Real Estate Taxation

Basic-know-how for successful real estate investments | 2023

Foreword

Real estate investments are a highly popular form of investment, both during periods of economic uncertainty and when there is steady economic growth. They often come with tax advantages, the likelihood of appreciation over the long term and also make an attractive proposition for making retirement provisions.

The real estate experts at TPA have analysed the most relevant tax regulations and compiled them for you here. This 27th edition of our brochure provides you with a practical overview of the current situation regarding the taxation of real estate in Austria as of 31 May 2023, both in terms of income tax and VAT.

The “real estate held as business assets” chapter contains interesting information on this topic of particular importance to SMEs and family-run businesses. Aspects regarding the taxation of real estate in private foundations, of builder-owner and pension fund models as well as of real estate funds have also been taken into account. The topic of investing in real estate abroad, the attractiveness of which is reflected in its scope of potential for tax structuring, is covered in a separate chapter.

The purpose of this guide is to help you navigate the jungle that is real estate taxation and we look forward to your feedback on it. See our website www.tpa-group.at for more in-depth information.

Our thanks go to those TPA employees who have contributed significantly to the content of this brochure.

Since this is exclusively a technical text, gender-specific spelling has been omitted. The personal terms used refer to all genders.

Mag. Karin Fuhrmann

Mag. Manfred Kunisch

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I. Real estate in private ownership

The following tax framework exists in general for real estate held as private assets in Austria: for privately owned rental property, the taxable income is calculated using a "receipts/taxable expenses" payments account (similar to cash basis accounting).

As a general rule, costs of acquisition and construction form the basis for calculating depreciation allowances for tax purposes (Absetzung für Abnutzung – AfA, as standard depreciation is referred to under Austrian tax law). The explanations in Chapter III must be considered to the extent there is partial business use. The tax authorities' views are set out in the Einkommensteuerrichtlinien (EStR 2000, Income Tax Guidelines) and the Umsatzsteuerrichtlinien (UStR 2000, Value Added Tax Guidelines), 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, notarial and lawyers' fees, agent fees, court costs) – representing the cost of the land must first be deducted. Basically, this land portion is 40%; however, the Grundanteilverordnung (GrundanteilV, Land Portion Decree) 2016 provides ranges between 20% and 40% according to the nature and location of the real estate. The following generally applies:

- 20% land portion in municipalities with fewer than 100,000 inhabitants if the price of building land per square metre is below EUR 400 (i.e. in the major portion of rural Austria).
- 40% land portion in municipalities with over 100,000 inhabitants or where the price of building land per square metre is above EUR 400, except
- 30% land portion if the rental property has at least 10 residential or commercial rental units. Every 400 m^2 of usable floor space or part thereof always constitutes a separate business unit.

Both taxpayer and financial authorities may deviate from this percentage if sufficient proof is furnished. It must also 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% without evidence of useful life;
- 2.0% 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. Since 1 July 2020, there has been the option to apply three times the normal depreciation of 1.5% in the first year of use and two times the normal depreciation of 1.5% in the second year of use for buildings acquired and constructed after 30 June 2020.

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

TIP:
Upon application, there is an option to spread these depreciation expenses for extraordinary wear and tear and other related expenses on a straight-line basis 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.

The limit for immediate tax deductibility of low-value items has been increased to EUR 1,000 as of 2023.

2. When is accelerated depreciation possible?

2.1. 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) Einkommensteuergesetz (EStG, Income Tax Act) 1988).

This applies to:
- Expenses under the Denkmalschutzgesetz (DMSG, 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 evidence of the exact amount of expenses provided.
- Expenses under sections 3 – 5 of the Mietrechtsgesetz (MRG, Tenancy Act), for buildings to which the provisions of the MRG governing the application of basic rental income apply: for example, expenses for improving apartments and raising them to a higher category, for installing passenger lifts and for combining apartments.

- Expenses for certain measures to renovate real estate, where a grant under the Wohnhaussanierungsgesetz (WSG, Residential Property Rehabilitation Act), the Startwohnungsgesetz (StWG, First Homes Act) or the provisions of state legislation governing grants for the renovation of residential property has been approved. Based on the Wiener Assanierungsverordnung (Vienna Reconstruction Decree), demolition and reconstruction can also come under this regulation.

Subsidies reduce the basis of calculation of accelerated depreciation (cf. Income Tax Guidelines 2000, margin no. 6454).

TIP:
In the case of compulsory rents, application can be made for accelerated depreciation for the duration of compulsory rents.

Other examples of normal **capitalisable costs of construction** (according to the Income Tax Guidelines 2000, margin no. 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. Repair and maintenance expense

Expenses are considered to be repair and maintenance expenses eligible for immediate deduction 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 immediately deductible repairs where, in connection with a building rehabilitation concept, there is a single contract for the replacement of more than 25% of the elements, e.g. windows, 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 the end of these 10 years.

2.3. 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 need to be capitalised.

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);
- lifts and heating plants and furnaces;
- electricity, gas, water and heating fittings even if they represent a technological change;
- renewal of external plastering and thermal insulation, and
- damp-proofing of walls.

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.

In addition, there is an option to spread the following expenses, upon application, voluntarily on a straight-line basis 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.

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 capitalised but can – depending on the circumstances – be expensed immediately, or be spread as renovation and renewal expense over 15 years.

Where 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 granted 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 deductible** include:
- interest and incidental finance costs on borrowings used to finance the real estate (but not capital repayments);
- costs of tax and legal services, except where they form part of costs of acquisition and 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 – such as 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 following year.**

Current jurisprudence only permits a very limited immediate deduction of business expenses when purchasing an apartment or when it comes to builder-owner models.

Simplification is permissible in that an estimated flat rate deduction for expenses is allowable for bed and breakfast rental income and income from the letting of apartments without services (exception: long-term leasing of apartments). The allowance often is 30% of the income for rooms and apartments (not including VAT and visitor's tax). For details see margin no. 5435 et seq. of the Income Tax Guidelines 2000. Additional provisions of trade law, tenancy law and state legislation must be observed in Airbnb-related matters.

Concerning the demolition costs of a building, reference is made to item III/14.

5. Depreciation in case of 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 disregarded. Depreciation can only be taken on the parts that are let, and only that proportion of the running costs is deductible.

There are **special provisions** for co-owned properties: the tax authorities are particularly strict (e.g. concerning the arms'-length principle, or that there is no abuse of the *Bundesabgabenordnung* (BAO, Austrian Tax Code)). The recognition of a rental contract formed on an arm's length basis is only permitted in exceptional cases in accordance with the jurisprudence. Where the users are completely identical with the co-owners (related persons shall also be considered here), tax authorities will definitely question the property's nature as a source of income. By the same token, renting to persons entitled to alimony is often not recognised by the tax authorities.

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 unutilised accelerated allowances in respect of construction costs is no longer available (for VAT position see Chapter II). Any input VAT to be adjusted due to the change of use can, in some circumstances, be treated as retroactive rental expense.

7. Depreciation in case of first-time letting

For first-time letting, the following provisions apply:
- For old cases (see item 8.) the notional acquisition costs of the building at the time of first-time letting may be used as the calculation basis of tax depreciation.

- Where the building was formerly used as a source of other income, other rules are applicable (see Income Tax Guidelines 2000, margin no. 6433 et seqq).
- Where the real estate is acquired without consideration, the question of whether a first-time letting exists is closely examined, and the legal predecessor is also taken into account.

TIP:
With regard to old cases in which the predecessor has already used the real estate to generate rental income, the Ministry of Finance has no objection to basing the (higher) AfA allowance on the notional cost of acquisition under the condition that a period of more than **10 years** has elapsed between the termination of a lease by the legal predecessor and the start of a lease by the taxpayer.

It is deemed equivalent to termination by the legal predecessor if the taxpayer in the process of acquiring real estate without consideration gives notice of termination of a lease granted by a legal predecessor. Notice of termination is considered to have taken place in the process of acquisition without consideration 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.)

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 levied on the underlying notional acquisition costs – hence the "notional" contribution value – which means that the flat rate taxation of "old hidden reserves of old cases" applies.
- For the proportion of the gain on the sale arising after letting commences (hidden reserves exceeding the "notional acquisition costs"), the property income tax generally amounts to 30%.

8. What is important when selling real estate

The sale of real estate is subject to property income tax (ImmoESt) of 30%. In addition, it must be examined if this is what is known as an "old case" or a "new case".

8.1. Old case – new case

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

The period is computed day-by-day on the basis of the date of the obligatory transaction. Where real estate acquired without consideration for tax purposes is sold, the ownership periods of the seller and their legal predecessor are added together. Here, the latest acquisition with consideration is the starting point for computing the period. This date is therefore also used for the categorization as an old case or as a new case.

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

TIP:
For old cases – for which no rededication was made after 31 December 1987 – the proceeds from the sale can be reduced by 86% as notional acquisition costs. 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 31 December 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.** Rededications are relevant to the seller in respect of the "tax rate" if they are then carried out within five years after the sale. In addition, acquisition price increases lead to an adjustment of the property income tax for the entire purchase price in case of a subsequent rededication, e.g. due to an improvement clause.

TIP:
In both cases (4.2% and 18%), the taxable excess can also be computed using the general rules (in case this is more favourable; for computation see item 8.3.).

In case an application for regular taxation at the normal rate of up to 55% is made, all expenses and cost of the sale can be principally considered.

As a general rule, **rededications are relevant for tax purposes** if they permit for the first time the "typical" construction of a building on a plot of land. This includes special dedications, such as for the construction of shopping centres. Any such rededication is 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 a residential zone.

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 since being acquired for consideration for at least two years, and in the course of the sale the principal place of residence is abandoned. 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 continuous years within the last 10 years (important e.g. when married couples separate and subsequently sell the real estate). According to jurisprudence by the Administrative High Court this also applies where the principal place of residence was originally used under a rental contract and the real estate is only acquired at a later point in time.
- **Buildings built by owner (major building 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. This applies, however, only where the building was not used for income-generating purposes within the last ten years. In the Finance Ministry's opinion, the treatment of the building as owner-built cannot be transferred to the legal successor having acquired it without consideration. This means 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, additions to the building and extensions without a separate building unit), nor to major renovations.
- Intervention by the authorities: If assets are disposed of as a result of an intervention by the authorities or to forestall an intervention that is demonstrably imminent, any gain is tax-free.
- In addition, an exemption was added concerning **the barter of real estate** in connection with land combination or land consolidation proceedings.

8.3. Calculation of income

Taxable income from disposition of private real estate is calculated as follows:

Disposal proceeds
– Acquisition costs – Construction costs – Renovation and renewal expense to the extent that the unutilised fifteenths of the allowance relate to the period subsequent to the disposal – Any amounts resulting from input VAT adjustment according to section 12(10) *Umsatzsteuergesetz* (VAT Act) – Cost of self-computation + Tax-exempt subsidies pursuant to section 28(6) Income Tax Act 1988 + Any depreciation already deducted
Income pursuant to section 30(3) Income Tax Act1988

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, in the opinion of the Finance Ministry, deductible only where ongoing lease and rental income is generated. Exchange losses resulting from loans in foreign currency are not deductible.

In the case of private assets, tax liability arises basically at the **time of receipt**, meaning that taxes must be paid partially or totally in calendar years subsequent to the disposal for instalments or annuities. This is an important element to consider for tax planning purposes. In the case of 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%. Where payment in instalments is agreed, tax authorities require an imputed interest portion to be excluded from the instalment unless interest has been agreed. Where payment of an annuity was agreed, tax authorities believe that an immediate proportionate tax liability can arise if, in addition to the annuity, a one-time payment of over 50% of the market value is made.

8.4. Subsequent taxation of accelerated depreciation

The provisions for subsequent taxation of accelerated depreciation are as follows:

- **For new cases**, there is no future separate taxation at all since the subsequent taxation of the accelerated depreciation is automatically included in the calculation of the gain on the sale, rendering the need for a separate regulation obsolete.

- **For old cases**, one-half of the accelerated 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 exists if the real estate was acquired after 31 March 1997 and partial deductions of 1/15 or 1/10 on construction costs were claimed.

8.5. How to deal with losses

Losses on the sale of private real estate can only be netted against gains from disposals of real estate upon application for assessment. The application for assessment does not need to contain every case of real estate sold in a calendar year.

60% of the exceeding losses can be carried forward for 15 years and netted against future surpluses from lets and leases. Upon application, 60% of the exceeding losses do not have to be spread over 15 years but can be netted against (sufficient) income from lets and leases immediately in the year of loss.

8.6. Self-calculation and payment of property income tax

Legal counsels (attorneys, notaries public) are obliged to pay the property income tax. The actual receipt of the purchase price is relevant for the tax liability.

8.7. Other tax implications of the sale

In addition, the following aspects must be considered:

- Input VAT adjustment or option of tax liability under section 6(2) VAT Act 1994 (see Chapter II): The buyer is required to verify if the option of tax liability continues to exist for all rental contracts where the apartment is not used.
- Lapse of the unused balance of 1/15 allowances for renovation and renewal or construction costs for the seller.
- Unused 1/15 (1/10) allowances for maintenance can – in our opinion – continue to be claimed.
- Under certain conditions, 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 real estate (see here Chapter III).
- Liability to property income tax of 30%.
- Subsequent taxation of used 1/10 and 1/15 allowances for "old cases". (see item 8.4)

8.8. Business or hobby?

The tax authorities' views on whether a business or hobby is at hand are regulated in the 2012 Hobby Guidelines, which were updated in 2021.

Where the real estate is disposed of or the real estate is no longer let – whether by reason of gift or because the real estate 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 recognise the rental as a source of taxable income at all, and thus any losses so claimed. Under the provisions of the *Liebhabereiverordnung* (LVO, Hobby Regulation), in order for income from renting and leasing real estate to be recognised 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 two-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 real estate when the real estate was first erected or renovated.

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

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

8.9. Compensation for the implementation of servitudes

Since the tax treatment of consideration received in connection with the granting of pipeline easements is not unambiguous and difficult to qualify, a 10% flat rate withholding tax is collected as final taxation for such consideration. The flat tax applies to any consideration paid by certain operators of infrastructure. Standard taxation is of course also possible in this case.

9. Gifting real estate

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

Conversely, a gift under civil law may, under certain conditions, be considered as a sale for income tax purposes if the deal also includes the transfer of many liabilities, for instance. In this regard, the Supreme Administrative Court has now ruled that a consideration of up to 75 % of the fair market value of the donated property is in any case deemed to be a gift and not a sale if there is an intent of enrichment.

9.1. Consequences of transfers for the donor

- No possibility to continue the unused 1/15 allowances for prior construction costs and renovation and renewal expenses – they are transferred.
- Unused 1/15 (1/10) allowances for maintenance can, however, in our opinion continue to be claimed by the donor – contrary to the view taken by the tax authorities.
- Input VAT adjustment or option of tax liability under section 6(2) VAT Act 1994 (see Chapter II, item 8).

9.2. Consequences of transfers for the donee

- Accelerated depreciation of construction costs can be carried over, with the liability to subsequent taxation for old cases when the donee sells the real estate.
- Unused balances of accelerated depreciation for renovation and renewal costs incurred by the donee can be carried over.
- The donor's unused allowances for maintenance can be carried over (in the view of the tax authorities).
- Notional acquisition costs can be depreciated in the event of first-time letting for old cases. In other cases, the donor's depreciation (AfA) must be continued.
- Where the donor selects the option for tax liability under section 6(2) VAT Act 1994, the donee has the right to deduct input VAT provided the real estate continues to be let and the rental is subject to VAT (see Chapter II, item 8).
- The option of tax liability for rentals must be reviewed again since the tax authorities assume NEW landlord-tenant relationships. See Chapter II on VAT.
- The donor's date of acquisition is carried over, and thus also the qualification as an old case or new case.
- Transfers without consideration 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, real estate price guide or an 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 regarding the addition of previous gifts must be observed.
- Real estate transfer tax, registration fees and other incidental expenses are not deductible for income tax purposes.

The registration in the land register triggers the lower of a 1.1% registration fee based on three times the assessed value, or, upon application, 30% of the attested market value.

9.3. Gifts with retention of beneficial interest

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

Advantages:

- The donor can continue deducting (1/10 and) 1/15 allowances.
- No input VAT adjustment is necessary.
- The nature of the real estate concerning VAT treatment remains unchanged since the business identity is maintained.
- No obligation to pay a fee for the agreement to retain a beneficial interest according to Administrative High Court jurisprudence.

Disadvantages:

- The income is treated as income of the original owner (no avoidance of higher tax brackets because no effect of "splitting the income").
- Existing allowances on the real estate may be lost (professional advice recommended).
- Transfers without consideration 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.
- Following continued Administrative High Court jurisprudence, additional requirements for the formulation of agreements on the retention of beneficial interest exist, causing a certain degree of legal uncertainty at present.

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 or) 1/15 continue to be available.
- No adjustment of input tax with respect to the deceased. The heir or legatee must however review the VAT option since the Finance Ministry assumes NEW leases. According to the judicature of the Supreme Administrative Court on the universal succession for tax purposes in the case of inheritance, this is also true for the continuation of lease contracts.
- The most recent acquisition for consideration for tax purposes by the donor or his predecessor in title is used for the purposes of categorisation as an old case or new case.
- Transfers without consideration are subject to real estate transfer tax, with the taxation base being the property value (see above or Chapter V for further details).

The registration in the land register triggers the lower of a 1.1% registration fee based on three times the assessed value, or, upon application, 30% of the attested market value.

This Chapter summarises the fundamentals of how real estate should be treated for the purposes of VAT:

1. What small business owners need to consider

Small businesses with net revenues as lessors not exceeding EUR 35,000 annually are subject to the following provisions:

- Exemption from VAT not qualifying for input tax relief – 0% output VAT;
- Rent charged excluding output VAT – 0% output VAT;
- No possibility of deducting input VAT;
- Option of electing for taxation on the standard basis.

When calculating the revenues limit, 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 taken into account. A VAT declaration only needs to be submitted by a small business if revenues exceed EUR 35,000 by 15% more than once in a 5-year period.

A small business is only required to file a VAT return

- if revenues – excluding ancillary transactions including the sale of the business – exceed EUR 35,000 a year, or
- if the business is required to pay VAT for the assessment period (note: for other reasons).

The revenues of a small business, which is domiciled in a foreign country and receives income from the letting of real estate located in Austria, are tax-free if the business is operated in Austria. The tax authorities take the view that, in order to qualify as a domestic business operation, it is not enough for the real estate to be managed by a domestic real estate management firm. See also chapter II.4 Leasing by foreign entrepreneurs.

2. Which tax rates apply?

2.1. Nature of service

The following tax rates apply depending on the nature of the service:

Letting 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 (except for personal use)	10%
Rental of business facilities, etc.	20%
Rental of movable equipment (furniture)	20%
Provision of furnished accommodation, etc.	10%
Rental of garages and parking spaces	20%*)
Rental of land for camping purposes	10%
Various services rendered by condominium cooperatives to residential parts of the real estate	10%
Provision of heating, including 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.

In order to claim the zero rating for rental to diplomats, the tenant (diplomat) must provide to the landlord a confirmation issued by the Austrian Ministry for Integration, European and Foreign Affairs (U 46 – Application for tax exemption in connection with the rental of real estate).

2.2. VAT exemption not qualifying for input tax relief

With effect from 1 September 2012, the 20% VAT liability option when letting business premises is only permitted to the extent that the recipient of the service uses the real estate almost entirely to generate revenues that do not exclude the deduction of input VAT (95% limit). Evidence that this condition has been met must be provided, although it does not need to take any special form. It is possible to revoke the option before the notification comes into effect (*ex tunc*). Specifically, it does not require approval by the recipient of the service (any input VAT already deducted must be refunded).

This new rule applies to:
- real estate which actually started being used after 31 August 2012; and to
- condominium ownership acquired after 31 August 2012.

Exceptions:
- Where a change of the business identity occurs after 31 August 2012 (e.g. due to an asset deal or reorganisation measures), the tax authorities take the position that a new tenancy relationship starts for VAT purposes in cases where tenancy passes to the legal successor under civil law (e.g. in case of an asset deal) or by universal succession (e.g. in case of a merger). In all of these cases, the successor's options may be limited. As regards universal succession, the Administrative High Court has already ruled that a merger involving the tenant company should not result in the option being excluded. In the case of singular succession (e.g. purchase), the Administrative High Court has confirmed the view of the tax authorities and ruled that the tenancy relationship between the tenant and the new landlord (e.g. buyer) begins anew if the landlord changes. Therefore, the new landlord's possibility to opt for VAT is restricted and it must be checked if the requirements are fulfilled.
- Constructor's privilege: where construction of the building (ground-breaking) by the lessor started before 1 September 2012; however, transferring the real estate leads, in the opinion of the tax authorities, to loss of the privilege.
  Where, in the course of reorganisations, the business identity is changed, the question arises if the qualification as constructor passes over or is lost. This question cannot be answered unequivocally at present. This means that reorganisations always carry the risk of the constructor qualification being lost.
- Exceptions also apply for rentals to recipients of grants pursuant to the *Gesundheits- und Sozialbereich-Beihilfengesetz* (GSBG, Austrian Healthcare and Social Benefits Act; hospitals and medical institutions, social insurance providers, homes for the aged, disabled persons and nursing homes).

2.3. Tax base – standard value

Where objects are sold at attractive prices for external (non-business) reasons, an arms'-length price, i.e. the so-called standard value, must be used nevertheless in certain cases as the basis for calculating VAT. Examples for such reasons are familial and friendship relationships, relations under company 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 free market conditions.

As a rule, the standard value corresponds to the direct reference price (if unavailable: the fair value), to the non-cash-benefit value in case of donations to employees, or to the arms'-length transfer price in case of cross-border transactions.

As of 2016, the standard value must also be used as a basis for calculating the VAT for real estate supplies and for real estate renting and leasing by the business for non-business-related purposes, or for the needs of its employees.

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 cases where a consideration is too low, the recipient as well) is not entitled to a full or partial input VAT refund.

2.4. Definition of real estate

As of 2017, the definition of real estate for the entire scope of application of the VAT Act was brought in line with the real estate definition used by the European Union. (Since there are significant civil law differences within the EU, a separate definition was created in the EU for the purposes of harmonisation). This results, among other things, in changes concerning the tax exemption for the supply of real estate.

According to the new definition of real estate, **buildings** and structures come under the definition of "real estate" if they are fixed 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. The building or structure does not need to be inseparably connected to the ground, but it must be examined if the fixtures immobilising them can be easily removed (without effort and considerable expense).

TIP:
This means that, from now on, prefabricated houses, kiosks, selling stalls, boats or mobile homes, etc. can be considered as real estate as long as they are immobilised and cannot be easily removed.

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

Changes can therefore occur specifically for certain **operating equipment** which is now covered by the real estate definition.

2.5. Short-term letting

Since 2017, the short-term letting (no more than 14 days) of real estate has been subject to VAT if the business otherwise uses the real estate exclusively for generating revenues that do not preclude the deduction of input VAT, for short-term letting and/or to satisfy housing needs. Where the business also uses the real estate to generate revenues that preclude the deduction of input VAT, the short-term rental is tax-exempt unless liability for tax is opted for.

The change means that businesses otherwise entitled to fully deduct input VAT are not required to distinguish whether the customer is entitled to deduct input VAT (in its near entirety) for this service. In addition, the requirement to allocate the input VAT or the possible requirement to adjust input VAT resulting from items such as seminar rooms rented on a daily basis to persons not entitled to deduct input VAT (in its near entirety) does not apply either.

2.6. Real estate services

The place of other services – including work performance – in connection with real estate is determined by its location. Here, the other service must be rendered in direct connection with a specific item of real estate. As of 2017, legal services (such as those rendered by lawyers and notaries) aimed at changing the legal status of a certain piece of real estate are also categorised as other services in connection with real estate if 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 of no relevance whether the underlying transaction is ultimately completed.

3. Taxation of actual receipts and of advance payments

3.1. Scope of application

For rentals of real estate held as private assets, VAT must be accounted for on the basis of when the income is received if the total rent from real estate not used for business purposes in either of the two preceding calendar years is not greater than EUR 110,000. What is therefore important is not the rent charged, 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 it represents a genuine loan.

Persons with income 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 form. This therefore also

applies to a business consultancy firm set up as a limited liability company.

3.2. Input VAT deduction only after payment

Input VAT deduction for services received by taxpayers on a receipts basis can basically be claimed **only at the time of payment** (subject to a proper invoice being presented). Full payment of the services received is not required. This means that, in case of payment in instalments for example, input VAT deduction can be claimed proportionally for instalment payments made. In cases where the tax liability is transferred to the taxpayer 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.

Where the input VAT is paid via transfer on the tax account, only the VAT amount calculated on the basis of the actual payment may be transferred. Here, taxpayer accounting on an accrual basis and on a receipts basis are treated equally.

Where the transfer is not made in full, the receiving business must correct the advance VAT return correspondingly because the input VAT deduction was not made completely.

3.3. Exemptions for large businesses

This rule does not apply to

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

These businesses are obliged to claim input VAT deduction according to the general regulations.

4. Leasing by foreign entrepreneurs

According to the Austrian tax authorities, foreign entrepreneurs leasing domestic real estate property was treated as be treated as domestic entrepreneurs with regard to their rental income generated in Austria. As a result, the sales and input taxes had to be declared in Austria in the assessment procedure.

However, the ECJ ruled on an Austrian case in June 2021(C-931/19, Titanium) that the view of the Austrian tax authorities is contrary to EU law. A foreign landlord may only be treated as a domestic entrepreneur if they have their own local staff who are able to act autonomously. This decision has given rise to many questions concerning its practical implementation as of 2022.

In the Tax Amendment Act 2022 (Abgabenänderungsgesetz), it was fortunately enshrined in law that, as of 20 July 2022, the leasing of real estate by a foreign entrepreneur that neither operates its business nor has a permanent establishment involved in the provision of services in Austria will not result in the transfer of the tax liability. Instead, the foreign entrepreneur remains liable for tax and must declare the sales and input VAT resulting from the rental in the assessment procedure. In principle, the assessment procedure is to be applied for the whole of 2022; all input VAT amounts can be claimed via assessment procedure. However, if input VAT has already been claimed in the refund procedure for at least 3 months up to the June 2022 accounting period, the input tax amounts already refunded are not to be taken into account in the assessment.

TIP:
Landlords not domiciled within the EU (in case of a lease to private individuals or if they are treated as domestic entrepreneurs) need to appoint a domestic fiscal representative for the payment of sales tax.

5. Input VAT on services rendered in advance

Input VAT from purchased services is only deductible where the taxpayer uses the real estate to generate income that is subject to VAT. 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 argued to be overwhelmingly probable.

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

6. VAT in case of partial personal use

Where real estate forming part of business assets is used by the business owner partly as a private dwelling, the personal use is exempt for the purposes of VAT, and **input VAT is only deductible** for the portion of the real estate in business use (the allocation ratio is usually calculated by comparing the usable areas). According to jurisprudence, 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 later used again for business purposes.

The same applies to lodgings in 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 real estate forming part of a rental pool is deductible provided there is no break in the **business chain**. Where the purchaser of the retirement real estate is a business, the input VAT is deductible provided the rental of the real estate to the rental pool (rental consortium) by the business is subject to VAT.

The Austrian Tax Code (BAO) stipulates that the rental income of rental pools is set by means of a separate administrative decision.

7.2. Co-ownership communities

The tax authorities are of the opinion that input VAT is deductible where the community 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 invoice is issued to issued to the co-ownership community. The amount deductible equals the co-owner's proportionate share – this is of course dependent on the co-owner being an entrepreneur with revenues subject to VAT.

7.3. Condominium cooperatives

As of 2016, the VAT treatment of vehicle parking places is the same as is the case for their lease (mandatory taxation at 20%) which should lead to simplified administrative proceedings.

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

8. VAT in case of sale, gift and cessation

8.1. Basics

Since the sale of real estate is generally VAT exempt but not qualifying for input tax relief, its transfer *inter vivos* (sale, gift or cessation of rental activities) may lead to a need to adjust 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 in the last 20 years.

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

8.2. One-tenth or one-twentieth adjustment

When calculating the adjustment, 1/20 must be used annually (previously 1/10). This provision largely applies to NEW CASES, i.e.

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

If, however, in "old cases" (tenancy agreement formed before 1 April 2012) a change of lessee takes place at a later time, the 20 years adjustment period also applies for the new tenancy agreement.

In the case of a subsequent transfer of a dwelling (not business premises) based on a claim pursuant to section 15c WGG, which takes place as of 1 April 2022, the adjustment period for the promotion of property formation is only 10 years.

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

8.3. Option for VAT taxation

The seller has the option of treating **sales of real estate 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. It is possible to choose tax liability separately for each

individual "property unit" (it is doubtful if this also applies to each individual room).

It must be considered that exercising the option leads to an increase in the tax base for the land register registration fee and the real estate transfer tax by 20%.

8.4. Minimum adjustment limit

In 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.

No adjustment is necessary either for real estate if the relating input VAT does not exceed EUR 1,200 (using the twenty years' adjustment period). This applies, for example, to fixed assets subject to the standard tax rate with acquisition costs of less than EUR 1,500 or, for land, EUR 6,000.

8.5. Date of deduction of input tax

Input VAT on services supplied in advance is not only deductible when the transaction subject to VAT takes place, but can be deducted immediately – provided that at the time the services are supplied the sale subject to VAT is commercially more likely than not. This has been clarified by the Administrative High Court.

8.6. Gift of real estate and VAT

The option of electing for tax liability is also available where real estate is gifted. Unlike in the case of a sale, the calculation of VAT liability is only based on those parts of the real estate for which input VAT was claimed as a deduction (since 1972).

According to the VAT Guidelines 2000 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(15) VAT Act 1994), the new owner of the real estate can then deduct input VAT, assuming that the land is used to generate revenues subject 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 tenancies by the past tenant to the subsequent tenant 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.

9. VAT in case of transfer by way of succession

Where real estate is transferred because of death, no adjustment of input VAT is required because in principle the new owner of the real estate inherits all the rights and duties of the previous owner. However, the tax authorities take the contentious view that the constructor's privilege is lost here. The tax authorities also assume the existence of new rental contracts.

10. Duty to maintain records

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

In connection with the extension of the adjustment period, the retention period was also changed. It is at least 22 years with effect from 1 April 2012. Other regulations, particularly those of the *Unternehmensgesetzbuch* (UGB, Austrian Business Code), which in some instances prescribe longer retention periods, must also be observed.

11. VAT in case of construction services

11.1. Principles

When it comes to 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 reverse charge on the services supplied by subcontractors.

The following services are not considered by the Federal Fiscal Court (5 October 2018) to be "construction services" and are, therefore, not subject to this regulation if they are to be considered as independent main services: exclusive planning services (architect), transport services including loading and unloading, collection and disposal of construction rubble, rental of construction machines, service work on buildings provided that parts are not changed, processed or exchanged. Material deliveries, e.g. by building material dealers or DIY stores, cannot be classified as construction work either. This also applies to the delivery of asphalt or concrete that is "unloaded" at the construction site on the instructions of the service recipient.

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 (such as 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 tax authorities publish 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 building managers and landlords

12.1. Invoices – principles

For a business to be able to deduct 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

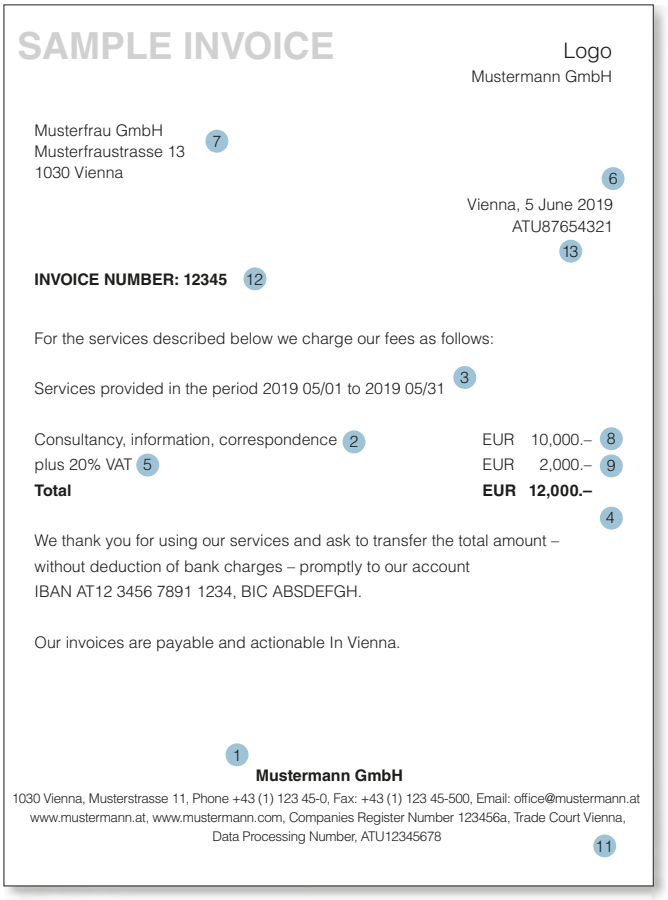
- Invoices up to EUR 400 including VAT (known as "invoices for small-value invoices"):[1)]
  1. Name, address[4)] of the supplier
  2. Quantity and customary description of the goods supplied, or nature and extent of the services
  3. Date of the supply or period of the services
  4. Consideration for the supply or the services (gross, including VAT)
  5. Applicable VAT rate
  6. Date of issue

- Invoices exceeding EUR 400 including VAT, additionally:
  7. Name and address[4)] 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[3)]
  11. The VAT Identification Number (VAT ID number) of the business supplying or performing the service[2)]
  12. A sequential number which does not have to be checked by the recipient

- Additional requirements for invoices exceeding EUR 10,000 (including VAT):
  13. VAT ID number of the recipient of the supply or service;

- In addition, the following must be noted:
  14. For invoices issued in a foreign currency, the amount of VAT must be shown in euros or, in individual cases, the conversion method must be described.
  15. Credit notes must be identified as credit notes.
  16. Where differential taxation is used, this must be indicated, such as by describing the nature of items and by indicating the application of a special rule.

1) The simplification rules for small-value invoices do not apply to intra-community supplies.
2) It is only necessary to indicate the VAT ID Number on the invoice where the business provides supplies or other services for which input VAT is deducted.
3) It is not necessary (but recommended) to give details of the relevant statutory provisions.
4) Business operations do not necessarily have to take place at the indicated address. The provider of the service indicated on the invoice must have actually provided the service and can be reached at the indicated address for VAT purposes.



SAMPLE INVOICE

Logo
Mustermann GmbH

Musterfrau GmbH
Musterfraustrasse 13
1030 Vienna

Vienna, 5 June 2019
ATU87654321

INVOICE NUMBER: 12345

For the services described below we charge our fees as follows:

Services provided in the period 2019 05/01 to 2019 05/31

Consultancy, information, correspondence	EUR	10,000.–
plus 20% VAT	EUR	2,000.–
Total	**EUR**	**12,000.–**

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.

Mustermann GmbH
1030 Vienna, Musterstrasse 11, Phone +43 (1) 123 45-0, Fax: +43 (1) 123 45-500, Email: office@mustermann.at
www.mustermann.at, www.mustermann.com, Companies Register Number 123456a, Trade Court Vienna,
Data Processing Number, ATU12345678

It is necessary to issue an invoice in any case where services are supplied to businesses or legal entities, as well where services are provided to private persons/non-businesses in connection with real estate.

Where invoices are not addressed directly to the customer or the customer's authorised representative (e.g. property managers), it must be clear beyond doubt to whom the goods or services are being supplied (margin no. 1507 VAT Guidelines).

According to case law, however, input tax may generally be deducted even if the invoice does not meet all formal invoice requirements, as long as all material requirements for the deduction of input tax are met.

Electronic invoices
Electronic invoicing is also permitted under certain circumstances. For example, invoices can be transferred by email, email attachment, 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 its origin, the integrity of the contents, and the legibility (for the entire retention period of seven years, as a general rule) must be assured. These requirements are met in the following cases:

1. An operational control procedure exists guaranteeing a reliable comparison between invoice and underlying supply or service.
2. The invoice is issued via FinanzOnline or the business service portal.
3. A qualified electronic signature is used on the invoice.
4. The invoice is transmitted by means of an electronic data interchange (EDI).

With effect from 2016, the Signaturgesetz (Austrian Digital Signatures Act) is no longer applicable for electronic signatures, but instead eIDAS (EU Decree on Electronic Identification and Trust Services for Electronic Transactions in the European Single Market).

The provisions for electronic cash registers must also be observed.

Requirements for tax exemption of intra-community supplies
As of 1 January 2020, the requirements for tax exemption of intra-community supplies have been tightened ("Quick Fixes" of the European Commission). In addition to using a valid VAT ID number of the recipient, making an entry in the Recapitulative Statement ("ZM") by the supplier is also a substantive requirement for an intra-community supply being tax-exempt. This means that it will no longer be possible to claim the tax exemption if the recipient of the supply did not provide a valid VAT ID number to the supplier. The invoice must also expressly state that the intra-community delivery is tax-free.

12.2. Sequential numbering of rent demands

Where **demands** for rent or services are based on continuing obligations in the form of tenancy or leasing agreements, or contracts for maintenance or similar services, similar services, an invoice can be issued in advance according to view of the Ministry of Finance.

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, but no longer than to the end of the tenancy agreement.

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**, containing all the information required by law, is to be issued.

The requirement for invoices to be sequentially numbered is not defined in more detail in the legislation.

The real estate trustee can therefore number the invoices in advance using a separate sequential series for each building, or for each individual item of rental real estate.

According to current jurisprudence, these permanent invoices/advance invoices must also contain all required features under the VAT Act 1994. Individual invoice features, such as 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.

13. Ways of verifying the VAT ID number

The following procedure applies to verifying VAT ID numbers:

Two-stage verification procedure

Stage 1: Confirm the validity of the VAT ID number without reference to a particular VAT registered business.

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

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

At the request of the tax authorities, a business has to prove via a Stage 2 query on what basis it assumed that a business partner was a VAT registered business.

TIP:
The business receiving the service must check the VAT ID number of the supplier of goods or services indicated on purchase invoices under Stage 2 to ensure its correctness.

If during an audit by the tax authorities, it is found that the VAT ID number indicated on the invoice is wrong (i.e. the VAT ID number is invalid or does not agree with the issuer of the invoice), it must be assumed that, in future, any such deficiency means that the tax authorities will not allow input VAT to be deducted on the basis of these invoices. However, under special circumstances, input VAT may still be deducted.

EXCURSUS

14. Liability for social insurance contributions and payroll taxes of subcontractors

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

See also our brochure "Das 1x1 der Steuern 2023" (in German), page 4.

III. Real estate held as business assets

The following chapter relates specifically to the tax treatment of real estate held as business assets, specifically of

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

Real estate owned by businesses have been included in the system of the new property income tax (flat tax on real estate income, Immo-ESt). 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 24% (from 2024: 23 %). For natural persons, the effective tax burden for so-called old cases is 4.2% (or 18% in case of rededications).

Where real estate is used both for business and private purposes, the extent of allocation of such mixed-use real estate to business assets or private assets must be determined. For example, buildings used partly as office and living space must generally be allocated to business and private assets on a proportional basis. According to Administrative High Court jurisprudence, the ratio of usable areas is as a rule relevant for purposes of allocation of the building to business and private assets.

Exceptions: Where the business portion is below 20%, the entire real estate must be allocated to private assets for tax purposes; where the business portion exceeds 80%, the entire real estate is allocated to business assets for tax purposes.

TIP:
Make sure that the business portion of your private residence does not exceed the one-third limit, otherwise you will forfeit the exemption for the main place of residence.

The tax authorities generally consider land and buildings to be two separate assets. This means that if work on erecting a building on land acquired before 31 March 2002 (old assets) was begun after 31 March 2012 by an entity eligible for profit calculation under section 4, the building is to be viewed as a new asset. If work on erecting the building was begun before 31 March 2012, the tax office takes the view that the uniform valuation theory applies, which means that the land and the building constitute a single economic entity and are to be viewed as an old asset under section 4 for calculating profits. However, more recent Administrative High Court jurisprudence suggests that the court basically follows its previous theory of uniform valuation and that an individual view is required only in case of special legal regulations (e.g. taxation of real estate sales). The definition of assets (separation of land and building or unity of “developed real estate”) can also be relevant for valuation purposes.

1. Calculating profits

For business income, calculation of profits requires the preparation of financial statements on an accruals basis or – where the requirements are met – of receipts and payments statements on a cash basis. However, the way in which profits are calculated only has a minor impact on the taxation of real estate.

Pursuant to the Austrian Business Code (UGB) and tax regulations, the following **requirements or thresholds for financial statements** apply:

- Corporations (e.g. GmbHs and AGs) must determine profits in accordance with sections 189 seqq. Austrian Business Code and section 5(1) of the Income Tax Act (EStG) 1988.
- Where a commercial sole proprietorship or partnership is required by section 189 Austrian Business Code 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 (EStG) 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 the disposal of the business or a part of it), may calculate profit through cash basis accounting or opt for profits to be calculated by means of balance sheet accounting 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”, known as 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 under section 5 Income Tax Act. A new (commercial) GmbH & Co KG must prepare financial statements from the beginning; it is not something that can be started at a subsequent point in time.

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

- A deviating fiscal year can be chosen.
- The company may opt to treat assets as recognised business assets (to be understood as assets constituting neither necessary business assets nor private property but dedicated as business assets, such as real estate used for generating rental income, on condition that such assets are recorded in the accounts).

III. Real estate held as business assets

Change in the method of calculating profits		
Effects on real estate	**from section 4 to section 5 EStG**	**from section 5 to section 4 EStG**
	Generally no effect on existing business real estate (no profit realisation assumed); It is possible to contribute real estate to recognised business assets. In case of disposal, taxation is at a special rate (30%); flat-rate profit calculation (4.2%/18%) possible for old assets or for old appreciation amounts.	Generally no effect on business real estate, except for real estate previously belonging to recognised business assets: taxable withdrawal from buildings (expected to be applicable until the end of 2023); As a rule, land – and as of 2024 – also buildings can be withdrawn at book value. In case of disposal, taxation at a special rate (30%), no flat-rate profit calculation possible.

Table: Consequences of change of method of calculating profit

For further questions concerning the preparation of financial statements, see our brochure „Geschäftsführer und Jahresabschluss“ (in German) which you can order free of charge on our website.

2. Taxation of gains made upon disposal

Where business real estate is sold or transferred into private assets, land on the one hand has to be distinguished from the building on the other hand as a general rule.

The same largely applies to **disposals of corporate land** and private real estate, namely:

- The 30% special tax rate is normally applied. The deduction of operating expenses is restricted, however, the cost of self-calculation (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 31 March 2012 (i.e. after expiration of the former 10 to 15 years’ speculation period and not being part of business assets of a business calculating its profits according to section 5 Income Tax Act, the 4.2% or 18% flat tax rate on the revenue can be applied. In this case, however, the self-calculation cost of the notary and – in the opinion of the tax authorities – the reductions resulting from input VAT adjustments are not deductible.

TIP:
Even if profits were calculated under section 5 as per 31 March 2012, flat rate taxation may be applicable for the old revaluation amount incurred if the method used for calculating profits was changed earlier.

For **taxation of building sales**, the following applies:

- the 30% special rate (with exceptions), and not the regular tax rate of up to 50% or 55%.
- Here the taxation base is essentially the “revenue minus taxable residual value”; also in case of “old buildings” there is no possibility of flat-rate taxation.
- This may be different under certain conditions, for instance where the building was part of taxable private assets, meaning that the hidden reserves could be taxed at a preferential rate until contributed.
- Apart from this, the general profit calculation provisions continue to apply, however, with operating expenses only being subject to limited deductibility if the special tax rate is actually applied. Therefore, expenses such as the cost of preparing contracts, the cost of intermediaries, valuation expenses or consultancy costs are not deductible.

TIP:
Operating expenses may be largely deducted without any limits where an application for regular taxation with a progressive tax rate is made.

ADDITIONAL TIP:
Even where regular taxation is applied, as the case may be, the gain on disposal may be calculated using a flat rate (as a rule 14% of proceeds). In addition, operating expenses are deductible.

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

For **businesses calculating their tax liability under section 5 Income Tax Act,** the following applies:

- Profit is generally calculated the regular way;
- Operating expenses can only be deducted to a limited extent where the special tax rate of 30% is actually applied (see above).
- Incidental acquisition costs must be capitalised and will reduce the taxable gain on disposal at a later time.

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

In case the profit calculation method was changed to **section 5 Income Tax Act**, an (older) **appreciation amount for land** must be recognised through profit and loss and taxed at 30%, if the change was made before 31 March 2012.

III. Real estate held as business assets

TIP:
For "old real estate" (i.e. the old speculation deadline expired on 31 March 2012), taxation at the flat rate of 4.2% or 18% of the proceeds is available optionally for the appreciation amount.

See Item 8 below for the new regulation on the tax-free withdrawal of buildings from business assets.

	Section 4(1) and Section 4(3)		Section 5	
	Disposal	**Withdrawal**	**Disposal**	**Withdrawal**
Land held as fixed assets	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: Standard taxation	Tax-free due to continuance of carrying amount 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: Standard taxation	Tax-free due to continuance of carrying amount
Buildings held as fixed asset	Taxable Tax rate: 30% or standard taxation	Taxable Tax rate: 30 % or standard taxation expected to be applicable until 31 December 2023 Tax exempt from 1 January 2024 due to continuance of carrying amount	Taxable Tax rate: 30% or standard taxation	Taxable Tax rate: 30 % or standard taxation expected to be applicable until 31 December 2023 Tax exempt from 1 January 2024 due to continuance of carrying amount

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

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

- 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 by the 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 *Flurverfassungsgesetz* (FlVG, Land Consolidation Principles Act):
  Land swaps in connection with land consolidation procedures pursuant to the Flurverfassungs-Grundsatzgesetz (Land Consolidation Principles Act) 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).
- According to the draft legislation, real estate swaps due to mutual border adjustments will also be tax-exempt as of 1 September 2023, if any potential compensation payment does not exceed EUR 730.

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

Special provisions apply for **real estate used for forestry**. Here the portion of the gain on sale relating to the standing timber and the hunting rights is not subject to the 30% property income tax rate.

Example: In 1990, forestry areas were acquired for EUR 130,000; this is a case of old real estate. EUR 50,000 was paid for the forest land. In 2019, these forest areas are sold for EUR 190,000. The gain on the sale is computed pursuant to section 1(5) of the Agriculture and Forestry Flat Rate Regulation (LuF-PauschVO) (NB: EUR 250,000 limit).

Solution: For the standing timber and the hunting rights, a gain of EUR 66,500 is calculated (= 190,000*35%), which is taxed at the income tax rate of up to 55%.

A portion of EUR 95,000 is calculated relating to the land (50% of EUR 190,000). Applying the flat-rate profit calculation, the property income tax amounts to EUR 3,990 (= 95,000*4.2%).

3. Payment of property income tax

In principle, the property income 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),
- for the disposal of land by tax subjects pursuant to section 7(3) Körperschaftsteuergesetz (KStG, Corporate Income Tax Act) (specifically corporations),
- for private foundations (see Chapter V) or
- where there is no tax liability.

III. Real estate held as business assets

Contrary to private land disposals, the collection of property income tax when disposing of land held as a commercial asset has **no "final taxation effect"**. This means that the disposal must be included in the tax return. The property income tax paid is netted against the tax liability or credited to the tax account if it is higher than the liability.

If the property income 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:
A special advance payment does not have to be made, such as where the proceeds of the disposal are paid after a year or later, or where the realised hidden reserves are transferred to a suitable replacement acquisition (formation of a transfer reserve).

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

4. Taxation of real estate for corporations

Since domestic corporations must prepare financial statements pursuant to the Austrian Business Code and to section 5 Income Tax Act on account of their legal form, real estate is carried as a commercial asset (however, rare exemptions may apply for hobby real estate or for luxury real estate, see our German-language folder "1x1 der Stiftungsbesteuerung").

TIP:
The property income tax is not applicable, for payment purposes, to corporations under section 7 (3) Corporate Income Tax Act , specifically to stock corporations and limited liability companies since they are subject to the 24% corporate income tax (as of 2024: 23 %) for the entirety of their profits. In such a case, the notary does not have to perform a self-calculation of property income tax, and no special advance payment will have to be made; the sale must (only) be declared 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 form see our leaflet "Steuersparen mit der optimalen Rechtsform [Saving Taxes Using the Best Legal Organisation]" (in German).

5. Tax liability of foreign entities

For foreign corporations subject to limited taxation which are comparable to domestic corporations pursuant to section 7(3) Corporate Income Tax Act, the disposal/realisation of domestic land (including land not held by a permanent establishment) is fully taxable as a "notional" disposal of business assets.

TIP:
For old cases, a taxation rate of 3.36% (as of 2024: 3.22 %) of the proceeds (14.4% in 2023 and as of 2024: 13.8% in case of rededications after 31 December 1987) applies; for new cases, a limited corporate tax rate of 24% applies (as of 2024: 23 %). See also item 4.

6. Exclusion from 30% property income tax

The special tax rate of 30% **does not apply** in the following cases, which means the regular income tax of up to 55%, with all applicable business expenses being fully deductible, applies:

- For real estate held as current assets (e.g. for commercial real estate dealers acting 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** (!) the sale of land (e.g. for commercial real estate developers, but not for mere accommodation businesses such as 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 the fair value before 1 April 2012; or
- to the extent of the transfer of hidden reserves disclosed before 1 April 2012.

7. Trading commercial real estate

In the past, it was possible to **trade real estate commercially in the form of small business** without an accounting obligation, meaning that profits were calculated using cash-basis accounting. Under certain conditions, the acquisition of real estate could be immediately claimed as a tax expense. The resulting losses were either offset against other income or carried forward.

Changes in the law mean that this is no longer possible for real estate acquisitions, construction and contributions of current assets. Acquisition or construction costs or the contribution value of land held as current assets by a business using cash-basis accounting for tax

purposes will, in future, only be tax-deductible when the asset is retired from business assets.

To the extent that the real estate was contributed to the commercial real estate dealing business at market value, the difference between the market value and the lower of the acquisition or construction costs must be taxed at the time of disposal using the special tax rate.

TIP:
If "old assets" are involved, it may be possible to apply the 4.2% or 18% flat tax (applicable to natural persons); in this case based on the market value at the time of contribution. This also applies to contributions of land made on or after 1 April 2012, which are considered as "old assets" and recognised at acquisition cost.

8. Contributions to and withdrawals from the business

With effect from 1 April 2012, **contributions of land** to the business must, in principle, be valued at the historical acquisition or construction costs (with certain adaptations) – as is the case for capital assets – unless the market value at the time of contribution is lower. Hidden reserves of private assets are therefore included in the business assets. Future non-deductible losses can, therefore, be made deductible by being contributed in time and in advance to the business assets.

With effect from 1 April 2012, **contributions of buildings** are also recognised at the lower of market value and (adapted) acquisition or construction cost.

TIP:
An important exemption applies for buildings deemed as "old assets": their contribution is recognised at the market value ("appreciation"), irrespective of the prior use of the building. No changes are expected to be made to this step-up as a result of the new regulation on taxing building withdrawals by the Tax Amendment Act (AbgÄG) 2023 (see below).

Withdrawal of land from business assets into private ownership is recognised at book value with a neutral effect on tax, regardless of how profits are calculated (i.e. exempt from tax), to the extent that the beneficial tax rate would generally apply (i.e. not applicable to a commercial land dealer, for instance). However, where a "land reserve" resulting from a change of the method of calculating profits until the end of 2012 exists, such a reserve must be taxed at the time of withdrawal at all times.

TIP:
Normally this leads to the taxation of land being postponed to the time of actual disposal.

When it comes to the **withdrawal of buildings,** this "continuation of carrying amounts" was not applicable for withdrawals executed until 30 June 2023. In these cases, **withdrawal taxation** based on the market value using the special tax rate of 30% applied (again with the exception of commercial real estate dealers, for example, where withdrawals are taxed at the progressive income tax rate).

NEW: Tax-free withdrawal from buildings and building rights: In line with the existing regulation on the tax-exempt withdrawal of land, the withdrawal of buildings from business assets is also effected at carrying amount instead of market value and will thus be tax-exempt. The tax-free withdrawal also applies to rights equivalent to land (e.g. building rights). This new regulation under the AbgÄG 2023 entered into force on 1 July 2023.

This improvement aims in particular at facilitating the non-business use of vacant business buildings (e.g. for residential purposes) and business closures for income tax purposes.

Consequently, the previous preferential treatment of buildings in case of sale and discontinuation of a business pursuant to section 24(6) Income Tax Act 1988, which provided for a tax-neutral step-up to the market value at the time of disposal in case of the sale of a building after a period of five years (see item 21. below), will also cease to apply.

TIP:
Taxation on the withdrawal of hidden reserves of buildings and building rights as well as land can be avoided by withdrawing them from the business assets after 31 December 2023. Therefore, operations should not cease before January 2024; 31 December 2023 would be too early.

In the case of **disposals (sale) of "old land"** from business assets **after** contribution from private assets, a "split" approach applies:

- Where buildings contributed earlier as business assets at their market value (normally contributions in 2007 and after) are sold, as a rule the difference between the market value at the time of contribution and the acquisition or construction costs is treated as income from the disposal of private land (with the possibility of flat-rate taxation of "old assets" at 4.2% or 18%, of the market value at the time of contribution).

- Hidden reserves accrued after contribution are taxed at the special rate of 30%.
- For "old land", the flat tax of 4.2% or 18% of proceeds (independent of the contribution value) applies to contributions made after 31 March 2012 by businesses calculating under section 5 Income Tax Act.

	Valuations at the time of contribution
Land – new assets	Acquisition costs/construction costs or lower market value
Land – old assets	Acquisition costs/construction costs or lower market value
Building – new assets	Adapted acquisition costs/adapted construction costs or lower market value
Buildings – old assets	**Market value**

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

9. "Land reserve"

These reserves according to section 4(10) Income Tax Act consist of untaxed appreciations of land held as business assets resulting from an earlier change of the profit calculation method from section 5 to section 4 Income Tax Act. Subsequent taxation applies for

- retirement of land from business assets (e.g. disposal, but also withdrawal as a private asset), or
- sale of business and
- termination of business

based on the amount of hidden reserves still existing, using the tax rate of 30%. According to the prevailing opinion, it is not permitted to apply the flat tax of 4.2% or 18% of proceeds for "old land".

10. Deduction of expenses for maintenance work

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

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.

This remaining part of the costs which have not yet been depreciated is normally not an asset or construction cost for tax purposes, meaning that it is normally not possible to transfer hidden reserves.

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

See Chapter I, item 2.1 for capitalisable construction costs.

11. Standard depreciation

For **regular depreciation**, a standardised depreciation rate for business assets applies:

- Up to 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
- Up to 2.5% for all other business buildings.
- In the case of residential buildings constructed before 1915, the 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, letting car parks and parking spaces, etc. is always subject to the 2.5% depreciation rate, therefore a car park 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, the tax authorities normally allow a uniform depreciation rate of 1.5%.

For **buildings under mixed use**, the 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%.
- This means that the predominant use is not relevant, but instead a mixed depreciation rate is to be applied in practice.

A **shorter useful life** may be used where supported by a well-founded and comprehensible expert opinion.

This normally applies only for the assessment year in which the building was commissioned (until the assessment is effective).

In the case of **buildings of lightweight construction**, a useful life of at least 25 years (4%) is recognised without needing to produce an expert opinion.

These rules apply for all new and existing business buildings.

By the same token, any **subsequent construction costs** are comprised by the new depreciation rule and must be distributed, where applicable, over the prolonged remaining useful period.

The **increase in the land portion** – of up to 40% as is the case for rentals and leases – does **not** apply to business buildings; here an allocation according to actual circumstances must be made as before.

Low-value items
The limit for the immediate depreciation of low-value items is EUR 1.000. Depreciable fixed assets with acquisition costs or production costs of up to EUR 1.00 can be fully depreciated in the year of acquisition and do not have to be depreciated over their useful lives, unless they are let.

12. Depreciation brought forward in year 1 and 2

For buildings depreciated for the first time, accelerated straight-line depreciation is possible in the first two years in line with the following principles:

- The higher level of depreciation is available for buildings acquired or constructed after 30 June 2020.
- This is also applicable if real estate is first acquired as a private asset after 30 June 2020 and then incorporated into business assets or rented out for the first time, i.e. always when it is depreciated for the first time.
- The depreciation rates are as follows:
  - Year 1: a maximum of three times the statutory percentage of 2.5% or 1.5%, i.e. 7.5% or 4.5%;
  - Year 2: no more than double the statutory percentage, i.e. 5 % and 3 % respectively; depreciation in year 2 cannot be higher than the depreciation in year 1.
- The date of construction is deemed to be the date of completion.

TIP:
For buildings acquired after 30 June 2020, there is no need to apply to apply the rules for half-year depreciation, i.e. full annual depreciation for wear and tear is always possible.

TIP:
Applying the accelerated tax depreciation for tax purposes is also valid for companies using the double-entry bookkeeping method independent of the depreciation under company law (the Austrian Business Code does not take precedence) by recognising a corresponding reconciliation of book and taxable income in the tax return.

13. Accelerated depreciation for historic buildings

Construction costs, i.e. those associated with the renovation of historic monuments, can be written off in business assets over **ten 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 for private assets in the form of a partial deduction of subsequent repair costs in relation to expenses (under sections 3 – 5 Tenancy Act (MRG) or a grant for renovation work is not available for rental property held as a business asset. This factor should be taken into account before any such real estate s added to the business assets.

14. Current value depreciation and appreciation

It is one of the consequences of the nature of business assets that changes in the value of assets affect taxes, e.g. by way of current-value depreciation.

The tax authorities take the view that land with buildings must be valued separately (no uniform valuation). As a result, depreciation to the lower current value is possible only for the building or for the land or for both, as the case may be. In practice, the tax authorities will demand a well-founded expert opinion of a real estate expert to substantiate/provide evidence of a decline in value. See item 20 below regarding restrictions for the offsetting of losses (also from current-value depreciation).

For real estate owners liable to accounting obligations, the following applies:

Any current-value depreciation of real estate assets must be recorded where the decline in value is expected to be permanent (conditional lower of cost or market value principle); where the decline in value is not permanent, a current-value depreciation may be recognised (optional). Where such depreciation is reported in the statutory financial statements, it is also applicable for tax purposes.

For real estate carried as current assets (e.g. by a commercial real estate dealer), the lower of cost or market value principle must be applied without restriction (even where the decline in value is not expected to be permanent; unconditional lower of cost or market value principle).

TIP:
Since regular depreciation is not permitted for current assets, the decline in value can be used for tax purposes by recognising a current-value depreciation due to interim usage.

If, after such current-value depreciation, the current value (essentially corresponding to the market value) increases, taxpayers obliged to keep accounting records in line with generally accepted accounting principles must record an appreciation for tax purposes. Such appreciation is limited by the extrapolated acquisition or construction costs. Where a current-value depreciation is appreciated fully or in part, the higher book value must be distributed over the remaining useful life.

15. Demolition and acquisition-related maintenance expenses

Where buildings are demolished, in the past the question arose as to whether the costs of demolition and the residual book value of the building can be treated as tax deductible expenses at the time of demolition according to what is termed the sacrifice theory, or whether they need to be capitalised.

The opinion of the tax authorities is set out in margin no. 2618 and 6418a of the Income Tax Guidelines 2000:

- When demolishing a dilapidated building with land: demolition costs are part of the cost of acquisition of the land together with the purchase price. In the opinion of the tax authorities, a building is dilapidated if it cannot reasonably be repaired for objective economic or technical reasons.
- When demolishing a building that is still usable: demolition costs and residual value of the building are immediately deductible (in the financial 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.

Maintenance expenses incurred soon after acquisition (within three years thereof) generally do not have to be capitalised; "normal" capitalisation rules apply. Depreciation expense resulting from earlier capitalisations can be continued unchanged.

16. Hidden reserves and roll-over relief

Hidden reserves consist of the differences between the proceeds of sale and the carrying amount for tax purposes of properties, which are revealed when the sales take place. Such differences can be transferred within the same business or credited to a reserve. This, in effect, leads to a postponement of the tax burden resulting from the sale.

16.1. Requirements

The real estate must have been part of business assets for at least seven full years. The times of a legal predecessor are to be included in the case of book values being continued.

The retention periods for land and for buildings must be considered separately since, in the opinion of the tax authorities, land and buildings are deemed 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. The effective date is to be used for the purpose of calculating the retention period.

TIP:
Check the retention period before meeting with the notary; in some circumstances, it may be enough to shift the meeting date by a few days.

16.2. Restrictions

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

	Transfer of hidden reserves	
admissible	**FROM**	**TO**
	land	land and buildings
	buildings	buildings
	other tangible assets	other tangible assets
	intangible assets	intangible assets
not admissible	——	acquisition costs of (parts of) businesses, investments in partnerships (co-entrepreneurships), financial fixed assets
not admissible	gains on sale of (parts of) business or of investments in partnerships	——

Where the hidden reserves cannot be transferred in the year they are revealed, they can be transferred to an **off balance sheet** transfer

reserve for which special provisions exist for its usage (e.g. usage within 12 months or 24 months).

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:
Timely retroactive reorganisation of a limited liability company into a limited partnership or a sole proprietorship enables the tax relief to be obtained.

17. Tax-free allowance

The tax-free allowance will also, as a general rule, be available on costs of acquisition and construction of buildings, tenants' investments, etc.

The tax-free allowance amounts to 15% (instead of the previous 13%) up to an assessment basis of EUR 30,000, and 13% of the taxable profit for the next EUR 145,000, less capital gains as defined in section 24 of the Income Tax Act. For amounts exceeding this level, a reduced tax-free allowance (staggered between 7% and 4.5%) is available, depending on the extent to which it is exceeded. If total business profits exceed EUR 580,000, the tax-free allowance is limited to EUR 45,950.

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

TIP:
Business income from disposal of real estate subject to special taxation for property income tax can be included in the basis for the tax-free allowance and reduces your tax burden.

18. Investment allowance (IFB and eco-IFB)

The investment allowance (IFB) respresents an off-book, additional operating expense and can be claimed for certain depreciable fixed assets, which are acquired or produced after 31 December 2022. The IFB amounts to 10% of the acquisition or production costs.

The IFB represents an off-book, additional operating expense and amounts to 10 % of the acquisition or production cost of certain depreciable fixed assets. If the assets are green(ing) assets, then the IFB increases to 15 % (eco-IFB). The IFB must be included in the list of assets or in the asset file and shown in the correct place in the tax return or notice of assessment. According to the Federal Ministry of Finance, classic 'tenant investments' should generally be excluded from the IFB. However, for certain 'tenant investments', the tenant may then be entitled to an (eco-)IFB if such investments are beneficially owned by the tenant and are not depreciable like a building (exception for preferential heating systems, see immediately below).

The IFB is capped because it can only be claimed for (partial) acquisition or (partial) production costs amounting to a maximum of EUR 1,000,000 per full financial year. The IFB can only be used within the only within the scope of business income types and only if profits are determined by means of balance sheet accounting or complete cash basis accounting, i.e. not in the case of flat rate accounting.

For environmental reasons, it is now explicitly stipulated in the law that an eco-IFB of up to 15 % is also due for the acquisition and production of climate-friendly heating systems in connection with buildings.

The beneficiary assets should be listed in full, with only
- Heat pumps
- Biomass boilers
- District heat exchanger or district cooling exchanger,
- District heating or cooling transfer stations and
- Microgrids

being listed as building components eligible for the eco-IFB.

Other assets that are to be capitalised as building components are not eligible. By their very nature, current expenses, i.e. maintenance and repairs, are not eligible for eco-IFB because only assets held as operating assets are eligible for the IFB. The maximum amount of EUR 1 million of investment per year (for 12 months in case of a full – even deviating – business year) is not increased. There is no new exception for flat rate accounting either.

19. Interest barrier for corporations

Due to EU requirements, a general interest barrier regulation was introduced in Austria for the first time in 2021; the existing interest deduction bans will also remain in place: An "interest overhang" (= excess of deductible interest expenses against taxable interest income) can only be deducted to the extent of a maximum of 30% of the taxable EBITDA.

Full interest deduction is available in particular as follows:

- An allowance (!) of up to EUR 3 million per assessment period is provided for the interest overhang; interest up to EUR 3 million can therefore be deducted in full. If the interest overhang is EUR 4 million, EUR 1 million cannot be deducted unless the 30% limit (see above) or another exception (see below) permits a deduction.
- For "stand alone" companies, i.e. in particular those that are not fully included (also applies to those consolidated under the equity method) in consolidated financial statements and do not have an affiliated company and do not maintain a foreign permanent establishment.
- For interest from "old contracts", i.e. contracts formed before 17 June 2016, until the end of 2025.
- If the equity ratio of the corporation is equal to or higher than the equity ratio of the group, with a shortfall of up to 2% (tolerance rule) being deemed harmless – referred to as the "equity escape clause".

TIP:
A group of companies for corporate tax also has the option of preparing a "notional" subgroup financial statement for the group ("consolidated financial statement") in order to make use of the "equity escape clause" if necessary.

20. Losses and tax models

Losses on disposal of commercial real estate (regarding buildings, in the opinion of the tax authorities also losses on withdrawal) as well as write-downs to market value must be set off as a priority against gains on disposal, write-ups and (in the view of the tax authorities) gains on withdrawals for commercial real estate. This preferential set-off against losses, however, only applies to land for which value appreciation is subject to the special 30% tax rate.

Any **remaining loss can be set off against progressively taxed income at 60%.** Where it is not possible to set off the business loss against other income (in full) in the assessment year, it can be reduced by 40% and carried forward to future assessment years.

TIP:
Losses incurred by businesses calculating their income on a cash basis can be carried forward indefinitely, as is the case for businesses using accrual accounting. This applies to losses as of the 2013 assessment year as well as any "old" start-up losses not yet offset under the situation before 2007.

Losses from businesses or separable business parts whose **principal purpose is the managing of intangible assets or 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 (subsequent) income from the same activity or business. This provision is predominantly aimed at leasing companies.

TIP:
According to administrative practice, the ban on offsetting losses is not applicable for the letting of real estate categorised as pure asset management.

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

Losses of capitalistic taxable 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. Losses exceeding this amount are placed into a "personal" deferral.

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

TIP:
For a capitalistic partnership, deferred losses can be fully set off against future contributions or taxable profits, as applicable.

21. Real estate 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**, 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 where an application for regular taxation is filed.

Where the business assets include real estate, all hidden reserves of it (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 (not on the sale of the 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 *Umgründungssteuergesetz* (UmgrStG, Reorganisation Tax Act).

III. Real estate held as business assets

TIP:
The taxpayer, on ceasing to do business, can immediately use the former business real estate to generate income in other forms (e.g. by letting); 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 hidden reserves actually realised in the sale.

- If the real estate loses value after withdrawal, the subsequent taxation is reduced to zero at most – no loss.
- In case of a gain in value, the hidden reserves at the time of withdrawal are subsequently taxed using the special tax rate or the regular tax rate.
- Subsequent value appreciations must be treated as income from disposal of private real estate.

The precondition for applying for this preferential treatment is for the person to have had his **principal place of residence in the business building at or until the time of cessation of business, and one of the following circumstances applies:**
- The taxpayer is 60 years old and effectively and effectively ceases his gainful occupation (in the view of the tax authorities: 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, up to 1,000 m² according to the prevailing opinion) to land attached to a principal place of residence; the transfer of land to private ownership is no longer taxable as a general rule.

In exceptional cases, the tax authorities take the view that the "normal" principal place of residence exemption can also be applied to business assets in the event of the real estate being sold if it has served as the principal place of residence for an uninterrupted period of at least 5 years within the last ten years prior to being contributed to the business assets.

The above-mentioned provision on exemption of the principal place of residence in the event of the cessation of business operations is expected to be replaced as of 2024 by the general tax-free option to withdraw real estate property (land, buildings and building rights) from business assets to private assets as introduced by the AbgÄG 2023 (see item 8. above).

TIP:
In the case of business sales in which the business premises are not sold, they can in future be transferred tax-free from the seller to their private assets for tax purposes without any further requirements. This means that the business premises withdrawn may also be leased to the purchaser of the business, for example, without a waiting period.

22. Real estate and transfer of business

The donation of a sole proprietorship (= transfer without consideration) basically has the same consequences concerning company law, trade law, labor law and social security law as a sale (transfer for consideration).

However, from a tax point of view, there are a few specifics, including benefits for transfers of real estate.

From an income tax view, a transfer without consideration (gift) where a positive market value (!) is transferred results in a **continuance of the taxable book value,** meaning that, in particular, no property income tax is due for the transferred land and building.

For income tax purposes, the transaction deemed to have been without consideration in cases where the business is transferred for a subsistence annuity or a (non-)occupational subsistence annuity, and not for a consideration. In case of a (non-)occupational subsistence annuity, the recipient of the annuity is liable to income tax (at the progressive tax rate) upon receipt. On the other hand, the payor can claim special expenses in full.

TIP:
According to recent judicature of the Supreme Administrative Court, the 50 % limit for transfers classified as with or without consideration for tax purposes applicable up to now only applies to annuity transactions. For all other transfers, only a 25 % limit may now apply: If the value of the consideration does not deviate by more than 25 % from the fair market value of the asset transferred, it is generally to be assumed that the transaction is a single legal transaction with consideration. Conversely, this means that where real estate is transferred (within the family) with a consideration of 1/2 or 2/3 of the market value, of example, a transaction without consideration is to be assumed according to the new judicature and the view of the Federal Ministry of Finance, which is in turn not subject to real estate gains tax.

III. Real estate held as business assets

As regards VAT, it must be remembered that the transfer of a business without consideration regularly triggers taxation for own use. This means that proper invoicing practices must be observed in order to make sure that the donee can claim input VAT. For real estate used by the business, there is essentially the choice between VAT liability and a VAT-free transfer. Where a VAT-free transfer is chosen, this may trigger input VAT corrections for the donor. In the case of rented real estate, it should also be noted that, according to the prevailing opinion, the "constructor's privilege" is lost upon transfer of the real estate, which may also give rise to input tax adjustment obligations.

For VAT details, see Chapter II.

When it comes to **real estate transfer tax**, relief for the transfer of businesses can be claimed under certain conditions. A tax free amount of up to EUR 900,000 may be deducted from the real estate transfer tax basis, specifically in the following circumstances:

- The transfer is made without consideration or for partial consideration. N.B. In the case of partial consideration, the tax-free amount can be deducted proportionally;
- The transfer relates to an entire business, part of a business or a partnership share. N.B. In the event of a quota transfer or the transfer of parts of partnership shares, the tax-free amount can be applied proportionally, but the minimum quota is 25%;
- The acquiring party is a natural person;
- The transferred real estate is part of the (special) business assets of the transferred (part of the) business or partnership share; real estate held as assets in a partnership and shares in corporations are – for reasons unknown – not eligible for tax relief.

The real estate transfer tax is normally based on the tax value of the property. Transfers for consideration are subject to the staggered tax rate (0.5% up to 3.5%). The maximum real estate transfer tax burden is limited **to 0.5% of the property value** – without deducting the tax-free amount. Consequently, this ceiling applies to real estate with a value of around EUR 1.4 million and above.

As regards the simultaneous transfer of **business debts**, it must be noted that the tax-free amount of EUR 900,000 must generally be reduced on a proportional basis where the transferred business debts are attributable to the real estate. In this case, a transfer for consideration exists amounting to the proportional "real estate debts", subject to the regular real estate transfer tax rate of 3.5%.

TIP:
The transfer of real estate within the favoured family circle is always treated as one without consideration, meaning it is not necessary to reduce the tax-free amount as shown above and can therefore be applied in full at EUR 900,000, where applicable.

See item 23 for the potential applicability of the Neugründungs-Förderungsgesetz (NeuFÖG, Austrian Business Startup Promotion Act).

23. Real estate and business reorganisations

Considerable savings in transaction taxes (e.g. land transfer tax) on property transactions can in some cases be achieved where the transfers take place within the framework of the Reorganisation Tax Act (UmgrStG). For reorganisations under the Reorganisation Tax Act, the land transfer tax is based on the land value. The applicable tax rate is 0.5 %. For agriculture and forestry real estate, the tax basis is not formed by the land value but by the single assessed value. The applicable tax rate is 3.5%. (The lawfulness of the link to the uniform valuation was confirmed by the Constitutional Court at the end of 2021). Where the transfers take place within the framework of the Reorganisation Tax Act, the 1.1% land registration fee is based on three times the assessed value – however, upon application with a maximum of 30% of the market value.

This relief granted for company reorganisations is, however, only applied when the real estate belongs to a business or part of a business or partnership share being transferred. **Exception**: mergers and business combinations.

TIP:
We recommend always taking professional advice before making a transfer under the provisions of the Reorganisation Tax Act.

In some circumstances, there is no liability to pay **real estate transfer tax** where the real estate being transferred was acquired by the acquiring entity within the last three years. Where these requirements are met, any real estate transfer tax already paid will be refunded.

If business assets are transferred from the joint business assets of a partnership to become **business assets owned by an individual partner** (while still preserving the ratio of partnership shares), **this does not constitute a taxable withdrawal.** The same applies to the transfer of land to private ownership.

III. Real estate held as business assets

In case of a contribution in kind of real estate to corporations and to partnerships where the Reorganisation Tax Act does not apply, please note the following: if no consideration (e.g. liabilities that are also transferred) is made, real estate transfer tax must be calculated at 0.5% to 3.5% (staggered rates) of the land value. Only the land registry fee will be measured on the basis of three times the assessed value – capped at a maximum of 30% of the market value upon application.

In the case of **contributions of real estate** from private assets for tax purposes to a partnership outside the scope of the Reorganisation Tax Act, the transfer must be assessed separately for income tax purposes with regard to the own participation quota of the transferring taxpayer (**own quota** = contribution transaction) and the participation quotas of the other partners (**third-party quota** = disposal transaction) at the latest as of 1 January 2024 as a result of the AbgÄG 2023 (according to the Federal Ministry of Finance since 2014): To the extent that the transferred real estate is no longer attributable to the taxpayer on a pro rata basis after transfer to the partnership's assets (third party quota), this constitutes a taxable sale, which is generally subject to real estate gains tax. With regard to the own share, tax precautions must also be taken to ensure that the tax burden is not shifted, e.g. through supplementary balance sheets.

In individual cases, **relief under the Austrian Business Startup Promotion Act** 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, no real estate transfer tax is payable as a general rule where the **requirements of section 34** of the Bundesbeschaffungsgesetz (BBG, Austrian Federal Procurement Act) 2001, as amended, are met.

IV. Real estate and private foundations

1. Fundamental principles of taxation

For real estate held in restricted or mixed-purpose private foundations, on the condition that all current foundation documents and trusteeships are disclosed to the tax office in a timely fashion before the assessment becomes final, the following fundamental principles apply:

- Regular taxation of **net rental income at 24%** (as of 2024 23 %) corporate income tax. The following must also be observed: when it comes to non-business rents, the distribution period of repair and maintenance expense as well as renovation and renewal expense is 15 years and the land portion as much as up to 40% according to the Land Share Regulation 2016 (GrundanteilV).
- Apart from exemptions, the **sale of non-business real estate** is generally taxable, and such "profits" are subject to **interim tax**, which is "credited" in the case of donations subject to capital yields tax (KESt). However, in the event of the private foundation being liquidated, the interim tax paid will not always be fully refunded.
- The sale of real estate for business purposes is generally subject to corporate income tax at a rate of 24 % (23 % as of 2024), although lump-sum taxation may apply to parts of the profit.
- Upon dissolution of the private foundation, the interim tax paid is no longer credited in full in all cases.

As to the taxation of non-business land disposals, the regulations described for private land disposals are also applicable to foundations (distinction between "old land" and "new land"):

For **"old land"**, i.e. land which on 31 March 2012 was not taxable due to expiration of the speculative period (N.B. Where the land was acquired without consideration, the foundation continued the speculation period of the predecessor in title), normally only the flat **interim tax of 3.36 % or 14.4 % for rezoning** (as of 2024 3.22 % or 13.8 % for rezoning) of disposal proceeds applies.

The provisions concerning the flat taxation of real estate classified as "old land" and rededicated after 1 January 1988 (effective taxation at 14.4% instead of 3.5%) were tightened. Within the period of limitation, all purchase price increases as a result of rededication are subsequently and retroactively subject to the increased real estate tax rate of 14.4% (13.8 % as of 2024).

"New land" of the tax private assets, the disposal of which is always subject to the **24% interim tax**, also includes land of affected foundations under the stipulations of the BBG 2011.

TIP:
As of 2024, the interim tax will also be reduced from 24% to 23%.

- As with corporations, the stipulations concerning the collection of property income tax are not applicable to private foundations (i.e. no self-calculation by legal advisors and no special advance payment is to be made).
- **Donations to the beneficiaries** are normally taxed – except for a tax-free distribution of substance – at 27.5% capital yields tax and are therefore taxed finally (opting for regular taxation is possible).
- **Certain proceeds from capital assets,** such as interest from bank deposits and bonds, gains from the sale of shares in limited liability companies (GmbH), shares, investment funds, income from derivatives, income from cryptocurrencies, etc., as long as they are retained in the private foundation, are normally subject to 24% interim tax (23% as of 2024). In case of a later donation to an (ultimate) beneficiary subject to capital gains tax, the interim tax paid earlier is credited to the private foundation again. In certain cases, income from capital assets is taxed at the "regular" 24% corporation tax rate (23% as of 2024, e.g. for loans, private placements or investments as a genuine silent partner).

TIP:
See our folder "Das 1x1 der Steuern 2023" (in German), chapter V.6. for the new tax regime generally applicable to cryptocurrencies as of 1 March 2022. Please refer to our website *www.tpa-group.at/de/tag/digital-realestate* for more information on crypto-assets, blockchain, token offerings and other new investment models and exciting new trends in real estate.

- The same rules as with corporations apply to private foundations regarding dividends from Austrian subsidiary companies and from international intercompany participations as well as portfolio participations of the private foundation. Therefore, they are treated as tax-exempt in principle however, the switch to the taxation of controlled foreign corporations (CFC rules, "Hinzurechnungsbesteuerung") as well as the "switch over rules" of the change of method regarding the imputation method must be observed.
- The hidden reserves realised on the sale of investments are generally taxable, but may be transferred to new acquisitions of more than 10 % under certain conditions (from 1 %). The interpretation of the preferential treatment, which has been tightened by the judicature of the Supreme Administrative Court, must – in simple terms – be observed as of 1 January 2023.
- A distribution of assets endowed on or after 1 August 2008 is tax-exempt (only) if the sum of the donations of the foundation reduce the evidence account. Ultimately, benefits continue to be subject to capital gains 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 substance."

- For information on the taxation of luxury real estate in private foundations, see the information on our website at *www.tpa-group.at/de/news/rechtssicherheit-fuer-die-vermietung-von-luxusimmobilien*

2. Fees in case of donation

Where domestic real estate is transferred by the founder to the foundation without consideration for tax purposes, the following costs arise (not counting legal expenses for preparing the contract 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 (see also Chapter VI here as well as with regard to the distinction between transactions with, without and with partial consideration):
  - for the first EUR 250,000 0.5%,
  - for the next EUR 150,000 2.0%,
  - for all exceeding amounts 3.5%.
- **Surcharge of 2.5%** of the "property value" and
- **Land register fee of 1.1 %** of three times the assessed value.

For further information see our German-language brochure "Das 1x1 der Stiftungsbesteuerung" on foundation taxation which can be ordered free of charge on our website.

V. Important issues regarding the real estate transfer tax

Since 2016, objects subject to real estate transfer tax are generally calculated on the basis of the consideration, but at least on the basis of the property value as defined in the Grundstückswertverordnung (GrWV, Property Value Decree).

The following scale/tax rates apply for the portion of the transfer made without consideration:

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

The portions of a transfer made with (partial) consideration are subject to the regular 3.5% tax rate.

For considerations up to 30%, the law deems the transfer to be entirely without consideration; between 30% and 70% is deemed partial consideration and anything above 70% is deemed a transfer with consideration in full.

Transfers within the family and by way of inheritance are always assumed to be without consideration. 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.

When it comes to the taxation of agricultural and forestry real estate, the assessed value continues to be applied.

Tax basis

The newly-defined property value that is to be used for acquisitions without consideration (e.g. gift, inheritance), transfers of shares, combinations of shares and transfers in the course of reorganisations, in place of (three times) the assessed value, can be determined in three ways (taxpayer is free to choose):

- **Flat-rate method: the total of three times the land value and the building value, see below for more details**
- **Real estate price guide: a value derived from an appropriate real estate price index**
  For acquisitions which incur a tax liability after 31 December 2016, the latest published average real estate prices published by Statistics Austria (at the time the tax liability arises) must be used exclusively. In order to avoid excessive values resulting from regional fluctuations, the land value is stated at 71.25% of the value determined by using the real estate price table.
- **Expert opinion: Proof of the lower fair market value by an expert**

Determination of the property value based on the flat-rate method

Using this method to **determine the land value** involves the land area being multiplied by three times the land value per square metre and the extrapolation factor.

The basis for **determining 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 floor space. 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 the basis for calculation. Basement and garage areas must be included at 50% (however, here again a 30% reduction must be made).

Usable floor space / gross floor plan area must be multiplied by the building cost factor (different values apply to each federal state) stipulated in the Property Value Decree issued by the Federal Ministry of Finance. Depending on the construction and use, the following portions of the building cost factor must be included in the calculation:

	Type of the building
100%	Buildings used as residential buildings to the extent that they are not subject to a standard or categorised rent
60%	Factory buildings, workshop buildings, storage buildings as parts of the business unit 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

The last calculation step involves taking into account a reduction due to the age of the building. The following percentages must be used depending on when the building was completed or last renovated:

	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 exists if, within the last 20 years before acquisition, at least four of the measures mentioned by the Property Value

Decree were carried out (partial renovation: at least two of the measures):

- Renewal of the outside plaster and improving heat insulation
- First-time installation or replacement of heating systems
- First-time installation or replacement of electrical, gas, water or heating installations
- First-time installation or replacement of bathrooms
- Replacement of at least 75% of the windows.

Share combinations

By the same token, 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 acquiring party's hand or are acquired by him. Additionally, it is also possible to combine shares indirectly since integration in a group of companies pursuant to section 9 Corporate Income 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 at least 95% of the shares in the company's assets are transferred to new partners within five years.

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

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

Spousal residences

Flats of up to 150 m^2 are exempt from tax in case of acquisition inter vivos or in case of inheritance (by the partner, spouse). The applicable 150 m^2 are to be seen as a tax-free allowance.

1. Fundamental principles of taxation

When it comes to rentals and leases, 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. This means that owner/developer and retirement saving schemes are normally not affected by the ban on offsetting losses (section 2(2a) Income Tax Act 1988). When comparing the returns before and after taxation, the focus must be on the entire expected useful life of the real estate. Owner/developer schemes are also not affected by the deferred loss provisions for capitalistic partners of section 23a Income Tax Act, but current administrative practice and jurisprudence for limited partnerships managing real estate assets must be observed.

Accelerated depreciation of construction costs

(see Chapter I, item 2) can be applied to

- expenses for the preservation of a historic monument;
- improvements under sections 3–5 Tenancy Act; and
- certain renovation costs subsidised by an approved grant (grant under the Residential Property Rehabilitation Act (WSG), the First Homes Act (StWG) or corresponding regulations of the Austrian states). This also applies for demolition and subsequent reconstruction under certain conditions.

Not only the form of the builder-owner schemes, based either on simple joint ownership or on a limited partnership, but also the investment of assets in residential real estate appropriately reflects the retirement savings concept. Long-term net rental income 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 real estate can be utilised for tax purposes (see particularly Chapter 1, item 8.8, Business or hobby?).

As the following comparison of "major" and "minor" owner/developer schemes demonstrates, investing in "buy-to-let" real estate also offers the possibility of **deducting input VAT on the building costs**. The real estate must, however, be accepted by the tax authorities as a source of taxable income and the letting itself be subject to VAT (see Chapter 1, item 8.8).

Finally, specific attention must be given to the structuring of the co-ownership and limited partnership agreements, as where investors do not have a sufficient voice, the application of the *Alternatives Investmentfonds Manager Gesetz* (AIFMG, Alternative Investment Fund Manager Act) cannot be entirely ruled out. This would entail the loss of all income tax benefits, in addition to special features concerning supervisory law.

2. Major owner/developer

2.1. Requirements

- No standard contractual relationships (contracts and agreements for the purchase and construction of real estate do not constitute a single economic unit);
- 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 real estate;
- 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) as well as financing costs. In this regard, however, it should be pointed out that jurisprudence is becoming increasingly critical here.

3. Minor owner/developer

3.1. Requirements

- Itemised final invoice from performing businesses showing a 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) after acquiring the real estate.

3.2. Tax consequences

- Accelerated depreciation of renovation and renewal and construction expenses (see above);
- Deduction of input VAT if the real estate is let subject to VAT;
- Up to 25% of the incidental expenses directly related to construction or renovation to be treated as renovation and renewal and construction expense (spread over 15 years) and the balance to be treated as acquisition costs (spread over 50 or 67 years);
- Land transfer tax on acquisition costs (including VAT in the event of the vendor opting for tax liability) plus construction expenses, as well as parts of other costs, in each case gross including VAT;
- Immediate deduction of incidental expenses not related to the construction of the building is limited according to jurisprudence; exception: e.g. financing costs.

The distinction between a major owner/developer and minor owner/developer is rejected by jurisprudence despite the existence of the *Bauherrenverordnung* (BherVO, Owner/Developer Decree). Instead, the immediate deduction of expenses is made dependent on whether they are incurred in connection with the cost of acquisition or construction.

VII. Real estate funds – tax considerations

Austrian real estate funds are governed by the Immobilien-Investmentfondsgesetz (ImmoInvFG, Austrian Real Estate Investment Fund Act). Since 2013, the AIFMG has also been relevant for real estate funds and must be observed.

1. Key features of real estate funds

- A real estate fund is an investment fund which mostly invests the money of its investors in real estate, rather than in securities.
- Depending on the terms and conditions of the fund, its investments may include the following kinds of real estate, 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 real estate.
  - A maximum of 20% of fund assets may be invested in real estate located outside the EU and EEA. It is generally possible for real estate companies to be acquired making up a maximum of 49% of fund assets.
- With a real estate fund, the fund assets are not jointly owned by the investors, but instead are held by the fund company in trust. This is to avoid a situation in which every change in investors would involve complicated changes to the land register and the payment of real estate transfer tax.
- Since there are no public exchanges to determine market prices for real estate, each item of real estate in a fund must be valued by two independent experts at least once a year.
- A maximum of 50% of the real estate assets may be financed by borrowed capital (e.g. loans).

2. Investment rules

- In order to ensure that risks are diversified appropriately for investment funds, the invested money as per Real Estate Investment Fund Act (ImmoInvFG) must be allocated to at least ten different (real estate) assets (for special funds: five), with the following conditions:
- No single asset at the time of its acquisition represents more than 20% of the fund's total assets (for special funds: 40%), and
- These minimum diversification requirements need to be fulfilled within a start-up period of four years. For special funds, risk diversification has been softened by the Alternative Investment Fund Manager Act (AIFMG).
- Given that funds are required at all times to repurchase shares on application, at least 10% of the funds' assets 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 the fund assets. See item 4 for information about marketability.
- The minimum liquid assets need not to be available in the fund itself, but can instead 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. Use of profits and taxation

- Funds themselves are not subject to income tax or corporate income tax. It is the individual investor with their (proportionate) shares in the profit (oder profit shares) who is subject to tax.
- There are no restrictions on how fund profits can be used: they may be fully distributed, fully reinvested or anything in between.
- The taxable profits are what are called the fund's "dividend equivalent profits" (i.e. profits that would in principle be distributable). Actual distributions will subsequently not be taxed any more.
- Not only is the income from renting out and leasing real estate (called "property operating income") subject to tax, but also 80% of the annual increase in value of the real estate (for funds not publicly marketed, this can even rise to 100%). This applies irrespective of whether the gains have been realised (especially by sale) or whether the increase arises merely as a result of the expert valuation. When calculating property operating income, depreciation is not tax deductible; instead, between 10% and 20% of the net rental income (excluding VAT and operating costs) 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 not transparent for tax purposes. The way in which income from foreign real estate is treated depends on the respective double taxation agreement (DTA) or on the foreign burden on profits:
  - Austria excludes such income from taxation ("relief method") for most countries.
  - Only in a few cases (e.g. Italy, UK, Japan, USA) can Austria levy taxes and offsets the foreign income taxes against the Austrian tax ("set-off method").
- In any case, foreign real estate companies are treated as transparent irrespective of their legal organisation, meaning the profits from them are treated and determined, for tax purposes, in the same way as for a direct investment.
- As regards private investors, income generated at the fund level counts as investment income.

- The profits are subject to capital yields tax of 27.5%.
- With the deduction of capital yields tax, a private investor's liability to tax is generally satisfied, though there is always the option of applying for assessment.
- Where real estate is sold, the difference between the sales price or repurchasing price and the adjusted acquisition cost is taxed. Exemptions exist for fund shares acquired before 1 January 2011. The tax rate is 27.5%. As regards publicly traded funds, 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 tax-exempt.

Foreign real estate funds
These tax provisions must, pursuant to the 'substance over form rule', also be applied to "foreign real estate funds" which are classified as AIF in real estate or to foreign real estate funds whose risk diversification is comparable that is comparable to that of domestic funds.

The tax regime of the ImmoInvFG does not apply to foreign 'funds' that are comparable to a domestic corporation within the meaning of section 7(3) KStG (e.g. a limited liability company) and are not subject to non-taxation or low taxation abroad.

4. Marketability

Unlike the listed shares of real estate companies, the prices of shares in real estate funds are not affected by stock market fluctuations. The value of the shares depends instead on the current market value of the fund assets; the property portfolio is required to be valued by two independent real estate experts at least once a year. Since the 2021 amendment, shares have been subject to a minimum retention period of twelve months in any case. On top of this, they can only be redeemed on certain dates, at which time the fund is obliged to repurchase shares at the current value. In times where share redemptions increase, there is however the option to suspend redemption in the shareholders' interests temporarily – for up to a maximum of two years. This is intended to ensure that the fund is not forced to dispose of real estate assets at a bad times.

1. Regular income

In most double taxation agreements (DTAs), the right to tax income from immovable assets is granted to the respective country where the real estate is situated. This applies both to private and to business assets. Profits from agricultural and forestry businesses are also treated as income from immovable assets.

Example:
A taxpayer resident in Austria has inherited rental property in Germany. The rental income from the German real estate is taxable in Germany. In Austria, such rental income is tax-exempt under the proviso for progression.

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

The rule applies in cases where the property is directly used by the owner and also where the benefit from the immovable asset is indirect and arises from exercising a right of use.

Example:
A businessman resident in Austria has purchased land 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. Gains made upon disposal

Gains on the disposal of immovable assets are generally taxable in the country in which the real estate is situated.

TIP:
In countries without a 'real estate clause', it is possible to transfer the immovable assets to a corporation in good time and subsequently sell the shares in the company. The prerequisite is that the right of taxation for the sale of company shares is also due to the country of residence of the seller in those cases in which the company owns real estate in the other country. It should, however, be considered that contributing real estate to a corporation constitutes a swap under Austrian tax law and can therefore result in the taxation of hidden reserves existing at that time.

It is often possible in the country of residence to take advantage of an international parent-subsidiary exemption so that the profit on disposal remains tax-free in both countries.

VIII. Real estate investments abroad

The OECD Model Agreement 2003 put a stop to this procedure by providing for profits on disposal of shares in real estate companies to be taxable in the country in which the real estate is situated (real estate clause). This means that Austria's international affiliation privilege is cancelled, making foreign real estate investments more difficult. The provisions of the MLI (Multilateral Instrument) may also cause additional red tape. Double taxation agreements containing this real estate clause are currently in force with the following countries (as of 28 March 2023; see below – the list is not necessarily complete):

DTA with	Applicable as of	DTA provision
Argentina	not yet in place	Art. 13 section 4
Armenia	2005	Art. 13 section 4
Azerbaijan	2002	Art. 13 section 2
Australia	1989	Art. 13 section 2
Brazil	1977	Art. 13 section 3[1]
Chile	2016	Art. 13 section 4
China	1993	Art. 13 section 4
Germany	2003	Art. 13 section 2
Estonia	2003	Art. 13 section 1
Finland	2002	Art. 13 section 2
France	1995	Art. 13 section 2
United Kingdom	2020	Art. 13 section 2
Hong Kong	2012	Art. 13 section 4
India	2002	Art. 13 section 4
Ireland	1989	Art. 11 section 2
Israel	2019	Art. 13 section 2
Japan	2019	Art. 13 section 2
Canada	1981	Art. 13 section 3, 4
Kyrgyzstan	2004	Art. 13 section 4
Korea	2003	Art. 13 section 1
Kosovo	2019	Art. 13 section 4
Latvia	2008	Art. 13 section 1
Lithuania	2006	Art. 13 section 1
Morocco	2007	Art. 13 section 4
Mexico	2006	Art. 13 section 2
New Zealand	2008	Art. 13 section 4
Pakistan	2008 (1968)	Art. 14 section 4
Philippines	1983	Art. 13 section 4
Poland	2006	Art. 13 section 2
Romania	2007	Art. 13 section 4
Russia	2003	Art. 13 section 4, 5
San Marino	2006	Art. 13 section 4
Saudi Arabia	2008	Art. 13 section 3
Serbia	2011	Art. 13 section 4
Singapore	2003	Art. 13 section 2
Thailand	1987	Art. 13 section 4
Turkmenistan	2017	Art. 13 section 4
Ukraine	2000	Art. 13 section 2
USA	1998 – 2000	Art. 13 section 2
Venezuela	2008	Art. 13 section 4
Vietnam	2011	Art. 13 section 4
Cyprus	1991	Art. 13 section 1

[1] No pure real estate clause.

3. Provisions for limited tax liability

Property income tax also concerns individuals subject to limited tax liability upon disposal (specifically foreign nationals as investors, corporations formed under public law and charitable corporations). A new assessment liability was established under certain conditions for individuals with limited tax liability under section 102(1)(4) Income Tax Act 1988.

Even corporations and associations only subject to limited tax liability are affected by property income tax. This means that disposals (sale) of real estate within the meaning of income tax law are subject to corporate income tax (according to the rules of sections 30, 30b and 30c Income Tax Act 1988).

Land attributable to a tax-exempt business (e.g. indispensable ancillary undertaking of a charitable association or utility installations of a corporation formed under public law) is still tax-exempt, for instance. By the same token, the tax exemptions for self-constructed buildings, etc. are applicable.

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