary and separate taxes, as follows:

- Branch profits tax (BPT).
- Branch level interest tax (BLIT).

BLIT, in turn, has two parts, which are BLIT based on interest paid, and BLIT based on deductible interest in excess of the amount paid, or excess interest.

The following is a discussion of rules pertaining to BLT. Some points mentioned below were explained in the early sections regarding planning, and are mentioned again because of their significance to the entire BLT scheme.

### *Branch profits tax (BPT)*

BPT is generally 30% of the annual amount of earnings that the foreign corporation is considered to have taken out of its US business. It is imposed in addition to the regular or alternative minimum tax, and state and local income taxes. As a result of the BPT provisions, a foreign corporation might be required to pay federal income tax amounting to 54.5% of its gain from the sale of a US real property.

BPT generally applies to foreign corporations that earn business income, or income treated like business income by virtue of a net basis election, through a US place of business, i.e. a branch. For these purposes, income and gains realised by foreign corporations from US real property, excluding gains from the sale of stock in a US real property holding corporation, are treated as business income earned through a US place of business. BPT may not apply, however, to a foreign corporation that qualifies as a resident of a country that has an income tax treaty with the US that eliminates the tax.

If a foreign corporation is not subject to BPT as a result of applicable treaty benefits, dividends paid by a foreign corporation whose gross income is at least 25% effectively connected with a US trade or business may be subject to a 'second-tier' of US withholding at a rate of 30%. Nonetheless, a treaty may eliminate the second-tier withholding if either the foreign corporation or the ultimate dividend recipient is entitled to treaty benefits.

### *Mechanics of BPT*

The mechanics of BPT can be difficult to follow. The annual calculation of a foreign corporation's US business earnings considered repatriated for a tax year, also called the dividend equivalent amount (DEA), can be summarised as follows:

- US business earnings and profits for the tax year, plus
- Net decrease in the net equity of the US business, or minus
- Net increase in the net equity of the US business, equals
- Dividend equivalent amount.

DEA, multiplied by the 30% BPT rate, results in the BPT payable.

### BPT points to note

The foreign corporation's US business earnings and profits (E&P) are not the same as the taxable income or the net profit or loss generally shown on the financial statements or books and records of the US business. The determination of E&P, for US income tax purposes, is generally based on a different set of rules than the determination of taxable income or book income. Some of the differences are as follows:

- Depreciation, for E&P purposes, is determined using longer asset lives or cost recovery periods.
- Tax-exempt income is included as part of E&P, but excluded from taxable income for regular tax purposes.
- Federal income taxes, but not BPT and BLIT, are deducted for E&P purposes, but not from taxable income for regular tax purposes.
- The deductions for losses from passive activities apparently are not limited for E&P purposes. (As discussed in 2.4.5, passive activity loss rules generally limit the amount of such losses to income from passive activities.)

Net equity of the US business, or US net equity, is the adjusted tax basis, for E&P purposes, of those assets that generate, or are expected to generate, US business income, or income treated as US business income in case of a real property net basis election, less those liabilities related or connected to the US business.

If the BPT applies to a foreign corporation in any tax year, then the US WHT on US-sourced dividends paid to foreign shareholders from E&P of such tax year will not apply, and such dividends will not reduce that year's E&P for BPT purposes. The effect of such dividends is accounted for through the upward or downward adjustments for changes in US net equity.

The BPT was not intended to apply to the repatriation of earnings from pre-1987 tax years. Dividends paid out of such E&P should be subject to the US WHT.

A foreign corporation with current-year E&P deficits, i.e. losses, would appear not to be subject to a BPT. However, if US assets were repatriated during the tax year in other than a complete termination of the US business, and the company had cumulative positive E&P at the end of the tax year that accumulated since the effective date of the BPT law, BPT would apply. This occurs because, in essence, the US assets repatriated were a distribution of part or all of such cumulative E&P. This rule is analogous to the rule governing corporate distributions in loss years by domestic corporations and foreign corporations not subject to the BPT.

Conversely, E&P repatriated are assumed to be distributed first out of current year E&P. Therefore, if US assets are repatriated during the year, i.e. no longer used in the US business, and there is positive E&P for the year, BPT will result, even if cumulatively the foreign corporation has E&P deficits.

A foreign corporation will not be subject to the BPT on the repatriation of its cash after it has sold all its US real estate and other US business assets if it completely terminates its interest in US business assets and does not reinvest those assets in a US trade or business within three years. This result is the same as that which would apply had the foreign investor used a US corporation to hold the US business, and had liquidated the US corporation after it sold its assets.

## **Branch-level interest tax (BLIT)**

### **Branch-level interest paid tax**

The law treats any interest paid by a foreign corporation's US trade or business as if it were paid by a US corporation. Generally, interest paid by a US corporation to a foreign entity or person is subject to a 30% US WHT. Accordingly, the 30% US WHT will apply to interest paid by the US branch, unless a US tax treaty applies to lower or eliminate the tax. To obtain the benefit of any US treaty's lower rate, the beneficial owner of the interest, or in certain cases the payer foreign corporation, must be a qualified resident of the foreign country that is a party to the US treaty. The definition of qualified resident for these purposes is the same as for purposes of the branch profits tax.

### **Branch-level excess interest tax**

A third tax imposed by the branch tax provisions is a 30%, or lower treaty rate, tax on the excess of the interest expense deduction allocable to the foreign corporation's ECI for US tax purposes over the actual interest paid by the branch.

Allocable interest is interest that is allocable to income effectively connected, or treated as effectively connected, with the conduct of a trade or business in the US.

The calculation of the allocable interest deduction for a foreign corporation with only US real property and other US businesses is relatively simple, because all interest would be related to the US business, and so would be effectively connected.

However, for corporations having businesses within and without the US, the computation of the US interest expense deduction can be complex, and can result in interest deductions that exceed the amount of interest actually paid by the foreign corporation's US trade or business. Since these computations also affect a second-level tax, they are important for foreign corporations doing business within and without the US, and can result in the imposition of the 30% BLIT. However, an election is available that allows foreign corporations basically to reduce their interest expense to the amount of interest actually paid, thereby eliminating the BLIT problem.

### **Operating rules for the BLIT**

Regulations issued by the IRS reflect most of the operating rules for the BLIT. Interest exempt from the regular 30% US WHT provisions pursuant to the Internal Revenue Code should also be exempt from the branch level interest paid provisions. Such exemptions include the following:

- Interest earned on US bank deposits that are not connected with the foreign corporation's US business.

- Interest that is not connected with the US business.
- Interest qualifying for the portfolio interest exemption.
- Original issue discount (OID) on obligations maturing in 183 days or less from the original date of issue.

The 30% US tax on interest paid should be withheld by the foreign corporation, and remitted to the IRS, under the normal withholding and remittance procedures, because the tax on interest paid is considered imposed on the beneficial owner of the interest.

### *Branch-level tax and treaties*

Generally, the requirements for a corporation to be considered a qualified resident of a particular country with a US treaty for purposes of the BLT and BLIT are as follows:

- More than 50% of the value of the corporation's stock must be owned during at least half of the tax year by residents of such country or by citizens or residents of the US. This is the stock value test.
- Less than 50% of the corporation's income is used, directly or indirectly, to meet liabilities to persons that are not residents of such country or citizens or residents of the US. This is the base erosion test.
- The corporation must be a resident of the treaty country as defined in the treaty.

To meet the stock value test, the corporation must be able to substantiate the residence status of the shareholders in accordance with regulations.

Alternatively, if the corporation's stock is regularly traded on an established securities exchange of the treaty country, or if it has a substantial and active business presence in such country that is an integral part of the US business, then the corporation may also be considered a qualified resident. In all cases, the corporation on which the particular BLT would be imposed, or possibly NRA, in the case of the BLT on interest paid, must also meet the particular treaty's requirements. Some treaties, for example, have higher thresholds for the stock value and base erosion tests.

To determine which treaty, if any, applies to reduce or alter the application of the BLT provisions, one must consider the entity on which the particular BLT is imposed, and any applicable treaty language. Certain US treaties prohibit the BPT by means of their non-discrimination articles. Other treaties explicitly alter the computation and/or rate and permit the imposition of the tax. Those treaties that do not fit either of these two categories permit the tax. The IRS has published a notice of those countries with US treaties prohibiting and altering the BPT.

In addition, foreign corporations that are qualified residents of other treaty countries may be able to use a reduced BPT rate as specified by the applicable treaty.

### *Disclosure of treaty-based positions*

Persons and entities subject to US income tax that take a position on their US income tax returns that a US treaty overrules or otherwise modifies a US tax law must disclose the position on the tax return. Regulations indicate specifically when an income tax return is required and when other filings, such as WHT returns, will satisfy these requirements.

Failure to disclose a treaty position can subject the taxpayer to a USD 1,000 IRS penalty, or USD 10,000 in the case of regular corporations.

### *Disclosure of related-party transactions*

US corporations that are at least 25% foreign-owned, and foreign corporations that are engaged in a US trade or business, are required to report transactions with related parties to the IRS. These disclosures are made on Form 5472. There is a penalty of USD 10,000 for each failure to file this form when it is required.

## FIRPTA

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) and its regulations, which subject a foreign investor to US tax on a disposition of an investment in US real property, eliminated almost all viable means for foreigners to avoid US income tax permanently on these dispositions.

The FIRPTA rules contain two separate and distinct aspects. The first is the substantive aspect, which taxes NRAs and foreign corporations on the disposition of a US real property interest (USRPI). Gain or loss realised by a foreign person from the disposition of a USRPI is automatically considered US business income, irrespective of whether the foreign person is doing business in the US. The second aspect of FIRPTA is the withholding and reporting requirements.

### *Taxing provisions*

A USRPI includes not only a direct interest in real property located in the US or the Virgin Islands, including any pro rata interest held through a partnership, trust or estate, but also an interest in stock in a US corporation that is a US real property holding corporation (USRPHC).

Basically, for a corporation to qualify as a USRPHC, USRPIs must constitute at least 50% of the fair market value of its assets. A corporation's fair market value generally does not include the value of assets not used or held for use in a business, although USRPIs and foreign real property are always includable. An alternative test based on 25% of book value of specified assets is also permitted by the regulations.

Despite the fact that a US corporation, or one treated as such, meets the 50% asset criteria for status as a USRPHC, the FIRPTA tax will not apply to the sale of shares of any class of the corporation's stock that is regularly traded on an established securities market if the seller owns, directly or indirectly, 5% or less of such class of stock. This exception for stock traded on an established securities market applies only if the 5% test is satisfied at all times during the five-year period ending on the date of the disposition of the stock.

### *Real property*

The term real property includes land and unsevered natural products of the land, e.g. crops, timber, mines, wells, or other natural deposits, as well as improvements on land, including buildings, bridges, railroad tracks, pipelines, storage tanks and bins, and permanently installed telephone and television cables. Also included is certain personal property associated with the use of the real property, e.g. furnishings or moveable walls. However, despite this general rule, personal property will be associated with, and therefore will also be considered real property for, FIRPTA purposes, only

if the personal property is predominantly used in one or more of the following four activities:

- The exploitation of unsevered natural products from the land, such as in mining, forestry and farming activities. Equipment used to transport the products once they are severed is explicitly excluded from association with real property.
- The construction or making of improvements to the land.
- The operation of a lodging facility. A lodging facility generally includes a residential rental property, a hotel or a motel, but excludes a personal residence occupied solely by its owner, an aircraft, a vessel, a railroad car, or a facility used primarily to provide medical or convalescent services.
- The rental of furnished office and other work space.

### US real property interests (USRPIs)

The FIRPTA rules provide that interests in US real property and in US corporations that qualify as USRPHCs that are held other than solely as a creditor will qualify as USRPIs for FIRPTA purposes, and thereby be subject to US tax upon their dispositions. The rules are broad enough to help assure that such interests in US real estate do not escape taxation. The following are examples from the regulations that will generally qualify as interests in US real property held other than as a creditor:

- Fee ownership or co-ownership in US real property.
- A time-sharing interest in US real property.
- A life estate, remainder or reversionary interest in US real property.
- Direct or indirect rights to share in the appreciation in the value, or in the gross or net proceeds, or profits generated by the US real property, or the US real property entity.
- A right to receive instalments or deferred payments from the sale of a USRPI, unless the seller elects not to have the instalment method of reporting apply, any gain or loss is reported in the tax year of the sale, and all tax due is timely paid.
- An option, a contract or a right of first refusal to acquire any interest in US real property, other than an interest held solely as a creditor.
- An interest as a beneficiary in a trust or estate that holds USRPIs.
- An interest in a partnership that holds US real property.

Leaseholds of US real property and options to acquire such leaseholds are also classified as USRPIs.

### Interests in Real Estate Investment Trusts (REITs)

A REIT is a US corporation, business trust, or other entity taxable as a corporation that elects to be taxed as a REIT. In general, shares in a REIT that predominantly holds US real property are treated as USRPIs. As a result, before applying the exceptions noted below, gain recognised on the sale of REIT shares by a foreign shareholder is subject to FIRPTA, and taxed accordingly. The exception noted previously for stock regularly

traded on an established securities market applies to REIT stock if the foreign shareholder does not own more than 5% of the stock of the REIT. In addition, gain on the sale of stock in a domestically controlled REIT, where less than 50% of the value of the REIT's stock is held directly or indirectly by foreign persons during the five-year period ending on the date of disposition, is not subject to FIRPTA.

FIRPTA also applies to certain dividends paid by REITs to their foreign shareholders. An ordinary dividend distribution from a REIT to its foreign shareholder is generally subject to the 30% US WHT, unless the tax is reduced or eliminated by treaty. A REIT distribution to a foreign shareholder that is attributable to gain from the sale of a USRPI will be treated as such for purposes of FIRPTA, and will generally not be eligible for reduced dividend withholding under a relevant US income tax treaty. A REIT distribution to a foreign shareholder that is attributable to gain from the sale of a USRPI will not be treated as gain from the sale of USRPI provided that the class of shares is regularly traded on a US established securities market and the foreign investor does not own more than 5% of the REIT stock at any time during the year prior to payment of the dividend.

### *FIRPTA anti-avoidance rules*

FIRPTA contains several technical rules relating to whether property is classified as a USRPI and what constitutes a disposition of a USRPI, thereby yielding US business income. These rules, which follow, were designed to prevent a foreign investor from using various devices to avoid US tax on the disposition of US real property.

A disposition of a USRPI, for purposes of FIRPTA, can be any transfer of a USRPI. Consequently, it is possible to trigger a taxable gain inadvertently when a USRPI is involved in a transaction that normally would not trigger a taxable gain. The general rule is that upon a transfer of a USRPI that would normally be non-taxable, because of special non-recognition provisions in the Internal Revenue Code, the non-recognition provisions will apply only if the foreign investor transfers the USRPI in exchange for another USRPI, or a property interest that would be subject to US income tax upon a subsequent disposition.

An interest in a domestic corporation, held other than solely as a creditor, will be presumed to be, and will be classified, as a USRPI, irrespective of the type of assets the corporation holds, unless the shareholder establishes, in accordance with procedures in the regulations, that the company was not a USRPHC at any time during the five-year period ending on the date of the particular disposition in question. Once classified as a USRPHC, and its stock as a USRPI, the corporation's stock will be considered a USRPI until the corporation no longer holds a USRPI, and all of the USRPIs previously held by the corporation during the foregoing period are disposed of in fully taxable transactions. Without these rules, a corporation could avoid USRPHC status within the five-year period by selling a sufficient amount of its USRPIs to reduce its US real property below 50%. In such a case, an interest in the corporation would not be considered a USRPI, and various approaches might be possible to avoid US tax upon the disposition of the remaining properties.

For purposes of determining whether a corporation is a USRPHC, assets held by a second corporation (including a foreign corporation) may be considered to be held directly by the first corporation. This provision applies only if the first corporation owns, directly or indirectly, at least 50% of the fair market value of all classes of stock of the second corporation. If the first corporation owns less than 100% of the second corporation, only a pro rata portion of each asset is considered owned by the first corporation.

In an otherwise tax-free transfer by a foreign person of a USRPI to a foreign corporation as paid-in surplus or a contribution to capital, the transferor is taxable on any inherent gain in the transferred property. An exception is provided in the temporary regulations. This holds that a non-recognition provision will survive FIRPTA when the transferred US real property interest is exchanged for another US real property interest, which, immediately following the exchange, would be subject to US taxation upon its disposition. In addition, a transferor must comply with certain reporting requirements to qualify for non-recognition. FIRPTA generally provides that gain will be recognised by a foreign corporation upon a distribution, including a distribution in liquidation or redemption, of a USRPI to its shareholders. This rule provides for recognition of gain by the foreign corporation, except where the distributee would be subject to tax on a subsequent disposition of the property, and the basis of the USRPI to the distributee would be no greater than the basis was to the foreign corporation immediately before the distribution. This rule represents one of the primary hurdles that foreign corporations face in reorganising as US corporations to avoid the BPT.

The tax basis of a USRPI held by a US corporation carries over to its foreign shareholders upon its distribution, but is increased by any gain recognised by the distributing corporation on the distribution, and any US income tax paid by the foreign investor on such distribution. Without this provision, the foreign shareholder could obtain a step-up in the basis of the property to its full market value, without paying the full amount of US tax on the appreciation. This provision is not applicable to a distribution in liquidation or redemption where such distribution is considered a disposition by the foreign shareholder of the corporation's stock. In such case, the distribution is covered by other FIRPTA rules.

## *Other provisions*

### **Double taxation**

The law provides that, except for gain from the disposition of interests in real property located in the Virgin Islands, gain from the disposition of a USRPI is US-source income. Therefore, a foreigner disposing of such an interest will generally not obtain a US credit for foreign taxes, if any, imposed on the gain. In other words, double taxation of the gain could result if the foreign investor's country of citizenship or residence does not allow a credit, or some other form of relief, for the US taxes imposed by FIRPTA. In some cases, tax treaties will mitigate the potential double taxation.

### **Special election for certain foreign corporations**

Under certain US treaty non-discrimination provisions, generally those of a tax treaty, but in some cases a treaty of friendship, commerce or navigation, the US may not discriminate against foreign corporations. In anticipation of claims of discrimination under these treaties, Congress provided an election to enable foreign treaty country corporations to be treated as domestic corporations for the purposes of the FIRPTA taxing and reporting provisions. The election, referred to as the Section 897(i) election, is based on the underlying tax code Section 897(i).

The 'i' election is critical for a foreign corporation that holds USRPIs with a tax basis lower than the foreign shareholder's tax basis in the corporation's stock, and that must reorganise into a US corporation either to avoid the BLT prospectively, or for other reasons. Without the election, such a foreign corporation generally must recognise FIRPTA gain upon the distribution of the property. The "i" election is also used to avoid withholding of the FIRPTA tax by the buyer of a USRPI from a foreign corporation.

The election provides these results because it causes the foreign corporation to be treated as a domestic corporation for purposes of the FIRPTA taxing, withholding and reporting provisions. Accordingly, those rules in FIRPTA applying exclusively to foreign corporations become inapplicable to the electing corporation. Some of those rules are the anti-avoidance rules, discussed previously, that trigger FIRPTA gain in seemingly non-taxable transactions. However, upon making an 'i' election, the stock of the foreign USRPHC will be treated as the stock of a domestic USRPHC and, accordingly, as a USRPI taxable upon its disposition.

Under the regulations, a valid 'i' election may be made only if the foreign corporation, as well as each person holding an interest in the corporation, e.g. shareholder, on the date the election is made, signs a consent to the election and a waiver of treaty benefits and the corporation is entitled to non-discriminatory treatment under the pertinent treaty. More specifically, the law requires that tax, including accrued interest, be paid on all previous dispositions of the company's stock, even if such dispositions were non-taxable pursuant to a treaty. The regulations permit the electing corporation to retain the shareholder consents in its files rather than submit them to the IRS if certain conditions are met. Accordingly, the identities of the shareholders, or interest holders, will not necessarily be disclosed to the IRS. Nonetheless, examining IRS agents will have access to such consents if they believe it necessary to carry out an examination. Therefore, absolute shareholder anonymity cannot be assured. The regulations also require that the foreign corporation be a USRPHC, i.e. have 50% or more of its assets, by value, in the form of USRPIs.

The regulations detail the manner, form and timing of making an election under Internal Revenue Code Section 897(i).

### *Withholding tax*

The general rule is that any person who acquires a USRPI from a foreign person is required to withhold tax equal to 10% of the amount realised, and remit the withheld amount to the IRS by the 20th day after the date of transfer. However, if the seller's maximum tax liability is less than 10% of the amount realised, a procedure is available to reduce the amount withheld by the buyer and/or remitted to the IRS.

Through a so-called withholding certificate application, the seller can request approval from the IRS of the seller's representation of a calculation of the maximum tax liability that may be imposed on the disposition of the real property, or a statement as to why the disposition is not subject to tax.

If the withholding certificate has been filed with and approved by the IRS on the transfer date, then the buyer or transferee can withhold a reduced amount of tax in accordance with the approved withholding certificate, and remit the reduced amount to the IRS.

If the withholding certificate application is pending with the IRS on the transfer date, then the buyer or transferee must withhold 10% of the proceeds, but can wait to remit the withheld amount to the IRS, pending IRS action on the application. The amount withheld or a lesser amount based on the IRS determination with respect to the application must be remitted to the IRS by the 20th day after the IRS determination. Any amount withheld but not required to be remitted to the IRS would then be returned to the seller or transferor.

A foreign seller may request a refund of any amounts withheld under this provision in excess of the maximum US tax liability. The foreign seller may request the refund

prior to filing a federal income tax return; however, no interest will accrue on the refund. In addition, the foreign seller must still file a US income tax return to report the gain from the sale.

Buyers that fail to carry out the tax withholding become liable for the underwithheld amount themselves if the seller fails to pay in the tax with its US return. Penalties and interest may also apply.

The 10% withholding rule can create difficulties, because the regulations require that the entire amount be withheld and remitted to the IRS by the 20th day after the date of the sale, regardless of the amount actually paid by the buyer. As a result, there could be situations, such as in an instalment sale, in which not enough of the total contract price is paid in the initial year to satisfy the withholding requirement. In such cases, buyers have the choice of obtaining a withholding certificate, if they anticipated the problem in adequate time, or paying over to the IRS the required 10%, and reducing their future instalments to the seller.

The following exemptions, inter alia, relieve the purchaser from the obligation to withhold, but do not relieve the foreign seller of liability for the tax:

- The seller or transferor furnishes the purchaser or transferee with a certificate to the effect that the transferor is not a foreign person.
- The buyer or transferee determines that the property acquired is not a USRPI. If the property acquired represents shares in a domestic corporation that is not publicly traded, the transferee must obtain a statement from the transferor certifying that the stock is not a USRPI. In general, this means that the corporation must not have been a USRPHC during the five-year look-back period discussed previously.
- The transferee is an individual and acquires realty for use as a residence, not necessarily a principal residence, at a price of no more than USD 300,000.
- The transferor has made a valid Internal Revenue Code Section 897(i) election to be treated as a domestic corporation, and furnishes an acknowledgement of the election from the IRS to the transferee.

A domestic partnership must withhold 35% (or 15% or 25% for capital gains allocable to individuals or trusts) of any amount over which the partnership has custody, and that is attributable to the disposition of a USRPI or ECI, if the amounts are includable in the income of a foreign partner.

A trustee of a domestic trust, or an executor of a domestic estate, must withhold 35% (or 15% or 25% for capital gains allocable to other individuals or trusts) of any amount over which the entity has custody, and that is attributable to the disposition of a USRPI if the amounts are includable in the income of a foreign beneficiary of the trust/estate, or the foreign grantor in the case of a grantor trust. In addition, gains from certain distributions by foreign corporations that are taxable under FIRPTA may be subject to withholding at 35% of the excess of the fair market value of the interest distributed over its adjusted basis. Return of capital distributions by a USRPHC to its foreign shareholder may be subject to a 10% WHT.

Any transferee acquiring a USRPI from a foreign person is a withholding agent, and is obligated to withhold, unless the transaction is otherwise exempt. Also, agents of the transferee or transferor may have the liability for WHT if they fail to comply with

certain requirements. For example, a transferor's agent must notify the transferee if the transferor is a foreign corporation. Failure to do so may shift the withholding obligation to the agent, limited to the amount of compensation received by the agent.

## US gift and estate taxation

### *Gift taxation*

An NRA is subject to US gift tax only with respect to tangible property situated in the US. Shares of a corporation, whether foreign or US, are intangible property for gift tax purposes, even if the corporation's only asset is US real property.

Taxable gifts by an NRA are taxed cumulatively over the lifetime of the donor at a current rate of 35%. An annual exclusion permits the donor to exclude from taxable gifts the first USD 13,000 in gifts to each donee.

### *Estate taxation*

The estate of a non-resident alien decedent is subject to US estate tax on all property – tangible and intangible – situated in the US at death. Shares of a US corporation are subject to the estate tax, whereas shares in a foreign corporation are not, irrespective of where the corporation's assets may be situated.

The estates of NRA decedents are subject to the same US estate tax rates that apply to estates of US citizens. The rate is currently at 35%, with it set to increase in 2013 to 55%. Although the estate of a US citizen is entitled to a credit equivalent to an exemption of USD 5,000,000 from US estate tax, the estate of an NRA is entitled to a credit equivalent to only a USD 60,000 exemption, assuming no treaty benefits apply. Not all people who are US residents for income tax purposes are US residents for estate and gift tax purposes. These high rates and the low exemption amount make planning for avoiding the estate tax an important aspect of tax planning for foreign investment in the US real property.

Taxable gifts are included in the estate, and can, as a result, increase the rate of tax. Credits are allowed for gift taxes paid on these gifts. The estate tax liability can also be credited, i.e. reduced, by death taxes paid to states where the taxable property has a situs at date of death.

### *Gift and estate tax treaties*

The US has gift and estate tax treaties with several foreign countries.

## Municipal tax system in the United States

### *Ad valorem tax*

The *ad valorem* tax system in the US varies by state and sometimes by local jurisdiction. Within each state the local authority, is required to comply with the tax laws of the state to annually assess and collect a tax on the value of all taxable property. There is no national law regarding the *ad valorem* taxation of property. All property subject to *ad valorem* tax is appraised as of a specific date. Most states use 1 January as that date.

Land, structures and improvements to realty are generally subject to taxation. As a general rule, the fair market value of these property items is the basis to which the local taxing authorities apply the tax levy (typically expressed as a percentage of the value). The tax levies for public schools, municipal and regional governmental units are combined for ease of collection. Tax levy rates vary by locality.

The *ad valorem* tax laws in several states have made provision for the exemption of property that is owned by a charitable, religious or not-for-profit educational organisation; controls air or water pollution; has historical significance; or was deemed to be integral to the economic development of a region. These laws vary by state and require analysis for each particular circumstance.

In addition to the *ad valorem* on real property, most state property tax statutes provide for the taxation of tangible personal property owned by business entities. As with real property, the levy rate for taxable tangible personal property varies by locality and may even differ from the real estate levy for a particular locality. The levy is typically applied to the fair market value of the subject property, although the valuation by assessors is frequently below the true market value or purchase price of real property.

Finally, certain states impose a property tax on intangible property, such as goodwill, copyrights and exploration rights.

### *Realty transfer or recordation taxes*

Several states have enacted a tax on the transfer of real property between persons and the recordation of deeds or mortgages on real property. In addition to direct transfers of property, some states impose a tax on transfers of a controlling interest in an entity that owns property located within the states' borders. Each state and local government that imposes the tax sets its own rate of tax and basis to which that rate is applied. This information is based on authorising state laws, and local laws may be different. Furthermore, transfer of property between entities with common ownership may be excluded from taxation.

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# *Real Estate Going Global Uzbekistan*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 12 June 2012.

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# *Real Estate Tax Summary – Uzbekistan*

## **General**

The rapid changes that have taken place in the economic and legal environment in Uzbekistan since independence have led to profound developments in the real estate market. Yet, at the same time, vestiges of the previous system do remain, providing formidable challenges to investors.

The legislation underpinning real estate activity is still very much in the developing stage and there remain many restrictions on real estate ownership. Uzbek legislation defines real estate as a variety of properties, including the plots of land and subsoil, buildings and premises. The right of ownership, i.e. its acquisition, transfer, restrictions and termination, in respect of real estate is subject to state registration.

According to the Uzbek land code, land is state property, and cannot be bought or sold in Uzbekistan. In July 2006 a Presidential Decree was issued on “privatisation of land plots occupied by the estate of legal entities and/or individuals”. However, there have been no developments in this area since then, and enterprises continue to lease plots of land when they acquired the objects of trade or service located on these plots. When buildings are sold or otherwise transferred, the right to lease land plots is also transferred to a new owner with a moderate re-registration fee. Land tax, as discussed below, is charged as a fixed amount of Uzbek Soum (UZS) per hectare. As the period of lease is indefinite, the state could at any time repossess land from enterprises, compensating the value of building and relocation costs, which would be calculated by the state.

The residential property sales agreements are subject to notarisation. With effect from 1 August 2012 the notarisation fee is 1% of the minimum monthly wage (MMW). MMW is set at UZS 72,355 (approximately USD 38) for 1 square metre of premises.

The ownership of real estate is not restricted by the residency.

Currency control is one of the most critical factors to consider when evaluating inbound investments in real estate in Uzbekistan. The Uzbek currency control regulations are somewhat restrictive. Although formally UZS – the Uzbek national currency – is freely convertible, in practice it could be time-consuming to get UZS converted.

Under Uzbek currency control legislation, all Uzbek enterprises, except for small businesses and some specifically exempted enterprises, are required to convert 50% of their export receipts in foreign currency into UZS. In addition, payments in hard currency on the territory of Uzbekistan are prohibited.

In practice, foreign investors are limited in their choice of operating entities in Uzbekistan. Uzbek legislation does not allow investment through representative offices, because representative offices are prohibited from carrying out commercial, income-generating activities. The Uzbek Civil Code provides for a branch concept specifying that it would not be an independent legal entity. However, in the absence of further guidance on branches, this form of presence is not applied.

According to the new Tax Code (enforced as of 1 January 2008), a permanent establishment (PE) of a foreign legal entity in Uzbekistan shall mean ‘any place of entrepreneurial activity on the territory of the Republic of Uzbekistan including the activities performed through an authorised representative. The Uzbek PE would also be deemed as existing as a result of entrepreneurial activities carried on in Uzbekistan for 183 days and longer during any consecutive 12-month period’.

A foreign legal entity whose activities lead to PE creation should register its Uzbek PE with the local tax authority at the place of activity. Furthermore, if a foreign legal entity creates several PEs in different areas, it is required that such PEs be registered for tax purposes separately with each respective local tax authority. Consolidation of tax reporting of the foreign legal entity in respect of such PEs is prohibited.

Income of foreign legal entities received through their activities via Uzbek PEs in 2012 is subject to Uzbek corporate income tax at 9%. In 2010 changes were made to article of the Tax Code defining peculiarities of taxation of foreign legal entities that have Uzbek PEs. As a result, when determining taxable income of a foreign legal entity carrying on activities in Uzbekistan via PE, the taxable base should not be less than 10% of total expenses directly related to income generating activities in the Republic of Uzbekistan through the PE, whether incurred in or outside Uzbekistan.

In addition to corporate income tax, foreign legal entities acting via PEs are also subject to the net profits tax, which is assessed at 10% of profits after the payment of corporate income tax. PEs may also be subject to the following taxes:

- Property tax in respect of property (non-current assets and real estate) they own, which is located in Uzbekistan.
- 
- Land tax in respect of land plots they have in ownership, possession, or use.
- 
- Water use tax charged on the volume of consumed water resources.
- 
- Unified social charge in respect of gross staff remuneration.

The possible legal forms for the local entity include partnerships, limited liability companies and joint stock companies. Foreign investors commonly favour the limited liability company or the closed joint stock company.

Real estate may be leased. Uzbek legislation provides for two forms of lease – financial and operating. A lease will be treated as financial when the underlying contract stipulates at least one of the following:

- Title to the object of the lease is transferred to the lessee at the end of the lease period.
- The lease period exceeds 80% of the life of the object of the lease, or net book value of the object of the lease is less than 20% of its historic value at the end of the lease period.
- The lessee has the right to buy the object of lease at a price below market value at the date when such right is executed.
- The present discounted value of all payments during the lease period exceeds 90% of the lease value at the date of transfer to lease.

A financial lease is treated by the lessee as a purchase of a fixed asset and is subject to the normal depreciation regime, whereas operating lease payments are deductible from profits for tax purposes.

As a general characterisation, it should be noted that the tax system lacks stability and contains certain key features, some of which deviate significantly from the international norms. These features include the following:

- Although the double tax treaty (DTT) network is quite extensive (comprising 48 effective DTTs as of 4 June 2012), the tax authorities lack the practical experience to apply the DTT provisions.
- The inability to offset input VAT on capital asset acquisitions. Input VAT is instead capitalised and depreciated with the asset.
- Prohibitions on carrying out commercial, income-generating activity through a representative office, lack of application of the branch concept and the lack of practical guidance on taxation through a PE for a foreign legal entity.

## Rental income

Profits from rental activities of legal entities are subject to corporate income tax. The standard tax rate for 2012 is 9%. The corporate income tax rate for commercial banks remained unchanged at 15%.

There are certain limitations on deductibility of expenses related to the commercial activities of a legal entity. Examples of expenses subject to restrictions on deductibility include training not directly related to business, business trips exceeding the statutory norm and operational losses (sale below cost, except for export sale). There are more non-deductible expenses for PEs: royalty and other payments for the use of assets or intellectual property of their head companies, service commission fees, interest on loans provided by their head companies, management or administration costs incurred by their head companies outside of Uzbekistan, etc.

As mentioned earlier in this guide, the Uzbek authorities disallow representative offices of foreign legal entities to perform commercial, income-generating activity. This definition generally extends to rental income.

The Uzbek withholding tax (WHT) is charged at 20% on gross rental income received by a foreign legal entity from sources in Uzbekistan. Double tax treaties do not usually exempt income received in connection with immovable property from being taxed in Uzbekistan.

## Depreciation

The Tax Code sets out maximum tax depreciation rates that vary, depending on the group to which an amortisable asset is allocated. Rates range from 20% for computers and passenger cars to 5% for buildings and oil/gas pipelines. Depreciation can be charged at any rates, but for tax purposes these rates should not exceed the maximum rates of the respective group. Land and natural resources cannot be depreciated.

## Interest

Interest is deductible for corporate income tax purposes except for the interest subject to capitalisation and interest that is related to overdue/delayed loans.

Interest and other charges paid by lessors on the loans received for purchase of property for leasing purposes are deductible for corporate income tax purposes.

## Investment allowances and loss relief

The taxable income may be reduced, among others, by the amounts of:

- Funds spent on modernisation, technical and technological re-equipment of production facilities, acquisition of new technological equipment, expansion of production base, such as construction of new production facilities, reconstruction of business premises, as well as loans taken for these purposes, payments of principal value of the lease less accrued depreciation. The aggregate tax relief for such expenditure is limited to 30% of taxable income. This allowance may be used through five years; however, it may only apply to enterprises producing goods/services.
- Tax losses (excess of deductible expenses over aggregate income) can be carried forward for the period of up to five years in equal amounts to reduce taxable income in the years following the reporting period when such loss occurred. The gross amount of losses to be accounted for in each following year cannot exceed 50% of taxable income of the current year. Losses incurred in more than one calendar year are recoverable in the order of their occurrence. Losses incurred in the period when the taxpayers were exempt from corporate income tax cannot be recovered in the following periods.
- Losses resulting from the sale of fixed assets are deductible only if fixed assets have been used for more than three years.

## Taxation of capital transactions in property

Capital gains from the sale of property (defined as positive difference between the selling price and purchase price supported by documents) by Uzbek companies and foreign entities are subject to corporate income tax.

If property is sold by a foreign company with no registered presence in Uzbekistan, the buyer is required to withhold 20% of the capital gains.

The transfer of residential premises, whereby at least one party to the transaction is an individual, is subject to a notary registration fee based on the total area of the premises and fixed ratio per square metre. In other cases, notary registration is not required.

Starting from 2012 lease agreements with respect to buildings and premises or their parts and residential premises between individuals are subject to notary registration.

Starting from 2012 income of individuals from sale of non-residential premises and recurring sale of residential property (i.e. if sale takes place more than 2 times in a consequent 12 months period) are subject to PIT at the minimum rate of 9%.

Starting from 2012 minimum PIT rate of 9% shall be applied to income from lease of property of individuals.

Starting from 2012 the minimum lease rates for residential premises of individuals and commercial property of legal entities depending on their location were introduced.

Unrealised capital gains on the value of property are not taxed in Uzbekistan.

Free of charge transfer of fixed assets is not subject to VAT as VAT is assessed on the positive difference between the sales price and net book value (detailed further). Such transfer is subject to corporate income tax for the company receiving the assets.

## Other taxes on profit

There is a local tax imposed on enterprises' profits after corporate income tax. It is called infrastructure development tax and the rate is set by local municipal authorities, but is capped by law at 8%. In practice all municipal authorities set the rate at the maximum (8%).

## Value added tax (VAT)

In general, 20% VAT applies to the supply of goods and services on the territory of the Republic of Uzbekistan.

For this purpose, disposal of property, including buildings and construction, is regarded as the sale of goods, and is subject to VAT. The VAT base is the positive difference between the sales price and net book value of the property, inclusive of VAT.

Input VAT cost, which relates to purchase, installation or creation of fixed assets, should be capitalised and depreciated over the useful life of fixed assets.

When property is purchased with the purpose of resale and will not be used as a fixed asset, the amount of VAT is eligible for offset against output VAT. This does not apply, though, to cases when such purchase and resale is the enterprise's main business activity – in this event the enterprise is subject to the unified tax payment and may not claim input VAT for offset under certain conditions.

Lease payments are exempt from VAT and certain technological equipment, with assembly/spare parts (as per the government list) imported into Uzbekistan, are exempt from customs duties and VAT.

In accordance with effective legislation, lease payments include both principal value of assets and interest payable in accordance with the lease contract.

## Withholding taxes

If a foreign legal entity does not have a PE in Uzbekistan, WHT should apply to Uzbek-sourced income earned by a foreign legal entity. Double tax treaties do not usually

exempt income received in connection with immovable property from being taxed in Uzbekistan.

Withholding tax of 20% applies to real estate income. The Uzbek domestic WHT rate for dividends and interest income for 2012 is 10%. No deductions for expenses are permitted.

The mechanism of withholding the tax is not established for cases when income is paid by a foreign entity, i.e. where both parties involved in the transaction are foreign entities.

## Other taxes

### *Land tax*

Enterprises that have legal title to land plots are subject to land tax. It is calculated by taxpayers on the basis of the tax rates that depend on the quality, location and level of water supply to each piece of land.

Enterprises renting land plots from state institutions instead of land tax should make rent payments to municipal authorities in lieu of land tax.

Land tax is deductible for corporate income tax purposes.

### *Property tax*

Uzbek corporate property tax is imposed at the rate of 3.5%. The rate is applicable to the net book value of fixed and intangible assets and overdue construction-in-progress. The rate is doubled for equipment not installed in due time.

Newly opened enterprises are exempt from property tax for a period of two years from the date of their registration, unless these were created on the basis of production facilities of existing companies.

Enterprises exporting own goods, works or services can reduce their property tax rate by 30%, if the share of export earnings comprises 15% to 30% of the total turnover, and by 50%, if the share of export earnings comprises over 30% of the total turnover. This privilege does not apply to trading enterprises and production enterprises exporting certain raw materials.

Under the financial lease terms, lessors are not subject to property tax with respect to the leased assets. Lessees are exempt from property tax in respect of leased property for the period of the lease contract.

New technological equipment just placed into operation is exempt from property tax for five years. In case of sale or gratuitous assignment of this new equipment within three years from the date of acquisition, the above-mentioned privilege is cancelled.

In 2011, with the purpose of encouraging timely replacement of outdated equipment, a charge of 0.25% of the equipment's historic value was introduced. This charge is to be collected from legal entities (except for micro-firms and small enterprises) for use of fully depreciated equipment.

Property tax is deductible for corporate income tax purposes.

## *Turnover taxes*

Turnover taxes, comprising obligatory contributions to the Pension Fund, Road Fund and Fund on Reconstruction, Capital Repair and Equipment of Educational Institutions, are charged on sales turnover. Revenue received from rent is not included in the tax base. Disposal of property is generally not subject to turnover taxes, unless it is the core activity of an enterprise.

The general rates of obligatory contributions to the Pension Fund, Road Fund and Fund on Reconstruction, Capital Repair and Equipment of Educational Institutions are 1.6%, 1.4% and 0.5%, respectively, of the actual volume of goods sold, works and services performed, including export, less VAT and excise taxes.

## *Alternative tax regimes*

Uzbek legislation provides for alternative (simplified) taxation regimes for certain types of enterprises. Wholesale/retail sale companies, public catering companies, private notaries, as well as micro-firms and small companies (except for micro-firms and small companies producing excise-liable goods or extracting natural resources) are the payers of the unified tax payment.

Unified tax payment rates vary, depending on the type of company's activity, e.g. the rate for public catering companies is set at 10%, for wholesalers – 5%, for micro-firms and small companies – 6%.

Agricultural producers pay unified land tax.

These taxes replace a combination of all other taxes except for import customs' payments and some minor levies.

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# *Real Estate Going Global Venezuela*

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All information used in this content, unless otherwise stated, is up to date as of 18 June 2012.

# Real Estate Tax Summary – Venezuela

## General

Residents and non-residents may invest in Venezuelan real estate, directly or indirectly, through local companies or through foreign companies owning local real estate.

## Income tax (IT) on rental income

Earnings arising from properties located in Venezuela are subject to the income tax regime. Currently, a regime of worldwide taxation with rules including, among others, a dividend tax and transfer pricing rules, is applicable.

According to this regime the revenues obtained from real property located in the country will be taxable, whether they are received by resident or non-resident taxpayers. The income tax law contains a branch dividend tax, which taxes at 34%, the positive difference between a branch's accounting and tax income generated after 1 January 2001. This tax applies to deemed distributions, and may only apply if a real estate investment can be considered a branch for Venezuelan tax purposes.

The IT regime provides for various rates depending on the kind of taxpayer. The tax rate for individual residents in the country is progressive, and ranges from 6% to 34%.

The applicable tax rate for individuals who do not qualify as tax residents in the country is 34%, and this rate will be applied to any amount of taxable income deemed as sourced in Venezuela. For the case under review the income generated for properties located in Venezuela will be considered as Venezuelan source. The case under review is the income from properties located in Venezuela.

Companies are subject to progressive tax rates as follows:

Fraction in tax units (TUs)	Tariff (%)	Deductible in TU
From a fraction of 1TU up to 2,000 TUs	15	0
For the fraction exceeding 2,000 TUs up to 3,000 TUs	22	140
From the fraction exceeding 3,000 TUs	34	500

As of February 2012, the value of the tax unit, or TU, is VEF 90.00.<sup>1</sup> The official exchange rate is VEF 4.30/USD 1.<sup>2</sup>

For the purpose of collecting income tax, payers of certain revenues are obliged to withhold, as an advanced tax payment for the recipient, a percentage of these revenues at the time they are paid or credited to account. The tax withheld must subsequently be paid to the National Treasury.

## Thin capitalisation rules

Venezuela did not have any thin capitalisation rule (debt/equity ratio) established in its tax laws until February 2007, when the law stipulated that interest paid directly or indirectly to persons that are considered as related parties are deductible insofar as the amount of the debt contracted directly or indirectly with related parties, added to the amount of debts contracted with independent parties, do not exceed the taxpayer's net equity.

Effective as of 1 January 2002, taxpayers are specifically required to report for income tax purposes the amounts they would have accrued according to the arm's-length principle, notwithstanding the prices actually used in transactions between related parties. All intercompany transactions between related parties must be reported for income tax purposes at arm's-length prices. This general rule makes the arm's-length principle a cornerstone of the income tax regime, since it covers all transactions such as: transfers of tangible and intangible property, services and financial operations entered into by individual and corporate taxpayers.

## Loss carryforward

Operating or exploitation losses may be carried forward to the following three years. In this regard, the respective standard does not allow for carrybacks. Losses related to inflation adjustment can only be carried forward for one year. Foreign losses can only be used to offset foreign profits.

## Value added tax (VAT)

Venezuelan VAT is levied on the transfer of movable property, including its import and rendering of services used within the country. The concept of service includes the construction or building up of real properties, as well as the leasing of real property for non-residential purposes.

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<sup>1</sup> Pursuant to the Master Tax Code, the tax unit (TU) is to be adjusted within the first 15 days of the month of February.

<sup>2</sup> On February 2003 the Venezuelan Government established an Exchange Control Regime. The current exchange rate is VEF 4.30 / USD 1.

## Science, technology and innovation contribution

The Law on Science, Technology and Innovation (LOCTI, by its Spanish acronym) establishes a mandatory contribution to be paid by companies that obtain over 100,000 tax units (TU 100,000) in gross income, which are classified under the category of large companies.

Contributions established in the LOCTI are as follows:

- Contributions made from companies related to bingo and casino activities, alcoholic drinks or tobacco: The companies engaged in activities related to bingo and casino, alcoholic drinks or tobacco must contribute annually the equivalent of 2% of the gross income.
- Contributions made by private companies engaged in hydrocarbon or mining activities: the companies that are related with hydrocarbon activities, including gaseous hydrocarbons, or mining activities, must contribute with an equivalent amount of 1% of the gross income.
- Contributions made by companies engaged in other economic activities: these companies must contribute annually with the equivalent of 0.5% of gross income.
- LOCTI Regulation establishes that companies that carry out several activities will pay the contribution over the income obtained for the company's main activity.

## Anti-drugs contribution

The Organic Drug Law stipulates that any company employing 50 or more employees must make an annual contribution from their operating profit equivalent to 1%.

Operating profit or profits in operations: The amount resulting from subtracting the operative expenses from the gross income, in conformity with the Venezuelan generally accepted accounting principles.

## Law on Sports, Physical Activity and Physical Education

On 23 August 2011 was published the Master Law on Sports, Physical Activity and Physical Education (LODAFEF by its Spanish acronym), which has established that the corporations and public or private entities that carry out economic activities in Venezuela for profit interests will be obliged to make an annual contribution to the National Fund for Sports Development, equivalent to one percent (1%) of their annual net profit or accounting gain, when it had exceed more than twenty thousand tax units (20,000 TU).

# Real Estate Investments – Venezuela

## Income tax withholding

In connection with real property, the respective standards establish two scenarios under which revenues are subject to withholding tax, namely:

### *Withholding percentage on the amount paid or credited to account*

Activities	Individual		Company	
	Resident	Non-Resident	Domiciled	Not Domiciled
The commissions paid to intermediaries for the transfer of real property.	3%	34%	5%	5%
Payments made by real property administrators to the lessors of properties located in the country, as well as those made directly to the lessor by companies or associations, or when these payments are made to the administrating proprietor of the real estate	3%	34%	5%	IT tariff 2 (i.e. the corporate tariff structure)

Rental and other income from real property is taxable on a cash basis. In calculating the earnings subject to tax, taxpayers may deduct costs and expenses, provided that they are normal, necessary and related to their habitual business activity. For services provided from abroad, the transfer pricing rules may be applicable. Administration expenses paid for leased properties may not exceed 10% of the gross revenues obtained from such lease. For properties that are to be treated as fixed assets, or which are leased to the company's employees, depreciation expenses will be deductible. Other depreciation expenses are not deductible for income tax purposes.

Please note that companies that carry out commercial, industrial, financial and insurance operations, as well as exploitation of mines and hydrocarbons are obliged to prepare an adjustment for each inflation calculation for all the non-monetary assets, liability and equity held by the company at the end of the fiscal year. This calculation will be included in the taxable income of the company.

In this regard, real estate held by the company at the end of the fiscal year will be subject to an adjustment for each inflation calculation. The adjusted inflation value of the property will be considered as the cost of it for tax purposes.

Regarding individuals, even though they are not obliged to have adjustment per inflation calculation, they can temporarily be subject to the adjust per inflation system, applying at the cost of their non-monetary assets at the moment of its sale, in order to recognise the effect of the inflation in the cost of their properties. As in the case of the companies, the adjusted per inflation value of the property will be considered as the cost of it for tax purposes.

## Capital gains

Capital gains arising from the transfer of real property are subject to the general regime set forth in the income tax law. This regime includes a special 0.5% withholding tax calculated on the sale price, whether cash or credit, of real property. This withholding tax is an advanced tax payment, and will be credited to the amount of income tax resulting from the final tax return for the corresponding fiscal period of the transferor.

To this end, the definition of transfer includes the sale of properties, or rights to properties, the contributions of such assets or rights to partnerships, and even their delivery for their respective part to their partners in the event of liquidation or reduction of capital stock. Sales under 3,000 TUs and the transfer of property used as an individual's main domicile are exempt from this withholding obligation.

Revenues obtained by the transfer of real property will be included in the calculation of taxable income. For such purpose, the value of the property, plus the value of improvements made, and the registration fees will be considered as a tax cost. This amount will also be applied in the case of liquidation of partnerships, or reduction of capital stock, when real properties are assigned.

Capital gains realised on the transfer of shares in a Venezuelan real estate company are subject to income tax. Certain tax treaties may prevent Venezuela from levying its income tax on the transfer of shares in real estate companies.

## Value added tax (VAT)

It can be stated that the sale or transfer of ownership of real property is not subject to VAT, whereas the construction of real property and the lease of immovable property different than the used for residential purposes is subject to VAT for being considered as a service. The current applicable tax rate is 12%.

## Municipal tax

The Venezuelan fiscal system includes taxes at municipal level, such as the tax on urban properties, or *Impuestos a los Inmuebles Urbanos* (IIU), also known as the land registry or real estate tax. This tax burdens the ownership of the real property within the urban areas of the municipality where the real estate is located.

The taxpayer is the proprietor of such real estate. Historically, the value of the property, its productivity, or the effective income derived from it has been considered as the tax base. The actual tax base applicable depends on the municipality.

The applicable tax rate is established by each municipality, through the respective bylaws, and the tax payable will be calculated by the municipal authorities at the end of each tax period, whether on a monthly, bimonthly or quarterly basis.

## Public registry

The Law on Public Registries and Notaries<sup>3</sup> establishes a series

- of emoluments and rights in favour of the National Treasury for
- the registration of agreements, transactions, or acts that refer to the purchase, sale, trade, assignment or acceptance in payment
- of real property, as well as the incorporation of such property
- into partnerships. These fees are calculated, based on the following rates.

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Up to 2,000 TU's	0.20%
From a fraction exceeding 2,000 TUs to 3,500 TUs	0.25%
From a fraction exceeding 3,500 TUs to 4,500 TUs	0.30%
From a fraction exceeding 4,500 TUs to 6,500 TUs	0.35%
Starting from 6,500 TUs up	0.40%.

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<sup>3</sup> This Law entered into effect on 1 January 2007.

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# *Real Estate Going Global Vietnam*

*Tax and legal aspects of  
real estate investments  
around the globe*

*2012*

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All information used in this content, unless otherwise stated, is up to date as of 21 June 2012.

# Real Estate Tax Summary – Vietnam

## General

All land in the country belongs to the people and, consequently, the state. There is no private ownership of land. Individuals and organisations may only be granted land use rights.

## Land and building

Foreign investors may access land under various forms to develop a real estate project in Vietnam, e.g. leasing the land directly from the State or participating in a joint venture with a local partner.

## Taxation

Major taxes relevant to real estate business are land rental, non-agricultural land usage tax, registration fee, Value added tax (“VAT”) and Corporate income tax (“CIT”). The tax rates are set out below.

Type of tax	Tax rate (%)
VAT	10
CIT	25
Registration fee	0.5
Non-agricultural land usage tax	0.03 to 0.2
Land rental and fee to use land	Determined by the provincial people's committee

Tax losses from transfer of real estate are not allowed to offset taxable profits from other activities, but can only be offset against taxable profits derived from the same activity in the future.

## Dividend

There is no withholding tax on dividends paid by a Vietnamese company to an overseas corporate investor. However, notification to the tax authorities is required prior to the profit remittance.

# ***Real Estate Investments – Vietnam***

## **General**

### *Introduction*

This guide comprises an overview of the tax and legal aspects relating to the acquisition, developments and operation of commercial real estate in Vietnam.

### *Foreign investment control*

Foreign investors are allowed to participate in certain real estate activities, such as housing construction for sales and lease, investment in infrastructure for leasing the land, and real estate-related services. They are, however, not permitted to engage in pure trading of property (i.e. to purchase apartments/buildings for sales or lease or to lease apartments/buildings for sublease) without investment on the infrastructure or construction of the property).

## **Land issues in Vietnam**

### *Legal aspects*

#### **Land use rights**

There is no freehold ownership of land in Vietnam. The Government can allocate or lease the land use right (“LUR”) to the investors by issuing a LUR certificate. Land allocation is only applied to Vietnamese investors.

Foreign investors may obtain LURs in Vietnam through (i) leasing the land from the Government and other permitted landlords, or (ii) participating in a joint venture company in which a local partner contributes the LUR as capital.

The LUR certificate does not certify the land ownership of the holder but recognises the right of the holder to use the land.

The term of a LUR is limited to 50 years, but up to 70 years under certain special cases. Such term can be renewed, subject to certain conditions.

#### **The land users’ rights**

The rights of a foreign invested company over a LUR will vary according to the method of rental payments.

A foreign investor who made a one-time payment for the term of the lease is allowed to transfer, mortgage, sub-lease, or contribute the LUR to form an entity.

Where the rental is paid annually, the land user’s right over the land is very limited, e.g. transfer of the LUR is not allowed.

#### **Acquisition of residential apartments by foreigners**

Foreign invested companies and certain categories of foreigners are entitled to purchase residential apartments in Vietnam. Conditions apply, e.g. the ownership of an apartment by a foreigner is limited to 50 years.

A foreigner is only permitted to acquire one apartment and only for personal use, while a foreign-invested company may purchase a number of apartments.

## *Tax aspects*

### *Property tax*

Vietnam does not have a property tax (the law on property tax is still in draft). However, the rental of LURs by foreign or domestic investors is in effect a property tax. It is usually known as land rental or fee to use land and the range of rates is wide, depending upon the location, infrastructure and the industrial sector in which the business is operating.

The land rental rates and fee to use land are determined by the provincial people's committee and can be adjusted on a periodic basis if there is significant movement in the real estate market.

The land rental rate can also vary, depending on how investors obtain the land, i.e. via acquisition in public auction, direct negotiation with the relevant authorities, or assignment of land by the government (only in specific cases and subject to conditions).

For certain projects such as development of housing at cities for low-income earners, etc., land rental or fee could be exempt.

### *Non-agricultural land usage tax*

Residential land, non-agricultural land used for business are subject to non-agricultural land usage tax, with some exemptions.

Non-agricultural land usage tax is calculated by multiplying the taxable land area with the price and the applicable tax rate.

The taxable land area is the total land area allocated by or leased from the Government. The price of a square meter of taxable land is the price of land based on its use purpose which is promulgated by the government authorities and kept stable for a 5-year period starting from 1 January 2012.

Tax rates are in the range of 0.03% to 0.2% depending on the type of land. Land for investment projects registered by investors and approved by competent state agencies is subject to the flat tax rate of 0.03%.

### *Registration fee, value added tax and corporate income tax*

Please refer to our comments on '*Tax aspects*' under the section '*Construction issues and new buildings*' below.

## *Construction issues and new buildings*

### *Legal aspects*

#### *Sale and purchase of an apartment/house*

Subject to certain conditions, it is possible for a developer to receive advance payments from buyers prior to completion of construction of a project. For example, the first payment can only be made after the developer has completed construction of foundation.

A standard contract for sale of apartments must be prepared by a developer and registered with the authority. It must be consistent with the template issued by the Ministry of Construction.

Real estate companies must sell and/or lease out apartments/buildings through a real estate trading floor. The sale and purchase of apartments/buildings by individuals are not required to be carried out through real estate trading floor.

In the past, the owner of an apartment/building (including house) was issued with a certificate of ownership of apartment/building in addition to the LUR certificate as a separate document evidencing their title over the apartment/building. From 10 December 2009, a unified certificate which combines LUR and apartment/building ownership is issued to the owners.

### Regulatory issues

Construction issues in relation to development of a property project are mainly governed by the Construction Law, Real Estate Business Law, Land Law, Housing Law and numbers other decrees, circulars legislations.

### Construction permit

A construction permit is required before commencing construction of a project, except for certain limited cases, e.g. small scale infrastructure and projects located in remote areas. It is possible to amend an issued construction permit subject to the approval of the licensing authority.

Construction of a property project must comply with the approved master plan, local land use plan and other specific legislation.

### Building works

#### *Construction works*

The developer must engage a qualified contractor(s) to carry out the construction of a property project.

The developer must supervise the works implemented by the contractors.

If the developer is incapable of carrying out the supervision of construction works, a consultancy must be employed for this purpose.

### Builder's liability

The warranty period of a project is calculated from the signing date of the hand over minute or from the date on which construction is completed and the project is put into operation.

The contractors shall be responsible for warranty of the works for a period of at least 24 months for special grade and grade one projects. For the remaining projects, the warranty period must be not less than 12 months.

### Insurance

#### *Compulsory insurances*

Insurance for works is to be incurred by the developer. Where the insurance is included to the contract price, the contractor will procure such insurance.

The contractors and the consultant are required to procure equipment, professional liability and third party liability insurances in accordance with the law.

### *Subcontracting*

For a project with 30% or more of the investment capital funded by the State, the main contractors are not permitted to subcontract the whole works. For private projects, the volume of works to be subcontracted can be agreed by the parties.

## *Tax aspects*

### *Registration fee*

Registration fee is the fee payable on the registration of ownership, or the right to use land and building (residential, office building, factory, shops, warehouse and other construction works), unless specific exemption is provided under the regulations, e.g. capital contributions in form of land use rights.

The registration fee of LUR and building is calculated based on the price list stipulated by the government authorities. The rate is 0.5%, but the maximum registration fee is capped at VND 500m (approximately USD 24,000) per single asset (for each time of registration). For this purpose, land and the buildings on the land are considered a single asset.

The registration fee obligation arises when an organization or individual registers the right to ownership or use of assets with the competent State body.

### *Value added tax*

Rental income derived from Vietnamese property is taxable in Vietnam. A 10% VAT is imposed on gross rental revenue.

A 10% VAT also applies to the sale or assignment of houses or infrastructure facilities.

The transfer of LURs is VAT exempt. However, VAT will apply to the taxable price for 'trading in property', which is the selling price of the property minus (-) deductible land price for VAT purposes. The deductible land price depends on how the land is acquired. For example, if land is allocated by the State, the deductible land price is defined as land use fee plus land compensation and clearance expenses. If the land is acquired from another organisation or individual, the deductible land price is the land price at the time of acquisition (i.e. based on the property transfer contract) plus the value of infrastructure. However, if it is not possible to determine the land price at the time of acquisition, the land value set by the government authorities at the time of acquisition will be used.

### *Corporate income tax*

25% CIT will apply to rental income received less any deductible expenses. Deductible expenses for CIT purposes, amongst others, include:

- depreciation
- repairs
- interest on loans
- land rental and

- other deductible expenses.

In respect of depreciation, the maximum allowable annual depreciation rates for buildings and other architectural constructions are: 2% to 4% for solid houses and buildings; 4% to 16.6% for other types of houses and buildings; 5% to 20% for warehouses, containers, bridges, roads, air runways, parking places and driving yards; 3.3% to 16.6% for dams, breakwaters, canals, trenches for irrigation, ports and docks; and 10% to 20% for other construction works.

The cost of LURs, if paid in advance is capitalised and amortised over the term of the lease contract/payments.

Enterprises intending to apply different rates must obtain permission from the Ministry of Finance.

LURs with indefinite term are recorded as intangible fixed assets and amortisation, if any, is not deductible for CIT purposes.

Business establishments earning regular income from the sale of property, transfer of LURs and land lease rights will be subject to 25% CIT.

The taxable income from the transfer will be calculated based on the revenue from the transfer less (-) historical cost of properties and deductible expenses related to property transfer activities.

In respect of the transfer of LURs, the taxable revenue is the higher of the actual transfer price or the price specified by the government authorities.

Operating tax losses incurred in any year can be carried forward for five years to offset against taxable profits. Tax losses from the transfer of real estate are not allowed to offset taxable profits from other activities. Tax losses from the transfer of real estate can be offset against taxable profits derived from the same activity in the future.

### Income from transfer of LURs/property and rental derived by individuals

CIT will not apply to individuals or households earning income from the transfer of real estate. Instead, it will be subject to Personal income tax (PIT) at the rate of either 25% of the gain or 2% of the gross proceeds depending on the availability of documents supporting the purchase price and related expenses incurred.

Rental income derived by an individual is subject to PIT at progressive tax rates. The highest rate currently is 35%.

### Withholding tax on profit remittance

Foreign investors are permitted to remit their after tax profits annually after the end of the financial year or upon termination of the investment in Vietnam.

Foreign investors are not permitted to distribute and remit dividends overseas if the financial statements of the profit making year show that there is still accumulated losses.

There is no withholding tax on dividends paid by a Vietnamese company to an overseas corporate investor. However, notification to the tax authorities is required prior to the profit remittance.

## Purchase of a real estate company

### *Legal aspects*

It is possible for a foreign investor to acquire shares/interest in whole or in part of a real estate company in Vietnam, subject to certain conditions.

The target company's scope of business must fall within real estate activities that are permitted to be carried out by foreign investors.

The foreign invested companies may also consider receiving the transfer of a property project from other developers. The transfer of a property project is subject to certain conditions, e.g. the developer of the project has completed the land site clearance and has obtained the LUR.

### *Tax aspects*

The transfer of interest/shares in a company in Vietnam is exempt from VAT. No registration fees are imposed on the transfer of interest/shares.

Gains on transfer of an interest (as opposed to shares) are subject to 25% capital assignment profits tax. The taxable gain is determined as the excess of the sales proceeds over the cost (or initial value of contributed charter capital for the first transfer) less transfer expenses.

A foreign company (not incorporated in Vietnam) is taxed on the transfer of shares of a public joint stock company on a deemed basis of 0.1% of the sales proceeds. A double tax agreement may provide protection from the above taxes.

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