



# Real Estate Taxation

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## Introduction

Real estate continues to be a very popular form of investment both in times of economic insecurity and stable business growth. It often offers tax advantages and the prospect of longterm capital appreciation, and is also an attractive form of retirement provision.

TPA's property experts have analyzed and summarized for you the most important tax provisions. This 22nd edition of our brochure gives you a practical overview of the current position with respect to real estate taxation in Austria as of April 1, 2018 both for income tax and VAT.

The comprehensive chapter on real estate as part of a company's assets provides interesting information on this topic which is especially important to SMEs and family businesses. Also aspects of property income taxation in private foundations, of developer schemes and retirement provision schemes as well as property funds were considered. The topic of property investments in foreign countries is treated in a separate chapter too since it has high potential for tax structuring due to its attractiveness.

In this brief guide we try to let some light into the "jungle of real estate taxation" – we shall be interested to receive your comments. More information is available in the handbook "Immobilienbesteuerung NEU", fourth edition, published by Manz Verlag, and on our website [www.tpa-group.at](http://www.tpa-group.at)

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## Contents

<b>I. Real Estate in Private Ownership</b>	5
1. <b>How Tax Depreciation of Rental Properties Works</b>	5
2. <b>When is Accelerated Depreciation Possible?</b>	6
2.1. Factor: Costs of Construction	6
2.2. Factor: Repair and Maintenance Expense	7
2.3. Factor: Renovation and Renewal Expense	7
3. <b>Grants and Their Consequences</b>	8
4. <b>Which Business Expenses Are Deductible?</b>	8
5. <b>Personal Use</b>	9
6. <b>Personal Use of Previously Rented Property</b>	10
7. <b>Depreciation in Case of First-time Rental</b>	10
8. <b>What is Important in the Sale of Properties</b>	11
8.1. Old Case	11
8.2. Significant Exemptions	12
8.3. Calculation of Income	13
8.4. Subsequent Taxation of Accelerated Depreciation	14
8.5. How to Deal with Losses	14
8.6. Self-computation and Payment of Property Income Tax	14
8.7. Tax Free Rent Reserve Expired	14
8.8. Other Tax Implications of the Sale	15
8.9. Business or Hobby?	15
8.10. Compensation for the Implementation of Servitudes	16
9. <b>Gift of Properties</b>	16
9.1. Consequences of Transfers for Donor	16
9.2. Consequences of Transfers for Donee	16
9.3. Gifts with Retention of Beneficial Interest	17
10. <b>Tax Consequences in Case of Transfer by Way of Inheritance</b>	18
<b>II. VAT</b>	19
1. <b>What Small Businesses Need to Consider</b>	19
2. <b>Which Tax Rates Apply?</b>	19
2.1. Nature of Supply	19
2.2. VAT Exemption	20
2.3. Tax base – Standard Value	20
2.4. Definition of Real Estate	21
2.5. Short-term Rental	22
2.6. Real Estate Services	22
3. <b>Taxation of Actual Receipts and of Advance Payments</b>	22
3.1. Scope of Application	22
3.2. Input VAT Deduction only after Payment	23
3.3. Exceptions for Large Businesses	23
4. <b>Rental by Foreign Businesses</b>	23
5. <b>Input VAT on Services Supplied in Advance</b>	24
6. <b>VAT and Partial Private Use</b>	24

<b>7. Special Cases of Input VAT Deduction</b>	24
7.1. Rental Pools	24
7.2. Co-ownership	25
7.3. Condominium Cooperatives	25
<b>8. VAT in Case of Sale, Gift and Cessation</b>	25
8.1. Basics	25
8.2. One-tenth or One-twentieth Adjustment	26
8.3. Option for VAT Taxation	26
8.4. Minimum Adjustment Limit	26
8.5. Date of Input VAT Deduction	26
8.6. Gift of Real Estate and VAT	27
8.7. Cessation of Business Activity	27
8.8. Sale of Tenancy Rights	27
<b>9. VAT in Case of Transfer Because of Death</b>	27
<b>10. Retention of Records</b>	27
<b>11. VAT in Case of Construction Services</b>	28
11.1. Principles	28
11.2. Businesses Commissioned to Provide Construction Services	28
11.3. Businesses Normally Supplying Construction Services	28
<b>12. Provisions for Landlords and Property Managers</b>	29
12.1. Invoices – Principles	29
12.2. Numbering of Rent Demands	31
<b>13. VAT Registration Numbers Verification Procedure</b>	32
<b>14. Liability for Social Insurance Contributions and Payroll-related Taxes of Subcontractors</b>	33

<b>III. Real Estate Forming Part of Business Assets</b>	34
1. <b>Calculation of Profits</b>	34
2. <b>Taxation of Disposal Gains</b>	35
3. <b>Rules for Payment of the Property Gains Tax</b>	37
4. <b>Taxation of Corporations</b>	38
5. <b>Taxation of Foreign Business Investors</b>	38
6. <b>Exclusion from the 30 % Property Gains Tax</b>	39
7. <b>Restrictions for Commercial Property Trade</b>	39
8. <b>Contribution to the Business and Withdrawals</b>	40
9. <b>“Land Reserve” (Reserve Pursuant to Section 4 Para 10)</b>	41
10. <b>Deducting of Renovation and Renewal Expense</b>	41
11. <b>Standard Depreciation</b>	42
12. <b>Accelerated Depreciation for Historic Monuments</b>	44
13. <b>Demolition Expense and Renewal Expense in Close Connection with Acquisition</b>	44
14. <b>Hidden Reserves and Roll-over Relief</b>	44
14.1. Requirements	45
14.2. Restrictions	45

## Contents

15. Tax-free Allowance	46
16. Losses, Loss Set-off, Loss Carry-forward and Tax Models	46
17. Property and Cessation/Sale of Business	47
18. Real Estate and Business Reorganizations	48

IV. Withholding Tax: Capital Gains Tax from Transfer of Real Estate (Property Income Tax)	50
1. Self-computation of Property Income Tax and Payment	50

V. Property and Private Foundations	52
1. Fundamental Principles of Taxation	52
2. Taxes and Duties on Donation	53
3. Gratuitous Transfers out of Private Property	54
4. Disclosure and Reporting Requirements for Private Foundations	55

VI. News on Real Estate Transfer Tax	56
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VII. Developer Schemes and Retirement Saving Schemes	60
1. Fundamental Principles of Taxation	60
2. Major Owner/Developer	61
2.1. Requirements	61
2.2. Tax Consequences	61
3. Minor Owner/Developer	61
3.1. Requirements	61
3.2. Tax Consequences	61

VIII. Property Funds – Tax Considerations	63
1. Key Features of Property Funds	63
2. Investment Regulations	63
3. Application of Profits and Taxation	64
4. Marketability	65
5. Alternative Investment Fund Manager Act	65
6. Alternative Financing Act – Crowdfunding	66

IX. Property Investment Abroad	67
1. Regular Income	67
2. Profits on Disposal	67
3. Limited Tax Liability	69

## I. Real Estate in Private Ownership

Generally, for real estate held in private-ownership in Austria the following tax framework exists: For privately owned rental property, the taxable income is calculated using a prescribed form of receipts-taxable expense-payments account (similar to cash basis accounting).

As a rule, costs of acquisition and construction form the basis for calculation of depreciation allowances for tax purposes (Absetzung für Abnutzung – AfA, as the regular depreciation is called in Austrian tax law). Depreciation can only be claimed by the economic owner. The tax authorities' views are set out in the Income Tax Guidelines 2000 (EStR 2000) and the Value Added Tax Guidelines (UStR 2000), which can be used as a supplement to the statutory provisions and an aid to interpretation.

### 1. How Tax Depreciation of Rental Properties Works

The portion of total acquisition costs – including incidental costs (e.g., real estate transfer tax, court costs, fees of real estate brokers, notarial and lawyers' fees) – representing the cost of the land must first be deducted. This land portion was increased to 40 % as of the year 2016 providing, in the land portion decree, ranges between 20 % and 40 % according to the nature and location of the real estate.

Henceforth the following applies:

- 20 % land portion in communities with fewer than 100,000 inhabitants if the price of building land per square meter is below EUR 400 (i.e., in the major portion of rural Austria).
- 40 % land portion in communities with over 100,000 inhabitants or where the price of building land per square meter is above EUR 400, except
- 30 % land portion if the rental property has at least 10 rental units.

Both taxpayer and financial authorities may deviate from this percentage if sufficient proof is furnished. Also, it must be checked whether the flat percentage does not obviously deviate substantially (> 50 %) from the actual circumstances. The new provision applies also for real estate acquired earlier.

The rate of depreciation applicable to buildings is (up to):

- 1.5 % p.a. without evidence of useful life;
- 2 % p.a. for buildings constructed before 1915.

**TIP:** The depreciation rate is higher than 1.5 % or 2 % where there is a professional appraisal providing evidence of a shorter useful life.

## I. Real Estate in Private Ownership

Where a building has, e.g., defects so severe that rehabilitation does not make economic sense, or it has come to the end of its economic useful life, a **deduction for extraordinary wear and tear (AfA)** in excess of the fixed rate of 1.5 % or 2 % may be permitted.

**TIP:** It is optional to spread these depreciation expenses for extraordinary wear and tear and other related expenses voluntarily over 15 years. This may be advantageous in case of lower income.

**TIP:** The optional spreading over 15 years also applies to **all extraordinary expenses** other than maintenance, renovation, or construction costs.

## 2. When is Accelerated Depreciation Possible?

### 2.1. Factor: Costs of Construction

On application, certain expenses **forming part of construction costs** can be depreciated at a faster rate, i.e., on a straight-line basis **over 15 years** (section 28 (3) Income Tax Act (EStG) 1988).

This applies to:

- Expenses under the Historic Monuments Act: Confirmation in writing that the work contributes to the protection of a historic monument must be obtained from the Austrian Federal Office for the Care of Monuments, and the concrete amount of expenses must be proven.
- Expenses under sections 3–5 of the Rent Act (MRG), for buildings to which the provisions of MRG governing the application of basic rental income (Hauptmietzins) apply. For example, expenses for improving apartments and raising them to a higher category, for installing for installing elevators and for combining apartments.
- Expenses for certain property rehabilitation, where a grant under the Residential Property Rehabilitation Act (WSG), the First Homes Act (Startwohnungsgesetz) or the provisions of Provincial legislation governing grants for the rehabilitation of residential property has been approved. Based on the Vienna Reconstruction Decree, demolition and reconstruction can also come under this regulation.

Grants reduce the basis of calculation of accelerated depreciation.

**TIP:** In the case of compulsory rents, application can be made for accelerated depreciation over 10 years.

The following must be treated not as renovation and renewal expense

but as **capitalizable costs of construction** specifically pursuant to Income Tax Guidelines 2000, margin number 3175:

- Addition to, major restructuring of, or addition of a floor to a building;
- replacement of a flat roof by a steep roof creating new rooms, which is economically tantamount to the addition of a floor;
- combination of two apartments;
- a general overhaul of a building that has become unusable or significantly reduced in its usability and useful life by severe damages to its substance if its usability is fully restored.

### 2.2. Factor: Repair and Maintenance Expense

Expenses are considered to be repair and maintenance where only **minor parts of the building** are replaced, and there is no significant increase in rentable value or expected useful life. Such expenses normally include:

- regular service and maintenance;
- painting the exterior;
- painting the stairwell;
- repairing the plastering;
- repairing damage by natural forces or acts of God;
- renewal, where no more than 25 % of the elements to be renewed are replaced (e.g., 10 out of 90 windows).

The expenses will not be treated as repairs where there is a single contract for the replacement of more than 25 % of the elements, even if the replacement work is spread over several years.

Repair and maintenance costs are **immediately deductible** or, where the work is not annually recurring, may optionally be spread over 15 years. One-tenth allowances already begun before 2016 can be continued until expiration at the end of 10 years.

### 2.3. Factor: Renovation and Renewal Expense

Renovation and renewal expense increases the **rentable value** of the building or prolongs its **expected useful life**, but the expense does not require to be capitalized.

Renovation and renewal expenses typically include the replacement of

- windows and doors;
- roofing and roof timbers;
- stairs and interior walls and intermediate floors;
- underfloors (e.g., screeded floors replacing wooden);
- elevators and heating plants and furnaces;
- electricity, gas, water and heating fittings even if it represents a technological change;
- renewal of external plastering and thermal insulation as well as
- damp-proofing of walls.



## I. Real Estate in Private Ownership

If only some apartments or parts of the building are renovated in this way (less than 25 % of the total rental property), then the costs are generally treated as repair and maintenance.

For **residential property**, the allowance is spread over **15 years**.

For **commercial rental property and office property**, the entire allowance can be taken immediately, or it can be spread over 15 years where the expenses do not arise regularly every year. Allowances for costs of renovation and renewal must be reduced by the value of any grants received. One-tenth allowances already begun before 2016 must be extended to 15 years, beginning as of the tax year 2016.

In addition, it is optional to spread the following expenses, upon application, evenly and voluntarily over 15 years:

- repair and maintenance expense not incurred regularly every year;
- allowances for extraordinary wear and tear and other relating expenses; and
- extraordinary expenses not constituting repair and maintenance, renovation and renewal, or costs of construction.

Here, too, this period is extended to 15 years. This can often avoid creating a loss unusable for tax purposes which cannot be carried forward in case of income from rent and lease.

**TIP:** Repair and maintenance expenses incurred near the time of acquisition do not have to be capitalized but can – depending on circumstances – in tax authorities' opinion be expensed immediately, or be spread as renovation and renewal expense over 15 years.

To the extent that these expenses constitute construction costs an accelerated depreciation over 15 years can be requested provided the other requirements are met.

### 3. Grants and Their Consequences

Grants from public funds reduce the basis of calculation for depreciation and allowable expenses, and should therefore not be included as taxable income.

### 4. Which Business Expenses are Deductible?

The following business expenses are relevant in the area of real estate:

In the year of payment, expenses which are immediately allowable include:

- interest and incidental finance costs on borrowings used to finance the property (but not capital repayments);
- costs of tax and legal services, except where they form part of costs of acquisition or construction;
- operating costs (e.g., insurance, chimney sweeping, water, rubbish collection, janitor, property tax, property management fees); these can optionally be treated as transitory items – like operating expenses collected;
- agents' fees, to the extent that they relate to letting.

**TIP:** Payments in advance for the costs of consultancy services, sureties, finance, guarantees, rentals, trustee, agency and brokerage services, selling and administration services must be spread over the period to which they relate unless they relate only to the current year **and the next following year**.

Judicature currently only permits a very limited immediate deduction of business expenses when purchasing an apartment.

A simplification is permissible, so that for bed and breakfast rental income and income from the renting of apartments without services an estimated flat rate deduction for expenses is allowable (exception: long-term rental or lease of apartments). The allowance is 30 % of the income for rooms, and 10 % for apartments (not including VAT and spa tax). For details see margin number 5435 et seq. of Income Tax Guidelines 2000.

Concerning the demolition costs of a building reference, is made to item III/13.

## 5. Personal Use

If a rental property is partly used for private purposes, then in calculating the taxable net income the proportion of costs relating to personal use must be left out of account. Depreciation can only be taken on the parts that are rented, and only that proportion of the running costs is deductible.

There are **special provisions** for co-owned properties: the tax authorities are particularly concerned to ensure that there is no abuse of the Austrian Tax Code (BAO). The recognition of an arms'-length rental contract is only permitted in exceptional cases. Where the users are completely identical with the co-owners (considering also related persons), tax authorities will definitely question the property's nature as source of income. Also, renting to persons entitled to alimention is not recognized by tax authorities.

## I. Real Estate in Private Ownership

### 6. Personal Use of Previously Rented Property

Where a previously rented property is transferred to exclusive personal use, the 1/15 allowance in respect of **repair and maintenance and renovation and renewal expenses** continues to be available since they are actually tax-allowable expenses of the past. However, the balance of unutilized accelerated allowances in respect of construction costs is no longer available (for VAT position see Chapter II).

### 7. Depreciation in Case of First-time Rental

For first-time rental, effective April 1, 2012 the following provisions apply:

- For old cases (see item 8.) the notional acquisition costs of the asset at the time of first-time rental may be used as calculation basis of tax depreciation.
- Where the property was formerly used as a source of other income, other rules are applicable (see EStR 2000, margin no. 6433 et seqq).
- Where the property is acquired gratuitously, in considering whether a first-time rental exists, the predecessor in title is as a general rule also taken into account, so that, as a rule, the person acquiring gratuitously is required to continue to apply the (lower) depreciation allowances (AfA).

**TIP:** In the Finance Ministry's view, however, for old cases there is no objection to basing the (higher) AfA allowance on the notional cost of acquisition at the time of first use where **a period of more than 10 years** has elapsed between the termination of a lease by the predecessor in title and the start of a lease by the tax-payer.

It is deemed equivalent to termination by the predecessor in title if the taxpayer in the process of acquiring a property gratuitously gives notice of termination of a lease granted by a predecessor in title. Notice of termination is considered to have taken place in the process of acquisition gratuitously where notice is given within three months following transfer of the inheritance or acceptance of the gift. (The transfer of the inheritance takes place when the heir assumes the rights and obligations of the testator.)

In future, however, this provision (depreciation based on notional acquisition costs) is also subject to a split computation of the gain on the sale:

- A property income tax of effectively 4.2% is charged on the underlying notional acquisition costs – hence the “fictional” contribution value – which means that the flat rate taxation of “old cases” applies.

- For the proportion of the gain on the sale arising after commencement of the renting activity (silent reserves exceeding the “contribution value”), the property income tax is basically 30%.

### 8. What is Important in the Sale of Properties

Effective April 1, 2012 taxation of the sale of personal properties was changed completely. The speculation period in effect up to March 31, 2012 was eliminated without replacement. Now, principally, the sale of properties is subject to property income tax – ImmoEST of 30% now, in addition, it must be examined if a so-called “old case” or “new case” is at hand.

#### 8.1. Old Case

If property was not taxable on March 31, 2012, due to expiration of the 10 years' or 15 years' speculative period, an old case is at hand. This means, property belonging to private assets for tax purposes was acquired by natural persons, as a general rule, before March 31, 2002, or in exceptional cases before March 31, 1997. Properties acquired after these dates are considered new cases.

For new cases the surplus or the gain (see item 8.3.), resp., on the sale after deduction of the relating expenses is subject to a fixed 30% self-calculated property income tax so-called ImmoEST).

**TIP:** For old cases – for which no rededication was made after December 31, 1987 – the proceeds from the sale can be reduced by 86% as notional acquisition costs. As of 2016, the remaining gain is subject to a 30% property income tax which, in effect, amounts to **4.2% of the proceeds**.

If, however, in an old case a **rededication** was made after December 31, 1987, the proceeds from the sale may only be reduced by a flat rate 40% allowance, meaning that 60% of the proceeds are taxed at 30%. The property income tax, therefore, effectively amounts to **18% of the selling price received**. Since 2014, rededications have also been relevant to the seller if they are carried out by the acquirer after the sale.

**TIP:** In both cases the taxable excess can also be computed using the general rules (in case this is more favorable; for computation see item 8.3.).

As a general rule, **rededications are relevant for tax purposes** if they permit the first-time “typical” construction of a building on a piece of land.

## I. Real Estate in Private Ownership

This includes special dedications, e.g. for the construction of shopping centers. It is, however, irrelevant if, in spite of the dedication as building land, construction is impossible due to regional planning measures. A rededication is also irrelevant for tax purposes if it concerns only the dedications category, e.g. if a mixed use area is dedicated as residential zone.

The period is computed day-by-day on the basis of the date of the obligatory transaction. Where the sold property was acquired gratuitously, the ownership periods of the seller and his predecessor in title are added together. Here, the latest non-gratuitous acquisition is the starting point for computing the period. This date, therefore, is also used for the categorization as old case or new case.

In case an application for regular taxation at the normal rate is made, all expenses and cost of the sale can be considered as of the 2016 tax assessment.

### 8.2. Significant Exemptions

- **Principal place of residence:** Owner-occupied houses and apartments (both within the meaning of section 18 Income Tax Act 1988) can be disposed of tax-free provided they have been the seller's principal place of residence both since being acquired for consideration and for at least two years, and in the course of the sale the principal place of residence is abandoned. As at April 1, 2012, this provision applies only where the property was acquired for consideration; it does not apply – as formerly in exceptional cases – where the property was acquired by inheritance or as gift.

Since April 1, 2012 the tax exemption for the principal place of residence can be claimed also in cases where the house or apartment was used as principal place of residence for a minimum period of five years running within the last 10 years (important e.g. for separations of married couples and subsequent sale of the property). According to Administrative High Court judicature this also applies where the principal place of residence was originally used under a rental contract and the property is only acquired at a later time.

- **Buildings built by owner** (major owner / developer): When buildings constructed by the owner are disposed of, the gain on the disposal of the building is tax-free, but not the portion of any speculative gains relating to land. As of April 1, 2012 this applies, however, only where the building was not used for income generating purposes within the last 10 years. In the Finance Ministry's opinion, the treatment of the building as owner-constructed cannot be transferred to the legal successor, therefore the tax exemption only applies to the actual constructor.

- The tax authorities and the courts are of the opinion that the exemption for buildings constructed by owners does not apply to parts of existing buildings (e.g., loft conversions), nor to major renovations.
- **Administrative interference:** If assets are disposed of as a result of administrative interference, or to forestall interference that is demonstrably to be expected in the immediate future, any gain is tax free.
- In addition, an exemption was added concerning **swaps of properties** in connection with land combination or land consolidation **proceedings**.

### 8.3. Calculation of Income

Taxable income from disposition of private property is calculated as follows:

Disposal proceeds
<ul style="list-style-type: none"> <li>- Acquisition costs</li> <li>- Construction costs</li> <li>- Renovation and renewal expense to the extent that the unutilized fifteenths of the allowance relate to the period subsequent to the disposal</li> <li>- Any amounts resulting from an input VAT adjustment according to section 12 para 10 VAT act</li> <li>- Costs of the self-computation</li> <li>+ Tax-exempt grants pursuant to section 28 para 6 Income Tax Act</li> <li>+ Any depreciations already deducted, including those used for computation of "special income"</li> </ul>
Income pursuant to section 30 para 4 Income Tax Act 1988

As of 2016, in addition to the costs of the self-computation, other disposal costs such as the costs of the estate agent and the contract preparation may be deducted **in the course of regular taxation**.

Interest on borrowed capital, expenses and operating expenses paid since acquisition / construction are therefore, according to tax authorities' opinion, basically deductible only where running lease and rent income is generated.

For private property, tax liability arises basically **at the point of collection**, so that for installments or annuities taxes must be paid partially or totally in calendar years subsequent to the disposal. This is an important element that should be taken into account for tax planning. Concerning annuities held as private assets it must be noted that such income is subject to the full progressive tax rate and is not taxed at the flat rate of 30%.



## I. Real Estate in Private Ownership

### 8.4. Subsequent Taxation of Accelerated Depreciation

The provisions for subsequent taxation of beneficial depreciations applicable earlier are as follows:

- **For new cases** a future separate taxation is completely omitted since the subsequent taxation of the beneficial depreciation is automatically included in the computation of the gain on the sale obviating a separate regulation.
- **For old cases** one-half of the beneficial depreciations claimed within the last 15 years before the sale must be added to the gain on the sale and also taxed at 30%.  
Due to the extended speculation period applicable earlier a new case is at hand if the property was acquired after March 31, 1997 and partial deductions of 1/15 or 1/10 were claimed.

### 8.5. How to Deal with Losses

Losses on private property disposals can only be netted against gains from disposals of properties upon application for assessment. In case of application for assessment not all disposals of properties during a calendar year have to be reported.

As of the tax assessment for 2016, 60% of the exceeding loss can be carried forward for 15 years and netted against future rental and leasing surpluses in the amount of 1/15 each year. Upon application, 60% of the exceeding loss do not have to be spread over 15 years but can be netted against (sufficient) income from rent and lease immediately in the year of loss.

### 8.6. Self-computation and Payment of Property Income Tax

Legal counsels (attorneys, notaries public) are obliged to self-compute and pay the property income tax. Before January 1, 2013 a voluntary self-computation was possible. The actual receipt of the purchase price is relevant for the tax liability. For details see Chapter IV.

### 8.7. Tax Free Rent Reserve Expired

The creation of new rent reserves or other tax-free amounts ceased to be possible as of fiscal year 1996. Existing amounts were required to be utilized in accordance with the provisions within 9 years, and by 31 December 1999 at the latest. For categorization as old or new case the set-off against rent reserve (possible earlier) must be examined.

### 8.8. Other Tax Implications of the Sale

In addition, the following aspects must be considered by all means:

- Input VAT adjustment or option of tax liability under section 6 (2) Value Added Tax Act (UStG) 1994 (see Chapter II). The buyer has to recheck if the option of tax liability continues to exist for all rental contracts without use of the apartment.
- Lapse of the unutilized balance of 1/15th allowances for renovation and renewal or construction costs.
- Unused 1/15 (1/10) allowances for maintenance can – in our opinion – continue to be claimed (contrary to prevailing opinion).
- Under certain preconditions, the negative outcomes above can be avoided by retaining a beneficial interest (see Chapter I, section 9.3).
- Repeated purchases and / or sales of real estate can constitute trading in property (for which, see Chapter III).
- Liability to property income tax of 30%.
- Subsequent taxation of utilized 1/10th and 1/15th allowances for “old cases”.

### 8.9. Business or Hobby?

The tax authorities' views on whether a business or hobby is at hand are regulated in the Hobby guidelines 2012.

Where the property is disposed of or the rental of the property ceases – whether by reason of gift or because the property is reserved for personal use – before the point where there is an overall taxable profit, the danger is that the tax authorities will refuse to recognize the rental as a source of taxable income at all. Under the provisions of the Hobby Regulation (Liebhäberegulierung), in order for income from renting and leasing property to be recognized as a source of taxable income there must be an overall profit within a maximum period of 20 or 25 years:

- The maximum permitted period is 20 years for the rental of apartments and single and double family homes, etc. (small-scale rental).
- The maximum permitted period is 25 years for the rental of apartment blocks, warehouses, office and business buildings, etc. (large-scale rental).

An additional 3 years are available from the time when the first costs of the business were incurred to the time of first rental, where the property had first to be erected or renovated.

As a rule, the fact that no hobby is at hand must be demonstrated to the fiscal authorities by a forecast computation.

## I. Real Estate in Private Ownership

**TIP:** In such case the effective taxable result is specifically adapted in two essential points. On the one hand the favorable 1/15 depreciation must be recalculated to a normal depreciation, on the other hand, if legal restrictions on income exist, market-based rents can be used instead of actual rents.

### 8.10. Compensation for the Implementation of Servitudes

Since the tax treatment of compensations in connection with the implementation of servitudes (e.g. high voltage powerlines) is not unambiguous and difficult to qualify, the legislator plans to introduce a 10 % flat rate withholding tax for such compensation as of January 1, 2019. Of course even in such cases an actual assessment will be possible should the tax-free components of such compensation be preponderant.

## 9. Gift of Properties

The gift of a property frequently also has tax consequences. A disposal may also constitute a gift for the purposes of income tax where the property is sold for much less than market value (e.g., within a family).

Conversely, a gift under civil law may be considered as a sale for income tax purposes if, e.g., high liabilities are transferred in the deal.

### 9.1. Consequences of Transfers for Donor

No possibility to continue the unused 1/15 allowances for prior construction cost and renovation and renewal expense.

Unused 1/15 (1/10) allowances for maintenance can however in our opinion continue to be claimed by the donor – contrary to the view of the tax authorities. Input VAT adjustment or option of tax liability under section 6 (2) VAT Act 1994 (see Chapter II, section 8).

### 9.2. Consequences of Transfers for Donee

- Carryover of accelerated depreciation of construction costs, with the liability to subsequent taxation for old cases when donee sells the property.
- Carryover of the unused balances of accelerated depreciation of renovation and renewal costs incurred by donor.
- Carryover of unused allowances for maintenance (tax authorities' view).
- Depreciation of notional acquisition costs in case of first letting for old cases. In other cases the donor's depreciation must be continued.

- Where the donor elects for tax liability under section 6 (2) VAT Act 1994, the right to deduct input VAT provided the property continues to be let and the rental is VATable (see Chapter II, section 8). The option of tax liability for rentals must be rechecked since tax authorities assume NEW landlord-tenant relationships.
- Carryover of the donor's speculation period, hence the qualification as old case or new case.
- As of January 1, 2016 gratuitous transfers are subject to real estate transfer tax at the following staggered amounts, with the taxation base being the property value (determined by using a flat rate method, the real estate price table or expert opinion):
  - the first EUR 250,000 at 0.5 %,
  - the next EUR 150,000 at 2 %,
  - and amounts exceeding EUR 400,000 are subject to 3.5 % real estate transfer tax.
- Provisions on counting up with previous gifts must be observed.
- Real estate transfer tax, registration fees and other incidental expenses are not deductible for income tax purposes.

### 9.3. Gifts with Retention of Beneficial Interest

In order for the donor to avoid the often negative tax consequences of the donation of property, there is the possibility of donation with retention of beneficial interest (effectively, the income).

#### Advantages:

- The donor can continue to deduct (1/10 and) 1/15 allowances.
- No input VAT adjustment necessary.
- The nature of the property concerning VAT treatment remains unchanged since the business identity is maintained.

#### Disadvantages:

- The income is treated as income of the original owner (no avoidance of higher rates of taxation because no effect of "splitting the income").
- Possibly, lapse of existing allowances on the property (professional advice recommended).
- Duty potentially payable on written agreement for retention of beneficial interest for consideration.
- As from January 1, 2016 gratuitous transfers are subject to real estate transfer tax at the following staggered amounts, with the taxation base being the property value (see above): the first EUR 250,000 at 0.5 %, the next EUR 150,000 at 2 %, and amounts exceeding EUR 400,000 are subject to 3.5 % real estate transfer tax.
- Based on recent Administrative High Court judicature additional requirements for the formulation of agreements on retention of beneficial interest exist, causing, at present, a certain amount of legal uncertainty.

## I. Real Estate in Private Ownership

### 10. Tax Consequences in Case of Transfer by Way of Inheritance

Tax consequences for the heir or legatee:

- The deceased's depreciation allowances and (1/10<sup>th</sup> or) 1/15<sup>th</sup> continue to be available.
- No adjustment of input VAT with respect to the deceased. However, the heir or legatee has to recheck the option of tax liability since the Finance Ministry assumes NEW rentals.
- For purposes of categorization as old case or new case the latest acquisition for consideration for tax purposes by the donor or his predecessor in title is used.
- As from January 1, 2016 gratuitous transfers are subject to real estate transfer tax at the following staggered amounts, with the taxation base being the property value (see above): the first EUR 250,000 at 0.5 %, the next EUR 150,000 at 2 %, and amounts exceeding EUR 400,000 are subject to 3.5 % real estate transfer tax.

## II. VAT

This Chapter summarizes the fundamentals of the treatment of real estate for the purposes of VAT:

### 1. What Small Businesses Need to Consider

Small businesses with net revenues not exceeding EUR 30,000 annually are subject to the following provisions:

- Exemption from VAT – 0 % output VAT
- Rent charged without the addition of output VAT – 0 % output VAT
- No possibility of deducting input VAT
- Option of electing for taxation on the standard basis.

A VAT declaration must only be submitted by a small business if revenues exceed EUR 30,000 a year. Until the end of 2016, the small business rule did not apply to foreign lessors/businesses. Now the Finance Ministry has clarified that the question of principal place of residence or whether the business is domiciled in Austria is no longer decisive for the application of the small business rule for foreign lessors/businesses. As of January 1, 2017, where a business domiciled in a foreign country receives income from letting of property located in Austria, its revenues are, however, only tax-free if the business is operated in Austria. For qualifying as domestic business operation it is insufficient to have the property managed by a domestic property management firm. In computing the revenues limit, since January 1, 2017 ancillary transactions including sale of the business and certain tax-free revenues (e.g. services of condominium cooperatives or VAT-free professional services) do not have to be counted in.

### 2. Which Tax Rates Apply?

#### 2.1. Nature of Supply

Depending on the nature of the service the following tax rates apply.

Rental for other purposes (offices, commercial premises) (option available under section 6(2) VAT Act 1994; see also section 2.2.)	0%**) / 20%
Rental of land for residential purpose (excepting personal use)	10%
Rental of business facilities, etc.	20%
Provision of furnished accommodation, etc.	13% / 10%***)
Rental of garages and parking space	20% *)
Rental of land for camping purposes	13% / 10%***)
Various services supplied by condominium cooperatives to residential parts of the property	10%
Provision of heating, also as an ancillary service	20%
Rental to diplomats (zero-rated if confirmed by Austrian Foreign Ministry)	0%

\*) See item 7.3.      \*\*) Rental and leasing of building rights is also tax-exempt.

\*\*\*) After November 1, 2018, revenues will (again) be taxed at 10 %.

## II. VAT

In order to claim the zero rating for rental to diplomats, the tenant (diplomat) must provide to the lessor a confirmation of the Austrian Ministry for European and International Affairs (U 46 – Application for tax exemption in connection with rental of property).

Effective on May 1, 2016, the reduced tax rate of 10% for accommodations (hotel overnight stays etc.) and for rental of land for camping purposes was increased to 13%. The draft proposal to reduce the tax rate for accommodations and for rental of land for camping purposes again to 10% was voted in on April 5, 2018 by the Federal Council and will become effective on November 1, 2018.

**TIP:** The reduced tax rate of 10% for rental of residential rooms is not affected by the increase. Likewise, the tax rate of 10% will continue to apply for student homes.

### 2.2. VAT Exemption

Effective September 1, 2012, the option for the 20% value added tax liability for the lease of business premises is only permitted to the extent that the recipient of the service uses the property nearly exclusively to generate revenues that do not exclude the deduction of input VAT (95% limit). This condition must be demonstrated; the proof is not bound to any specific form.

This new rule applies to:

- property whose actual use started after August 31, 2012; and to
- condominium ownership acquired after August 31, 2012.

Exceptions:

- Rent and lease contracts that started before September 1, 2012;
- Constructor's privilege: where construction of the building (groundbreaking) by the lessor started before September 1, 2012; transferring the property, however, leads, in the Finance Ministry's opinion, to loss of the privilege;
- Exceptions also apply for rental to recipients of grants pursuant to GSBG (hospitals and medical institutions, social insurance carriers, homes for the aged, handicapped persons and nursing homes).

### 2.3. Tax base – Standard Value

Where objects are sold at attractive prices for external (non-business) motifs, in certain cases an arms'-length price, the so-called standard value, must be used as VAT basis nevertheless. Examples for such motifs are familial and friendship relationships, relations in connection with corporation law or employee relations.

The standard value is the total amount the recipient of goods or other services would have to pay to an independent supplier in order to obtain the goods or other services under conditions of free competition. As a rule, the standard value corresponds to the direct reference price (if unavailable: the fair value), to the fringe benefit value in case of donations to employees, or to the arms'-length transfer price in case of trans-border transactions.

As of January 1, 2016 the standard value must also be used as VAT basis for property supplies and for property rent and lease by the business for purposes external to the business, or for employees' requirements.

**TIP:** However, the standard value can only be used if the consideration is higher or lower than the standard value and if the business (or, in case of too low a consideration, also the recipient) is not entitled to a full or partial input VAT refund.

### 2.4. Definition of Real Estate

As of January 1, 2017 the definition of real estate for the entire application scope of the VAT Act was adapted to the real estate definition used by the European Union (since there are significant civil law differences within the EU, for purposes of harmonization a separate definition was created in the EU). This results, among others, in changes concerning the tax exemption for the supply of properties.

According to the new definition of real estate, **buildings** and structures come under the definition of "real estate" if they are attached to or in the ground – above or below sea level – and cannot be easily dismantled or moved. The same applies to buildings on land not owned. Inseparable connection of the building or structure to the ground is not required but it must be examined if the installation can be easily (without effort and considerable expenses) removed for immobilization.

**TIP:** Henceforth, e.g. prefabricated houses, kiosks, selling stalls, boats or mobile homes can be considered as real estate as long as they are immobilized and cannot be removed easily.

The term "structure" also comprises other "constructions" which are usually not considered as buildings, e. g. roads, railway lines, bridges, airports, harbors, dykes, gas pipelines, water and sewage systems as well as industrial plants such as power plants, wind turbines, refineries.

Therefore, changes can occur specifically for certain **operating equipment** which are now comprised by the real estate definition.

## II. VAT

### 2.5. Short-term Rental

As of January 1, 2017 short-term rental (not exceeding 14 days) of real estate is necessarily subject to VAT if the business otherwise uses the real estate exclusively for generating revenues not precluding the deduction of input VAT, for short-term rental and/or to satisfy the requirement of accommodation.

Where the business also uses the real estate to generate revenues precluding the deduction of input VAT, the short-term rental is tax-exempt unless liability for tax is opted for.

Due to the change, businesses otherwise entitled to full deduction of input VAT do not have to distinguish whether the customer is entitled to (nearly complete) deduction of input VAT for this service. In addition, also the requirement to allocate the input VAT or the possible requirement to adjust input VAT resulting from, e.g. seminar rooms that were rented on a daily basis to persons not (nearly completely) entitled to deduction of input VAT does not apply.

### 2.6. Real Estate Services

As of January 1, 2017, also legal services (e.g. of lawyers, notaries) aimed at the change of the legal status of a certain piece of real estate are categorized as other services in connection with real estate in case they are rendered in connection with the transfer of real estate or with the justification or transfer of real estate rights in rem. It is irrelevant whether the underlying transaction is finally completed. Up to now only other services provided by notaries in documenting real estate purchase agreements were to be considered as real estate services.

## 3. Taxation of Actual Receipts and of Advance Payments

### 3.1. Scope of Application

For rental property in private ownership, VAT must be accounted for on the basis of when the income is received if the total rents from property not used for business purposes in either of the two preceding calendar years are not greater than EUR 110,000. What is therefore important is not the rent receivable, but when the rent is actually received. With rental payments received in advance and other payments on account, the output VAT must also be accounted for as of the time of receipt, except where the payment represents a genuine loan.

Persons with incomes from agriculture and forestry, and/or from trade pay taxes on a receipts basis if the business is not required to keep accounting records.

**TIP:** Businesses with income from professional activities always pay taxes on a receipts basis independent of the legal organization. Therefore, this also applies to a law firm.

### 3.2. Input VAT Deduction only after Payment

In case of taxation on a receipts basis, until December 31, 2012 input VAT deduction could be claimed basically at the time the service was provided and the invoice was issued. Effective January 1, 2013 input VAT deduction for services received by taxpayers on a receipts basis can basically be claimed **only at the time of payment** (subject to the existence of a proper invoice). Full payment of the services received is not required. This means that, e.g., in case of payment in instalments, input VAT deduction can be claimed proportionally for instalment payments made. In the case of transfer of the tax liability to the tax payer on a receipts basis the additional requirement of payment does not apply since in such cases the tax liability arises according to accrual basis principles.

**In the case of paying the input VAT via transfer on the tax accounts**, since August 15, 2015 taxpayers on a receipts basis and on an accrual basis are treated equally. The taxpayer on a receipts basis can transfer to the recipient the complete input VAT relating to the service provided.

In case of incomplete transfer the entrepreneur must correct the advance VAT return correspondingly because the input VAT deduction did not arise completely.

### 3.3. Exceptions for Large Businesses

This rule does not apply to

- utilities (gas, water, electricity and heating plants as well as waste disposal plants) and to
- those businesses taxed on a receipts basis (e.g. lawyers) whose revenues during the previous assessment period exceeded the limit of EUR 2 million (not including ancillary business).

Effective January 1, 2013, such businesses are obliged to claim input VAT deduction according to the general regulations.

## 4. Rental by Foreign Businesses

Even where the lessor does not have a business in Austria and where there is also no domestic permanent establishment, according to the Finance Ministry the tax liability is not transferred to the tenant if the property is rented to a domestic company entitled to deduct input VAT. To the extent the leasing relationship is subject to taxation, the



## II. VAT

foreign business is treated like a domestic business. Hence, like where the tenant is a private person renting for housing purposes, VAT must be shown and paid to the respective tax office.

**TIP:** Lessors not domiciled within the EU must appoint a domestic fiscal representative for purposes of VAT payment.

### 5. Input VAT on Services Supplied in Advance

Input VAT from purchased services is only deductible where the taxpayer uses the property to generate **VATable income**. Input VAT incurred before rental actually begins can be deducted immediately where the intention to generate taxable rental income can be demonstrated, or at least credibly be argued to be overwhelmingly probable.

Where property is sold, according to the Administrative High Court input VAT on services supplied in advance is **deductible immediately** when the future taxable property sale can be demonstrated or argued to be overwhelmingly probable.

### 6. VAT and Partial Private Use

Where property forming part of business assets is used by the business owner partly as a private dwelling, the personal use is an exempt supply for the purposes of VAT, and **input VAT** is only deductible for the portion of the property in business use. According to judicature this also applies to partners of partnerships but, as a rule, not to shareholders of corporations.

**Input VAT may need to be adjusted** if the part in private use was formerly used for business purposes. In subsequent years this may also lead to a positive input VAT adjustment in case a privately-used part is again used for business purposes later.

Also, with the provision of furnished accommodation and land for camping purposes, the part in private use is not taxable, and in all other cases of private use the normal 20% rate applies (e.g., private use of a parking space).

### 7. Special Cases of Input VAT Deduction

#### 7.1. Rental Pools

Input VAT on retirement property forming part of a rental pool is

deductible provided there is no break in the **business chain**. Where the purchaser of the retirement property is a business, the input VAT is deductible provided the rental of the property to the rental pool (rental consortium) by the business is VAT-able.

The Austrian Tax Code (BAO) stipulates that a **determination of the rental income** of rental pools is made by separate ruling.

#### 7.2. Co-ownership

The tax authorities are of the opinion that input VAT is deductible where the cooperative uses the building for business purposes.

Following the ECJ decision, in case of spouses individual co-owners are entitled to a proportional deduction even when the supply is invoiced to both partners. The amount deductible is the co-owner's proportionate share – this is of course dependent on the co-owner being a business, with VATable revenues.

#### 7.3. Condominium Cooperatives

Since January 1, 2016, the VAT treatment of vehicle parking places is equal to their lease (mandatorily taxed at 20%) which should lead to an administrative simplification.

In 2016 the Administrative High Court clarified that financing expenses (interest) have to be included in the taxation base of the condominium cooperative's servicees where such services are required for maintenance, administration or operation (e.g. renovation expense) of the condominium cooperative.

## 8. VAT in Case of Sale, Gift and Cessation

#### 8.1. Basics

Since the sale of property is fundamentally VAT exempt, its transfer inter vivos (sale, donation or cessation of rental activities) may lead to adjustment of input VAT previously deducted.

The adjustment relates to the input VAT on acquisition or construction costs and the costs of major repairs (renovation and major maintenance) deducted during the last 20 years.

Not only renting and leasing of building rights is tax-exempt but also the non-gratuitous transfer of a building right.

## II. VAT

### 8.2. One-tenth or One-twentieth Adjustment

In computing the adjustment 1/20 must be used annually (instead of 1/10 as earlier). This provision basically applies to NEW CASES, i.e.

- property initially used by the business as fixed asset after March 31, 2012, and
- condominiums (used for residential purposes!) for which the contract was closed after March 31, 2012 (even if the apartment was not yet finished and physically transferred at that time).

If, however, in “old cases” (rent agreement closed before April 1, 2012) a change of lessees takes place at a later time, the 20 years adjustment period also applies for the new rent agreement.

The total amount of VAT requiring to be adjusted is reduced by 1/10th or 1/20th for every year of use, beginning with the year following the first year of use.

### 8.3. Option for VAT Taxation

However, the seller also has the option of treating sales of property as liable to VAT and of invoicing the purchasers with 20 % VAT, provided this is agreed in the contracts. Where the seller – at the latest before the assessment becomes final – opts for tax liability, no input VAT adjustment is required, and the seller at the same time is entitled to deduct the input VAT. Election for tax liability can be made separately for each individual “property unit” (it is doubtful if this also applies to each individual room).

### 8.4. Minimum Adjustment Limit

As of January 1, 2017, the minimum adjustment limit was increased: The input VAT deduction does not have to be adjusted if the amount of adjustment for an item does not exceed EUR 60 for the calendar year.

Also, for real estate no adjustment is necessary if the relating input VAT does not exceed EUR 1,200 (using the twenty years' adjustment period). This applies, for example, to fixed asset items subject to the standard tax rate with acquisition cost of less than EUR 1,500 or, for land, EUR 6,000. Until December 31, 2016, input VAT for each item of EUR 220 forms the basis.

### 8.5. Date of Input VAT Deduction

It has now been clarified by the Austrian Administrative Court of Appeal that input VAT on services supplied in advance is not deductible only when the VATable transaction takes place, but can

be deducted immediately – provided that at the time the services are supplied the VATable sale is commercially more likely than not.

### 8.6. Gift of Real Estate and VAT

The option of electing for tax liability is also available where a property is made the subject of a gift. Unlike in the case of a sale, the calculation of VAT liability is based only on those parts of the property for which input VAT was claimed as a deduction (since 1972). According to the VAT Guidelines 2000 prepared by the Finance Ministry, this covers both construction costs, or parts thereof, and also major repairs. In any case, the value of the land should not however be subjected to VAT unless VAT was charged on the purchase. Where there is an invoice from the donor for the VAT (section 12 para 15 VAT Act), the new owner of the property can then deduct input VAT, assuming that the land is used to generate revenues liable to VAT.

### 8.7. Cessation of Business Activity

The cessation of rental activities entails the obligation to adjust input VAT on acquisition and construction costs and also on major repairs during the last 10/20 years.

### 8.8. Sale of Tenancy Rights

The sale of rights under rental or leasehold tenancies by tenants is liable to VAT at the reduced rate of 10% for buildings used for residential purposes, and at the standard rate of 0% or 20% as applicable, for buildings used for other purposes, or 13% in case of accommodation (until November 1, 2018, and 10% thereafter).

## 9. VAT in Case of Transfer Because of Death

Where a property is transferred because of death, no adjustment of input VAT is required, because in principle the new owner of the property inherits all the rights and duties of the previous owner, however, in the Finance Ministry's view the so-called constructor's privilege is lost. Also, in the Finance Administration's view, new rental contracts are assumed to exist.

## 10. Retention of Records

It should be noted that, under the provisions of the VAT Act of 1994 applicable until March 31, 2012, all documents and records relating to the ownership of property must be retained for at least 12 years following the end of the relevant calendar year.

## II. VAT

In connection with the new law and the extension of the adjustment period, also the retention period was changed. Effective on April 1, 2012 it is at least 22 years. Other regulations, particularly those of the Austrian Business Code (UGB), which in some instances prescribe longer retention periods, must also be observed.

### 11. VAT in Case of Construction Services

#### 11.1. Principles

On certain construction services, liability for VAT is shifted to the customer ("reverse charge"): this happens when a business provides construction services for another business

- which is in its turn commissioned to provide the services, or
- which is also in the business of providing such services.

#### 11.2. Businesses Commissioned to Provide Construction Services

For the tax charge to be reversed and shifted to the customer, the customer must be a

- business, and must be
- commissioned to supply the relevant construction services.

A production business which commissions a general contractor to put up a factory building for its operations is thus not affected by this new regulation, but the main contractor is liable for the reverse charges on the services supplied by subcontractors.

For the subcontractor to know that its customer has been commissioned to supply construction services, the main contractor is obliged to inform the subcontractor of this fact (e.g., in the form of written confirmation, or in the order).

#### 11.3. Businesses Normally Supplying Construction Services

Where construction services are supplied to a business which itself normally supplies construction services (i.e., a "typical construction contractor") liability for the tax is always shifted to the customer. The Ministry of Finance maintains a list of firms which count as "typical construction contractors".

**TIP:** This illustrative list is published as Annex 4 to the Austrian VAT Guidelines 2000, and consists largely of enterprises included in section F, subsection FA, Department 45 of Austrian NACE (ÖNACE) 1995. There is no reverse charge where the construction services supplied by the typical construction contractor constitute not more than 50 % of that contractor's revenues.

### 12. Provisions for Landlords and Property Managers

#### 12.1. Invoices – Principles

For a business to be able to deduct the input VAT on supplies by other businesses, the invoices for supplies must contain all the details required under section 11 VAT Act 1994:

##### Required invoice features

- Invoices **up to EUR 400.00 including VAT** (so-called "Invoices for small amounts"):
  1. The name and address of the supplier
  2. Quantity and customary description of the goods supplied, or nature and extent of the services
  3. Date of the supply or period of the services
  4. Consideration for the supply or the services (gross, including VAT)
  5. Applicable VAT rate
  6. The date of issue
- Invoices exceeding **EUR 400.00**, additionally:
  7. Name and address of the customer of the supply or service
  8. Consideration excluding VAT
  9. Amount of VAT charged on the consideration
  10. Where the supply is not liable to VAT, an indication to that effect<sup>2)</sup>
  11. The VAT Identification Number of the business supplying or performing the service<sup>1)</sup>
  12. A sequential number which does not have to be checked by the customer
- Additional requirements for invoices **exceeding EUR 10,000.00 (including VAT)**:
  13. The VAT Identification Number of the customer
- In addition, the following must be noted:
  14. For invoices issued in foreign currency, the amount of VAT must be shown in euros or, individual cases, the translation method must be described.
  15. Credit notes must be described as credit notes.
  16. Where differential taxation is used, this must be indicated, e.g. by describing the nature of items and by indicating the application of a special rule.

1) The indication of the VAT Identification Number on the invoice is only obligatory where the business provides supplies or other services for which input VAT is deducted.

2) It is not necessary but recommendable to give details of the relevant statutory provisions.

## II. VAT

### SAMPLE INVOICE

Musterfrau GmbH  
Musterfraustraße 13  
1030 Vienna

**INVOICE NUMBER: 12345**

For services described below we charge our fees as follows:

Services provided In the period 2018/05/01 to 2018/05/31

Consultancy, information, correspondence	EUR 10,000.00
plus 20 % VAT	EUR 2,000.00
<b>Total</b>	<b>EUR 12,000.00</b>

We thank you for using our services and ask to transfer the total amount – without deduction of bank charges – promptly to our account IBAN AT12 3456 7891 1234, BIC ABSDEFGH.

Our invoices are payable and actionable In Vienna.

Logo  
Mustermann GmbH

Vienna, 5 June 2018  
ATU87654321

**Mustermann GmbH**

1030 Vienna, Musterstraße 11, Tel.: +43 (1) 123 45-0, Fax: +43 (1) 123 45-500, E-Mail: office@mustermann.at  
www.mustermann.at, www.mustermann.com, FN 123456a HG Vienna, DVR 1234567, ATU12345678

The **issuance of an invoice is in any case obligatory** where services are supplied to businesses or legal persons, but also where services are provided to private persons / non-businesses in connection with real estate.

### Electronic Invoices

Electronic invoicing is also permitted under certain circumstances. Requirements for electronic transfer of invoices were simplified effective January 1, 2013. E.g., invoices can be transferred by email, email annex, web download, PDF or text message, scanned paper invoice or fax invoice provided the recipient of the service agrees to the respective way of invoicing.

Where electronic invoices are used, the genuineness of origination, the integrity of the contents, and the legibility (during the complete retention period) must be assured. These requirements are met in the following cases:

1. Existence of an operational control procedure guaranteeing a reliable comparison between invoice and underlying supply or service.
2. Issuance via FinanzOnline or the business service portal.
3. A qualified electronic signature on the invoice.
4. Transfer by use of an electronic data interchange (EDI).

In the case of invoices not addressed directly to the customer or the customer's authorized representative (e.g., building managing agents), it must be clear beyond doubt to whom the goods or services are being supplied (margin no. 1507 VAT Guidelines).

Effective July 1, 2016, for electronic signatures no longer the Digital Signatures Act but the Electronic Data Protection Decree (eIDAS-VO) applies (EU Decree on Electronic Identification and Trust Services for Electronic Transaction in the Single European Market).

### 12.2. Numbering of Rent Demands

Where **demands** with respect to rent or services are based on continuing obligations in the form of rental or leasing agreements, or contracts for maintenance or similar services, it is possible, in the Finance Ministry's view, to issue an invoice in advance.

These invoices can specify the period to which they relate with a note at the **beginning of the period** to the effect that the rent demand (= invoice in advance) is valid until the issue of a new rent demand, at most, however, to the end of the rental contract.

If there is a subsequent change in the amount of the rent, for example as the result of an index adjustment, a new invoice in advance, with full details required by law, is to be issued. The requirement for invoices to be sequentially numbered is not more specifically defined in the legislation. The managing agent can therefore number the invoices in advance using a separate sequential series for each house, or for each individual rented or freehold property.

According to current judicature, these permanent invoices/advance invoices, too, must contain **all required features** according to the VAT Act 1994. Individual invoice details such as, e.g. the service period, can be contained in other documents (like payment documents or contracts) on condition that reference is made to them on the invoice.

## II. VAT

### 13. VAT Registration Numbers Verification Procedure

The existing Stage 1 verification procedure using FinanzOnline for the verification of VAT registration numbers is supplemented by a more detailed Stage 2 procedure.

#### Two-stage Verification Procedure

**Stage 1:** Confirmation of the validity of the VAT identification number without reference to a particular VAT registered business.

**Stage 2:** Confirmation of the validity of the VAT identification number for a particular business (name or company name) at a particular address.

The supplier's VAT registration number is a **necessary component of a proper** invoice for domestic supplies, and is hence essential for input VAT to be deductible.

When required by the tax authorities, a business must be prepared to **demonstrate using the Stage 2 verification procedure** on what basis it assumed that a business partner was a VAT registered business.

**TIP:** The business receiving the service must examine the VAT identification number of the supplier of goods or services indicated on purchase invoices for substantial correctness using Stage 2.

If during an audit by the fiscal authorities it is found that the VAT identification number indicated on the invoice is wrong (i.e. the VAT identification number is invalid or does not conform with the issuer of the invoice), it must be assumed that in future the deduction of VAT of such invoices will not be accepted by fiscal authorities due to such deficiency. However, under special circumstances the deduction of input VAT is not necessarily lost.

### EXCURSUS

#### 14. Liability for Social Insurance Contributions and Payroll-related Taxes of Subcontractors

In case an enterprise outsources building services to another enterprise, the outsourcing enterprise is, in principle, liable for unpaid contributions of the enterprise performing the services (subcontractor) up to 25 % of the invoiced services. The outsourcing enterprise can avoid liability in two cases.

- The outsourcing enterprise withholds 25 % of the fee for contract labor from the invoiced services and transfers this amount to the Vienna Regional Social Insurance Authority (WGKK).
- The subcontractor, at the time of performing the outsourced services, is listed on a comprehensive list of liability-exempt enterprises maintained by WGKK as service center (HFU comprehensive list). Enterprises can apply for inclusion in this list. In order to be listed the enterprise must have paid all social insurance contributions due up to the second preceding calendar month before the application, and (!) must have provided building services for at least 3 years previously (exemptions are possible).

See also our brochure "Tax Service 2018", page 32.



### III. Real Estate Forming Part of Business Assets

The following statements relate specifically to the tax treatment of property forming part of business assets, specifically of

- natural persons (sole proprietorships);
- partnerships operating businesses (taxable partnerships) whose partners are natural persons;
- corporations, especially incorporated enterprises.

Properties owned by businesses have been included in the system of the new property income taxation (straight-line flat tax on property income, "Immo-ESt") since April 1, 2012. Effective January 1, 2016, the tax rate is 30% for disposals of real estate forming part of business assets, for limited liability companies/joint stock corporations and foundations the tax rate remains at 25%.

For natural persons, the effective tax burden for so-called old cases is 4.2% (or 18% in case of rededications, resp.).

#### 1. Calculation of Profits

For business income, calculation of profits requires the preparation of financial statements on an accruals basis or – where the conditions are satisfied – of receipts and payments statements on a cash basis. The differences in profit calculation concerning taxation of property have been largely eliminated after April 1, 2012.

Pursuant to the Austrian Business Code (UGB) the following **thresholds for accrual basis financial statements** apply:

- Where a commercial sole proprietorship or partnership is obliged by section 189 UGB to prepare financial statements (where annual sales are more than EUR 700,000 in two successive years, or more than EUR 1,000,000 in one year), it is mandatory for its profit to be calculated in accordance with section 5 Income Tax Act 1988.
- Commercial businesses not required to prepare financial statements on an accrual basis, with sales below the thresholds (annual sales less than EUR 700,000 in two successive years, or in one year less than EUR 350,000, as the result of disposal of the business, or a part of it), can opt to calculate profits under section 5 (1) Income Tax Act 1988.
- Business partnerships where no natural person is an unlimited partner (e.g. a limited partnership where a limited liability company is the unlimited partner – "GmbH & Co KG", "Verein & Co KG", so-called hidden corporations) as well as business partnerships whose partners consist exclusively of limited liability companies, are always required to prepare accrual basis financial statements pursuant to the Austrian Business Code and income tax legislation. A new commercial

GmbH & Co KG must prepare financial statements from the beginning, there is no growing into it.

**TIP:** Advantages of calculating profit according to section 5 para 1 Income Tax Act 1988 are:

- A deviating fiscal year can be chosen.
- The company may opt to treat assets as recognized business assets (to be understood as assets constituting neither necessary business assets nor private property but dedicated as business assets such as real property used for generating rental income).

Change of Method of Calculating Profit (since April 1, 2012)		
Effects on real estate	to Section 5 Income Tax Act	from Section 5 Income Tax Act
	In principle no effect on existing business property (no profit realization assumed); Contribution of real property to recognized business assets is possible.  In case of disposal, taxation at a special rate (30 %), flat-rate profit calculation (4.2%/18 %) possible for old property or for old appreciation amounts.	In principle no effect on business property, except for property previously belonging to recognized business assets: <ul style="list-style-type: none"> <li>■ Taxable withdrawal of buildings</li> <li>■ As a rule, land can be withdrawn at book value</li> <li>■ In case of disposal, taxation at a special rate (30 %), no flat-rate profit calculation possible</li> </ul>

Table: Consequences of Change of Method of Calculating Profit since April 1, 2012.

For further questions concerning financial statement preparation see our booklet "Geschäftsführer und Jahresabschluss".

#### 2. Taxation of Disposal Gains

In case of disposal of business real estate or also in case of withdrawal of business real estate into private assets, as a rule land, on the one hand, has to be distinguished from the building on the other hand.

Effective April 1, 2012, the same applies to a large extent to **disposals of business land** as to private real estate, meaning

- Basically, the 30% special tax rate is applied. Deduction of operating expenses is restricted, however, the cost of self-computation (including reporting and payment) of the notary as well as any reductions resulting from input VAT adjustments are deductible.
- In case land was not subject to tax pursuant to the "old tax regime" as of March 31, 2012 (i.e. after expiration of the former 10 to 15 years' speculation period and not being part of business assets), the 4.2% or 18% flat tax rate on the revenue can be applied. In this case, however, the self-computation cost of the notary and – in the Finance Ministry's opinion – the reductions resulting from input VAT adjustments are not deductible.

### III. Real Estate Forming Part of Business Assets

For **taxation of building dispositions**, effective April 1, 2012, uniformly not the standard tax rate of up to 50 % or 55 %, resp., applies but the 30 % special rate (with exceptions).

Here the taxation base is the "revenue minus taxable residual value"; also in case of "old buildings" there is NO possibility of flat-rate taxation. Apart from this, the general profit calculation provisions continue to apply, however with restricted deductibility of operating expenses in case the special tax rate – without flat-rate taxation – is actually applied. Therefore, expenses such as cost of contract preparation, intermediary's cost, valuation expenses or consultancy, are not deductible.

**TIP:** Effective January 1, 2016 an unrestricted reduction of operating expenses is possible where an application for regular taxation with a progressive tax rate is made.

Where parts of real estate are ceded to municipalities without consideration, the acquisition costs of the remaining portion are increased. Possible compensations for land consolidation are now income tax-exempt.

For **businesses computing their profit pursuant to section 5 Income Tax Act**, the following applies:

In principle, profit is computed the regular way. i.e. even incidental acquisition costs must be capitalized and will reduce the taxable gain on disposal at a later time.

Deduction of operating expenses is restricted where the special tax rate of 30 % is actually applied (see above).

**TIP:** No restriction applies where the progressive regular tax rate must be used, hence, e.g. for commercial real estate traders (see items 6 and 7).

In case a change in the profit computation method was made until March 31, 2012, an appreciation amount for real estate must be recognized and taxed at 30 %.

**TIP:** For "old real estate" taxation at the flat rate of 4.2 % or 18 % of the proceeds is available optionally.

	Section 4 para 1 and Section 4 para 3		Section 5	
	Disposal	Withdrawal	Disposal	Withdrawal
<b>Land held as fixed asset</b>	Taxable  Tax rate: 30 % or flat rate of 4.2 %/18 % of proceeds for old land (no flat-rate taxation possible for "land reserve")  Alternatively: regular taxation	Tax-exempt  Subsequent taxation of "land reserve" at 30 % – no flat-rate taxation	Taxable  Tax rate: 30 % (and, possibly, flat-rate taxation of contribution at fair value)  Alternatively: regular taxation	Tax-exempt
<b>Building held as fixed asset</b>	Taxable  Tax rate: 30 % or regular taxation	Taxable  Tax rate: 30 % or regular taxation	Taxable  Tax rate: 30 % or regular taxation	Taxable  Tax rate: 30 % or regular taxation

Table: Simplified presentation of the taxation of real estate held as business assets of natural persons for 2018.

**Certain "compulsory profits"** are tax-exempt both for private property and for commercial property:

- Compensation of impairments in the public interest:  
If value losses for land due to measures taken in the public interest are compensated, such payments are tax-exempt (e.g. cross-over by an electric power line, construction of a sewer); in addition, the book value can remain unreduced.
- Intervention of authorities:  
Gains on disposal of land, as defined by tax law, caused by intervention of authorities or for the purpose of avoiding such intervention which can be demonstrated to be immediately impending are also tax-exempt.
- Land swaps as defined by the Land Consolidation Principles Act:  
Land swaps in connection with land consolidation procedures pursuant to the Land Consolidation Principles Act of 1951 are tax-exempt. Land acquired in such procedures replaces the land for which it is swapped for tax purposes (this applies specifically to book values and acquisition dates).

**TIP:** These tax exemptions also apply to corporations, especially to stock corporations and limited liability companies.

### 3. Rules for Payment of the Property Gains Tax

In principle, the property gains tax is also self-computed by the notary for commercial property disposals pursuant to tax law (see Chapter I item 8.6 above). In particular, exemptions apply specifically

- where the fixed 30 % tax rate does not have to be used for the whole tax base (see item 6 below),

### III. Real Estate Forming Part of Business Assets

- for the disposal of land by tax subjects pursuant to section 7 para 3 Corporation Income Tax Act (specifically corporations),
- for private foundations (see Chapter V) or
- where no tax liability exists.

Contrary to private land disposals, the collection of property gains tax on the occasion of disposal of land held as commercial asset has **no “final taxation effect”**. Therefore, the disposal must be included in the tax return, the property gains tax paid is netted against the tax liability or credited to the tax account if it is higher than the liability.

If the property gains tax is not paid, the taxpayer must – just like the private seller (for details, see there) – make a **special advance payment** of 30 %, rounded off to the nearest euro.

**TIP:** Be sure to make this special advance payment on time to avoid the respective consequence of delay.

#### 4. Taxation of Corporations

Since domestic corporations must prepare financial statements pursuant to the Business Code (UGB) and to section 5 Income Tax Act on account of their legal organization, property is carried as commercial asset (however, extremely rare exemptions may apply for hobby property).

**TIP:** The property gains tax is not applicable, for payment purposes, to corporations pursuant to section 7 para 3 Corporation Income Tax, specifically to stock corporations and limited liability companies, since they are subject to the 25 % corporation income tax for the totality of their profits. In such case, the notary does not have to perform a self-computation of property gains tax, and no special advance payment will have to be made; the sale must be declared (only) in the corporation income tax return of the respective year.

Concerning the question of possible tax exemptions see item 2.

Concerning the question of the optimal legal organization see our leaflet “Steuersparen mit der richtigen Rechtsform.”

#### 5. Taxation of Foreign Business Investors

For foreign corporations subject to limited taxation which are comparable to domestic corporations pursuant to section 7 para 3 Corporation Income Tax, the disposal / realization of domestic land

(including land not held in a permanent establishment) is fully taxable as “notional” disposal of business assets.

**TIP:** For **old cases**, a taxation rate of 3.5 % of the proceeds (15 % in case of rededications after December 31, 1987) applies, for new cases a limited taxation of 25 % applies (see also item 4).

#### 6. Exclusion from the 30 % Property Gains Tax

In the following cases, the special tax rate of 30 % **does not apply**, therefore, the regular income tax of up to 55 %, with full deductibility of all applicable business expenses, applies:

- For property held as current assets (e.g. for commercial property dealers as sole proprietorships or partnerships); for hidden reserves dating back to the time before contribution to the company, however, the special tax rate of 30 % remains applicable;
- for companies with a focus on **letting and (!) disposal** of land (e.g. for commercial property developers, but not for mere accommodation business like hotels); for hidden reserves dating back to the time before contribution to the company, however, the special tax rate of 30 % remains applicable;
- to the extent the tax book value was reduced by a depreciation to fair value before April 1, 2012; or
- to the extent of the transfer of hidden reserves disclosed before April 1, 2012.

#### 7. Restrictions for Commercial Property Trade

Up to now it was possible to **trade in property commercially in the form of small business** without accounting obligation, hence computing profits using cash-basis accounting pursuant to section 4 para 3 Income Tax Act of 1988. Here the acquisition of land could be claimed immediately as deductible expense under certain conditions. Resulting losses were either netted against other income or carried forward.

This is no longer possible for property acquisitions and constructions classified as current assets effective as of April 1, 2012. Acquisition or construction costs or the contribution value of land held as current asset by a business using cash-basis accounting for tax purposes will, in future, only be tax-deductible **on the occasion of the withdrawal or sale** of the asset.

To the extent that the land was contributed to the commercial property dealing business at market value, the difference between

### III. Real Estate Forming Part of Business Assets

the market value and the lower acquisition or construction costs must be taxed at the time of disposal using the special tax rate.

**TIP:** To the extent “old property” is involved, also the 4.2% or 18%, resp., flat-rate taxation (applicable to natural persons) (in this case based on the market value at the time of contribution!) is possible. This also applies to contributions of land on or after April 1, 2012 considered as “old property” and recorded at acquisition costs.

#### 8. Contribution to the Business and Withdrawals

Effective on April 1, 2012 **contributions of land** to the business must, in principle, be valued at the historical acquisition or construction costs (with certain adaptations) – like capital assets – unless market value at the time of contribution is lower. Future non-deductible losses can, therefore, be made deductible by prior contribution to the business assets.

Effective on April 1, 2012, **contributions of buildings** are also recorded at the lower of market value and (adapted) acquisition or production cost.

**TIP:** For buildings (but not land!) considered as “old property” an important exemption applies: their contribution is recorded at the market value (“appreciation”) as previously even after April 1, 2012 independent of the prior use of the building.

**Withdrawal of land** from business assets into private ownership was newly regulated stipulating continuation of book values (meaning tax-exempt withdrawal!) to the extent that in principle the beneficial tax rate would apply (therefore, e.g., not applying for a commercial land dealer). The tax-neutral withdrawal as of April 1, 2012 applies independent of the method of computing profits. This applies, therefore, also where profit is calculated pursuant to section 5 Income Tax Act. However, where profit is calculated pursuant to section 4 Income Tax Act and a “land reserve” resulting from a change of the method of calculating profits until the end of 2012 exists, such reserve is taxed at the time of withdrawal.

**TIP:** Normally this leads to postponement of the taxation of land to the time of actual disposal.

For the **withdrawal of a building** this “continuation of book values” is not applicable. Here, the **withdrawal taxation** based on the market value using the special tax rate of 30% as of 2016 applies (again, with the exception, e.g., of commercial land dealers where withdrawals are taxed at the progressive income tax rate). This

withdrawal value is then used as acquisition costs in later disposals from private assets or in immediate or later contributions to another business.

For **disposals (realizations) of “old land”** from business assets **after** contribution from private assets the following applies:

- Where buildings contributed earlier as business assets at the market value (normally contributions in 2007 and after) are sold, the difference between the market value at the time of contribution and the acquisition or construction costs is treated as income from private land disposal (with the possibility of flat-rate taxation of “old property” at 4.2% or 18%, resp., of market at the time of contribution).
- Hidden reserves accrued after contribution are taxed at the special rate of 30%.
- For “old land” the flat-rate taxation at 4.2% or 18% of proceeds (independent of the contribution value) applies.

	Valuations at the time of contribution
Land – new property	Acquisition costs / production costs or lower market value
Land – old property	Acquisition costs / production costs or lower market value
Building – new property	Adapted acquisition costs / adapted production costs or lower market value
Building – old property	Market value

Table: Simplified presentation of the valuation of property in case of contribution to the business assets of natural persons.

#### 9. “Land Reserve” (Reserve Pursuant to Section 4 Para 10)

These reserves consist of untaxed appreciations of land held as business property resulting from an earlier change of the profit computation method from section 5 to section 4 Income Tax Act. For old reserves existing on March 31, 2012 the existing provisions remain: Subsequent taxation applies for

- retirement of land from business assets (e.g. disposal, but also withdrawal as private asset), or
- sale / termination of business based on the amount of hidden reserves still existing, using the tax rate of 30%. The flat-tax rate for “old land” at 4.2% or 18%, resp. of proceeds is not permitted according to prevailing literature.

#### 10. Deduction of Renovation and Renewal Expense

Renovation and renewal work (repairs) in commercial buildings or other buildings forming part of business assets are, in principle, fully allowable in the year they are incurred.

### III. Real Estate Forming Part of Business Assets

If, however, renovation and renewal work is performed in business buildings rented out as dwellings, these expenses have to be spread (net of any grants) over 15 years (since 2016, previously 10 years). For "old" renovation not yet completely deducted, the period over which the "unused residual value" can be deducted is extended correspondingly.

**Example:** If, by December 31, 2015, 3/10 have already been deducted, the remaining 7/10 must be spread over 12 years (= 15-3 years) as from January 1, 2016.

This remaining part of the costs which are not yet depreciated normally is not an asset or construction cost for tax purposes which means that a transfer of hidden reserves normally is not possible.

**TIP:** An exception from the spread over 15 years applies to buildings rented to the company's employees where the renovation and renewal expense can be fully deducted immediately.

For capitalizable construction cost see Chapter I, item 2.1.

#### 11. Standard Depreciation

Effective as of the tax assessment for 2016 a standardized depreciation rate for business assets applies:

- 1.5 % for business buildings used for residential purposes ("residential buildings", in analogy to the provisions for rent and leasing in the non-business area), and
- 2.5 % for all other business buildings.
- For residential buildings constructed before 1915 tax authorities permit a depreciation rate of up to 2 % without requiring evidence (the same as in the non-business area).

In the tax authorities' view, rent of garages, car parking etc. is always subject to the 2.5 % depreciation rate, therefore a garage rented together with an apartment is not subject to the 1.5 % rate but 2.5 %. Where cellar compartments are rented together with a residential building, tax authorities normally allow a uniform depreciation rate of 1.5 %.

For **buildings under mixed use**, tax authorities hold that

- those building parts used for residential purposes should be depreciated at 1.5 %, and
- the remaining building parts used by the business should be depreciated at 2.5 %.

Therefore, no preponderant view prevails but for all practical purposes a mixed depreciation rate is to be applied.

A **shorter useful life** may be used where supported by a well-founded and comprehensible professional appraisal. Principally this applies only for the assessment year of the commissioning of the building (until the assessment is effective). As an exception, the tax-payer can apply special legal provisions permitting him to produce evidence of a shorter residual useful life than the one resulting from the application of the new percentages of 2.5 % or 1.5 %, resp. This applies to the fiscal year commencing in 2016 until the assessment is effective.

For **buildings of lightweight construction** acquired or completed in or after 2007, a useful life of at least 25 years (4 %) is recognized without requirement of producing a professional appraisal.

These provisions are first applicable for business years beginning in 2016 and also apply for all existing business buildings. E.g., if previously 3 % depreciation was deducted, a reduction of the depreciation rate and a corresponding increase of the remaining depreciation period must be made as of 2016 (except if the previous residual period of useful life has been proven).

#### Example:

Building with acquisition/production cost		EUR 100,000
Previous depreciation rate 3 %, annual depreciation =	EUR 3,000	
Previous depreciation period: 10 years x 10		– EUR 30,000
Remaining book value as of December 31, 2015		EUR 70,000
As from January 1, 2016 the depreciation is reduced to 2.5 %		
(2,500 = 83.33 % von 3,000), AfA=	EUR 2,500	
Thus the remaining useful life increases (70,000 / 2,500) to		28 years
In total, therefore, the overall useful life increases from 33.33 to		38 years

Also possible **subsequent production cost** are comprised by the new depreciation rule and must eventually be distributed to the (prolonged) remaining useful period applicable as from January 1, 2016.

The **increase of the land portion** – to generally 40 % like in the area of rent and lease – does not apply to business buildings; here an allocation according to actual circumstances must be made as previously.



### III. Real Estate Forming Part of Business Assets

#### 12. Accelerated Depreciation for Historic Monuments

The **cost of renovation** of historic monuments can be written off over 10 years. Confirmation must be obtained from the Austrian Federal Office for the Care of Monuments (Bundesdenkmalamt) that the work in question contributes to the protection of historic monuments.

**TIP:** The preferential treatment available to private owners in the form of a partial deduction of subsequent repair costs in relation to expenses under sections 3–5 MRG or a grant for rehabilitation work is not available for rental property held as a business asset. This factor should be taken into account before such property is added to the assets of a business.

#### 13. Demolition Expense and Renewal Expense in Close Connection with Acquisition

Where **buildings are demolished**, in the past the question arose as to whether the demolition costs and the residual book value of the building can be treated as tax deductible expenses at the time of demolition according to the so-called **sacrifice theory**, or whether they require to be capitalized.

Set out below are the opinions of the Finance Ministry set out in margin notes 2618 and 6418a of Income Tax Guidelines 2000.

- Acquisition of a dilapidated building with land: demolition costs belong to the cost of acquisition of the land together with the purchase price. In the opinion of the Finance Ministry, a building is dilapidated if it cannot reasonably be repaired for objective economic or technical reasons.
- Demolition of a still exploitable building: demolition costs and residual value of the building are immediately deductible (in the fiscal year of commencement of demolition). Whether the building was acquired with the intention of demolition or not, or whether it is demolished with the intention of newly erecting a building or for creating land without a building does not make any difference.

Effective January 1, 2011 (even earlier upon application in ongoing proceedings), **maintenance expenses incurred soon after acquisition** (within 3 years of acquisition) do not have to be capitalized; “normal” capitalization rules apply. Depreciation expense resulting from earlier capitalizations can be continued unchanged.

#### 14. Hidden Reserves and Roll-over Relief

Hidden reserves consist of the differences between the proceeds

of sale and the carrying value for tax purposes of properties, which are revealed when the sales take place. Such differences can be transferred and set off against the costs of acquisition or construction of tangible assets, or credited to a reserve. This, in effect, leads to a postponement of the tax burden resulting from the sale.

**Notice:** The disclosure of untaxed reserves in the financial statements prepared for purposes of commercial law will be abolished. This applies as of 2016, i.e. for business years beginning after December 31, 2015. These special tax regulations can be applied off balance sheet independent of presentation in the commercial financial statements.

#### 14.1. Requirements

The property must have been part of business assets for at least 7 full years.

The retention periods for land and for buildings must be considered separately since, in the Finance Ministry's opinion, land and buildings are considered to be separate assets.

The retention period for a building disposed of is extended to 15 years where hidden reserves have already been transferred, or where special depreciation allowances have been claimed. For the purpose of calculating the retention period the effective date is to be used.

**TIP:** Check the retention period before meeting with the notary; in some circumstances a shift of the meeting date by a few days may be sufficient.

#### 14.2. Restrictions

The following transfer rules for disposal gains, as defined by income tax law, apply:

Transfer of Hidden Reserves		
	FROM	TO
	land	land and buildings
	buildings	buildings
	other tangible assets	other tangible assets
	intangible assets	intangible assets
Not permitted	—	acquisition costs of (parts of) businesses, investments in partnerships (co-entrepreneurships), financial fixed assets
Not permitted	gains on sale of (parts of) business or of investments in partnerships (co-entrepreneurships)	—

### III. Real Estate Forming Part of Business Assets

Where the hidden reserves cannot be transferred in the year they are revealed, they can be transferred to an (as of 2016: **off balance sheet**) transfer reserve for whose usage special provisions (e.g. usage within 12 months or 24 months) exist.

The transfer is only permitted for natural persons as sole proprietors or co-entrepreneurs; therefore it is not permitted for stock corporations, limited liability companies and other corporations.

**TIP:** By timely retroactive reorganization of a limited liability company into a limited partnership or a sole proprietorship the use of the tax benefit can be assured.

#### 15. Tax-free Allowance

Starting with the tax year 2010, the tax-free allowance (GFB) will also as a general rule be available on costs of acquisition and construction of buildings, tenants' investments, etc.

**Up to a tax basis of EUR 175,000 the tax-free allowance is 13%.**

For an exceeding amount a reduced tax-free allowance (for assessment years from 2013 staggered between 7 % and 4.5 %), depending on the exceeding amount, is available. If total business profits exceed EUR 580,000, the tax-free allowance is limited to EUR 45,350.

In case of building construction, the total construction costs of the fiscal year of completion are relevant..

**TIP:** Business income from disposal of property actually subject to special taxation pursuant to section 30a Income Tax Act 1988 can be included in the basis for the tax-free allowance and reduces your tax burden.

#### 16. Losses, Loss Set-off, Loss Carry-forward and Tax Models

Losses on disposal of commercial property (concerning buildings, in the Finance Ministry's opinion: also losses on withdrawal) as well as write-downs to market value must preferentially be set off against gains on disposal, write-ups and (in the Finance Ministry's opinion) gains on withdrawal for commercial property. The preferential set-off, however, only applies to land whose value appreciation is subject to the special 30 % tax rate.

For disposals as of January 1, 2016 any **remaining loss** can be set off against progressively taxed income at **60 %**. Where a set-off of the business loss against other income is impossible or not completely

possible in the assessment year, it can be carried forward to future assessment years.

**TIP:** As of 2016, **losses incurred by businesses computing their income on a cash basis** can be carried forward not only for 3 years but – like businesses using accrual accounting – without time limit. This applies to losses as of the assessment year 2013 as well as any not yet offset "old" start-up losses according to the former legal situation before 2007.

Losses from businesses or separable business parts whose **principal purpose is the commercial letting** of assets can neither be carried forward as special allowances nor set off against other income. Losses of this kind can only be set off against (later) income from the same activity or business. Predominantly, this provision is aimed at leasing companies.

**TIP:** According to administrative practice, the loss set-off prohibition is not applicable for (property managing) rental of real estate.

There are also special regulations for deducting losses in connection with investments whose **primary purpose is the procuring of tax advantages**. As a general rule, schemes advertising tax advantages should be treated with caution.

Since the beginning of 2016, **losses of capitalist partnerships**, i.e. partnerships with limited liability without a distinct partnership initiative, are allocated to the limited capitalistic partners only up to the amount of capital participation. Exceeding loss portions are placed into a "personal" deferral.

**TIP:** Partners of a capitalistic partnership are recommended to check towards year-end whether their capital participation is sufficient to ensure full loss allocation.

**TIP:** For a capitalistic partner, deferred losses can be fully set off against future contributions or taxable profits, resp.

#### 17. Property and Cessation/Sale of Business

Under certain conditions the gain on the cessation or the sale of the business, including the positive adjustment by reason of change in method of accounting, is subject to half the progressive tax rate ("Hälftesteuersatz"), i.e. half the average tax rate. However, disposal gains or withdrawal gains of land are not part of such disposal or cessation gains where they are in fact subject to the special 30 % tax rate, except an application for regular taxation is filed.

### III. Real Estate Forming Part of Business Assets

Where the business assets include real property, all hidden reserves on the property (including the building) in certain cases (**principal place of residence**) escape taxation if the sole proprietor transfers it to his or her private ownership on ceasing to do business. The situation is different in case of a sale of business or withdrawal of the building in conjunction with a contribution pursuant to Article III Reorganization Tax Act.

**TIP:** The taxpayer on ceasing to do business can immediately use the former business property to generate income in other forms (e.g., by renting); this has no negative effect on the tax relief for the principal place of residence.

The untaxed hidden reserves do however reduce the value of the building for tax purposes, and hence the basis of depreciation, in case of continued income generation. The untaxed hidden reserves **are (subsequently) only taxed** if the real estate is disposed of within five years of the cessation of business, and only up to the amount of actual realization of hidden reserves in the sale:

- If the property loses value after withdrawal, the subsequent taxation is reduced (to zero in the extreme; no loss);
- if the property gains in value the hidden reserves at the time of withdrawal are (subsequently) taxed using the special tax rate or the regular tax rate;
- later value appreciations must be treated as income from private property disposals.

The precondition for the application of this preferential treatment is for the entrepreneur to have had his **principal place of residence in the business building until the time of cessation of business, and the occurrence of one of the following circumstances:**

- The taxpayer has reached his 60th year and ceases his gainful occupation (for at least one year) in connection with the cessation of business or
- the taxpayer is unable to work; or
- the taxpayer has died, and the business is ceased for this reason.

The preferential treatment also applies, to an appropriate extent, to land attached to a principal place of residence; effective April 1, 2012, the transfer of land to private ownership is not taxable as a general rule.

#### 18. Real Estate and Business Reorganizations

Considerable **savings in transaction taxes** (e.g., real estate transfer tax) on property transactions can in some cases be achieved where the transfers take place within the framework of the Reorganization Tax Act (UmgrStG). For reorganizations the real estate transfer tax

is based on the property value (for the computation of the property value see chapter VI). Here the applicable **tax rate is 0.5 %**. For agriculture and forestry the tax basis is not formed by the property value but by the single assessed value. On the other hand, the applicable tax rate is 3.5 %. Where the transfers take place within the framework of the Reorganization Tax Act, the 1.1 % land registration fee is based on three times the assessed value –upon application with a maximum of 30 % of market value.

**TIP:** These preferential treatments of company reorganizations are however only applied where the property belongs to a business or part of a business or partnership share being transferred in addition to the building. **Exception:** mergers and business combinations.

**TIP:** We recommend always taking professional advice before making such transfer under the provisions of the Company Reorganizations Tax Act.

In some circumstances **no liability to real estate transfer tax** arises where the property being transferred was acquired by the acquiring entity within the last three years. Where these conditions are satisfied the real estate transfer tax already paid will also be refunded.

If business assets are transferred from the joint business assets of a partnership to become **private business assets** of an individual partner (while still **preserving the ratio of partnership shares**), there is no taxable withdrawal. Effective April 1, 2012, the same applies to the transfer of land to private ownership.

In case of a “contribution in kind” of properties into corporations and into partnerships **without the application of the Reorganization Tax Act**, please note: if no consideration is granted, real estate transfer tax must be computed, as of January 1, 2016, at 0.5 % to 3.5 % (staggered rates) of the property value of the property. Only the land registry fee will be triggered from the basis of three times the assessed value – maximum 30 % of the market value.

In individual cases, the benefits available under the **Business Start-up Promotion Act** (NeuFÖG) may result in real estate transfer tax being reduced or not being payable at all. In the case of public sector spin-offs and remergers, too, no real estate transfer tax will be payable as a general rule where the **requirements of section 34 Federal Procurement Act** (BBG) 2001, as amended, are satisfied.

## IV. Withholding Tax: Capital Gains Tax from Transfer of Real Estate (Property Income Tax)

### 1. Self-computation of Property Income Tax and Payment

Effective January 1, 2013 legal advisors (lawyers and notaries public) have the possibility to

- file a tax return in a land transfer tax proceeding (variant 1), or
- perform a self-computation of land transfer tax (variant 2).

This requirement must be met at the time the land transfer tax return or the self-computation of land transfer tax must be filed. The deadline is the 15th of the second following month after accrual of the land transfer tax liability.

#### Variant 1

Where in a land transfer tax proceeding a tax return is filed, the legal advisor is obliged to file a report for property income tax purposes, i.e. as a rule 30 % property income tax.

He has to report the following:

- The parties involved in the sale transaction,
- the respective tax registration numbers, and
- the amount of the special advance payment due based on the taxpayer's statements.

#### Variant 2

Where land transfer tax is self-computed, the legal advisor is obliged to file a report and to self-compute and pay the property income tax.

In the context of his reporting obligation he has to report the following:

- The parties involved in the sale transaction,
- the respective tax registration numbers, and
- the amount of the property income tax to be computed based on the taxpayer's statements.

Concerning the self-computation and the payment, the following must be noted:

- The legal advisor must pay the property income tax and is liable for its payment.
- The due date for payment of the property income tax is the 15th of the second following month after receipt of the consideration for the sale.
- The receipt of the consideration is considered to be the time when payment to the seller or to his creditor is possible.

### No withholding of property income tax

Under certain conditions, self-computation or payment, resp., can be omitted specifically where:

- the income is tax-exempt (principal place of residence exemption, builder exemption etc.), or
- receipt of consideration is expected to be later than one year after the sales transaction, or
- in case of the sale of business assets hidden reserves pursuant to section 12 Income Tax Act are transferred or placed in a transfer reserve, or
- the consideration is an annuity, or
- the sale is made in the course of a compulsory auction (pursuant to section 133 et seq. Attachment Act (EO), or
- the sale is made due to authorities' intervention, or
- a swap transaction in connection with a consolidation or reallocation of property procedure is on hand, or
- a property disposal of a certain corporation with limited tax liability is on hand, or
- the sale is not subject to the special tax rate of 30 % (e.g. trading in property).

### Duties and liability of the legal advisor

The legal advisor's obligation to pay lapses where consideration is not received within one year after reporting.

- Concerning correctness of the property income tax he is "only" liable in case he computes the property income tax based on the taxpayer's incorrect statements against his better judgment.

### Special advance payment

In addition, constellations may occur where property income tax is triggered and a special advance payment must be made without involvement of a legal advisor pursuant to the Land Transfer Tax Act (e.g. sale of a share in an unlimited partnership or limited partnership owning real property; see also <https://www.bmf.gv.at/steuern/startseite-steuern.html>).

## V. Property and Private Foundations

### 1. Fundamental Principles of Taxation

For property held in restricted or mixed-purpose private foundations, on the condition that **all documents** and trusteeships are **disclosed to the tax office**, the following fundamental principles apply:

- Regular taxation of net rental income at 25 % corporate income tax (KöSt). Also in private foundations the following must be observed: in the area of non-business rents the distribution period of repair and maintenance expense as well as renovation and renewal expense was increased, as of January 1, 2016, from 10 to 15 years and the land portion for properties without deviating evidence was increased from 20 % to up to 40 %.
- Effective April 1, 2012, non-business land disposals are generally taxable; such “profits” are basically subject to the 25 % interim tax. However, the Tax Reform Act 2015 stipulated that, in case of liquidation of the private foundation, the paid interim tax will not always be refunded completely.

As to taxation of land disposals, effective April 1, 2012 for foundations the regulations described for private land disposals are applicable respectively (distinction between “old land” and “new land”).

For “**old land**”, being that which on March 31, 2012 was (no longer) taxable (note: where the land was acquired without consideration, the foundation continued the speculation period of the predecessor in title), normally only the flat-rate interim tax of 3.5 % (or 15 % for rededications) of disposal proceeds applies. The provisions concerning a lump sum taxation of “old land” property rededicated after January 1, 1988 (effective taxation at 15 % instead of 3.5 %) were tightened. Within the period of limitation all purchase price increases due to rededication are subsequently subject to the increased property taxation of 15 % retroactively.

“**New land**” whose disposal is always subject to the 25 % interim tax also includes land of foundation “infected” according to the stipulations of the Procurement Act 2011. As with corporations, for private foundations the stipulations concerning property income tax are not applicable (i.e. no self-computation by legal advisors, no special advance payment etc.).

- As of January 1, 2016, **donations to the beneficiaries** are principally taxed – except for a disbursement of the substance – at 27.5 % capital yields tax (KESt) and are therefore taxed finally (opting for regular taxation is possible).

- **Certain proceeds from capital assets** (interest on bank deposits and debentures, gains on the sale of shares in limited liability companies and stock corporations, mutual funds, gains from derivatives etc.) are generally burdened with 25 % interim tax, as long as they are retained in the private foundation. In case of later donation to an (ultimate) beneficiary subject to capital yields tax the interim tax paid earlier is credited. In certain cases income from capital assets is taxed at the “regular” 25 % corporation income tax (e.g. for loans, private placements or investments as genuine silent partner).
- **Dividends from Austrian subsidiary corporations** and from international subsidiaries under dividend exemption as well as portfolio dividends of the private foundation are treated the same as with corporations and are therefore tax-exempt in principle (however, the switch-over provisions concerning change to the set-off method must be considered).
- Hidden reserves revealed in connection with a **disposal of investments (minimum 1 %)** can be transferred under certain conditions to new acquisitions resulting in a tax postponement.

A distribution (“**substance disbursement**”) of assets donated on or after August 1, 2008 is tax-exempt (only) if total donations of the foundation reduce the amount originally introduced into the foundation (evidence account). In the end donations continue to be subject to capital yields tax as long as they are funded by retained earnings and revenue reserves as well as hidden reserves (for tax purposes) of the foundation. In a nutshell: “First taxable profits, then tax-free capital.”

### 2. Taxes and Duties on Donation

In the case of a tax-free transfer of domestic real property by the founder to the foundation without consideration for tax purposes, effective January 1, 2016 the following costs arise (not counting legal expenses of contract preparation and notarial costs):

- Real estate transfer tax of between 0.5 % and 3.5 % of the “property value”; here “staggered tax rates” are to be applied (concerning this and also concerning the new distinction between gratuitous, partially gratuitous and transactions for consideration see also Chapter III, Item 13.):
  - For the first 250,000 euros 0.5 %,
  - For the next 150,000 euros 2.0 %,
  - For all exceeding amounts 3.5 %.
- Surcharge of 2.5 % (so-called substitute foundation endowment tax) of the “property value”, and
- land register fee of 1.1 % of three times the “old” assessed value.



## V. Property and Private Foundations

If the property is “retransferred” later, this transaction, in exceptional cases, is not subject to real estate transfer tax, e.g. the “retransferred” property was acquired from the foundation by the subsequent acquirer within the last three years. In addition, on condition that all requirements are met, the real estate transfer tax paid earlier will be refunded.

The original 10 year period for subsequent taxation for gift tax was abolished. Likewise, for so-called external co-donators no special regulations exist.

**TIP:** Donation of foreign real estate is not subject to endowment tax since January 1, 2012! Possible foreign tax consequences, however, should be investigated.

Where properties from the foundation are transferred to an ultimate beneficiary without compensation, in addition to 27.5% investment income withholding tax in principle there is now also a liability to real estate transfer tax and to the land register fee.

**TIP:** Investment income withholding tax is not payable on distributions out of capital or if foundation endowment values can be deducted. Under certain conditions, real estate transfer tax may not be applicable under the special provisions of the Land Transfer Tax Act (GrEStG). Value added tax has also to be taken into account.

### 3. Gratuitous Transfers out of Private Property

- The transfer of real estate to the foundation without consideration out of private property subject to taxation of income does not affect taxable profits; there are no longer any distinctions between this and other transfers without consideration.
- In case of transfer without consideration, a 27.5% capital yields tax can apply if liabilities are included in the transfer. As a rule, however, encumbrance of a property with a registered right of residence or usufruct is not considered to be without consideration independent of the amount.
- 1/10 and 1/15 depreciation allowances and “standard depreciation” allowances continue to be available.
- There is no special income to be taxed.
- Adjustment of input VAT or exercise of the option of tax liability under section 6 para 2 VAT Act are possible, whereas in case of opting for taxation the private foundation is entitled to deduct input VAT only if in the future the property is rented subject to VAT (see Chapter II, section 2, mutatis mutandis).
- Old land donated without consideration for income tax purposes is also considered to be old land in the foundation (see above).

### 4. Disclosure and Reporting Requirements for Private Foundations

- **Disclosure requirement:** Private foundations are obliged to disclose to fiscal authorities their deed of foundation including all supplementary deeds and existing trusteeships, failing this, the tax office has to inform the money laundering registration office immediately.
- **Reporting requirement:** The foundation's managing board has to report to fiscal authorities the beneficiaries of a private foundation continually without delay. Severe fines will be imposed upon violation of the reporting requirement (up to EUR 20,000 per concealed or incompletely reported beneficiary).

For further information see our brochure  
“Das 1 x 1 der Stiftungsbesteuerung”.

## VI. News on Real Estate Transfer Tax

Effective January 1, 2016, the tax basis for real estate transfer tax is computed based on the consideration, with the minimum being the property value derived from the market value defined in the Property Value Decree.

The following scaling or the following tax rates, resp., apply for the gratuitous portion of a transfer:

- the first EUR 250,000 at 0.5 %
- the next EUR 150,000 at 2.0 %
- exceeding amounts at 3.5 %.

The non-gratuitous portion and the partially non-gratuitous portion of a transfer are subject to the regular 3.5 % tax rate.

For considerations up to 30 %, the law assumes a totally gratuitous transfer, between 30 % and 70 % a partially gratuitous transaction is assumed, and above 70 % consideration a transfer for consideration is entirely assumed.

Transfers within the family and inheritances are always assumed to be gratuitous. The same applies to transfers of the shared permanent residence. In order to determine the applicable tax rate, all transfers between the same natural persons within the last five years are combined the same way as the acquisition of a business unit.

For taxation of agricultural and forestry properties the assessed value continues to be applied.

### Tax Basis

The newly-defined property value that is to be used, effective January 1, 2016, for acquisitions without consideration (e.g. gift, inheritance), transfers of shares, combinations of shares and transfers in the course of reorganizations, in place of (three times) the assessed value, can be determined in three ways (tax-payer's option):

- **Lump-sum method: The total of three times the imputed (proportional) land value and the building value**
- **Real estate price table: A value derived from an appropriate real estate price table**

For purchase transactions for which the tax liability arises before January 1, 2017, the latest published real estate price table of the Austrian Chamber of Commerce, Section Real Estate and Asset Trustees (at the time the tax liability arises) must be used

exclusively. For purchase transactions for which the tax liability arises after December 31, 2016, the latest published average real estate prices of the Austrian Federal Statistics Institution (at the time the tax liability arises) must be used exclusively. In order to avoid excessive values resulting from regional fluctuations, in both cases the real estate value is stated at 71.25 % of the determined value.

- **Expert opinion: Proof of the lower market value by an expert opinion**

### Determination of the land value based on the lump-sum method

With this method, for the **determination of the land value** the land area is multiplied by three times the land value per square meter and the surcharge factor.

The basis **for determination of the Building Value** is the **usable floor** space of the building (floor area minus wall thickness and breaches and recesses in the walls). Stairs or undeveloped attics are not counted as usable spaces. Basement areas, the areas of garages or car parking spaces are to be included at 35 %.

In case the usable floor space is unknown, 70 % of the gross floor plan area (total of all floor plan areas) must be used as computation basis. Basement and garage areas must be estimated at 50 % (but here again a 30 % reduction must be made).

Usable floor space or gross floor plan area, resp., must be multiplied by the building cost factor (different values for each federal state) stipulated in the Property Value Decree (GrVV) of the Finance Ministry. Depending on the construction and use the following portion of the building cost factor must be included in the computation:

	Nature of the building
100 %	Buildings used as residential buildings insofar as they are not subject to a standard or categorial rent
60 %	Factory buildings, workshop buildings, storage buildings as parts of the economic unity of a factory building
25 %	Buildings of a very simple nature (e.g. greenhouses, unheated space, tool houses, allotment garden houses) as well as temporary structures
71,25 %	For all other buildings

## VI. News on Real Estate Transfer Tax

In a last computation step a reduction due to the age of the building must be considered. According to the time of past renovations or the completion of the building the following percentages must be used:

	100 %	80 %	65 %	30 %
Buildings	Completion or extensive renovation < 20 years ago	Partial renovation < 20 years ago if building was completed over 20 years ago	Completion 20 – 40 years ago	Completion > 40 years ago
Buildings of a very simple nature	Completion < 10 years ago		Completion 10 – 20 years ago	Completion > 20 years ago

An extensive renovation is on hand if, within the last 20 years before acquisition at least four of the measures mentioned in the Property Value Decree were carried out (partial renovation: at least two of the measures):

Renewal of the outside plaster involving increase of the heat insulation, first-time installation or exchange of heating plants, electric, gas, water, or heating installations, bathrooms or exchange of at least 75 % of the windows.

### Share Combinations

Also transfers of shares in real estate companies are subject to real estate transfer tax on condition that at least 95 % of the company's shares are combined in the acquirer's hand or are acquired by him. Additionally, also the possibilities of an indirect share combination are extended, since now the integration in a group of companies pursuant to Section 9 Corporation Tax Act can lead to an indirect share combination.

Following the German example, a share combination in case of share transfers to real estate-owning partnerships is achieved if within five years at least 95 % of the shares in the company's assets are transferred to new partners.

For share combinations the applicable tax rate is a uniform 0.5 % of the property value.

Effective January 1, 2016, company shares transferred under a trust agreement are attributed to the trustor, with the attribution being effective not before the first transaction after January 1, 2016. This rule has to be applied likewise to partnerships and capital corporations which makes the previous construction of trusteeships obsolete.

### Business Transfers

For gratuitous or partially gratuitous business transfers, resp., the tax exempt amount was increased to EUR 900,000. Further, the real estate transfer tax for the gratuitous portion was limited to 0.5 % of the real estate value.

For agriculture and forestry, the tax exemption is EUR 365,000, the limitation of the tax rate within a family is 2 % (unchanged).

### Spouses' Residences

Flats of up to 150 square meters are tax exempt in case of acquisition among the living or in case of inheritance (by the partner, spouse). The applicable 150 square meters must be understood to be a tax exempt allowance.

Restructurings pursuant to the Restructuring Tax Act are now taxed on the basis of the property value derived from the market value. Here the tax rate is 0.5 %.

## VII. Developer Schemes and Retirement Saving Schemes

### 1. Fundamental Principles of Taxation

In the area of rent and lease, tax advantages in the form of accelerated depreciation can be used to reduce taxable rental and leasing income, to the extent that these advantages are not (explicitly) used for the purposes of advertising. Therefore, developer schemes and retirement saving schemes are normally not affected by the prohibition of loss set-offs (Section 2 para 2a Income Tax Act 1988). The comparison of returns before and after taxation is to be carried out over the entire expected useful life of the property. Developer schemes are also not affected by the deferred loss provisions for capitalistic co-owners of Section 23a Income Tax Act, however, the current administrative practice and judicature for property managing limited partnerships must be observed.

**Accelerated depreciation of construction cost** (see Chapter I, item 2) can be applied to:

- Expenses for the preservation of a historic monument;
- improvements in accordance with sections 3–5 MRG; and
- certain rehabilitation costs subsidized by an approved grant (grant under Residential Property Rehabilitation Act (WHSG), First Homes Act (Startwohnungsgesetz) or corresponding regulations of the Austrian Provinces). Under certain conditions this also applies for demolition and subsequent reconstruction.

Not only the form of the property ownership schemes, based either on simple joint ownership or on a limited partnership, but also the investment of assets in residential property appropriately reflects the retirement savings concept. Long-term rental income surpluses can constitute an important contribution to private retirement savings.

Even if the intention is to acquire a home immediately, under certain circumstances the initial losses from a property can be exploited for tax purposes (see particularly Chapter 1, item 8.9, Business or hobby?).

As the following comparison of "major" and "minor" owner / developer schemes demonstrates, investment in rental property also offers the possibility of **deducting input VAT on the building costs**. It is an essential requirement, though, for the property to be accepted by the tax authorities as a source of taxable income and that the property is rented subject to VAT (see Chapter 1, item 8.9).

Finally, specific attention must be given to the structuring of the co-ownership and limited partnership agreements, since in case of insufficient voice of the investors the application of the Alternative Investment Fund Manager Act (AIFMG) cannot be excluded entirely. This would, however, – in addition to special features concerning supervisory law – entail the loss of all income tax benefits.

### 2. Major Owner / Developer

#### 2.1. Requirements

- No unified contractual network (contracts and agreements for property purchase and construction may not constitute a single economic whole);
- Control of construction by owner / developer (influence over planning);
- Construction risk borne by owner / developer (financial risk – agreement of a fixed price is generally detrimental).

#### 2.2. Tax Consequences

- Deduction of input VAT on construction costs in case of taxable rent;
- real estate transfer tax only on acquisition costs (possibly including VAT) of the property;
- claiming the exemption of property income tax for self-constructed buildings is irrelevant since the exemption was restricted to the effect that generation of revenues is detrimental to the exemption;
- accelerated depreciation of renovation and renewal and construction expenses (15 years);
- immediate deduction of incidental expenses not related to the construction of the building (e.g., planning and consultancy costs). Concerning this, however, the increasingly critical judicature should be pointed at.

### 3. Minor Owner / Developer

#### 3.1. Requirements

- Itemized final invoice from performing businesses showing breakdown of services rendered;
- no unlimited fixed or maximum price guarantee (the taxpayer must be liable for additional costs attributable to special wishes or regulatory requirements);
- start of construction work (ground-breaking ceremony) after acquisition of the property.

#### 3.2. Tax Consequences

- Accelerated depreciation of renovation and renewal and construction expenses (see above);
- deduction of input VAT if the property is rented subject to VAT;

## VII. Developer Schemes and Retirement Saving Schemes

- up to 25 % of the incidental expenses directly related to construction or rehabilitation to be treated as renovation and renewal and construction expense (written down over 15 years) and the balance to be treated as acquisition costs (written down over 50 or 67 years);
- real estate transfer tax on acquisition costs (including VAT in the event of the vendor opting for tax liability), plus construction expenses (gross amount including VAT);
- an immediate deduction of incidental expenses not related to the construction of the building is subject to restrictions with the exception of, e.g., financing costs.

## VIII. Property Funds – Tax Considerations

Austrian property funds are governed by the Austrian Real Estate Investment Fund Act (ImmoInvFG).

### 1. Key Features of Property Funds

- A property fund is an investment fund which invests its investors' money largely in property, rather than in securities.
- Depending on the terms and conditions of the fund, its investments may include the following kinds of property, both in Austria and abroad:
  - Developed land
  - Vacant land suitable for immediate development
  - Land under development
  - Building rights, buildings on land owned by others, jointly owned and residential property.
- A maximum of 20 % of fund assets may be invested in properties outside the EU and EEA. The acquisition of property companies up to a maximum of 49 % of fund assets is generally possible.
- With a property fund, the fund assets are not jointly owned by the investors, but are held by the property company as trustee. This is to avoid a situation in which every change in investors would involve complicated changes to the Land Register and payment of real estate transfer tax.
- Since there are no public exchanges to determine market prices for property, each property in a fund must be valued at least annually by two independent experts.
- A maximum of 50 % of the assets of property may be financed by borrowings (e.g., loans).

### 2. Investment Regulations

- In order to achieve the spread of risks appropriate for investment funds, the invested money must be allocated to at least 10 different investment properties (for special funds: 5), whereby:
  - no single property at the time of its acquisition represents more than 20 % of the fund's total assets (for special funds: 40 %), and
  - these minimum spread requirements are satisfied by the end of the start-up period of four years.
- Since funds are obliged at all times to repurchase shares on application, at least 10 % of public property funds' assets (for special funds: 5 %) must be held in the form of short-term to medium-term bank deposits and/or qualifying securities. The upper limit on liquid assets is 49 % of fund assets. The repurchase obligation can be restricted in the fund terms for large investors.

## VIII. Property Funds – Tax Considerations

- The minimum liquid assets need not be available in the fund itself, but can alternatively be made available under an agreement with an EU or EEA bank or credit institution, or appropriate insurance companies. The counterpart institution must undertake when necessary to purchase corresponding quantities of shares in the fund.

### 3. Application of Profits and Taxation

- Funds themselves are not subject to income tax or corporate income tax, it is the individual investors with their (proportionate) shares of profits who are subject to tax.
- There are no restrictions on the application of fund profits: they may be fully distributed, or fully accumulated, or anything in between.
- The taxable profits are the fund's so-called "dividend equivalent profits" (i.e. profits that would in principle be distributable). Actual distributions will subsequently not be taxed any more.
- Not only the income from property rental and leasing (property operating income) is subject to tax, but also 80 % of the annual increase in value of the properties (for funds not publicly marketed, even 100 %). This applies irrespective of whether the gains have been realized (especially by sale) or whether the increase arises merely as a result of the professional valuation. In calculating property operating income depreciation is not tax deductible; instead, between 10 and 20 % of the net rental income (exclusive of VAT) may be charged against income and set aside in a maintenance reserve. Profit distributions of domestic corporations in which the fund may have invested are also included in profits since they are untransparent for tax purposes. Treatment of income from foreign property depends on the respective double taxation agreement (DTA) or on the foreign burden on profits, resp.:
  - In respect of most countries, Austria excludes such income from taxation ("relief method").
  - Only in a few cases (Italy, UK, Japan, USA) Austria is entitled to taxation and sets the foreign income taxes off against the Austrian tax ("set-off method").

In any case, foreign property companies are treated as transparent irrespective of their legal organization, and hence, income from them is treated and determined, for tax purposes, the same way as for a direct investment.

- For private investors all funds income counts as investment income.
- The income is subject to investment income withholding tax (KESt) of 27.5 %.

- With the deduction of KESt, private investors' liability to tax is in principle satisfied, though there is always the option of applying for assessment (employee's assessment).
- In case of sale the difference between the sales price or repurchasing price and the adjusted acquisition cost is taxed. Exemptions exist for fund shares acquired before January 1, 2011. The tax rate is 27.5 %. For the publicly traded fund this also leads to a subsequent taxation of 20 % of appreciation profits not yet currently taxed to the extent the value appreciation relates to foreign "relief countries", it remains untaxed.

### Foreign property funds

Pursuant to the "substance over form rule", these tax provisions should also be applied to "foreign property funds" whose risk distribution is comparable to that of domestic funds. Effective July 22, 2013 the legal organization of foreign funds is relevant in any case.

That is to say, the tax regulations of the Property Investment Fund Act ("ImmoInvFG") may become inapplicable to foreign funds where the fund's legal organization is comparable to a domestic corporation pursuant to section 7 para 3 Corporation Income Tax Act and the fund is not subject to foreign low taxation.

### 4. Marketability

Unlike the exchange-listed shares of property companies, the prices of shares in property funds are not affected by stock exchange fluctuations. The value of the shares depends instead on the current market value of the fund assets, whereby the property portfolio is required to be valued by two independent property experts at least annually. Funds are obliged in principle to repurchase shares at any time at the going value. In times of intensified share redemptions, there is however the option to suspend redemption in the shareholders' interests temporarily – for up to a maximum of 2 years. This is intended to ensure that the fund is not forced to dispose of property assets at the worst possible moment.

### 5. Alternative Investment Fund Manager Act

Effective July 22, 2013, specifically open property funds must observe the AIFM Act of 2013, which means that also a license pursuant to the AIFM Act must definitely exist.



## VIII. Property Funds – Tax Considerations

### 6. Alternative Financing Act – Crowdfunding

Since August 2015, the raising of funds from the public by SMEs and operative businesses was facilitated considerably, creating an additional investment possibility in real estate also for small investors. Here, possible methods of financing to a limited extent are predominantly

- subordinated loans;
- profit participation rights;
- participation as genuine silent partner; as well as
- shares in a stock corporation, shares in a limited liability company.

Taxation at the investor's level is subject either to a 27.5% capital yields tax or to the regular tax rate of up to 55% depending on the configuration and type of investment.

## IX. Property Investment Abroad

### 1. Regular Income

Most double taxation agreements assign the right to tax income from immovable property to the country in which the property is situated. This applies both to private and to business property. Profits from agricultural and forestry businesses are also treated as income from immovable property.

#### Example:

A taxpayer resident in Austria has inherited rental property in Germany. The rental income from the German property is taxable in Germany. In Austria, such rental income is tax-exempt with progressivity proviso.

The income from property investment partnerships (e.g. property limited partnership) also falls under the rule for immovable property.

The rule is applied not only where the property is directly used by the owner, but also where the benefit from the immovable property is indirect and arises from the exercise of a right of use.

#### Example:

A businessman resident in Austria has purchased property in Austria and erected an apartment block, which he subsequently lets to a Swiss limited company. The Swiss company sublets the individual apartments. The Swiss company has only the right to sublet, but the income from the sublet apartments is taxable in Austria.

### 2. Profits on Disposal

Gains on the disposal of immovable property are generally taxable in the country in which the property is situated.

**TIP:** An alternative is to transfer the immovable property to a limited company in good time. By selling the shares in the company taxation in the country in which the property is situated can be avoided because the right to tax transactions in company shares generally belongs to the country in which the person disposing of the shares resides. It should, however, be considered that the contribution of property to a corporation constitutes a swap and can, therefore, result in taxation of hidden reserves existing at that time. In the country of residence it is often possible to take advantage of an international parent-subsidary exemption, so that the profit on disposal remains tax-free in both countries.

## IX. Property Investment Abroad

The OECD Model Agreement 2003 puts a stop to this procedure by providing for profits on disposal of shares in property companies also to be taxable in the country in which the property is situated. Thus the so-called Austrian international parent-subsidiary exemption is cancelled and foreign real estate investments are impeded. Additional aggravations can arise through the provisions of MLI (Multilateral Instrument). Double taxation agreements containing this property provision are currently in force with the following countries (as of March 1, 2018; see below – the list is not necessarily complete):

DTA with	Applicable as of	DTA provision
Armenia	2005	Art. 13 para 4
Azerbaijan	2002	Art. 13 para 2
Australia	1989	Art. 13 para 2
Canada	1981	Art. 13 para 3, 4
China	1993	Art. 13 para 4
Cyprus	1991	Art. 13 para 1
Estonia	2003	Art. 13 para 1
Finland	2002	Art. 13 para 2
France	1995	Art. 13 para 2
Germany	2003	Art. 13 para 2
Hong Kong	2012	Art. 13 para 4
India	2002	Art. 13 para 4
Ireland	01.03.1989	Art. 11 para 2
Israel	1968	Art. 13 para 3
Korea	2003	Art. 13 para 1
Kyrgyzstan	2004	Art. 13 para 4
Latvia	2008	Art. 13 para 1
Lithuania	2006	Art. 13 para 1
Mexico	2006	Art. 13 para 2
Morocco	2007	Art. 13 para 4
New Zealand	2008	Art. 13 para 4
Pakistan	2008 (1968)	Art. 14 para 4
Philippines	1983	Art. 13 para 4
Poland	2006	Art. 13 para 2
Romania	2007	Art. 13 para 4
San Marino	2006	Art. 13 para 4
Saudi Arabia	2008	Art. 13 para 3
Serbia	2011	Art. 13 para 4
Singapore	2003	Art. 13 para 2
Thailand	1987	Art. 13 para 4
Turkmenistan	2017	Art. 13 para 4
Ukraine	2000	Art. 13 para 2
USA	1998 - 2000	Art. 13 para 2
Venezuela	2008	Art. 13 para 4
Vietnam	2011	Art. 13 para 4

### 3. Limited Tax Liability

The new provisions for property income taxation also concern those subject to limited tax liability (specifically foreign natural persons as investors, public-law corporations and charitable corporations) since the speculation period is abolished in this area too. Under certain circumstances a new assessment liability was established for limited taxpayers according to section 102 para 2 no. 4 Income Tax Act 1988. Future developments will show if the interest of foreign property funds in Austrian real estate will diminish due to the new tax liability.

Even corporations and associations only subject to limited tax liability are included in taxation. Therefore, disposals (realizations) of property pursuant to income tax law are subject to corporation income tax (according to the rules of sections 30, 30b and 30c Income Tax Act of 1988).

This is intended to achieve a certain equalization of capital investments and property investments. Only land attributable to a tax-exempt business (e.g. indispensable auxiliary plant of a charitable association or utility installations of a public-law corporation) is still tax-exempt. Also the tax exemptions for self-constructed buildings etc. are applicable.

Notes

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