

GENERAL OVERVIEW OF DUTCH VAT AND RETT RULES

I GENERAL VALUE ADDED TAX (VAT) RULES

VAT is levied in the Netherlands as pursuant to the Dutch Turnover Tax Act 1968 (*Wet op de omzetbelasting 1968*) (TTA). As a general rule, VAT is due *inter alia* on the provision of services and the supply of goods by a taxable person. A person who leases out real property is considered a taxable person for VAT purposes. In principle, the transfer and lease of Dutch real property by a taxable person are exempt from VAT. However, some exceptions apply, which are discussed below. If the transfer of real property is taxed with VAT, the standard VAT rate of 21% is applicable. If the lease of real estate is taxed with VAT, the standard VAT rate of 21% is also generally applicable. However, the lease of furnished accommodation for short stay purposes is subject to a reduced VAT rate of 9%.

A real property can for VAT purposes be regarded as a single object, based on the so-called ‘**Complex-theory**’. It is also possible to treat part of a real property that is independent or that is not to be considered as an independent real property, but that can be used or operated independently in the economic sense (**Unit**) separately, based on the so-called ‘**Unit-theory**’. In practice, the Unit-theory is broadly applied. This means that in practice the VAT consequences of a transaction should be determined for each separate Unit within a single object. Consequently, the RETT aspects of a transaction should in certain circumstances also be determined on a Unit basis.

1 TRANSFER OF REAL PROPERTY

1.1 General

In practice, the transfer¹ of leased out real property by a taxable person is likely to qualify as a transfer of (part of) a totality of assets (*algemeenheid van goederen*), also referred to as a transfer of a going concern (**TOGC**), provided

that the purchaser continues the operation (i.e. the leasing activities) of that real property. In case of a TOGC, the transfer of the real property is outside the scope of VAT and the purchaser assumes the seller’s position in respect of the relevant real property. The TOGC-scheme will be discussed in more detail in paragraph 1.2.

If the transfer of real property by a taxable person does not qualify as a TOGC, the transfer is, in principle, exempt from VAT. There are three exceptions to this rule:

- (a) the transfer of newly constructed real property as defined in the TTA, including real property that due to significant refurbishment is deemed to be newly constructed (**Newly constructed real property**), is taxed with VAT by operation of law before, on the date or within the first two years after the real property was first put into use (*eerste ingebruikneming*);
- (b) the transfer of building land is taxed with VAT by operation of law; and
- (c) the transfer of real property is taxed with VAT if the seller and the purchaser have opted for a VAT taxed transfer. Such option is only possible if certain conditions are met, as further set out in paragraph 1.3.

If a Dutch seller transfers real property VAT taxed by operation of law – see exceptions (a) and (b) –, the seller is obliged to charge VAT on the purchase price for the real property to the purchaser.

On the other hand, if a foreign seller transfers Dutch real property to a Dutch purchaser and the transaction is VAT taxed by operation of law, no VAT should be charged by that seller. Instead, the Dutch purchaser should report VAT in its VAT return based on the so-called ‘reverse charge mechanism’, provided that the seller and purchaser both qualify as a taxable person. If both the seller and the purchaser are not established (and do not have any presence) in the Netherlands, then the seller should charge VAT to the purchaser. That seller is obliged to register for VAT in the Netherlands and report the VAT payable on the transfer in its VAT return.

¹ For VAT purposes, the taxable event is the supply of goods for consideration.

If the transfer of real property is taxed with VAT by way of an option, the levying of VAT is shifted to the purchaser under the domestic reverse charge mechanism. This means that the seller should not charge VAT to the purchaser, instead the purchaser is obliged to report the VAT payable in its VAT return.

1.2 Transfer of a 'going concern'

If the transfer of the real property qualifies as a TOGC, Section 37d TTA applies. As a result, no goods or services are deemed to be supplied or rendered. Instead, the purchaser in a TOGC takes over the VAT position of the seller in respect of the real property transferred. As a result, pending Revision periods, annual Revision VAT obligations and potential Recalculation obligations continue in the hands of the purchaser (see paragraph 3 below). The application of Section 37d TTA is a matter of operation of law.

Pursuant to Dutch case law, the TOGC-scheme can apply to transfers of real properties that are leased out. In practice, the TOGC-scheme is generally deemed to apply in respect of transfers of leased out real properties between investors.

It is uncertain whether the transfer of a leased out real property can be considered to qualify as a TOGC if it is transferred by a developer – who has developed the property and subsequently leased the real property out to increase its value – to an investor that will hold the property for leasing purposes. Please note that questions have been referred to the Supreme Court concerning the application of the TOGC scheme in such case.

Pursuant to Dutch case law, the transfer of a real property within the context of a sale-and-lease-back, in which a seller transfers real property to a purchaser and subsequently leases that property back, in principle does not qualify as a TOGC.

1.3 Option for a VAT taxed transfer

The option for a VAT taxed transfer should be jointly made by the seller and purchaser. It is only possible to opt for a VAT taxed transfer if the purchaser

uses the real property for purposes for which he is entitled to deduct at least 90% (in exceptional cases 70%) of the VAT due by the purchaser (**90% criterion**).

The option for a VAT taxed transfer can be made (i) in the notarial deed of transfer of the real property or (ii) by filing a separate option request with the Dutch tax authorities (**DTA**). In case the option takes place via a notarial deed the following three conditions have to be met:

- (a) the transfer takes place by means of a notarial deed pursuant to which the real property is transferred;
- (b) it can be derived from the notarial deed that the seller and purchaser have opted for a transfer taxed with VAT; and
- (c) the notarial deed includes the following information:
 - (i) the data of the real property as recorded in the land registry (*kadaster*);
 - (ii) a statement of the purchaser that the 90% criterion is met; and
 - (iii) the date of commencement of the financial year (*boekjaar*) of the purchaser.

If the option for a VAT taxed transfer is made by means of a request, such request should be received by the DTA before the transfer of the real property. The option should include the information as described above under c.

In principle, the 90% criterion is not met if the purchaser has not started to de facto use the real property for purposes for which he is entitled to deduct at least 90% (or 70% in exceptional cases) of the input VAT before the end of the financial year following the financial year of acquisition. Note that based on policy, in specific circumstances this requirement is effectively waived.

In a decree (no. BLKB2013/1686M) the State Secretary of Finance has approved that it is also possible to opt for a VAT taxed transfer for a Unit. In that case, the relevant Unit must be clearly described in the notarial deed or in the option request.

1.4 VAT deduction

A seller of real property can recover VAT on costs attributable to that transfer (e.g. VAT on real estate agent's and advisors' fees related to the transfer) based on its proportionate VAT deduction right ('pro rata') if the transfer qualifies as a TOGC.

In the case of a VAT taxed transfer, the seller can recover all VAT attributable to that transfer.

In the case of a VAT exempt transfer, the seller cannot recover any of the input VAT attributable to the transfer.

A purchaser of real property can deduct VAT on costs incurred for that acquisition (e.g. VAT on advisory costs or on the purchase price, if applicable) based on the use of the real property following acquisition. This means that if the real property is fully used by the purchaser for VAT taxed purposes (e.g. a VAT taxed lease), he can fully recover VAT on costs incurred, whereas if the real property is fully used for VAT exempt purposes (e.g. a VAT exempt lease), VAT cannot be recovered at all. If the real property is used for both VAT exempt and VAT taxed purposes, a proportionate right to deduct VAT should be determined, which is typically determined on the basis of sq m.

2 LEASE OF REAL PROPERTY

2.1 General

In principle, the lease of real property is VAT exempt. However, several exceptions to this general rule apply, such as the lease of furnished accommodation for short stay purposes, which is VAT taxed by operation of law against the reduced VAT rate of 9%, and the stand-alone lease of parking spaces, which is VAT taxed against the standard VAT rate of 21%.

2.2 Option for a VAT taxed lease

Similar to the transfer of real property, it is possible to opt for a VAT taxed lease of real property – to the extent this lease is not already VAT taxed by force of law. The option for a VAT taxed lease can be exercised for a real property in its entirety or per Unit.² The lessee and the lessor can jointly file a request opting for the lease to be taxed with VAT if the following requirements are met:

- (a) the lessee meets the 90% criterion; and
- (b) the real property or Unit concerned is not a building or part of a building that is used for residential purposes.

The lessee and the lessor can opt for a VAT taxed lease (i) by including such option in the lease agreement or (ii) by filing a separate option request with the DTA. As from 2009, opting in the lease agreement is subject to the following conditions:

- (a) it is clearly formulated in the lease agreement that VAT will be charged on the lease;
- (b) the lease agreement contains a statement of the lessee in which it declares that it will use the leased premises for activities which entitle it to a full or virtually full (i.e. at least 90%, or in some exceptional cases 70%) right to deduct input VAT on the basis of Section 15 TTA;
- (c) the lease agreement includes the description of the leased premises, the data recorded in the land registry, as well as the local address. If the option is exercised in respect of a Unit, the Unit concerned should be clearly described;
- (d) the lease agreement includes the commencement date of the lease;
- (e) the lease agreement includes the date of commencement of the financial year of the lessee; and
- (f) the lessor includes the lease agreement in his books and records.

² The State Secretary of Finance has approved that it is possible to opt for VAT taxed lease of part of a real property that is independent or for a Unit (decree no. BLKB2013/1686M).

In order to opt for a VAT taxed lease by filing a separate request, the request³ must be received by the DTA within three months after commencement of the lease. If the request is filed within the three months period, the lease will be VAT taxed as from the commencement of the lease (provided all other conditions are met). It is also possible to file such a request after three months of the commencement of the lease. However, in that case, since the request has retroactive effect of max. 3 months (only) the lease will not be subject to VAT and VAT will not be levied, as from the commencement date of the lease.

Until 24 March 1999 it was only possible to opt for a VAT taxed lease by way of filing a request with the DTA. In the period as from 24 March 1999 until 2009 the possibility to opt for a VAT taxed lease in the lease agreement itself was introduced, but in addition to the aforementioned conditions under (a) up to and including (f) the lease agreement should make reference to a specific decree from the State Secretary of Finance (no. VB99/571). Whether or not a lease is correctly subject to VAT should be determined based on the rules that were in force at the time the lease agreement was concluded. Hence, the rules concerning a VAT taxed lease prior to 2009 remain relevant in respect of leases that were concluded before then.

The 90% criterion will not be met if the lessee has not started to use the real property before the end of the financial year in which the lease commenced. In that case, the request for a VAT taxed lease will be annulled and the lease is deemed VAT exempt as from its commencement. The State Secretary has approved in his decree (no. BLKB2013/1686M) that in the cases in which the actual occupation takes place at a later date, the lease can nonetheless be taxed with VAT, provided that:

- (a) the lessee uses the real property for a consecutive period of at least six months;
- (a) the lessee satisfies, in the financial year(s) in which this six-month period falls, the 90% criterion requirement; and

- (b) the lessor agrees that the Recalculation / Revision period (see paragraph 3 below) commences in the financial year in which the lessee actually takes the real property into use.

If one or more of these conditions is not satisfied, the lease will retroactively be exempt from VAT. This extension of the reference period applies in the event of vacancy which arises prior to the commencement of the revision period as well as to vacancy which arises after the revision period has commenced.

If a lease is VAT exempt, the lessor is not allowed to deduct VAT charged to him which is attributable to the VAT exempt lease. This non-deductible VAT results in an increase of the costs for the lessor. In the Netherlands, it is common practice for a lessee to compensate the non-deductible VAT on the investment and/or maintenance costs incurred by the lessor if the 90% criterion is not or can no longer be met by the lessee ('VAT compensation arrangement').

2.3 Parking space

The lease of parking space is taxed with VAT by operation of law. However, the lease of parking space may be closely related to the lease of another real property with the same lessor and lessee. For instance, where a parking space and a dwelling/office in the same complex or property are owned by a single owner who leases both to a single lessee. In this situation the lease of parking space could be deemed to be incorporated in the lease of the other real property (e.g. dwelling/office). The lease of parking space is in such cases generally considered to be subservient (*ondergeschikt*) to that other real property and, consequently, follows the VAT regime of the lease of the other real property. Hence, if the other real property is leased out exempt from VAT, the lease of parking spaces is considered VAT exempt as well. This may be different if a separate agreement is concluded with the operator of a multi-storey or underground car park.

³ The request for a VAT taxed lease also has to meet certain specific administrative requirements. These requirements differ from the administrative requirements for the request for a VAT taxed transfer of real property.

3 RECALCULATION / REVISION PERIOD

3.1 Revision period

To the extent the transfer of real property was VAT taxed (either by operation of law or by option), and in case of a Newly constructed real property, the real property and the investment VAT (e.g. VAT on the purchase price or the construction costs) will be under review for a period of nine years following the year of first use (**Revision period**⁴ or *herzieningstermijn*). In addition, in the case of significant refurbishment, real property may be under review for a period of nine years following the year of first use after such refurbishment, provided that the refurbishment led to a Newly constructed real property. If a refurbishment has not led to a Newly constructed real property, we are of the view that, according to Dutch VAT law, no Revision period should apply to investments procured in connection with such refurbishment ('investment goods').

If the transfer of the real property was taxed with VAT, either by operation of law or by option, the purchaser can deduct the input VAT in accordance with the future use of the real property. For example, if the entire real property is to be used for a VAT taxed lease, the purchaser is entitled to deduct all input VAT relating to the purchase of the real property. If, subsequently, the real property is to be (partly) used for VAT exempt purposes within the Revision period, the original deduction of VAT on investment costs has to be adjusted by way of repayment by the purchaser to the DTA of a proportional part of the input VAT relating to the purchase of the real property to the DTA (**Revision VAT**). The maximum Revision VAT amounts to 10% per annum for the remainder of the Revision period.

If a real property is transferred within the Revision period, and the transfer qualifies as a TOGC, the Revision period continues in the hands of the

purchaser (i.e. the Revision period does not recommence). This also means that if there is an actual Revision VAT obligation for the seller, this obligation will be taken over by the purchaser as well.

If a real property is transferred within the Revision period, and VAT was deducted on the acquisition, the seller will be confronted with an input VAT correction if this transfer is VAT exempt. This correction will amount to the aggregate Revision VAT over the remaining Revision period and will have to be settled as a lump sum in the VAT return for the period in which the transfer takes place.

After expiration of the Revision period, a VAT exempt transfer or the start of a VAT exempt lease will no longer lead to Revision VAT. However, such VAT exempt transfer or lease may still result in other non-deductible VAT, for instance on operational costs.

Since it is possible to opt for a transfer or lease taxed with VAT per Unit, the Revision rules should also apply per Unit if the Unit-theory has been applied to a real property.

3.2 Recalculation obligation

Upon purchasing a real property VAT taxed (either by operation of law or by way of an option) and construction of a real property, the owner will be confronted with VAT on investment costs. If at the time that these investments are made the real property is not (yet) used, the VAT on such investment costs should be preliminarily determined based on the intended future use of the property. If the real property is intended to be used for VAT taxed purposes, e.g. a lease that is VAT taxed, VAT can be deducted on investment costs based on that intention. When the real property is actually put into first use following the investment, it should be assessed whether the VAT deduction based on such use is in line with the VAT deduction that has been applied based on the intended use. In addition, at the end of the financial year in which the real property has been put into use it should be assessed whether the VAT deduction applied is in line with the actual use of the real property in the year in which it has been put into use

⁴ The term 'revision period' is commonly used to refer to the adjustment period for VAT on investment/purchase costs in respect of movable and immovable property during the adjustment period which commences in the year of first use of a property and continues for the four (in case of movable property) or nine (in case of immovable property) financial years following the year of first use of such property.

(Recalculation). If the VAT deduction based on the actual use of the real property is less than the VAT deduction applied based on the intended use, the VAT would have to be repaid upon the use of the real property, and/or at the end of the year in which the real property was taken into use following the investments (**Recalculation VAT obligation**).

The same applies to investments (such as refurbishments) in vacant (parts of) existing real property. Upon making such investment the owner has to determine whether the VAT on the investment can be deducted based on the intended use of the vacant (parts of the) real property for VAT taxed and/or VAT exempt activities. If, subsequently, the use of the vacant (parts of the) real property deviates from the intended use, a Recalculation of the VAT deduction has to be made based on the actual use of the real property (or relevant parts thereof) in which the investments have been made.

In case a real property is transferred as a TOGC, the purchaser takes over this (potential) Recalculation VAT obligation for investments made by the seller in respect of that real property.

3.2.1 Examples Recalculation and Revision VAT

An investor acquires a Newly constructed real property (**Property X**) for a purchase price of EUR 1,000,000, to be increased with EUR 210,000 VAT. As the investor intends to use Property X for VAT taxed lease (as an office building), he recovers the entire amount of VAT.

Recalculation

If, contrary to the initial intention, the Property X is put into first use for VAT exempt purposes (e.g. if Property X is fully leased out VAT exempt), a Recalculation VAT obligation is triggered. The investor is obliged to repay the entire amount of VAT that it had recovered of EUR 210,000.

At the end of the financial year in which Property X was put into first use an assessment of the VAT deduction right should be carried out. If in the course of

that year Property X has also been used for VAT taxed purposes, the investor may reclaim a part of the Recalculation VAT it had repaid earlier to the DTA due to the VAT exempt first use of the property.

For instance, assuming a financial year that equals the calendar year, a first VAT exempt use of Property X on 1 January followed by a change of use to VAT taxed purposes per 1 July means that the VAT deduction right in that year amounts to 50%. As a result, due to the first VAT exempt use, the investor should initially repay the entire VAT amount of EUR 210,000. However, at the end of the year the investor may reclaim from the DTA a VAT amount of EUR 105,000 due to the VAT taxed use of Property X as per 1 July.

Revision period

If Property X is initially fully leased out VAT taxed, the initial recovery of VAT on the entire purchase price remains in place. However, during the nine years following the financial year in which the first use of Property X occurs, a change in use of the property may cause Revision VAT to become payable. By way of example, please refer to the following table.

Year	Actual use		Revision VAT
	VAT taxed	VAT exempt	
1 ⁵	100%	0%	NIL
2	100%	0%	NIL
3	50%	50%	€ 10,500
4	50%	50%	€ 10,500
5	30%	70%	€ 14,700
6	30%	70%	€ 14,700
7	100%	0%	NIL
8	100%	0%	NIL
9	80%	20%	€ 4,200
10	80%	20%	€ 4,200

⁵ The first year is the financial year in which the Property has been put into first use.

Total amount of Revision VAT	€ 58,800
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Based on the above table, an amount of EUR 58,800 has to be repaid to the DTA as Revision VAT.

In case Property X would have been transferred VAT exempt by the investor immediately after the fifth year, the investor would be obliged to repay Revision VAT over the remainder of the Revision period to the DTA as a lump sum. Hence, he would have to pay an amount of EUR 105,000 of Revision VAT. If the transfer would be VAT taxed by way of an option, no Revision VAT would become due by the investor. Instead, a new Revision period would commence in the hands of the purchaser upon his first use of Property X following the VAT taxed transfer.

The transfer of leased out real property by an investor to a purchaser is likely to qualify as a TOGC. This means that the purchaser takes over a pending Revision period. In the above example, a transfer immediately after the fifth year would not trigger a Revision VAT obligation for the investor selling Property X, but instead the pending Revision period continues in the hands of the purchaser. Any Revision VAT for the years 6 – 10 becomes due by the purchaser, assuming it does not itself dispose of Property X during this Revision period.

4 RIGHTS IN REM

The granting, the transfer, the change, the waiver and the termination of a right in rem, for example, ground lease (*erfpachtrecht*), the right of superficies (*opstalrecht*) or easements (*erfdienstbaarheid*), relating to real property (**Transfer of a right in rem**) is deemed a transfer of real property, unless the remuneration including VAT does not exceed the fair market value of those rights. In that case, the Transfer of a right in rem qualifies as a service (comparable to lease). The fair market value of the right in rem is deemed to be at least the cost price of the real property, including VAT, as if the real property had been constructed by an independent third party at the time of the Transfer of a right in rem. In case of a right in rem for an indefinite period (*onbepaalde tijd*), the remuneration is deemed to be the fair market value of the real property.

Hence, the Transfer of a right in rem that has been vested for an indefinite period is likely deemed to be a transfer of real property.

If the transfer of a right in rem is deemed to be a transfer of real property for VAT purposes, it is possible to opt for a VAT taxed transfer under certain conditions (see paragraph 1.3), if the transfer is not VAT taxed by operation of law. In the event the Transfer of a right in rem is deemed a service comparable to a lease, it is possible to opt for a VAT taxed lease under certain conditions (see paragraph 2.2).

II REAL ESTATE TRANSFER TAX (RETT)

1 GENERAL RETT CONSEQUENCES

The acquisition of the legal title to, or the beneficial ownership of, a real property or rights in rem relating to such properties, located in the Netherlands, is subject to RETT. RETT is due at a rate of 10,4% (for non-residential real property) of the consideration or fair market value of the real property, if higher.

In case of the acquisition of several properties (or multiple legal titles to one object) it is important that the RETT taxable basis should be determined per single property and/or per separate legal title. If this allocation is not well-substantiated in for instance a portfolio transaction (e.g. there is no valuation report drawn up for the individual assets), this can result in RETT becoming due on a higher taxable amount than the combined value of the assets within the portfolio.

RETT is due by the purchaser. A special method applies to calculate the taxable base in case of an acquisition of rights in rem. The Dutch Legal Transaction (Taxation) Act (*Wet op belastingen van rechtsverkeer*) (**LTTA**) contains a number of exemptions that may apply. For example, under certain circumstances an exemption applies for newly constructed real property (see paragraph 1.1) or some installations of a real property, such as an ATES⁶

⁶ Aquifer thermal energy storage.

system (*warmte-koude-opslaginstallatie*), or parts thereof, may benefit from the grid exemption (*netwerkvrijstelling*).

With respect to residential real property (**Dwellings**), a reduced RETT rate of 2% applies to the acquisition of a Dwelling by natural persons that will be used by the acquirer as their main residence, other than temporary. For residential real estate investors, RETT is due at a rate of 10,4%. Housing cooperatives (*wooncoöperaties*) that acquire Dwellings from a social housing association (*woningcorporatie*) can apply the 2% rate as well. In addition, an exemption (*startersvrijstelling*) applies for the acquisition of Dwellings by natural persons in the age from 18 up to and including 34, under the conditions that the acquirer declares that he will use the Dwelling as main residence and that he did not applied the exemption before. The exemption only applies if the value of the Dwelling (including appurtenances) does not exceed EUR 440,000. A Dwelling should be understood as real property which is, at the moment of transfer, in its nature fit for residential purposes. The reduced RETT rate also applies for the acquisition of any appurtenances (*aanhorigheden*) to the Dwelling that are acquired together with that Dwelling (whether or not from the same seller). A related construction, such as a parking space, garage box, storage or a bicycle shed, qualifies as an appurtenance to Dwellings if such construction (i) belongs with the Dwelling, (ii) is used by (the occupant of) the Dwelling and (iii) is subservient to the Dwelling.

The acquisition of a real property of which at least 90% of the floor area is in its nature intended for residential use, qualifies for the application of the reduced RETT rate in its entirety.

2 RETT TAXABLE EVENTS

2.1 Acquisition legal title

The acquisition of the legal title to Dutch real property (or rights in rem thereto) is a taxable event for RETT. RETT is due by the acquirer of the real property.

The transfer of Dutch real property takes place via a notarial deed of transfer. As the notary that executes this deed of transfer is held severally and wholly liable for the RETT amount due that follows from this deed of transfer, a purchaser should transfer the RETT amount payable to the notary. The notary subsequently pays the RETT directly to the DTA. If a RETT exemption or RETT reduction scheme applies in connection with the acquisition of the legal title to a real property, such RETT facility will be reflected in the notarial deed of transfer.

2.2 Acquisition beneficial ownership

The acquisition of the beneficial ownership to Dutch real property (or right in rem thereto) is (also) a RETT taxable event. The concept of beneficial ownership is broadly defined and may encompass any interest in a real property that constitutes at least some risk in the change of value of that real property.

The acquisition of merely a right to delivery (*uitsluitend recht op levering*) of the real property does not qualify as the acquisition of beneficial ownership to real property and thus is not a taxable event for RETT purposes. For instance, as a result of concluding a sale and purchase agreement,

The transferor of the beneficial ownership to Dutch real property is required to notify the DTA that he has transferred such beneficial ownership within two weeks after this transfer occurred. If no notification is made, the transferor becomes severally and wholly liable for the RETT due in connection with the acquisition of the beneficial ownership by the acquirer. This notification is not required if the beneficial ownership is transferred by means of a notarial deed of transfer.

The acquirer of the beneficial ownership to Dutch real property is required to submit a RETT return in which he reports the RETT due (if any) in respect of the acquisition. The RETT return should be submitted, and the RETT due should be paid, within one month following the day that the beneficial ownership was required.

2.3 Accumulation of RETT

Since both the acquisition of the legal title and the acquisition of the beneficial ownership of real property are RETT taxable events, it may occur that RETT is levied twice in relation to the same real property: once for the acquisition of the legal title and once for the acquisition of the beneficial ownership. If no RETT facility applies, RETT would be calculated on the purchase price for the legal title, respectively beneficial ownership, or the fair market value of the real property if this is higher than the purchase price.

For example, if A acquires the legal title to a (non-residential) real property for a purchase price of EUR 1, whilst the beneficial ownership is acquired by B for a purchase price of EUR 100,000 (which purchase price equals the fair market value of the real property) and both acquisitions take place on the same day, the result would be that:

- i. A is obliged to calculate 10,4% RETT on the value of EUR 100,000, hence, RETT in the amount of EUR 10,400 is due; and
- ii. B is obliged to calculate 10,4% RETT on EUR 100,000 as well.

The consequence is that a total RETT amount of EUR 20,8000 is payable on the same day in respect of a single real property.

To mitigate the effects of both the acquisition of the legal title and the beneficial ownership qualifying as RETT taxable events, Section 9(4) LTTA provides for a reduction of RETT for the acquisition of the legal ownership of a real property by the beneficial owner or vice versa. This facility entails that the taxable base of the later acquisition of the legal or beneficial ownership is reduced with the amount on which RETT or non-deductible VAT was paid regarding the earlier acquisition of either the legal or the beneficial ownership of the relevant real property.

Furthermore, in practice it may occur that several investors acquire the beneficial ownership of a real property whilst the legal title is acquired by a custodian (*bewaarder*) on their behalf. This is common with investment funds, e.g. in the form of a limited partnership (*commanditaire vennootschap*). As the levying of

RETT from both the investors for the acquisition of the beneficial ownership (each for their part) and the custodian for the acquisition of the legal title to the real property is deemed undesirable, the State Secretary of Finance has approved in a decree that the acquisition of the beneficial ownership is not subject to RETT, provided certain conditions are met (no. 2021-64140).

3 CONCURRENCE OF VAT AND RETT

It is possible that both VAT and RETT are due on the same transaction. To avoid double taxation, the acquisition of real property is exempt from RETT pursuant to Section 15(1)(a), LTTA (**Concurrence exemption**) in the following two situations:

- (a) The transfer is VAT taxed by operation of law (i.e. not by way of opting for a taxed transfer) *and* the real property has not been used as a business asset (*bedrijfsmiddel*)⁷ at the time of the acquisition; or
- (b) The transfer is VAT taxed by operation of law (i.e. not by way of opting for a taxed transfer) *and* the real property has been used as a business asset at the time of acquisition *and* the purchaser is not entitled to a full or partial deduction of the input VAT incurred, i.e. the purchaser cannot recover the VAT in full or in part.

In principle, the Concurrence exemption is not applicable with respect to the acquisition of a Newly constructed real property (or part thereof) in so far as the real property has been used as a business asset at the time of acquisition *and* the purchaser is entitled to a full or partial deduction of the input VAT incurred. However, according to the LTTA, the Concurrence exemption can nevertheless be applied if the following conditions are met:

- (a) It concerns real property that is leased out or used within the business of the seller *and* the acquisition takes place within six months after the date of the first use by the seller or, if earlier, the commencement date of the lease;
- (b) A notarial deed is drafted for this transfer and this notarial deed is executed within the period set out under (a); and

⁷ The leasing of real property is considered to be the use as a business asset.

(c) The transfer is taxed with VAT by operation of law⁸.

If, for VAT purposes, the real property concerns separate Units and the VAT rules are applied per Unit (i.e. the Unit-theory has been applied), the RETT rules will also be applied per separate Unit.

4 SUCCESSIVE ACQUISITIONS

Section 13(1) LTTA includes a facility for successive acquisitions of the same real property within a period of six months to avoid double taxation. The taxable RETT base in respect of the acquisition of real property is reduced with the taxable base of previous acquisitions (i.e. RETT or VAT, which was not recoverable, must have been due on the earlier acquisition(s)) that took place in the six months preceding the date of the acquisition at hand. In case the initial acquisition is subject to a RETT rate of 2% and the subsequent acquisition is subject to a RETT rate of 10,4%, a tax credit will be given instead of a taxable RETT base reduction.

Example⁹

A acquires an office building on 1 January for a purchase price of EUR 25,000,000 ('acquisition 1'). The RETT due amounts to 10,4% of the purchase price, hence EUR 2,600,000.

On 1 March, B acquires the office building for a purchase price of EUR 24,000,000 ('acquisition 2'). Normally the RETT due by B would amount to 10,4% of the purchase price, hence EUR 2,496,000. However, since RETT was due in respect of acquisition 1 the taxable base for acquisition 2 can be reduced with the taxable base of acquisition 1. The application of the RETT facility for successive acquisitions can, however, not result in a refund of RETT (i.e. the

taxable base cannot become negative). This means that the taxable base for acquisition 2 is NIL and no RETT is due by B.

C acquires the office building on 1 July for a purchase price of EUR 30,000,000 ('acquisition 3'). The taxable base for acquisition 3 can be reduced with the taxable base for acquisition 1 since all the acquisitions take place within a period of six months. Acquisition 2 does not impact the taxable base for acquisition 3 as no RETT was due in respect of that acquisition. As a result, the RETT due by C is calculated as:

$$10,4\% \times (\text{EUR } 30,000,000 - \text{EUR } 25,000,000) = \text{EUR } 520,000$$

D acquires the office building on 2 July for a purchase price of EUR 30,000,000 ('acquisition 4'). The taxable base in respect of acquisition 4 can only be reduced with the taxable base for acquisition 3 since acquisition 1 took place more than six months prior to acquisition 4 and no RETT was due in respect of acquisition 2. As a result, the RETT due by D is calculated as:

$$10,4\% \times (\text{EUR } 30,000,000 - \text{EUR } 5,000,000) = \text{EUR } 2,600,000$$

Legally the RETT facility for successive acquisitions is applied by, and thus for the benefit of, the acquirer of real property. However, parties can commercially agree who will be the beneficiary of the RETT benefit. In practice it is common to agree that the purchaser should compensate the seller for the RETT benefit due to the application of the RETT facility for successive acquisitions. If that is the case, such compensation becomes part of the RETT taxable base. Parties generally agree that the purchaser shall in any case not pay more in terms of compensation and RETT than he would have paid if the RETT facility for successive acquisitions had not applied.

By way of illustration: A acquired a real property for a purchase price of EUR 25,000,000 and paid EUR 2,600,000 RETT. Within six months, A sells and transfers the real property to B for a purchase price of EUR 30,000,000. As B can apply the RETT facility and reduce the taxable base of its acquisition of the property, B is only required to pay RETT in the amount of EUR 520,000¹⁰.

⁸ If no VAT is levied because a transfer of real property takes place within a fiscal unity for VAT purposes or because the transfer qualifies as a TOGC, the Concurrence exemption should in principle also apply under the same conditions. The State Secretary of Finance has approved this in a decree (no. 2017-51500).

⁹ Assume that all transactions take place in the same year.

¹⁰ $10,4\% \times (\text{EUR } 30,000,000 - \text{EUR } 25,000,000) = \text{EUR } 520,000$.

Hence, B saves EUR 2,600,000 of RETT. If A and B commercially agree that B pays this RETT saving to A, B would have to pay an additional amount of EUR 2,600,000 to A. The primary RETT taxable base would then be EUR 32,600,000. As a result, the RETT due by B would be calculated as:

$$10,4\% \times (\text{EUR } 32,600,000 - \text{EUR } 25,000,000) = \text{EUR } 790,400$$

In total, B would have paid an amount of EUR 2,560,000 that is composed of the compensation and RETT. If the RETT facility had not applied, B would have had to pay a RETT amount of EUR 3,120,000. To avoid this effect, parties generally agree that the compensation that B is required to pay to A includes the RETT due on such compensation. That means that B is required to pay to A:

$$\text{EUR } 2,600,000 / 110,4\% = \text{EUR } 2,355,072 \text{ (rounded)}$$

The RETT due is then calculated as:

$$10,4\% \times (\text{EUR } 32,355,072 - \text{EUR } 25,000,000) = \text{EUR } 764,927$$

In that case, B would pay a total amount of EUR 3,120,000¹¹ in terms of compensation (to the seller) and RETT.

5 RIGHTS IN REM

The acquisition, the granting, the transfer, the amendment (including an extension of the term), the waiver and the termination of rights in rem relating to real property such as ground lease, right of superficies or easements, are in principle subject to RETT at a rate of 10,4%. The taxable base for RETT purposes for the transfer of such rights in rem is calculated at (i) the purchase price (or the market value if higher) of the right in rem, plus (ii) the net present value of future ground lease payments, charges or lease payments, minus the value of ground lease payments, charges or lease payments which have been paid upfront. The net present value of future payments should be calculated in accordance with a statutory formula, whereby the outcome may depend on several variables. The taxable base is capped at the market value of the real property concerned if it were in freehold (it is market practice to have a valuation

report drawn up). However, it is our understanding that the DTA are of the view that if the purchase price of the restricted right exceeds the market value of the real property if it were held in freehold, RETT should be calculated as 10,4% on the purchase price of the right in rem.

¹¹ EUR 2,355,072 + EUR 764,927 = EUR 3,120,000.