MOORE

BASIC PRINCIPLES OF TAXATION OF CROSS-BORDER INVESTMENT IN IMMOVABLE PROPERTY

CONTENTS

AUSTRIA

1. ACQUISITION OF IMMOVABLE PROPERTY IN AUSTRIA

1.1 Legal framework

The acquisition of Austrian immovable property must be carried out strictly in accordance with Austrian law, and there is no possibility of doing so pursuant to the law of any other country. The most common immovable-property transaction is the purchase of land. The purchase of an Austrian property can be considered as if it took place in two stages. Both title and procedure must be considered:

1). There must be a binding transfer of title (e.g. by deed of sale or deed of gift)

2). The acquisition of ownership occurs only once the procedure is carried out. In the case of immovable property, the procedure is entry in the Land Register *(Grundbuch*).

In order to be registered as owner in the Land Register, the acquirer must produce a valid document for land registration. This is a document on which the signatures of the contracting parties are attested by a court or notary. A deed of sale does not always have to be drawn up by a notary but the court's or a notary's certification of the signatures of all parties to the contract is required.

Deathbed gifts, gifts without a transfer and deeds of sale between spouses must be notarised.

Generally, both natural persons and legal persons may be registered as owners of immovable property in Austria. A civil-law partnership *(Gesellschaft bürgerlichen Rechts)* is subject to special treatment. It cannot be registered under its own name; only the names of the partners may be entered in the Land Register. A company incorporated under foreign law may purchase land in Austria and be registered as owner in the Land Register.

In the case of foreign nationals and companies in which predominantly foreigners are involved, a permit in accordance with the Foreigners Land Acquisition Act *(Ausländergrunderwerbsgesetz)* is required for registration in the Land Register.

1.2 Immovable-property transfer tax/other acquisition costs

In Austria acquisition of immovable property is subject to immovable-property transfer tax *(Grunderwerbsteuer)*. Insofar as domestic immovable property belongs to a partnership or company as part of its assets, qualifying transfers of shares or partnership interests, such as the consolidation of 95% of all shares or interests in the hand of a single acquirer, are also subject to immovable-property transfer tax.

In the case of a partnership or company, direct or indirect consolidation of 95% of all shares or interests in the hands of a single party is likewise subject to immovable-property transfer tax, as is the transfer of 100% of the shares or interests to a new member.

Furthermore, the contribution of immovable property to a company in return for the issue of shares is also subject to immovable-property transfer tax.

There are special rules, in particular for acquisitions of agricultural and forestry land. Likewise, there is no exemption for immovable property acquired *mortis causa* or by way of an *inter vivos* gift.

The concept of land for the purposes of immovable-property transfer tax differs considerably from the definition of land in civil law. The term land in the sense of the immovable-property transfer tax covers also heritable building rights, ownership and joint ownership of apartments, buildings on land belonging to another party and land-use rights.

The basis of assessment for immovable-property transfer tax is generally the value of the consideration paid, but no less than the value of the land. The value of the land is also applied, for example, to transfers of land free of charge. This can be calculated in three different ways, whereby the taxpayer is basically free to choose which form of calculation he or she wishes to use.

The tax rate is generally 3.5% of the taxable amount. However, there are various exceptions to this flat tax rate: If, for example, a property is acquired free of charge, as is always assumed by the Austrian Immovable-Property Transfer Tax Act *(Grunderwerbsteuergesetz)* within the family, a graduated tariff must be used: The first EUR 250 000 of the taxable amount (the value of the property) is then subject to a tax of 0.5%. The next EUR 150 000 is taxed at 2%. Any excess over EUR 400 000 is taxed at 3.5%.

Further lower tax rates are also provided for in the agricultural and forestry sector, for example, or in the case of transactions under the Reorganisation Tax Act *(Umgründungssteuergesetz*).

Liability for the tax lies usually with the persons involved in the acquisition process, and tax becomes

due when the transfer is completed and the entry in the land register has been made.

The company is liable for the tax where immovable property is transferred by way of a share transfer or the transfer of part of a business.

1.3 Value added tax

The sale of a property, even if it is sold by a taxable person, is generally exempt from VAT in Austria.

However, under certain conditions, the vendor has the option of opting for taxation and waiving the tax exemption. This will usually be in point where the vendor has within the last 20 years preceding the sale borne acquisition and production costs that were subject to VAT and has claimed deduction of input tax in respect of these costs, as otherwise the vendor would be obliged to make a partial refund of the input tax deducted.

The VAT rate applicable to property sales is currently 20%.

1.4 Acquisition of a property company

In order to have a choice in the case of a disposal between disposing of the immovable property itself and disposing instead of shares in a company holding the property, many investors interpose a company (a 'property company') or a partnership between themselves and the immovable property. If, in the course of the acquisition of shares, a consolidation of at least 95% of the shares into the hands of a single shareholder takes place, this is subject to immovable-property transfer tax. However, the immovable-property transfer tax is only levied on the value of the immovable property (assessment basis: 'property value') and not on the value of the total purchase price of the company shares.

2. CURRENT TAXATION

2.1 Delimitation of the right of taxation

Income generated from a property situated in Austria is subject to tax in Austria.

In this respect, it makes no difference whether an investor holds the property in his own person or through a property company. Irrespective of this, the so-called worldwide income principle applies to the investor in most countries, according to which income earned abroad is also taxable in the respective country of residence.

2.2 Income tax

Income from letting immovable property derived by a natural person in his or her own name or as a partner in a partnership is subject to income tax in Austria. In the case of natural persons and asset-management partnerships, taxable income is the surplus of income over income-related expenses.

Where a partnership that carries on a trade or business is concerned, rental income is included in operating income, and determination of the taxable profit depends upon the particular legal form and the amount of turnover. Irrespective of the method of determining profit, all current expenses, such as interest on borrowed capital, must be deducted from the gross rental income (rent plus operating expenses).

The deductions for depreciation may also reduce current income. Since depreciation is allowed only in respect of buildings, acquisition and production costs must be apportioned between buildings and land. With regard to this apportionment, the Income Tax Act *(Einkommensteuergesetz)* generally provides for a ratio of 60% (buildings) to 40% (land), unless the actual circumstances clearly differ significantly from this. A ratio of 70:30 or 80:20 can also be applied, depending on the location of the property and the number of residential units.

For buildings that are part of operating assets and directly serve the purposes of the business, the annual depreciation is generally 2.5%, whereby an annual depreciation of 1.5% is applied to buildings that are rented for residential purposes in the business sector.

In the case of buildings used to generate income from letting, 1.5% of the taxable amount may be claimed as depreciation each year without proof of actual useful life. For buildings constructed before 1915, a depreciation rate of 2% is permissible even without an expert opinion.

For buildings meant for residential purposes, maintenance expenses must be differentiated between those for maintenance and those for repairs. Maintenance expenses due every year may be written off immediately. Maintenance expenses not falling due every year may on request be spread over fifteen years. Deductions for repair expenses must be spread over fifteen years.

Foreign investors must file an income tax return for persons with limited tax liability (essentially non-

residents) in respect of Austrian-source rental income for the previous calendar year if that income exceeded EUR 2000.

The tax rates are basically the same for taxpayers with limited and unlimited tax liability, but the taxable income of taxpayers with limited tax liability is increased by EUR 9 000. Rates of income tax under the Austrian Income Tax Act are progressive and there are currently seven rate bands as follows:

Tranche of taxable income (EUR)	Rate of tax (%)
First 11 000	0
Next 7000	25
Next 13 000	35
Next 29 000	42
Next 30 000	48
Next 910 000	50
Remainder over 1 000 000	55

Losses from letting may not be carried forward and a tax-loss carry-back is currently not possible in Austria.

The income of a company from the rental of immovable property is subject to corporate income tax in Austria. The rate of corporate income tax in Austria is currently 25%. Profits are determined by a comparison of business assets. There is no trade tax in Austria.

2.3 Property taxes

Landholdings, i.e. land and buildings together, are subject to property tax *(Grundsteuer)* in Austria. Property tax is a local tax levied by local authorities.

Property tax is assessed on the 'unit value' *(Einheitswert)* of the property, which is generally lower than the market value. The rate of tax differs from one local authority to another.

The owner of a property is allowed to pass on the property tax in full to tenants as operating costs in the service-charge agreement, if a corresponding provision has been made in the lease agreement.

2.4 Value added tax

The letting of property for residential purposes is subject to the reduced VAT rate of 10%. Letting for other purposes is basically tax-exempt but landlords may opt to subject rents to the standard VAT rate of 20%, in order to be able to claim input-tax deduction.

Proceeds from disposal of land are tax-exempt. Again, an option to waive exemption exists.

The VAT option is of interest if the input-tax deduction was claimed for new buildings or extensive modernisation and maintenance expenditure. Without this option, there would be a pro-rata adjustment of the input tax deducted over a twenty-year period.

3. TRANSFER OF IMMOVABLE PROPERTY

3.1 Private disposals

Capital gains from the disposal of domestic immovable property that is a private asset of the vendor are classified as income from the private disposal of immovable property and have been taxable since 1 April 2012, regardless of the date of acquisition.

The rate of tax *(Immobilienerstragsteuer)* on income from private property disposals is 30%.

The basis of assessment is generally the difference between disposal proceeds and acquisition costs, as increased by investment in the property and reduced by deductions for depreciation. If the immovable property was acquired before 31 March 2002, the acquisition costs may be determined at a lump-sum amount of 86% of the disposal proceeds, subject to certain particularities.

Under certain conditions, the disposal of owner-occupied homes that have been the owner's primary residence, self-built buildings and compulsory purchases or land-consolidation arrangements are exempt from tax.

The calculation and collection of the tax is usually carried out by the representative (notary, lawyer) of a contracting party, in which case the tax on the income from the private disposal of immovable property is considered to have been settled and does not have to be taken into account when calculating the income tax subject to progressive rates. It is possible to opt instead for the net proceeds to be subject to progressive income tax by way of assessment, where this would be advantageous in the particular circumstances of the individual case.

3.2 Dealing in land

Insofar as the disposal of immovable property goes beyond the private management of assets, the profits earned from the disposal are taxed as income from a trade or business.

A transaction is deemed to constitute dealing in land where the criteria of section 23 of the Income Tax Act are met. Austrian jurisprudence has not followed the German 'Three Object Test' set by the German Federal Fiscal Court *(Bundesfinanzhof)* with regard to its scope. Rather, what matters in Austria is the overall picture of the circumstances of the individual case. It is difficult to make general statements regarding

the extent necessary for the existence of dealing in land. Even the sale of only two plots of land can, under certain circumstances, lead to dealing in land.

If dealing in land is established, all properties intended for disposal – regardless of whether the properties are let or not – are regarded as current assets. Due to their qualification as such, no depreciation may be claimed in respect of them.

Profits from dealing in land are subject to progressive income tax not to the 30% property disposal tax.

3.3 Commercial disposals

A capital gain derived from the disposal of property qualifying as a business asset is taxable according to the underlying (business) income type. In the case of natural persons, the capital gain is again taxed at the special rate of 30%, provided that dealing in land is not in point.

In Austria, in determining the income of natural persons, allocation of hidden reserves to a transfer reserve is allowed. However, the land or building sold must have been part of the fixed assets of the business for at least seven years. In special cases, a 15-year period is required.

3.4 Non-Resident property owners

If a person resident abroad owns immovable property in Austria, the non-resident is liable to income tax in Austria on his rental income and on any capital gains arising from the disposal of the property.

According to most double taxation agreements that Austria has concluded, capital gains from the disposal of shares in companies holding Austrian property may be taxed in Austria.

4. AVOIDANCE OF DOUBLE TAXATION

In order to avoid double taxation, Austria has concluded bilateral double taxation treaties with numerous countries, under which the right to tax income from immovable property, including rental income, is assigned to the state in which the property is situated (the situs state). As a rule, the state of residence reserves the right to take this foreign income into account when computing its own income tax. This rule conforms to the OECD Model Tax Convention and is applied by most countries.

FRANCE

1. ACQUISITION OF IMMOVABLE PROPERTY IN FRANCE

1.1 Introduction

France has always been a popular location for foreign immovable-property investors, witnessed by the purchase of a a flat in Paris, for example, of a holiday home in the sunny areas of Provence in the south of France, or investment in one of the many new building complexes in major French cities.

However, every immovable-property investor should analyse the tax consequences and the financial risks involved before making an investment. Owning a French property, even if only for private use, triggers a large number of tax obligations.

Similarly, the consequences of inheritance-tax law are seldom sufficiently taken into account in the run-up to acquisition of a property, which in extreme cases can mean that the heirs have no choice but to sell the inherited property in order to repay the tax liability.

1.2 Property transfer taxes/other acquisition costs

Acquisition of an existing property

As a rule, the acquisition of a property in France is subject to a land-transfer tax in the form of the so-called *droit d'enregistrement* (registration duty) of approximately 5%, for which the purchaser is normally liable and is payable via the notary when the transaction is registered in the Land Registry. However, the purchaser and the vendor are jointly and severally liable to the tax authorities for payment of the land-transfer tax.

The registration duty consists of the so-called property disclosure tax (*taxe de publicité foncière*), the so-called communal tax (*taxe communale*) and the so-called *prélèvement pour frais d'assiette* on the property disclosure tax.

Since 1 March 2014, most administrative districts (*départements*) have made use of the possibility to increase the property disclosure tax by a maximum of 0.7% to 4.5%. The total tax thus increases to a maximum of 5.8%.

Furthermore, additional costs and fees such as notarial fees and estate agent's commission must be taken into account when purchasing.

1.3 Value added tax

Purchase of a new property

The sale of immovable property is generally exempt from VAT. However, this is not the case if, for example, the building was completed less than five years ago. This triggers VAT of 20%, which is payable by the purchaser. In addition, there is a publication tax *(taxe de publicité foncière*) of 0.6% or, including the so-called *frais d'assiette*, 0.715%.

As VAT is generally not deductible or refundable for private investors, the VAT treatment is important in assessing the potential investment costs. Often, the quoted purchase price already includes VAT.

1.4 Acquisition of a property company

Under French tax law, shares in companies more than 50% of whose assets consist of land situated in France are treated as immovable property. The sale of shares in property companies is therefore subject to a 5% transfer tax. As these shares do not constitute immovable property under civil law, neither a notarial deed nor an entry in the land register is required for the acquisition or sale.

2. CURRENT TAXATION

2.1 Income tax

Under French tax law, a foreign owner of immovable property may be subject to a flat-rate income tax based on the rental value of the property, even if the property is not actually let. However, this rule only applies if there is no tax treaty between France and the investor's state, so that investors from countries such as Andorra, Guernsey, Jersey or Liechtenstein may be affected by this provision.

In other cases, where the investors are resident in the European Union or in treaty-partner countries, French income tax is levied only on the basis of the actual rental income from the French property (situs principle).

The income tax return must be submitted annually between March and April. When determining taxable income, costs such as interest, insurance premiums, administrative costs, property taxes, maintenance and renovation costs etc. can be taken into account. As a rule, depreciation is not permitted.

Possible losses from letting (negative difference between rental income and costs) may be carried forward for ten years and offset against future rental income. Under certain conditions, such losses can be deducted from other income up to a maximum of EUR 10 800 per annum.

In France, income tax is charged at progressive rates. The maximum rate of income tax on rental income is 40%.

A minimum rate of 20% applies to foreign taxpayers. For the part of the taxable income exceeding EUR 27 519, a minimum tax rate of 30% has applied from 2019 (without the benefit of a tax-free allowance).

2.2 Value added tax

The letting of furnished or unfurnished immovable property for residential purposes is generally exempt from VAT, and there is no option to waive exemption and charge VAT, as there is for the letting of commercial property. If the letting is VAT-exempt, no input-tax deduction can be claimed for renovation and other costs.

2.3 Wealth tax on immovable property *(Impôt de Solidarité sur la Fortune Immobilière – IFI)*

Before 2018, a general wealth tax was charged on natural persons whose assets exceeded the exemption limit of EUR 1.3 million on 1 January of the tax year. The tax applied to resident and non-resident taxpayers, by reference in the case of the latter to the value of their French assets.

With effect from 1 January 2018, however, the general wealth tax was replaced by a wealth tax on immovable property only (IFI – *Impôt sur la Fortune Immobilière*). The threshold value, which triggers the tax, remains unchanged at EUR 1.3 million, as do the tax rates, which are graduated between 0.5% and 1.5%. Thus, the immovable-property tax is payable if the net value of the immovable-property assets exceeds EUR 1.3 million as at 1 January of the tax year.

The rules on the determination of what is taxable property for tax purposes have been significantly changed. In principle, taxable property includes all directly and indirectly held immovable property and property rights. However, only those assets that are not dedicated to the owner's professional activity are subject to wealth tax on the assets side. The aim is to tax only that property which does not serve a business purpose.

As the charge to wealth tax is based on net market value, liabilities connected to the property are deductible. However, foreign investors should note in particular that liabilities in the form of loans, although still deductible, have been greatly restricted in their deductibility in some cases. The acquisition of immovable property financed by borrowing may now make less sense for tax purposes than previously.

In the case of maturing loans, a deduction may only be made in accordance with a so-called annual depreciation coefficient (*coefficient annuel de dépréciation*). In addition, certain loans are considered non-deductible, such as a loan granted directly or indirectly by members of the taxpayer's family in the broad sense of the term, unless the terms of the loan are able to withstand an arm's length comparison. Furthermore, a maximum deductibility limit of 50% of the loan is applied if the taxable assets exceed EUR 5 million and the loan principal constitutes more than 60% of these assets.

Once the taxpayer is subject to the IFI, the calculation for this tax starts at EUR 800 000.

So far, the government has refused demands to exclude a person's main residence from the scope of the tax for social policy reasons, as requested. However, a tax deduction of 30% is granted on the value of a property that is actually used as a main residence.

Unlike the position with inheritance tax, division of the property into usufruct and (residual) ownership is not beneficial for the taxpayer. It is the usufructuary alone who is liable for the wealth tax and the taxable amount is calculated on the basis of full ownership. In return, the owner is exempt from the tax.

Foreign taxpayers are obliged to submit an annual tax return, which usually has to be filed by May or June at the latest. The IFI must be reported at the same time as income tax. Failure to file a return is subject to financial penalties (default interest of up to 2.4% per year, 10% to 40% tax penalty for late submission). The tax authorities may review a taxpayer's wealth tax position for up to six years in arrears.

For non-residents, who were previously subject to the old wealth tax (ISF) only on immovable property situated in France or on shares they held in a French company whose assets consisted predominantly of immovable property (*société à prépondérance immobilière*), the new IFI entails an extension of their liability to tax.

2.4 Tax on immovable property owned by legal persons

As a general rule, legal persons (companies, partnerships, associations, foundations, trusts etc) are subject to an annual tax of 3%, calculated on the

basis of the market value of their immovable property situated in France. In most cases, however, exemption from this tax can be obtained provided that the legal entity complies with specific reporting obligations and provides the addresses of its partners or members to the tax authorities.

The aim of the tax is, inter alia, to identify the natural persons who are the beneficial owners of the legal entity and to make them directly subject to wealth tax on property.

2.5 Other taxes

Owning a French property generates a large number of other taxes and duties, such as local property taxes (property tax – *Taxe foncière and housing tax – Taxe d'habitation*), which are levied annually by the communes and départements. The tax rates are set at a local level on the basis of a so-called rental value (*valeur locative*).

The housing tax was modified by the 2018 Finance Act in the form of a progressive tax reduction: 80% of French residents no longer have to pay housing tax from 2020 onwards, while the remaining 20% will remain liable until 2023 at the latest. From 2023 onwards, all main residences should no longer be subject to housing tax.

The French Ministry of the Economy has published a purchasing-power simulator on its website, which calculates who is affected and gives an indication of the amount of savings: **https://www.economie.gouv.fr/particuliers/suppression-taxe-habitation-combien-allez-vous-gagner#.**

Taxes on owners of secondary or holiday homes, on the other hand, are likely to remain in place. These are usually equal to the maximum rate of the housing tax. Since 2017, the law has allowed communes with limited housing space to levy a surcharge of 5% to 60%.

In addition, a special tax is payable for the rental of office or commercial premises in Paris and the surrounding area.

Non-residents who own a residence in France must pay an annual tax of 20% of the theoretical rental value (*valeur locative cadastrale*). Like property taxes, this tax is due for the whole year if the individual concerned is non-resident on 1 January of a given year. It is levied and collected in the same way as the housing tax.

All persons who are not resident in France for tax purposes and who own a property in France at their free disposal are liable to this tax. The property must therefore be the taxpayer's second home and not a rented home. The taxpayer's income from French sources may not exceed 75% of total income (in France and abroad).

3. TRANSFER OF IMMOVABLE PROPERTY

Depending on the purpose of the investment (personal use or letting), the purchaser should already be considering the tax consequences of a later transfer of ownership by sale, gift or universal succession at the time of purchase and take into account any existing structuring options.

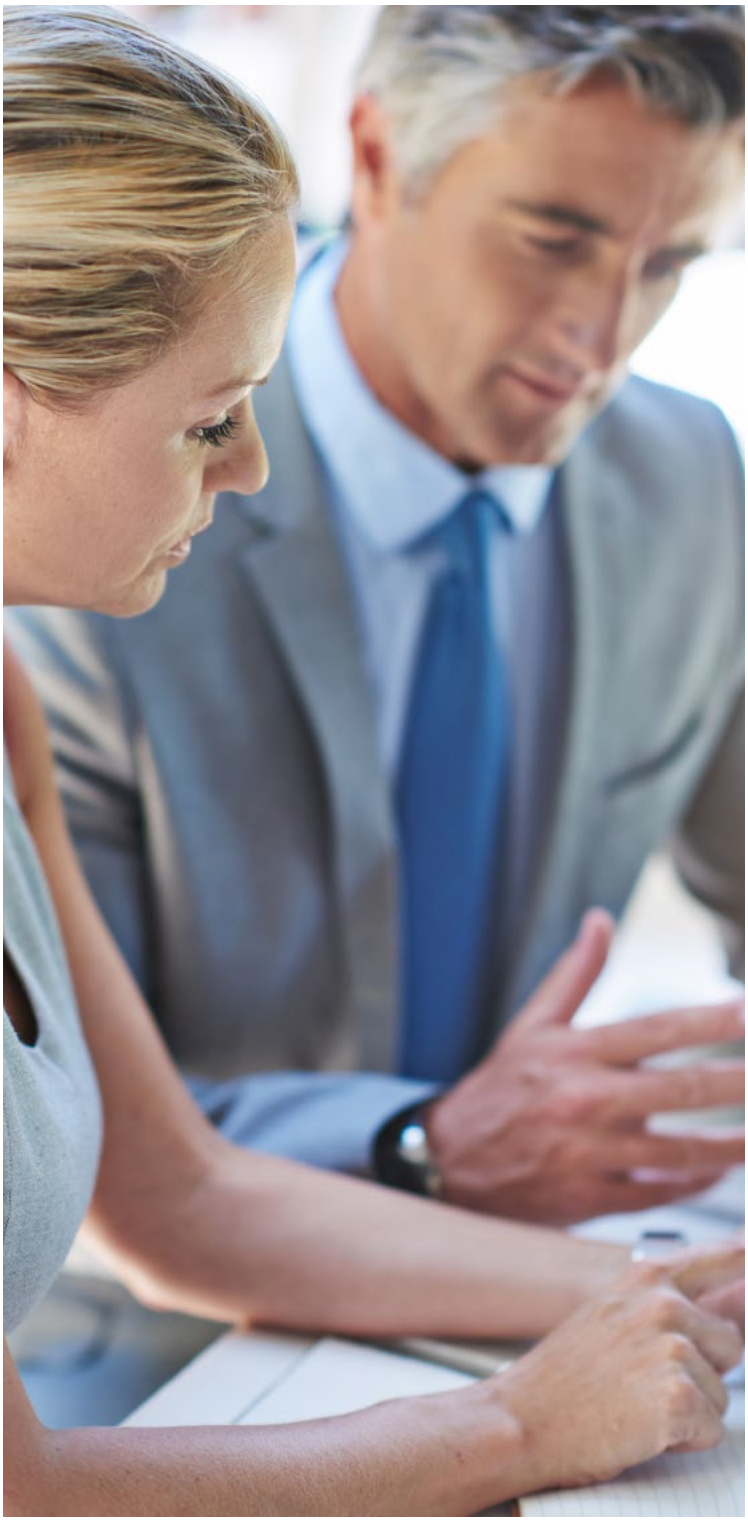
3.1 Disposal of the property

The net gains realised by foreign investors on the sale of French immovable property are in principle subject to a withholding tax, which for individuals is 19% of the proceeds. The tax liability is deducted from the purchase price and paid directly to the tax authorities by the notary public upon registration of the transaction. The appointment of a fiscal representative accredited by the tax authorities is required if the transaction value exceeds EUR 150 000 and the property has been held by the vendor for less than 15 years. Since 1 January 2015, this obligation no longer applies to citizens of the European Union or the European Economic Area.

Taxable income is the positive difference between the sale price and the acquisition cost, whereby the sale price may be reduced by certain costs borne by the purchaser (estate agent's commission, costs of cancellation of existing securities and guarantees etc). Deductible acquisition costs may be increased by the expenses borne by the vendor when acquiring the property (land transfer tax, gift or inheritance tax, notarial fees etc). Furthermore, renovation and reconstruction costs may be added to the purchase price as long as they can be evidenced by corresponding receipts, e.g. invoices. A lump sum (amounting to 15%) may also be added to the purchase price for these costs if the property is sold more than five years after its acquisition.

If the property is sold within five years, the capital gains tax is still due. An annual discount of 6% from the tax due is usually allowed from the sixth year of ownership onwards, which means that the sale proceeds are completely tax-free after 22 years of ownership. With regard to social security contributions, however, freedom from tax does not occur until 30 years have elapsed.

Under certain conditions, sales by EU-resident



taxpayers of their French property may also be exempted from capital gains tax. Since 2014, there has been a special tax-free allowance of EUR 150 000 on capital gains on immovable property, provided that the owner has been tax-resident in France for two consecutive years at any time prior to the sale. In addition, the sale must take place no later than 10 years after the individual ceased to be resident in France. Irrespective of this deadline, exemption may also be available if the former resident selling the property has had uninterrupted free disposal of the property since 1 January of the year preceding the year of sale.

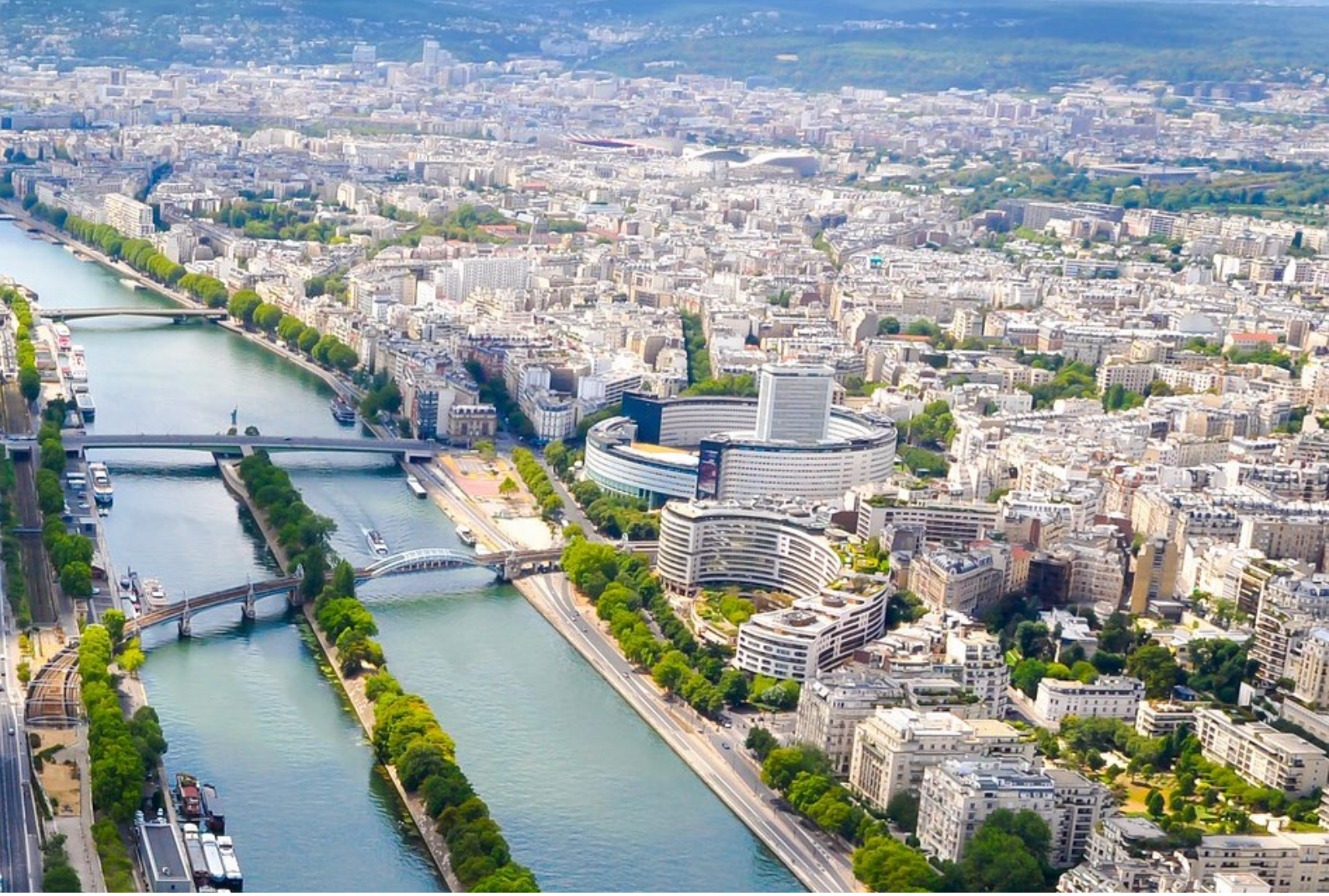
Full exemption continues to apply if the property sold is the taxpayer's main residence or if the price of the property is less than or equal to EUR 15 000.

As of 2019, French social security contributions are no longer payable on property proceeds (rental income or appreciation in value from the sale of property) generated in France, provided that social security coverage is not available in France but in Germany or another EU Member State. However, the so-called *prélèvement unique de solidarité* (one-off solidarity surcharge) of 7.5%, which is not considered a social security contribution but a tax, must still be paid.

3.2 Inheritance and gift tax

It is particularly important to consider the French inheritance-tax consequences when undertaking a private immovable-property project in France, regardless of whether the acquired property is intended for personal use or predominantly for rental. The French inheritance tax on the death of the owner is currently so high that the heirs often cannot pay the tax without selling the inherited property.

Specific arrangements must already be made put in place at the time of acquisition to structure the holding beneficially for inheritance-tax purposes. For example, dividing the estate into usufruct, to be granted to the parents (*acquirers*), and ownership, which is given to the children, must be considered. This reduces the basis of assessment for inheritance tax and, in the event of the death of the parents, the usufruct and thus the full ownership is transferred to the children without additional inheritance tax.



A progressive tax rate of 5% to 45% applies (for that part of the inherited or donated assets exceeding EUR 1.8 million). The tax-free amount for inheritances or gifts in the direct line is approximately EUR 100 000 per child. Inheritance between spouses is exempt from inheritance tax under the law as it stands.

The same rates apply to gift tax as to inheritance tax. However, the amount can be considerably reduced depending on the age of the donor: The earlier the gift is made, the lower the tax burden. The tax is reduced by 50% if the donor is under 70 years of age and by 30% if the donor is over 70 and under 80. The transfer of immovable property to children by way of a gift is therefore a suitable means of reducing the later inheritance tax burden.

4. AVOIDANCE OF DOUBLE TAXATION

4.1 Income tax

In most of France's double tax treaties, the right of taxation over capital gains from immovable property is reserved for the state in which the property is situated, under the situs principle. This principle applies both to directly held immovable property and to shares in property companies.

4.2 Inheritance tax

As a rule and under most tax treaties with inheritance-tax provisions, a foreign testator's immovable property assets situated in France are subject to French inheritance tax. The same rule applies in principle to shares in French or foreign companies more than 50% of the fixed assets of which consist of French immovable property. However, for the purposes of determining the 50% limit, immovable property used to carry on a business is not taken into account.

A recent development is the appearance of the European Certificate of Succession. It supplements the certificate of inheritance if the heir has to prove his entitlement to inherit in another European country.

GERMANY

1. ACQUISITION OF IMMOVABLE PROPERTY IN GERMANY

1.1 Legal framework

The acquisition of immovable property in Germany is possible only in accordance with German law. The most frequent immovable-property transaction is the purchase of immovable property. Purchase agreements must be notarised.

Registration of the purchaser in the Land Register (*Grundbuch*) is required for a legally valid transfer of ownership. Natural persons as well as entities having either full or restricted legal capacity under German law (OHG, KG, GmbH, AG) may be entered as owners in the Land Register.

Foreign companies may also acquire immovable property in Germany and may be the registered owner.

1.2 Immovable-property transfer tax/other costs

In Germany, the acquisition of both developed and undeveloped plots of land is subject to immovable-property transfer tax (*Grunderwerbsteuer*). In general, the immovable-property transfer tax rules also apply to apartment buildings or condominiums (e.g. rented or owner-occupied holiday apartments). Accordingly, these apartments will not be discussed separately in what follows.

Insofar as the assets of a partnership or company include domestic immovable property, both the direct and indirect transfer of at least 95% (in future, probably 90%) of the shares or interests in the company or partnership and – if certain conditions are met – the consolidation of at least 95% (in future, probably 90%) of the shares in the company in the hands of a single acquirer are also subject to immovable-property transfer tax.

Transactions exempt from immovable-property transfer tax include, in particular, the acquisition of immovable property by reason of death, a gift of immovable property *inter vivos*, a transfer between spouses, and restructuring within a group. In such cases, however, inheritance or gift tax may be payable.

The charge to immovable-property transfer tax is based on the value of the consideration given and thus on the purchase price. The tax rate is 3.5% in Bavaria and Saxony; 4.5% in Hamburg; 5% in Baden-Württemberg, Bremen, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate and Saxony-Anhalt; 6% in Berlin and Hesse; and 6.5% in the other federal states (*Bundesländer*) [1].

In addition to immovable-property transfer tax, a purchaser must bear in mind the cost of the notary and of registration in the Land Register. These together amount to approximately 1.5% to 2% of the purchase price. If an estate agent has been used, the agent's fee will be an additional cost for the purchaser.

1.3 Value added tax

The sale of land in Germany is exempt from VAT. However, under certain conditions, the vendor has the option of subjecting the sale to VAT and thus waiving the exemption. This may be beneficial if the purchaser is entitled to an input-tax deduction. A VAT rate of 19% is applicable to the sale of immovable property under this option.

1.4 Acquisition of a property company

In order to create an option either to sell immovable property itself or to sell interests in an entity holding the property, many investors acquire land through the vehicle of a company or partnership (a 'property company'). If at a later time the purchase of shares or interests results in a consolidation of more than 95% (in future, probably 90%) of the shares in the company or interests in the partnership in the hands of a single acquirer, such a transaction is subject to immovable-property transfer tax at the abovementioned rates. However, immovable-property transfer tax is imposed only on the value of the land.

The tax is based not on the purchase price of the shares, but on a value to be determined in accordance with the Valuation Act (*Bewertigungsgesetz*), which as a rule approximates closely to the market value of the property.

Warning: The transfer of shares in foreign parent companies of German property companies may also be subject to immovable-property transfer tax in Germany, even if the transfer transaction is neutral in terms of income tax.

2. CURRENT TAXATION

2.1 Income tax

Natural persons who use their immovable property solely for private purposes or who allow third parties to use it gratuitously have no rental income and thus, to this extent, are not subject to income tax.

1). i.e. Brandenburg, North Rhine-Westphalia, Saarland, Schleswig-Holstein and Thuringia

If the property is let, the income received under the lease is subject to taxation in Germany. This does not apply, however, if the letting activities are not designed to provide consistent future profits (e.g. private use of holiday homes).

The taxable rental income of natural persons and asset-management partnerships is calculated by determining the surplus of income over income-related expenses, and in the case of trading partnerships and companies by a business-asset comparison (profit).

Deductible operating expenses include all expenses related to the immovable property. These include the purchase and construction costs of the immovable property as well as the interest on borrowed capital for financing the acquisition. However, where the rent charged falls below 66% of the local market rent, the expenses are deductible on a pro rata basis only.

Moreover, the acquisition and production costs cannot be immediately deducted in full, but only gradually through depreciation. Deductions for wear and tear (tax depreciation) are based solely on the acquisition or production costs of the building. The underlying land itself is not (ordinarily) depreciated.

Depending on the year of completion of the building, whether it belongs to private or trading assets and on the purpose of any leases, the annual deductible depreciation is between 2% to 3% of the purchase and construction costs of the building.

In the case of major investments financed by borrowing, the 2008 Company Tax Reform introduced the so-called 'interest barrier' (*Zinsschranke*), which provides that the interest expense of a business is deductible only to the extent of the smaller of interest income and 30% of EBITDA (earnings before interest, taxes, depreciation and amortisation). Interest expense that cannot be deducted in the assessment period may be carried forward to the following assessment periods and increases interest expense for those periods. The [Corporate Income Tax] Act provides an exception where interest expense, less interest income, is less than EUR 3 million in a financial year. The unused amount of the deduction (30% of EBITDA) is carried forward and may be used in the following five years. Immovable-property investments, traditionally heavily financed by borrowing, are particularly affected by the rule. However, on the application of the Federal Finance Court (*Bundesfinanzhof*), the Federal Constitutional Court (*Bundesverfassungsgericht*) is currently examining whether the interest barrier complies with the constitution.

In any case, the interest barrier is not applicable to natural persons and asset-management partnerships because these are not regarded as carrying on a business under tax law.

Foreign investors not operating via a corporate vehicle must file a non-resident income-tax return in respect of their German immovable-property income of the previous year.

The rates of income tax in Germany are progressive. The highest rate is currently 42%. However, there is in addition a 'wealth tax', which imposes a three percentage-point surcharge on that part of taxable income exceeding EUR 270 500 for single persons or EUR 541 000 for jointly assessed couples, so that the rate of tax on this income is 45%. There is furthermore the so-called solidarity surcharge (*Solidaritätszuschlag*) of 5.5% on all income. With effect from 1 January 2021, however, whether and in what amount the solidarity surcharge applies depends on the amount of taxable income.

Losses from the letting of immovable property may be carried forward indefinitely but are not transferable. A limited loss carry-back to the previous calendar year is possible.

The rental income of a company from immovable property is subject to corporate income tax rather than income tax. German companies determine profits using a business-asset comparison. The interest barrier also applies to corporate income tax.

The rental profits of a company from immovable property are currently subject to a tax of 15% plus 5.5% solidarity surcharge on the corporate tax, for a total effective rate of 15.825%.

2.2 Property taxes

Immovable property including the underlying land and any buildings thereon is subject to a property tax (*Grundsteuer*). Property tax is a local tax, levied by local authorities.

Property tax is currently based on the so-called assessed value (*Einheitswert*) of the land, which is normally less than the market value. The applicable tax rate varies according to the local authority concerned.

After the finding of Federal Constitutional Court that the current calculation method is unconstitutional, a new calculation method will be introduced from 1 January 2025. From that date, the tax will be based, in particular, on the actual value of the land, the amount of the statistical net base rent, the land area, the type of property and the age of the building. However, the individual federal states will be able to make different regulations in the future, so that an accurate forecast of the burden is difficult to make at this point in time.

If the owner lets the property, he is entitled to transfer the liability for the tax in full to the tenants. This requires a corresponding provision in the lease agreement.

2.3 Value added tax

The letting of immovable property is not subject to VAT. A VAT option is permissible if the tenant is a taxable person and uses the property almost exclusively for the provision of services giving rise to input-tax deduction.

2.4 Other taxes

The income from a trade or business is also liable to trade tax (*Gewerbesteuer*). Private individuals and (asset-management) partnerships holding immovable property otherwise than as trading stock and whose activities are not classified as dealing in immovable property are not considered to be carrying on a business and thus their income is not subject to trade tax.

Foreign companies are not subject to trade tax provided that they do not have a permanent establishment in Germany. Even a photovoltaic plant can constitute a permanent establishment. Companies that exclusively manage and use their own immovable property or such property and their fixed assets may apply to have their assessment for trade-tax purposes reduced by the operating income attributable to the management and use of the immovable property (this is the so-called extended abatement – *erweiterte Kürzung*). Property companies that engage in long-term ownership of their immovable property are exempt from trade tax even if potentially liable to it because of their legal form (e.g. limited liability company).

Warning: If certain equipment or appliances (e.g. storage facilities, hotel equipment, photovoltaic systems whose electricity is fed into the general power grid) are leased out along with the property, the trade-tax exemption does not apply.

Taxable trading income is derived from the profit determined in accordance with the Income Tax Act (*Einkommensteuergesetz*) or Corporate Income Tax Act (*Körperschaftsteuergesetz*), as adjusted for the purposes of trade tax. Based on an average base rate of 400%, which varies from one local authority to another, the trade tax burden is approximately 14% of business profits. Trade tax is no longer a deductible expense for corporate income tax.

3 TRANSFER OF IMMOVABLE PROPERTY

3.1 Disposal of immovable property

Gains from the disposal of domestic immovable property that is part of the private assets of a vendor with limited tax liability and is sold within ten years of the conclusion of the notarised purchase agreement are taxable. The same applies to the disposal of an interest in a property-management partnership.

If immovable property or an interest in a property-management partnership is sold after ten years, the gain on disposal is tax-free in Germany.

Where the disposal of immovable property goes beyond the private management of assets and takes the form of dealing in land, the resulting profits are taxable as business income subject to limited taxation.

Based on case law, it is generally assumed that dealing in land takes place when more than three items of immovable property with an ownership period of no more than five years are sold. Legal precedent on dealing in land is complex and each individual case must be judged on its facts.

Where property dealing is concerned, all properties intended for disposal are included in current assets, regardless of whether they are let or not. As a result of their qualification as current assets, no depreciation may be claimed in respect of them. The gain on disposal is subject to income tax and possibly also to trade tax. Trade tax only arises if a permanent establishment is also maintained in Germany. It should be noted that immovable property as such does not usually qualify as a permanent establishment.

3.2 Disposal of participations in property companies

A gain arising to a vendor with limited tax liability from the disposal of shares in a company with its registered office or place of management in Germany is subject to income tax to the extent of only 60% under the so-called partial-income method (*Teileinkünfteverfahren*). The disposal of foreign companies is also taxable to the extent of 60% if at any time during the 365 days prior to the sale, more than 50% of their share value was directly or indirectly based on domestic immovable assets. The remaining 40% of the gain is tax-exempt. This applies in cases where the shares are held as private assets and the taxpayer has held at least 1% of the share capital directly or indirectly at any time in the previous five years.

Where the interest held is and was less than 1%, the so-called final withholding tax (*Abgeltungssteuer*) is applied, in which case the capital gain is subject to a flat tax of 25% plus solidarity surcharge, amounting to a total of 26.375%.

Where there is a disposal of an interest in an asset-management partnership owning immovable property, this is treated as a disposal of the corresponding proportion of the underlying immovable property. If the sale takes place within the ten-year period mentioned above, the capital gain is treated as speculative and is taxable (see paragraph 3.1 above).

3.3 Inheritance and gift tax

An inheritance and gift tax (*Erbschaft- und Schenkungsteuer*) applies on the acquisition of assets *mortis causa* (typically by way of inheritance) as well as on *inter vivos* gifts including the transfer of assets without consideration in anticipation of inheritance.

Even where all parties are non-resident, the transfer of domestic assets through gift or inheritance is subject to a limited inheritance and gift tax in Germany. Domestic assets include not only immovable property but also interests in asset-management partnerships holding domestic immovable property. The method of valuing assets for the purposes of inheritance and gift tax changed when the inheritance-tax reform came into force on 1 January 2009. From that date, the value of assets for the purposes of the tax is close to their market value.

A progressive tax rate is applied. Depending on the personal relationship of the transferee to the transferor (testator or donor) and the taxable amount, the tax rate can be as high as 50%. For transferees within Class 1, in particular children and spouses, the tax rate is limited to 30%. However, the highest tax rate is applied only upon the transfer of assets in excess of EUR 26 million. Lower tax rates are applied to transfers of smaller value. Under certain circumstances, owner-occupied (family) homes can be transferred tax-free. Tax reliefs may in certain cases also be applicable for let property, but not for immovable property held as a business asset. However, immovable property may also qualify as tax-privileged business assets in the case of a housing association or commercial property.

Where unlimited liability to inheritance tax applies, all assets are subject to German inheritance tax. This is regardless of in which jurisdiction the individual assets are situated. Unlimited liability to inheritance tax applies when either the transferor or the transferee is resident or has his habitual place of abode in Germany at the time of the transfer. Even the regular use of a

holiday home over a period of time that exceeds the typical holiday may cause the individual concerned to acquire residence status in Germany and thus lead to unlimited taxation.

This may not necessarily be disadvantageous because significantly higher exemptions are available in cases of unlimited inheritance or gift tax. In cases where immovable property situated in Germany is a significant part of the estate, it may be advantageous to establish residence in Germany.

4. AVOIDANCE OF DOUBLE TAXATION

The tax legislation of countries involved in a cross-border investment is often similar, resulting in overlapping and double taxation. Double taxation is partially avoided through bilateral agreements between states and to some degree through the domestic law of the countries involved. Nevertheless, double taxation cannot be avoided in all cases.

4.1 Income tax

In accordance with German double taxation treaties (DTTs), income from the commercial exploitation of immovable property is subject to the situs principle, with the result that income is taxed in the country where the immovable property is situated. Thus Germany, as the source state, has the right of taxation for income derived from German immovable property. The same applies to income or gains from the disposal of German immovable property and investments in companies whose assets consist mainly of German immovable property.

By contrast, capital gains from the sale of shares in companies with German immovable-property assets may only be taxed in the vendor's country of residence under the German DTTs with Italy and Switzerland.

If Germany has the right of taxation for the abovementioned income, the country of residence has the duty to prevent double taxation. This is provided in accordance with the provisions of the DTT by an exemption (tax-free in the country of residence), or by crediting the tax paid in Germany against the tax liability in the country of residence.

4.2 Inheritance and gift tax

Germany has so far concluded only a few DTTs for inheritance and gift tax. DTTs exist with Denmark, France, Greece, Sweden, Switzerland and the United States. According to these DTTs, the situs principle applies to immovable-property assets, i.e. Germany has the right of taxation for immovable property situated in Germany and belonging to a taxpayer resident abroad. However, the respective country of residence of the testator or donor must offset the tax paid in Germany against the inheritance or gift tax of that country.

In the event that there is no DTT, a review is necessary to determine whether or not the law of the country of residence grants a credit for the German inheritance and gift tax against its own tax.

ITALY

1. ACQUISITION OF IMMOVABLE PROPERTY IN ITALY

1.1 Legal framework

The acquisition of immovable property situated in Italy must be carried out strictly in accordance with Italian law, and there is no possibility of making the acquisition under the rules of any other jurisdiction. The most common immovable-property transaction is the purchase of land, in respect of which the deed of sale must be notarised.

In the Regions of Trentino-Alto Adige and Friuli-Venezia-Giulia, a transfer of title must be recorded in the Land Register (*libro fondiario*) in order to be valid. In principle, any domestic or foreign natural person and any domestic or foreign entity with legal capacity or partial legal capacity (general partnerships, limited partnerships, limited-liability companies and joint-stock companies) are eligible to be entered as owners in the Land Register.

In all other Italian regions, the transfer of ownership takes place upon conclusion of the deed of sale. In order for the transfer of ownership to be effective against third parties, the acquirer must be registered in the Public Land-Register Depository (*conservatoria dei registri immobiliari*). In principle, any domestic or foreign natural person and any domestic or foreign entity with legal capacity or partial legal capacity (general partnerships, limited partnerships, limited-liability companies and joint-stock companies) is eligible to be entered as owner.

1.2 Acquisition costs

In Italy, the purchase of a property is subject to a number of transfer duties (registration, mortgage and cadastral duties) and/or VAT. Where the acquisition is subject to VAT, the registration duty is a fixed amount of EUR 200, whereas in the case of an acquisition not subject to VAT, the registration duty is a certain percentage.

Where a building plot is acquired from a company as vendor, transfer duties amount to EUR 600 in total; where the vendor is a private individual, transfer duties are 9% plus a fixed duty of EUR 100. For the acquisition of agricultural land, transfer duties are 15% plus a fixed duty of EUR 100.

Where dwellings (residential property) are acquired from a company as vendor, transfer duties amount to EUR 600 in total; where the vendor is a private individual, on the other hand, transfer duties amount to 9% plus a fixed fee of EUR 100 (however, if the dwelling is to be used in Italy as the purchaser's main residence, there is a measure of relief, in that the registration duty is 2%, whereas the mortgage and cadastral duties amount to EUR 100 in total). For the acquisition of commercial property, a fixed registration duty of EUR 200 is generally payable, while the total mortgage and cadastral duty amounts to 4%.

Acquisitions before 1 January 2022 by builders of entire building complexes (residential or commercial) benefit from a special relief. Provided that within 10 years of acquisition the whole building is newly fitted according to Climate Standard A or B and subsequently at least 75% of the building is onsold, the total transfer duty is EUR 600. This preferential treatment creates a significant benefit for purchases by private individuals, where otherwise a transfer duty of 9% would apply.

Transfer duties (registration, mortgage and cadastral duties) on the acquisition of a property are generally based on the purchase price agreed in the deed of sale. It should be noted that, if the purchase price of the property agreed in the deed of sale is lower than its market value (*valore venale*), the market value is substituted as the basis of assessment, unless the taxpayer is able to prove that the purchase price agreed in the deed of sale is justified on the basis of objectively verifiable criteria (e.g. the specific condition or location of the property).

It is exclusively in the event of the sale of residential property to private individuals that transfer duties are based on the cadastral value (= the notional market value determined on the basis of officially established coefficients) of the property, which is generally significantly lower than the market value of the property.

In addition to the above acquisition costs, in Italy there are also costs for the notary and costs for entry in the appropriate property register. These amount to approximately 1.5% to 2% of the purchase price. If an estate agent has been involved, the agent's fee will also need to be borne in mind.

1.3 Value added tax

Where building land is acquired from a company as vendor, VAT of 22% is due. Where the vendor is a private individual, the acquisition is not subject to VAT. The acquisition of agricultural land is not subject to VAT.

The acquisition of residential property is subject to VAT at a rate of 10% where the vendor is a company (a reduced VAT rate of 4% applies if the dwelling is used in Italy as the purchaser's main residence). Where the vendor is a private individual, on the other hand, the acquisition is not subject to VAT. The acquisition of commercial property is generally subject to VAT at a

rate of 10% (in the case of renovation, reconstruction, urban recovery) or 22% (in all other cases).

VAT is generally based on the purchase price agreed in the deed of sale.

1.4 Acquisition of a property company

In principle, as an alternative to the direct purchase of immovable property, it is always possible to make an indirect acquisition through the medium of a company or partnership.

Where the purchase is effected using a newly incorporated company, which then acquires the property (a so-called asset deal), the transfer duties (registration, mortgage and cadastral duties) are generally the same as for a direct purchase of the property. Where the immovable property belongs to a business or branch of a business which is the acquisition target, the net value of the acquired assets (value of the immovable property after deduction of directly attributable liabilities) may be used as the amount on which the registration duty is charged.

When a property is contributed to a newly incorporated company, the transfer duties (registration, mortgage and cadastral duties) are basically the same as those for a direct purchase of the property. Where the immovable property belongs to a business or branch of a business which is the object being contributed, the registration, mortgage and cadastral duties are a fixed EUR 200 each.

The purchase of shares in a company that holds the immovable property (a so-called share deal) gives rise only to a fixed registration duty of EUR 200; the mortgage and cadastral duties are waived in full.

2 CURRENT TAXATION

2.1 Income tax

Income from the renting or letting of immovable property held directly by a natural person is subject in Italy to personal income tax (*IRPEF – imposta sul reddito delle persone fisiche*).

Where the property is not let, there is usually no income tax due, since the introduction of a property tax (local property tax - see paragraph 2.2 below) to take its place.

If the property is rented or let, the taxable amount is the higher of (a) the amount of the revalorised cadastral income and (b) the contractually agreed rental or lease income reduced by a lump-sum 5% (as a rule, the rental or lease income as reduced by the lump-sum 5% exceeds the cadastral income). Apart from this lump-sum deduction of 5%, no other costs incurred in relation to the property may be claimed for tax purposes. However, where a mortgage loan has been taken out in order to purchase a main residence, 19% of the interest payable and additional costs are deductible as a tax credit, capped at an amount of EUR 4000.

Individuals who directly own residential property may opt to subject their rental income to the substitute tax *cedolare secca* instead of IRPEF. This is a flat-rate tax of 21% but may be reduced to 10% in certain communes with a high density of residential property.

In Italy, income from the renting or letting of immovable property held by a natural person as a partner in a partnership is subject to IRAP (*imposta regionale sulle attività produttive* – regional tax on production) at the level of the partnership and to IRPEF at the level of the partner, qualified in the latter case as partnership income. IRPEF is charged at progressive rates on the total income of the taxpayer. The progressive tax rates for individuals in Italy start at a minimum 23% (for the first EUR 15 000 of income) and go up to a maximum 43% (on that part of income exceeding EUR 75 000).

The income from renting and letting of immovable property held by a natural person as a shareholder in a company is subject to IRES (*imposta sul reddito delle società* – corporate income tax) and the regional tax on production, IRAP. The rate of IRAP varies from 2.68% to 3.9% depending on the region, but it should be noted that interest expenses are not deductible. The rate of corporate income tax, IRES, is 24%.

In the case of partnerships and companies, taxable income is determined by applying the usual rules for determining the income of a business, i.e. taxable income (profit) is taken to be the difference between operating income (rental income, operating costs passed on etc.) and tax-deductible operating expenses (property-management costs, maintenance costs, depreciation, interest expense etc).

If the partnership or company is a property-management entity that lets residential property, the taxable profit is not calculated by reference to the difference between operating revenues and tax-deductible operating expenses. Instead, the taxable profit is taken to be the higher of (a) the revalorised cadastral income and (b) the contractually agreed rental or letting income, which may be reduced by a maximum of 5% in respect of expenses incurred in the ordinary maintenance of the property. No other costs (e.g. property-management costs, depreciation, interest expense etc) may be claimed for tax purposes.

In Italy, companies are subject to interest-expense limitation, under which the deduction of the amount of the company's interest expense exceeding interest income is capped at 30% of EBITDA (earnings before interest, taxes, depreciation and amortisation). The amount of interest expense disallowed by virtue of this cap in any assessment period is carried forward to following assessment periods, thereby increasing the interest expense attributable to those assessment periods.

However, it has been clarified that in the case of property-management companies, the interest-expense limitation does not extend to the interest payable on mortgage loans taken out for the purchase of the property. In this case, the interest is therefore fully deductible.

Italy has also tightened up its rules on so-called dummy companies (non-operating or dormant companies). If a company fails to realise a minimum 4% return on residential property, 5% on office premises and 6% on all other properties, the tax is instead calculated using lump-sum coefficients, irrespective of the taxable result actually achieved.

2.2 Property taxes

In Italy, agricultural land, building land and buildings – whether they are of a commercial or residential nature – are subject to local immovable-property tax IMU/IMI (*imposta municipale unica / immobiliare*). Agricultural land in mountainous areas is exempt from local immovable-property tax.

IMU/IMI is charged on a conventional market value of the property, which is determined on the basis of a notional rental income, the so-called cadastral income. The tax rate varies from commune to commune and ranges from 0.2% to 1.26%.

2.3 Value added tax

In Italy the renting and letting of immovable property is subject either to VAT or to registration duty.

The renting or letting of building land is subject to VAT at 22% if the landlord or lessor is a company or partnership; in all other cases, it is outside the scope of VAT. The renting or letting of agricultural land is never subject to VAT.

The renting or letting of both residential and commercial property is generally exempt from VAT. However, where the letting of commercial property is carried on as a business in the form of a company or partnership, the lessor may opt to waive exemption and charge VAT.

2.4 Other taxes

The renting or letting of building land by a company or partnership is not subject to registration duty; in all other cases registration duty of 2% is due. Registration duty of up to 0.5% may be charged for the renting or letting of agricultural land. Registration duty is charged on the contractually agreed annual rent or lease payment.

The renting or letting of both residential and commercial property is generally subject to registration duty of between 1% and 2%. Here too, the duty is charged on the contractually agreed annual rent or lease payment.

3. TRANSFER OF IMMOVABLE PROPERTY

3.1 Disposal of immovable property

Where Italian immovable property is directly held by a private individual, capital gains from the disposal of building land (without restriction) and from the disposal of buildings and agricultural land (if sold before five full years of ownership) are taxable in Italy as miscellaneous income of a person with limited tax liability along with the individual's other income taxable in Italy. However, the taxpayer may opt for alternative taxation of the capital gain, in which case a substitute tax of 26% will be applied to the capital gain (the rate was 20% before 1 January 2020).

For property-dealing companies, taxable income is determined by applying the usual rules for determining the income of a business, i.e. taxable income (profit) is taken to be the difference between operating income (gains on disposal etc) and tax-deductible operating expenses (personnel costs, administrative costs, other operating expenses, interest expense etc).

For property-dealing companies, all properties intended for sale represent necessary operating capital and are reported under current assets. Due to their classification as current assets, no depreciation may be claimed in respect of them. The taxable profit is subject to corporate income tax (IRES) and regional production tax (IRAP).

The income of a natural person as partner from a partnership dealing in Italian property is considered to be income with limited tax liability from a partnership interest and is included in the natural person's total taxable income in Italy. If dividends are distributed to a shareholder who is a natural person by a company dealing in Italian property, they are subject to a final

substitute tax of 26%. If the dividends are payable out of profits earned before 2017, these are considered as capital income with limited tax liability in Italy and are not liable to the substitute tax but are included in the natural person's total taxable income in Italy.

3.2 Disposal of a property company

Where a natural person holds immovable property in Italy through a partnership or a limited company, the gains from the sale of the shares in the company are subject to a substitute tax of 26% in Italy, irrespective of how the shares are treated for the purposes of income tax.

If shares in an Italian property-management company (irrespective of whether the property is residential or commercial) are held through a company or partnership, it should be noted that the participation exemption generally available in Italy does not apply. This means that if a company or partnership disposes of an investment in a property-management company in Italy, the capital gain is subject to ordinary taxation.

3.3 Inheritance and gift tax

Inheritance and gift tax is levied on the acquisition of assets *mortis causa* (usually by inheritance) or by *inter vivos* gift. In Italy, the only criterion for liability to inheritance and gift tax is the residence status of the testator or donor; the residence status of the heirs or legatees is irrelevant. If the testator or donor is resident in Italy at the time of death or gift, all assets are subject to tax in Italy (unlimited tax liability). However, if the testator or donor is resident abroad

at the time of death or gift, only the assets situated in Italy at the time of death or gift are subject to tax in Italy (limited tax liability).

Inheritance and gift tax is charged on the so-called equivalent value (*controvalore*) of the inherited or donated assets, being the difference between their market value and the associated deductible liabilities and expenses. However, the tax is cumulative, in the sense that gifts already received by the heirs or legatees during the lifetime of the testator or donor are to be taken into account.

In the case of immovable property and rights *in rem* in immovable property, the taxable amount is the market value of the property. However, it should be noted that the Italian tax authorities cannot make an adjustment to the value, provided that at least the cadastral value of the property is taxed. In other words, in practice, it is the cadastral value of the property on which the tax is based, as it is general significantly lower than the market value.

Where the assets transferred are shares in a company or an interest in a partnership that holds the immovable property, inheritance and gift tax is charged on the appropriate proportion of the net assets of the company or partnership as shown in its balance sheet. In the case of listed companies, on the other hand, the market value of the shares is the relevant factor.

A tax rate of 4% applies to inheritances and gifts in favour of a spouse or relatives in the direct line, with each transferee being entitled to a tax-free allowance of EUR 1 million. In the case of inheritances and gifts in favour of siblings, a tax rate of 6% is applicable, with a tax-free allowance of EUR 100 000 for each transferee. For all other relatives a tax rate of 6% is also applicable, but no tax-free allowance is granted. In the case of inheritances and gifts in favour of other transferees, a tax rate of 8% is applied with no allowance. In the case of inheritances and gifts of immovable property, it should be noted that in addition to inheritance and gift tax, mortgage and cadastral duties totalling 3% (or a total of EUR 400 in the case of a main residence in Italy) are payable.

Where unlimited tax liability applies (see above), all assets are subject to inheritance and gift tax in Italy. This applies irrespective of the countries in which the individual assets are situated. Unlimited tax liability for the purposes of inheritance and gift tax occurs if the testator or donor is resident or has a habitual place of abode in Italy at the time of death or gift. Even the regular use of holiday homes over a period of time that exceeds a usual longer holiday can lead to deemed residence in Italy and thus to unlimited tax liability for inheritance and gift tax purposes.

4. AVOIDANCE OF DOUBLE TAXATION

When it comes to the taxation of cross-border investments, the tax rules of the countries involved often depend on the same criteria, which can lead to overlapping and double taxation. Double taxation is avoided partly through bilateral agreements between two countries and partly through unilateral rules in the domestic law of the countries involved. However, double taxation cannot be avoided in all cases.

4.1 Income tax

In order to avoid double taxation, Italy has signed double taxation treaties (DTTs) with a large number of countries. Under these treaties, the right of taxation over income from immovable property, including income from renting or letting, is vested in the state in which the property is situated (the situs state). As a rule, the state of residence reserves the right to take this foreign income into account for income tax purposes. This rule accords with the OECD Model Tax Convention and is applied by most states.

On the basis of the DTTs that Italy has concluded, capital gains from the disposal of shares in property companies are generally taxable in the state of residence of the vendor. An example of an exception to this rule is the treaty with France, under which capital gains from the disposal of shares in property companies are subject to taxation in the country in which the property is situated, i.e. in this case, Italy.

By contrast, the taxation of capital gains from the sale of shares in property-holding partnerships is generally subject to the principle of taxation of capital gains in the country in which the company is domiciled, i.e. Italy, on the basis of the DTTs concluded in Italy.

4.2 Inheritance and gift tax

Italy has so far concluded only a few DTTs for inheritance and gift tax. DTTs exist with Denmark, France, Greece, Israel, Sweden, the United Kingdom and the United States. According to these treaties, the situs principle generally applies to immovable property, with the result that Italy has the right of taxation over immovable property situated in Italy and belonging to a taxpayer resident abroad. However, the respective state of residence of the testator or donor must offset the tax paid in Italy against the inheritance and gift tax of that state. The treaty with France provides that the situs principle also applies to shares in property companies.

If there is no treaty in the specific case, one has to look to the domestic law of the state of residence to see whether it provides for a deduction of the inheritance and gift tax paid in Italy from the tax payable in the state of residence.

SWITZERLAND

1. ACQUISITION OF IMMOVABLE PROPERTY IN SWITZERLAND

1.1 Legal framework

1.1.1 General

The direct acquisition of immovable property situated in Switzerland may be carried out in accordance with Swiss law only. The most frequent form of transaction in immovable property is the purchase of land. The purchase contract must be notarised.

For a valid transfer of title, registration of the acquirer in the Land Register (*Grundbuch*) is strictly necessary. In Switzerland, natural persons, partnerships (general and limited partnerships) and legal entities (AGs, GmbHs, cooperatives) are generally eligible for registration in the Land Register. A company incorporated under foreign law may also acquire immovable property in Switzerland and be entered in the Land Register.

The indirect acquisition of immovable property, i.e. the acquisition of shares in a company that is itself the owner of Swiss immovable property, may also be carried out in accordance with the regulations of a different legal system. This also applies where this company has its registered office (*Sitz*) in Switzerland. Under this mechanism, the purchaser acquires the immovable property only indirectly, whereas the formal owner does not change under this procedure.

1.1.2 Acquisition of Swiss immovable property by persons abroad

The acquisition of immovable property in Switzerland by persons abroad is under certain circumstances subject to approval.

Nationals of EU Member States who are legally and actually resident in Switzerland are not considered to be persons abroad and may acquire immovable property of any kind for their own and third-party use. They have the same rights as Swiss citizens in this respect.

Nationals of EU Member States without a main residence in Switzerland (including frontier workers, but only within their district), have (provided they are entitled to reside in Switzerland) the same rights as Swiss citizens only as respects the acquisition of immovable property used for professional purposes (as a permanent establishment). The acquisition of second homes and vacation homes is subject to approval. As a rule, such permits are granted only very sparingly.

Further restrictions (partly also as regards the acquisition of shares in property companies) apply to foreigners who are not nationals of an EU Member State. These depend upon the purchaser's place of abode, the purpose of the property and the motivation for the acquisition. In all cases, the legal situation must be carefully examined before acquiring immovable property in Switzerland.

1.2 Immovable-property transfer tax/other acquisition costs

In Switzerland, the acquisition of immovable property is subject to property-transfer tax (*Handänderungssteuer*). This is a tax not on the capital gain from the property but on the change of ownership as such. In Switzerland, the property-transfer tax is levied by the cantons and/or the communes, but not by the Confederation (the federal government). Depending on the cantonal tax legislation, it is called a 'tax' (*Steuer*), 'duty' (*Abgabe*) or 'fee' (*Gebühr*). Nevertheless, in most cantons it exists in addition to a land-registry fee (as a rule, a few tenths of 1% of the purchase price). In the canton of Zürich, the property-transfer tax has been completely abolished.

The tax is charged on the purchase price inclusive of all other acquisition costs. As a rule, it is borne by the acquirer. The tax rates vary considerably from canton to canton, ranging between 0.2% and 3.3% of the purchase price.

1.3 Value added tax

The purchase or sale of immovable property is generally exempt from VAT in Switzerland. Under certain circumstances, however, the vendor has the option of opting for VAT and thus waiving the tax exemption. The applicable VAT rate is currently 7.7% of the purchase price.

1.4 Acquisition of a property company

In most cantons, the acquisition of shares in a company whose assets consist mainly of immovable property (a so-called property company) is subject to property-transfer tax (*Handänderungssteuer*, see above) only where a majority shareholding is acquired (so-called change of economic ownership). In most cantons, the acquisition of a minority shareholding is not subject to property-transfer tax, even if the acquirer of the minority shareholding thereby acquires a majority holding.

2. CURRENT TAXATION

2.1 Income tax/Profit tax

Rental income from immovable property is subject to income tax in Switzerland (in the case of natural persons) or profit tax (in the case of legal entities). Both the Confederation and the cantons apply the same guidelines. The income from property of individuals and companies resident in Switzerland is taxed together with other income or gains. Property owners resident abroad must file a tax return as persons subject to limited tax liability in respect of their income from property of the previous calendar year.

According to Swiss tax law, the rental value (*Mietwert*) of owner-occupied immovable property (where the owner is a natural person), including holiday homes, is liable to tax. This imputed rental value is usually calculated by reference to the rent that would be demanded from a third party by the landlord and be payable by the tenant (*Vergleichsmiete* – comparative rent).

Loan interest is generally deductible in full and property costs (in part) may be deducted from both the income actually generated and the imputed rental value. Relevant property costs are treated differently depending on whether they are maintenance costs or constitute improvements. Whereas maintenance costs are fully deductible, expenditure that increases the value of the property may not be deducted from taxable income. However, improvement expenditure can be taken into account when disposing of the property. The distinction between maintenance expenditure and improvement expenditure is not always easy in practice and often leads to negotiation between tax authorities and taxpayers.

Depreciation is deductible from taxable profits in the case of legal persons but is deductible from the taxable income of natural persons only where the property is held as a business asset by a self-employed individual. The amount of depreciation recognised for tax purposes depends on the nature and use of the immovable property. While, for example, residential buildings (as business assets) may only be depreciated at 2% per annum, factory buildings may be depreciated at up to 8% of their book value.

Income tax rates are progressive in all cantons and vary in amount from one canton to another, sometimes greatly. Tax rates are applied to the worldwide income of the person, including income from property.

Income tax rates vary between 10% and 40%.

The tax rates for profit tax for legal entities as well as for wealth tax (natural persons) and capital tax (legal persons) are linear in most cantons. Where they are not, it is the global profit, global assets or global capital that are taken into account when determining the appropriate rate of tax.

Profit tax rates vary between 12% and 20%.

Wealth tax rates vary between 0.15% and 0.85%; capital tax rates between 0.001% and 0.5%.

2.2 Property taxes

In about half of the cantons, a so-called property tax (*Liegenschaftssteuer*) is levied in addition to wealth and/or capital tax. The Confederation itself does not levy any property taxes. Property tax is based on the taxable value of the property and varies between 0.05% and 0.3% depending on the canton.

Some cantons levy a minimum tax on the immovable property owned by legal persons. This tax is levied only if it would exceed the ordinary tax on profits and capital, and in this case, it replaces those ordinary taxes. As a rule, only companies that generate no or only a small amount of corporate profit are affected by this tax.

Depending on the canton, the minimum tax is a maximum of 0.2% of the property value.

2.3 Value added tax

The renting or letting of immovable property is generally exempt from VAT. An option to pay VAT is permissible if the tenant is a taxable person and makes almost exclusively taxable supplies himself.

3. THE TRANSFER OF IMMOVABLE PROPERTY

3.1 Disposal of immovable property

3.1.1 Property gains tax

In Switzerland, the disposal of immovable property is subject to property gains tax (*Grundstückgewinnsteuer*).

The taxation of profits (gains) from immovable property differs greatly between the Confederation and the 26 cantons. The Confederation does not levy a separate tax on profits or gains from immovable property but charges income tax or profit tax solely on gains from property forming part of business assets. Gains from private property are expressly exempt from direct federal tax.

The cantons also distinguish between business property and private property. In most cantons, gains from immovable property held as business assets are subject to ordinary income or profit tax. In some cantons, gains on business property are subject to a separate property gains tax. The same applies to gains on immovable property held as private assets in all cantons. Immovable-property gains are taxed in the commune or canton in which the property in question is situated.

The taxable person is always the person who has disposed of the property. In the case of a commercial transfer of ownership, the taxable person is the person who transfers the power to dispose of a property in return for monetary consideration. Taxation of an immovable-property gain may be deferred in certain cases (e.g. in the case of acquisition by inheritance or gift).

The tax is charged on the gain (if any) from the disposal of the property. The amount subject to tax is the net profit realised on a change of ownership of the property. It is calculated as the difference between the acquisition costs (purchase price plus improvement expenditure) and the sale price.

To the extent that gains from immovable property are subject to taxation, these gains may be offset against losses from immovable property. Where gains from immovable property are subject to a separate tax, however, it is generally not possible to offset losses, as the scope of the property gains tax is limited to the particular property in question. Some cantons nevertheless allow the deduction of losses from immovable property.

In most cantons, the tax rate depends on two factors, namely the amount of the gain and the period of ownership. Rates may be either flat or progressive and may reach a maximum of 40%, depending on the particular canton. Mostly, short-term gains are subject to surcharges, whereas long-term gains are usually privileged.

3.1.2 Dealing in land

To the extent that the disposals of land go beyond the mere management of private property, the profits generated from this are taxable as income from an independent business of dealing in land (*Liegenschaftenhandel*).

Dealing in land will be presumed where immovable property is traded continuously, in a concerted fashion and with a view to profit. It may arise from frequent property purchases and sales and from reinvesting the proceeds of disposal of property in new property. The fact that purchased immovable property is converted or renovated before being resold is also indicative of a business-like approach.

The qualification of immovable property disposals as commercial dealing in land has the result that the gains from immovable property are also taxed at the federal level and liable to social-security contributions.

3.2 Disposal of a property company

In most cantons, the transfer of shares of a corporation whose assets consist primarily of immovable property (a so-called property company) is only subject to immovable-property gains tax if a majority interest is sold (so-called economic change of control). The transfer of a minority shareholding is not subject to immovable-property gains tax, even if the purchaser of the minority shareholding obtains a majority interest after the acquisition.

3.3 Inheritance and gift tax

Where immovable property is acquired by gift or by inheritance (*mortis causa*), tax on the gain is deferred, i.e. tax first becomes chargeable on the next change of ownership. The period of ownership relevant for the assessment of the tax rate is calculated without taking into account the change of ownership by gift or inheritance.

In Switzerland, gift and inheritance taxes are levied solely at the cantonal level. Exceptions are in the cantons of Obwalden and Schwyz, which levy neither gift tax nor inheritance tax, and Lucerne, which does not levy gift tax.

The taxable event for gift and inheritance taxes is the acquisition *mortis causa* (usually by inheritance) or by *inter vivos* gift; as is, inter alia, a transfer of property without consideration by the potential beneficiary.

The transfer by inheritance or gift of immovable property situated in Switzerland is always subject to inheritance or gift tax in Switzerland, even if all parties involved are resident abroad. The tax is levied by the canton in which the property concerned is situated.

The rate of tax is progressive in all cantons. Depending on the personal relationship between the transferee (heir or donee) and the transferor (testator or donor) and the taxable amount (transfer value – *Verkehrswert*), the rate can be as high as 50%.

In most cantons, gifts and inheritances between spouses and to direct descendants – in some cantons also to parents – are exempt from tax.

4. AVOIDANCE OF DOUBLE TAXATION

4.1 Income tax

Switzerland has concluded bilateral double taxation treaties (DTTs) for the avoidance of double taxation with a large number of countries. Under these treaties, the right of taxation over income from immovable property, including income from renting and letting, is vested in the state in which the property is situated (the situs state). As a rule, the state of residence reserves the right to take this foreign income into account when determining its own applicable tax rate on this income (exemption with progression). This rule is in line with the OECD Model Tax Convention and is applied by most states.

4.2 Inheritance and gift tax

To date, in the area of inheritance and gift taxes, Switzerland has been concluded double tax treaties (DTTs) with Austria, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Under all of these DTTs, the situs principle applies to immovable-property assets, i.e. Switzerland has the right of taxation over immovable property situated in Switzerland and belonging to a taxpayer resident abroad. In contrast, the state of residence of the testator or donor must credit the tax paid in Switzerland against its own inheritance or gift taxes.

Where no DTT exists in a particular case, there is a need to determine whether the domestic law of the state of residence provides for a credit for Swiss inheritance or gift taxes against the taxes payable in the state of residence.

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