

Real estate and VAT (Part 1): VAT structuring options for the transfer of real estate

Value added tax and real estate is one of the perennial favourites in VAT advisory services. The regulations are complex in detail and the amounts for individual transactions are comparatively high. In our blog, we present relevant problem areas in loose succession and discuss what to look out for. In the first part, we deal with VAT issues in connection with the transfer of real estate.

THREE POSSIBLE FORMS OF TRANSFER

There are basically three ways to account for the sale of a property for VAT purposes:

1. The basic case provided for by law is the exempt supply in accordance with Art. 21 para. 2 no. 20 of the VAT Act
2. As an alternative, there is in principle the possibility of a transfer as a voluntarily taxed ("opted") supply in accordance with Art. 22 para. 1 of the VAT Act
3. Finally, under certain conditions, the parties may decide to apply the notification procedure in accordance with Art. 38 MWSTG in conjunction with Art. 104 MWSTV. Art. 104 MWSTV.

SALE OF A PROPERTY AS AN EXEMPT SUPPLY (ART. 21 PARA. 2 NO. 20 MWSTG)

The transfer as an exempt supply means that the sales transaction itself does not trigger VAT. As the supply itself is "non-taxable", the (taxable) seller cannot claim input tax deduction on the input tax-burdened expenses in connection with the transaction.

If the (taxable) seller has used the property until the sale (in whole or in part) for purposes entitling him to deduct input tax, the sale as a tax-exempt supply constitutes a "change of use" (old use: partially or fully entitling to deduct input tax, new use: not entitling to deduct input tax). Accordingly, the seller must make an input tax adjustment due to own use in accordance with Art. 31 of the VAT Act.

Example 1: The taxable company Hans Muster AG in Walchwil holds a property as part of its business assets. The property houses the joinery of Hans Muster AG. In October 2014, Hans Muster AG had the roof of the property re-covered. Hans Muster AG claimed the VAT invoiced for this as input tax. On 1 July 2024, Hans Muster AG sells the property to Müller Immo AG. The sale is to take place in accordance with the statutory base case as an exempt supply.

Hans Muster AG previously used the property extensively for taxable purposes (carpentry). The sale as an exempt supply results in a change of use. Accordingly, Hans Muster AG must correct the input tax deduction in connection with the property. In this case, the input tax deduction in connection with the renovation of the roof is affected. The extent of the correction depends on the current value of the renovation. To determine the current value, the input tax amount is reduced by 5% on a straight-line basis for each year that has

elapsed for immovable property. The accounting treatment is not relevant. Accordingly, Hans Muster AG must correct the originally deducted input tax by 50% (5% * 10 years, the current year of sale is generally not taken into account when determining the current value).

The purchaser acquires the property free of VAT. If the property is used for non-taxable purposes (e.g. as a retirement home), there is no risk of a change of use for the purchaser. On the other hand, the purchaser does not transfer any potential for de-taxation.

Example 2: Hans Muster AG includes the input tax adjustment to be made by it in the sales price. Müller Immo AG initially intended to demolish the business premises and build a modern residential property on the site. It is changing its plans to the effect that shops are now planned on the ground floor and offices on the first floor.

In the case of the construction of a residential property, Müller Immo AG is interested in minimising the input tax burden in connection with the acquisition of the property. In the case of taxable use (shops and office space can be let/sold on an opt-in basis), the input tax burden plays a rather minor role, as Müller Immo AG is entitled to deduct input tax. The "hidden" VAT transferred from the input tax correction of Hans Muster AG, on the other hand, results in a definitive additional charge for Müller Immo AG.

If the contracting parties have not made any special agreements and VAT is not shown in the purchase contract, the sale is to be treated as a tax-exempt transaction.

OPT. SALE OF A PROPERTY (ART. 22 PARA. 1 NO. 20 MWSTG)

As a first alternative, the taxable seller of a property has the option of voluntarily subjecting the sale to VAT ("option"). The prerequisite for exercising this option is that the property is not used by the buyer exclusively for residential purposes. If the buyer acquires the property in order to sublet it for residential purposes, the option is possible, as the buyer himself does not intend to use the property exclusively for residential purposes.

The seller can also opt for only part of the sale of the property. When selling developed properties, the seller can claim input tax on the costs directly related to the sale in full or in part (depending on the option).

Example 3: The taxable company Hans Muster AG in Walchwil holds a property as part of its business assets. The property houses Hans Muster AG's joinery workshop. Above it is a penthouse with a view of Lake Zug. In October 2014, Hans Muster AG had all the windows in the property replaced. Hans Muster AG claimed the VAT invoiced for this as input tax insofar as the windows of the joinery were affected. On 1 July 2024, Hans Muster AG sold the property to Müller Immo AG.

Hans Muster has the option of selling the property as a whole on an opt-in basis, as Müller Immo AG will not use the penthouse flat itself for residential purposes. By opting for VAT for the transfer, Hans Muster AG would not have to make an input tax adjustment in relation to the input tax claimed in connection with the renovation of the windows in the joinery area. Rather, there is a change of use with regard to the penthouse flat, which entitles Hans Muster AG to make an input tax deduction with regard to the input tax not claimed in connection with the renovation of the windows in the penthouse flat area. Insofar as Müller Immo AG continues the previous use of the penthouse flat, its opted transfer will result in

an additional VAT charge for Müller Immo AG, which will presumably have an impact on the purchase price negotiations.

There is also the possibility that Hans Muster AG merely opts for the sale of the joinery and transfers the penthouse flat as a tax-exempt supply. In this case, Max Muster AG does not have to calculate either an own-consumption correction or a subsequent input tax deduction.

Formally, a sale with an option only requires that the VAT is shown separately in the purchase contract on the purchase price without the value of the land or that the declaration is made in the statement in sections 200/205.

TRANSFER OF THE PROPERTY IN THE NOTIFICATION PROCEDURE (ART. 38 PARA. 2 MWSTG IN CONJUNCTION WITH ART. 104 MWSTV)

When using the notification procedure, VAT is settled with the FTA by notification instead of payment. The notification procedure therefore offers the possibility of processing the transaction without the buyer having to finance the VAT. By using the notification procedure, the buyer assumes the seller's taxable base and the utilisation level entitling to input tax deduction for the transferred assets.

Example 4: The taxable company Hans Muster AG in Walchwil holds a property as part of its business assets. The property houses Hans Muster AG's joinery workshop. Above it is a penthouse with a view of Lake Zug. In October 2014, Hans Muster AG had all the windows in the property replaced. Hans Muster AG claimed the VAT invoiced for this as input tax insofar as the windows of the joinery were affected. On 1 July 2024, Hans Muster AG sells the property to Müller Immo AG. The transfer is handled by means of a notification procedure.

Müller Immo AG takes the place of Hans Muster AG with regard to the property for VAT purposes, i.e. it takes over a property that was used in the taxable area with regard to the joinery and in the tax-exempt area with regard to the penthouse. If it rents the penthouse to a business consultant in the future, it can claim a subsequent input tax deduction for the replacement of the windows in 2014 (50% of the original input VAT paid). The prerequisite is that she can prove the extent to which VAT was originally invoiced and paid.

In connection with possible changes of use after the transfer in the notification procedure, proof of previous use by the seller is of central importance. It is the buyer's responsibility to provide this proof. He must ensure that he receives all input tax receipts relevant to a change of use, evidence of value-enhancing expenses or extensive renovations over the last 20 years and records of previous input tax corrections.

If the buyer is unable to provide this evidence, they run the risk of input tax corrections being calculated on the basis of the purchase price due to changes in use. In this case, the FTA assumes that the property has been used entirely within the taxable area to date.

Example 5: In example 4, Hans Muster AG is unable to provide any evidence of the history of the property due to a water ingress in its archive.

If Müller Immo AG continues to use the penthouse for residential purposes, it would have to make an input tax adjustment due to a lack of evidence of the previous use. This is based

on the purchase price with Hans Muster AG. If it rents the penthouse to a management consultant in the future, it cannot claim a subsequent input tax deduction.

Accordingly, the notification procedure should be used with caution in property transactions if there are uncertainties regarding the previous or future use and there are gaps in the documentation.

CONCLUSION

Even if the above summary of VAT structuring options in connection with real estate transactions is only an initial overview, it is clear that real estate transactions should also be thoroughly examined in advance from a VAT perspective in order to make optimum use of the structuring options available. We have summarised the various structuring options in simplified form below

	Excluded service	Taxable output ("option")	Reporting procedure
Tax liability of the seller required?	No	Yes	Yes
Tax liability of the buyer required?	No	No	Yes
Note/application required?	No	Yes	Yes
Is VAT due for payment?	No	Yes	No
Does the seller possibly have to take into account the correction of the input VAT?	No	No	No
Can the seller possibly claim subsequent input tax deduction?	No	Yes	No
Does the buyer possibly have to take into account a correction of the input VAT?	No	Yes	Yes
Can the buyer possibly claim subsequent input tax deduction?	No	No	Yes
Is the VAT history of the property relevant?	No	No	Yes