OPTION
FINANCE

Monday 27th February, 2012

REAL ESTATE NEWSLETTER

Dossier on

Provision of services in the real estate sector

Recent developments

Editorial

The main theme for our first issue of the Real Estate Newsletter for 2012 is the provision of services in the real estate sector.

First of all, from a tax standpoint, and more particularly in matters of corporate income tax, if the tax treatment of the remuneration collected by various providers of real estate services (appraisers, brokers…) raises very few queries these days, we shall see that this is not the case on the other hand for the criteria of deductibility of the corresponding expense for beneficiaries of these services. We will therefore examine below the various tax aspects of the expenditures pertaining to the acquisition of a real estate asset and to its operation. The international aspects will not be overlooked either, the tax authorities being particularly careful when examining the relations which exist between French service providers and their clients, foreign investment groups, having regard both to transfer pricing and to the issue of permanent establishments.

VAT will once again have a prominent role and we will focus on the consequences entailed by the qualification of real estate sales support aids, whether these concern price reductions, subsidies or the remuneration of services.

Local taxes, as we already know, concern more than ever the real estate sector, especially since the institution of the Territorial Economic Contribution (or CET) which now hits the rental of bare property and going beyond just proprietors, the service providers intervening in this sector are impacted, which justifies questions on the apportionment of the taxable bases and the avoidance of dual taxation.

With regard to legal issues, we shall consider the distinction between Contracts for Project Owner Assistance (AMO) and for Delegated Project Ownership (MOD), and shall see in this regard that the heading of a contract is not conclusive as to its nature.

There have also been a great many recent developments in the law, and in particular in the field of real estate tax. We will detail successively the contribution in this field of the finance bill for 2012 and of the amended finance bill for 2011, whether concerning corporations or individuals, the reform of transfer tax on the assignment of corporate interests with in particular the assignments of the securities of predominantly real estate companies and the new calculation of the assessment basis of duties, but also the favourable measures granted to real estate operations as concerns the date of entry into force of the new reduced VAT rate.

Finally, our writers wanted to remind our readers that the new floor areas to replace Net External Areas (SHON)/Gross External Areas (SHOB), and constituting the taxable base for development tax, will become applicable to building permit applications filed as from 1st March 2012, similarly to said tax. A significant article will be dedicated to this question and to the other adjustments made to the planning Code, of which some will enter into force also on 1st March. ■

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Services in construction related matters: the heading of a contract is not conclusive as to its nature

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Having regard to the extreme diversity of the services which exist, the stakes pertaining to qualification of contracts needs to be comprehended, in particular having regard to the relationship with third parties or with subcontractors, but also having regard to the regime of liability which applies.
The assignments of a project owner's assistant (AMO) are distinct from those of a delegated project owner (MOD). The AMO does not have the power to represent the project owner, who is the sole effective and operational contact of third parties. Acting as a service provider and not in an agent capacity, he provides the project owner with the benefit of his know-how in the field of management of building projects from an administrative, financial and technical standpoint. The AMO can not, in principle, be sued on the grounds of decennial liability. However, if his services prove to be those of a project manager, neither the heading of the contract, nor the use of the term "AMO" will create a viable illusion. An AMO has thus been considered as a developer, having regard to the assignments he was entrusted, that is to say the supervision and oversight of works (Administrative Court of Appeals of Douai, 21 May 2002, Sté Serete).

"*No window dressing will be possible for construction contractors! In order to determine the nature of their liability and their insurance regime, a shrewd analysis of their assignments will be necessary*"

The MOD, will act as an agent, concluding in the name and on behalf of the project owner the acts necessary to the achievement of the project; he shall thus act as the sole contact of third parties. However, the MOD can contract in his own name and on his own behalf, for the performance of his assignment, with project managers or engineering consultants. His co-contractors must check in which capacity he is dealing with them, as a binding relationship with a project owner entails material consequences.

Thus the qualification as a mandate shall not exclude a decennial liability from applying. Article 1792-1 3° of the Civil Code deems as builders "*Any person who, although acting in the capacity of agent for the work owner, performs duties similar to those of a hirer of work.*" A "genuine" MOD will qualify as being "deemed a builder" and will thus be held, in this respect, to the decennial liability. The quality of builder has been denied to a consultancy firm whose surveys excluded any pre-dimensioning of the work and were limited to guideline recommendations on positioning (Administrative Court of Appeals of Lyon, 7 October 2010, no.07LY01210).

The assignment of a works foreman (administrative and financial assistance, foremanship) presented as being an intellectual service for the assistance of the project owner was re-qualified as a contractor hire agreement, entailing a decennial liability in a builder capacity (*Conseil d'Etat*, 21 February 2011, Sté ICADE G3A no. 330515).

To this extent, contracts stipulating services which are identical to those of a property development contract, but excluding the use of the words "property development" and "property developer" (often because the contractor is not insured for an assignment under this denomination), will not fool anyone and the appropriate consequences will necessarily have to be drawn. Likewise, delegated project ownership agreements, which are fully stocked up to the extent where their qualification as a property development contract can not be denied, will imply underwriting insurance for a property development assignment.

Finally, a confusion is often entertained regarding "general contractor" agreements, wrongly presented as a sort of property development contract, whereas this operator is a works contractor. To this extent, the service providers with which he deals are sub-contractors. The project owner will therefore be exposed to claims for direct payment from said sub-contractors, a problem that will be unknown to those who choose to entrust the accomplishment of their projects to a "genuine" property developer.

No window dressing will be possible for construction contractors! In order to determine the nature of their liability and their insurance regime, a shrewd analysis of their assignments will be necessary. ■

Tax treatment of expenditures related to the provision of services

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If the tax treatment of the remuneration collected by various providers of real estate services (appraisers, brokers…) raises very few queries, this is not the case on the other hand for the criteria of deductibility of the corresponding expense for beneficiaries of these services. Below a brief tax guide of expenditures pertaining to the acquisition of a real estate asset and to its operation.

As per standard rule of law (interest of the enterprise, proportional character of the remuneration…), the expenditures outlaid by enterprises on account of the services that they benefit from in the context of the acquisition or management of a real estate asset can be deducted for the determination of their taxable income subject to certain specificities. As concerns expenditures outlaid on the occasion of the acquisition of a building constituting a fixed asset, it should be recalled that enterprises must have, in application of article 38 quinquies, annex III of the Tax code, exercised in 2005 an irrevocable option, related to booking as acquisition charges or expenses increasing the acquisition cost of the fixed asset (in particular the transfer duties and expenses). If the building constitutes part of the inventory, these same expenditures must necessarily, in accordance with article 38 nonies of this annex, be incorporated into the cost price.

A distinct option is open, both for fixed assets and inventories, as concerns the interest expense borne up until the date of acquisition or of definitive receipt of the asset. There can be, regarding this issue, an interest in activating financial interests for thinly capitalised enterprises, to the extent that the tax authorities accept not to submit these interests to the provisions of article 212 of the Tax Code, including if they are, thereafter, indirectly deducted in the form of an amortization or of a provision (administrative guideline of 31 December 2007 4 H-8-07, n° 21).

One should also bear in mind that, where the acquisition concerns the securities of real estate companies constituting a holding interest, article 209 VII of the Tax Code imposes, from a tax standpoint, the incorporation of the acquisition expenses into the cost price of the securities to amortize them (as the case may be, off the books) over a period of five years.

"If the building constitutes part of the inventory, these same expenditures must necessarily, in accordance with article 38 nonies of this annex, be incorporated into the cost price."

Subsequently to the acquisition of the asset, the treatment of the expenditures related to the different services that enterprises may benefit from can moreover present a specificity where these expenditures can be connected to a new fixed asset, to a component (new or replaced) or to an element of the inventory. In these different situations, expenditures can increase the asset value of the elements that they are connected to, as the case may be, complying with the constraints referred to above in respect of the acquisition expenses.

Certain expenditures can moreover give rise to the booking of deductible provisions – such as provisions for major upkeep – if they do not entail an increase of the asset value and where they exceed, due to their nature or their importance, the routine expenditure necessary to maintain the assets considered. In this respect, the program of expenditures must be clearly specified at close of the financial year to which the provision is attached, the corresponding costs having to be able to be estimated with sufficient accuracy. As regards this latter issue, it should be underlined that – if the enterprise, where it has the possibility, chooses to record such works as a component – this option will be rejected from a tax standpoint (article 15 bis of annex II of the Tax Code). ■

Sales support aids: price reductions, subsidies or remuneration of services

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Often vendors of buildings, in particular in the context of sales off plans, grant their purchasers various benefits or "sales support aids". These aids can come in different forms:
- a rental guarantee, granted over a certain period following the delivery of the building and the aim of which is to ensure in favour of the purchaser a replacement of the rental income where it has not found a tenant within the contemplated deadline;
- "yield on funds" remitted by the purchaser to the vendor during the construction period, or the assumption of interest during construction;
- assumption of expenditure such as notary's fees, or of kitchen equipment…

The VAT regime applicable to these aids is directly connected to their qualification. The latter is however often intricate and gives rise to frequent discussions with the tax authorities, as the stakes can be high. Where a service provided directly in consideration of the payment of the "aid" is identified, the taxation under VAT will be performed depending on the nature of the service. Conversely, where a service does not receive due financial consideration, the aid shall constitute a non taxable subsidy if one is to refuse to establish a link between its payment and the sale, or as a price reduction in the contrary case. This latter qualification offers the vendor a certain benefit where the transfer is subject to VAT: the right to re-credit oneself with the corresponding tax.

"It is paramount, albeit often difficult to identify faultlessly the existence of possible services directly connected to the payment of monies or to the allocation of a benefit within the framework of real estate transactions."

Sums paid under a rental guarantee were traditionally analysed by the authorities as rent, and taxed as such. But rent is construed as due consideration for the service of providing possession of the premises, which is not the situation contemplated by a rental guarantee. It would therefore appear fairer to analyse this as a reduction of the price granted by the vendor. A decision of the *Conseil d'Etat* has been adopted along these lines, but the authorities often look to minimize this as a mere *sui generis* ruling and invoke a treatment as a subsidy not subject to VAT, disconnected from the sale of the building, to deny the vendor the right to recredit the tax.

The "yield on funds" corresponding to the financial compensation for the absence of return on the funds remitted by the investor while waiting for the completion of the building is sometimes qualified as a "financial service" (exempted from VAT) provided by the purchaser to the vendor. However, is this not merely yet another price reduction granted by the vendor? For this to be considered as a financial advance, the payment would have to be made in advance in relation to what is provided by the sale agreement, which is not the case. It would therefore seem that the qualification as a price reduction prevails.

The same applies for the assumption of the purchaser's interest during construction, of its notary's expenses or other benefits. Where it appears that the sums are legally incumbent on the purchaser, their assumption economically by the vendor would appear to have to be analysed as a reduction of its sale price.

It thus appears clear through these few instances of sales support aids: that it is paramount albeit often difficult to identify faultlessly the existence of possible services directly connected to the payment of monies or to the allocation of a benefit within the framework of real estate transactions. In this perspective, one would be well advised to be particularly careful in drafting the contractual stipulations, as these will provide guidance to the process, failing established precedents and precise administrative guidelines on this matter. ■

Provision of services in the real estate sector: local tax issues

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Local taxes concern of course the real estate sector, especially since the institution of the Territorial Economic Contribution (or CET) which now hits the rental of bare property. Besides proprietors, the service providers intervening in this sector are impacted, which justifies questions on the apportionment of the taxable bases and on how to avoid dual taxation.

In respect of the Corporate Real Estate Contribution (CFE), if this hits that entity enjoying premises for the purpose of the exercise of its profession, real estate service providers will find themselves on the front line in dealing with the question as to what has to be taxed and on what basis. The example as to the outcome of common use areas enables the issue at hand to be illustrated. The *Conseil d'Etat* (decision of 03/05/2011 no. 312762) confirms that store operators in a shopping centre must also include in the taxable base for CFE a share of the common use areas made up of the mall and of the parking lots. The centre manager may not thus be taxed alone on these common use areas. It may only be taxed on those premises that it enjoys in a private and exclusive manner. The expense for the management of the reform on rental land values for 2014, implying a return campaign for the spring of 2012, will be incumbent in part on the service providers ensuring the management of real estate portfolios on behalf of proprietors.

"The authorities no longer hesitate to dismiss claims on grounds of an invalid mandate"

In respect of the Levy on the Added Value of Enterprises (CVAE) based on their added value, several questions need to be addressed. The main one concerns the method according to which brokerage operations are booked. Indeed, the CVAE is calculated as from a rate of taxation which depends on the importance of turnover. If the real estate broker only records his commission as an operating revenue, he will bear a tax liability inferior to that of a commission agent who has booked all operations for which he intervened, that is to say the rent managed on behalf of his clients. The distinction between charges which reduce added value or not leads to particular care having to be taken by the service provider in dealing with the accounting treatment. Thus, the re-invoicing of real estate tax on property and annual tax on office, retail and parking spaces in the Ile-de-France region creates added value at the level of the owner and must be neutralized at the level of the broker.
Resorting to undeclared partnerships is no longer neutral, as the latter are directly taxable under CET. They can thus be a source of tax friction. Service providers can not remain unaware of the requirement to manage the ten year spread enabling progressive taxation under CET of bare rental activities. Similarly, the management of the tax ceiling system on losers which benefits companies renting bare property must also be appraised. Finally, as a service provider, the latter has to ascertain the validity of the mandates that it holds to file claims challenging taxation issued in the name of its principals. The authorities no longer hesitate to dismiss claims on grounds of an invalid mandate.

In respect of the Local Tax on External Advertising (TLPE), real estate service providers are confronted with the management of this new taxation that is being implemented by a great may *communes* to face an alleged loss of revenue from CET. Real estate service providers must as a general rule manage on behalf of proprietors the issue related to the designation of the liable party for TLPE, but above all the determination of the taxable bases in the face of presumptive taxation attempts initiated by *communes*. ■

Provision of real estate services in an international context: tax exposures, extra caution required

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A building is closely connected to its immediate environment: to the land on which it is developed, to the other buildings that surround it, and more broadly to its city or region of location. It is thus subject to the economic and legal context of the country in which it is situated. Accordingly, services which are related to real estate are uneasily "relocatable": finding constructible land, the procurement of administrative authorisations, compliance with technical and environmental standards, negotiation with building contractors, search for tenants, all require sound knowledge of the market operators and of the life styles and working methods of local populations. Certain trades can be exported, of course, but real estate remains essentially a domestic science. In this context, major real estate operators (property developers, investment funds, property companies) frequently resort to French subsidiaries that will be put in charge of rendering these services, whether for proprietary purposes, for their investors or oven for third parties. Within the framework of these international intra-group relations, two intricate questions from a tax standpoint arise: the determination of fair remuneration and the exposure pertaining to permanent establishment in France. The first question comes within the ambit of a transfer pricing analysis between the subsidiary sited in France and the foreign entities of the group which benefit from these services. The basic principle is well known: the services have to be remunerated according to the "arm's length" rule that is to say that the remuneration must conform to that which would prevail between unrelated companies. Several concrete predicaments are likely to occur: how do you identify a company rendering comparable services which is not itself the member of a group? We know indeed that only the profitability of an independent enterprise constitutes a reliable criteria of comparability, to the extent where that of a company belonging to a group could be impacted by transfer prices which are inconsistent with the arm's length principle.

"The relations between providers of French real estate services and related foreign beneficiary companies must be examined carefully in order to avoid all tax exposures."

Another question arises: in the event of multiple functions (property development and tenant search for instance), should one determine the remuneration of each function independently or should one set a global remuneration for all of the services? The answer requires an accurate functional analysis and the identification of comparative elements on a case by case basis. The other series of issues concerns the exposure pertaining to permanent establishments in France. Where the consultancy structures are separate from the holding structures of real estate assets (which is the case for instance of investment funds where the ultimate shareholders are not identical), how does one ensure that the local subsidiary can not be considered as a "subordinated agent" of the foreign company owning French buildings? If the roles are clearly divided up between the French consultancy firm and the foreign holding entity, and in particular if the former does not hold powers enabling it to conclude contracts in the name of the latter, the French authorities should not be able to consider that the French company constitutes a permanent establishment of the foreign company. This should be true *a fortiori* where the foreign company holds the French real estate assets through the agency of French companies. Indeed, in this case, it is these French companies that benefit from the services of the providing company. The appraisal of the exposure will also depend on the "substance" of the foreign company in its country of location and on the compliance with local rules of corporate governance (holding of board meetings and general meetings of shareholders, in particular). ■

Real estate tax: contributions of the finance bill for 2012 and of the amended finance bill for 2011

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The measures voted at the end of December 2011 in real estate tax related matters are far too many to be itemized here. You will find below a brief summary of these.

Tax on individuals

Real estate capital gains

Adopted in September, the reform on real estate capital gains of individuals has been the subject of a first series of adjustments. The law of 19 September 2011 amended the taper relief applicable by extending from fifteen to thirty years the holding period necessary for a full exemption on capital gains and, save exception, these provisions will apply to sales completed as from 1st February 2012. The prior rules of taxation are maintained for sales of bare constructible land for which a promise to sell was recorded prior to 25 August 2011 if the sale is concluded prior to 1st January 2013.
Three new exemptions are contemplated in the event of:
- sales of an accommodation where the seller does not own his main place of residence and redeploys the proceeds to the acquisition of his main place of residence ;
- sales by persons of modest means, residing in a retirement home, of their former domicile within a period of two years after having vacated this;
- assignments up until 31 December 2014 of rights to increase a building in height in view of the construction of residential use premises.

Dividends of SIIC and Sppicav

As from the taxation of income during 2011, dividends derived from the exempted profits of SIIC and Sppicav cease to be eligible to the 40 % relief and to the fixed withholding tax (including if the option for the fixed withholding tax was formulated). In addition, these securities can no longer be entered into a PEA (share savings plan) since 21 October 2011. Those securities already there at this date can be left there.

Scellier scheme

Confirmation of the alterations announced in the Newsletter issue of 28 November 2011: last year of application in 2012, reduction of the rate, transitional measures for promises signed before 31 December 2011. The cost price of the accommodation which is used as an assessment base for the tax reduction (within the limits of 300,000 Euros) is now retained within the limit of a cap per m², depending on the location of the accommodation.

Tax on corporations

Non professional furnished renters

The tax reduction rate granted in the event of investment in certain structures (EPHAD, Student halls of residence, tourist residences…) is reduced down from 18 to 14 % for accommodations acquired in 2012 (on account of the general 15 % reduction of tax loopholes, the rate is in fact reduced down to 11 %). The tax benefit is maintained beyond 2012 for certain operations initiated prior to 1st January 2012.

"Adopted in September, the reform on real estate capital gains of individuals has been the subject of a first series of adjustments."

Real estate capital gains

Sales completed up until 31 December 2014:
- taxation under corporate income tax at the reduced rate of 19 % of the net capital gains realized on the sales of office buildings and commercial premises intended to be converted into housing within a period of three years. The failure to comply with the conversion covenant entails the payment by the seller (company subject to corporate income tax, property company or Social Housing Organisation) of a 25 % fine based on the sale value of the building;
- exemption (enterprises subject to personal income tax or corporate income tax) in the event of assignment of a right to raise the building in height in view of the construction of housing premises.

Without any time limit:
- deferment of taxation for the capital gains realized (enterprises subject to personal income tax or corporate income tax) on the occasion of exchanges of real estate assets carried out with local authorities or public establishments in view of the construction of general interest structures.

Thin-capitalisation: real estate partnerships for the construction and subsequent sale of property

For financial years closed as from 31 December 2011, exclusion (on certain conditions) from the scope of application of the thin-capitalisation mechanism, of the interest served under loans guaranteed by the partners. ■

Transfer tax: an abandoned reform?

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The amendment of article 726 of the Tax Code, further to the adoption of the finance bill for 2012, entails various significant variations as concerns transfer taxes on the corporate interests of listed companies, unlisted companies or predominantly real estate holding companies. First of all, this reform, which entered into force on 1st January 2012, has an impact on the rate applied to sales of listed shares recorded in a deed and to sales of unlisted shares. Thus, the 3 % duty has been replaced by a decreasing rate which breaks down in the following manner: 3 % for the base fraction inferior to 200,000 Euros, 0.5 % for the fraction comprised between 200,000 and 500,000,000 Euros, and 0.25 % for the fraction exceeding 500,000,000 Euros. Moreover, the collection cap of 5,000 Euros has been cancelled, which implies that the cost of a share deal is increased to the extent where the purchase price exceeds 166,666 Euros. On the other hand, the calculation of transfer tax on sales of partnership shares has not been affected by the reform. These shall remain calculated on the basis of a fixed 3% uncapped rate and coupled with a relief equal for each share to the ratio of 23,000 Euros out of the total number of shares which make up the share capital.

The new also law extended the scope of application of article 726 of the Tax Code, to the extent where are now concerned sales of listed shares issued by a French company, to the extent where these sales are recorded by an instrument executed in France or abroad. This is a real novelty having regard to the former regime, which only submitted such sales to transfer tax in regard to a deed signed in France. The scope of application of article 726 of the Tax Code has not, on the other hand, been altered as concerns sales of unlisted shares or of partnership shares, which remain subject to the payment of tax whatever the terms thereof.

"However, it would appear that this new regime is likely to be extremely temporary"

The third noteworthy point of the reform resides in the possibility to offset taxes settled abroad opened by the legislator. Indeed, in the event of sale by deed executed abroad applying to listed or unlisted shares issued by a French company, it is contemplated that the taxes of the same nature settled in the State of registration or of residence of the parties can be offset against the taxes to be paid in France, within the limits of the amount of the latter.

The fourth important point of this reform lies in the introduction of certain exemptions aiming to compensate for the increase of the cost of transfers through the exclusion of certain restructuring or reorganising operations practiced on a regular basis by enterprises, such as assignments carried out within the same tax group.

Finally, the legislator has provided for a derogatory regime applicable to assignments of interests of unlisted predominantly real estate holding companies (SPI). Indeed, if the assignments applying to the corporate interests of an SPI remain subject to an uncapped proportional duty of 5 %, the base to support this rate has been profoundly altered, to the extent where, from now on, the real value of the assets assigned shall be taken into account after the deduction of only the liabilities pertaining to the acquisition of said interests or real estate assets.

It shall thus become in practice very difficult to determine the contents of such acquisition liabilities.

However, it would appear that this new regime is likely to be extremely temporary. Indeed, at the date of drafting this article, a draft amended finance bill for 2012 contemplates returning to the regime applicable prior to the entry into force of the above mentioned provisions, with the exception of those related to predominantly real estate holding companies, and thus right from 1st August 2012: it would therefore be prudent to wait for the legislator to come to a final decision before engaging in any assignment or acquisition of corporate interests. ■

Raise in the reduced VAT rate: what modalities for the real estate operations?

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Real estate operations benefit from favourable measures relating to entry into force

Real estate operations which benefit from the reduced VAT rate are now liable to the rate of 7 % set forth by article 13 of the amended finance bill for 2011 of 28 December 2011. This rate applies in principle to operations in respect of which chargeability occurs as from 1st January 2012, that is to say at the time of delivery (understood as the transfer of the authority to dispose of an asset like its owner) for sales of movable or immovable property and at the cashing of deposits or of the price for the provision of services, save option by the liable party for payment on an accruals basis (invoice). Several adjustments enable however to submit to the rate of 5.5 % those real estate operations initiated prior to the date of entry into force of the new rate in order to protect the financial balance of the agreement reached between the parties, without taking into account the date at which chargeability occurs.

In the situations concerned, the VAT applies at the rate of 5.5 % to the whole operation. The criteria retained to determine whether an operation benefits from this favourable measure depends, as concerns the social housing sector, on the mechanism (in practice the operations referred to under article 278 sexies of the Tax code) under which the operation is placed. This can be, depending on the case, the date of the pre-contract, of the preliminary contract or of the sale contract, or alternatively the date of procurement of a decision of approval from the *préfet*, of that of a State funding or of that of signature of an agreement with the State representative, or yet still the date of filing of the planning permission application.

As concerns renovation works carried out in social housing accommodation, it is the existence of a signed estimate and of a deposit paid prior to the 1st January 2012 which shall subordinate the application of the 5.5 % rate to the whole of the operation, if these are works which do not benefit by nature from the reduced VAT rate.

For other works of improvement, conversion, fit-out and upkeep carried out in housing accommodation (whether or not social housing) completed for more than two years (that is to say those referred to in article 279 0 bis of the Tax Code), the rate of 5.5 % applies to the whole of the operation if an estimate was signed and a deposit paid prior to 20 December 2011. The authorities accept that this solution will apply to works contracts concluded prior to the same date, advance payments, interim payments or any other partial payment then being assimilated to a deposit.

Finally, for the sake of simplification, the 5.5 % rate applies to services which were started and having given rise to an invoice prior to 1st January 2012, whatever the date at which the chargeability occurs (BOI 3 C-1-12, guideline of 8 February 2012). ■

New rules in matters of impact surveys and public enquiries

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Two orders published on the same day[1] and enacted in application of the law of 12 July 2010, known as the "*Grenelle II*" act, substantially amended the regime applying to public enquiries and to impact surveys such as these are codified in the environmental code. The modifications contemplated, that will enter into force on 1st June 2012[2], concern essentially the following points:

- impact surveys: the generic threshold of 1.9 million Euros is cancelled. A table listing the works, structures or developments subject to an impact survey (systematically or on a case by case basis) is now annexed to article R. 122-2 of the code. The contents of the impact survey are completed (description of the project in particular as regards the nature and the quantity of materials used; Analysis of biological balance, of climatic factors, of ecological continuities; consideration of the effects of the project on energy consumption; analysis of the accrued effects of the project with other known projects …). The impact note, for its part, shall disappear.
- Public enquiry: the order specifies those projects related to works, structures or developments which must be the subject of a public enquiry in application of article L. 123-2 I 1° of the environmental code, that is to say those that are subject to the accomplishment of an impact survey. Those projects exempted are listed under the new wording of article R. 123-1 of the environmental code. The consolidation of all public enquiries into a single enquiry in the event where these is more than one project owner or where there are distinct regulatory frameworks (public enquiry coming under the expropriation code, for instance) is facilitated. ■

[1] *Official Journal of 30 December 2011 (orders no. 2011-2018 and no. 2011-2019 of 29 December 2011)*
[2] *The order related to impact surveys will apply to projects, whose authorisation, approval or execution application file is lodged with the relevant authority as from 1st June 2012. The order related to public enquiries will apply to enquiries whose bylaw ordering commencement and organisation thereof is published as from 1st June 2012.*

Entry into force of the new concept of floor areas on 1st March 2012 and other reforms of planning law

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The new floor areas replacing net external areas (SHON) and gross external areas (SHOB), and constituting the taxable base for development tax[3], will become applicable to building permit applications filed as from 1st March 2012, similarly to said tax. Certain adjustments are made to the planning Code, of which some will enter into force also on 1st March.

1. Article R.331-7 of the planning code[4] now defines the "floor area of the construction", which constitutes the base for development tax, as the sum of the floor areas of each floor level which is roofed and sided, calculated as from the bare inside face of the façades after deduction of the areas, corresponding:
- to the thickness of the walls surrounding the door and window frames leading outside;
- to the spaces and cavities pertaining to staircases and elevators ;
- to a ceiling height inferior or equal to 1.80 metres.

Article R.112-2 of the same code[5], defining the constructible "floor area of the construction", is identical, but deducts moreover:
- the areas fitted-out in view of the parking of vehicles, whether motorised or not, including the access ramps and manoeuvring zones;
- attics which are not susceptible to be fitted-out for housing or for activities of a professional, artisanal, industrial or commercial nature;
- technical premises necessary to the running of a group of buildings or of a property other than an individual house within the meaning of article L.231-1 of the construction and housing code, including waste storage premises;
- basement storage or cellars, which are annexes to housing, to the extent where these premises are serviced exclusively by a common use area;
- 10 % of the floor areas assigned to a residential purpose such as they result, as the case may be, from the application of the foregoing subparagraphs, to the extent where the accommodations are serviced by interior common use areas.

"The main part of the definition is identical for both areas, but the deductions are more restrictive concerning the area which is used as the base for development tax"

Thus, the main part of the definition is identical for both areas, but the deductions are more restrictive concerning the area which is used as the base for development tax. This base is also that applicable in matters of tax on the creation of office, commercial or storage premises in the Ile-de-France region.

As concerns more specifically constructible floor areas, all references to SHON, SHOB or to developed floor areas in laws, regulations, planning documents, risk prevention plans, heritage conservation and development plans, will have to be understood as "floor areas", which will also replace SHON for the application of the 20 % mark-up under the rules related to girth, height, site coverage and to Floor Area Ratio under planning documents, decided on by a deliberation of the municipal council for constructions for a housing use situated in delimited sectors of urban
zones.

Moreover, the notion of "site coverage", defined as being the "*vertical projection of the construction volume, all overhangs and protrusions included*", will now be used for the purpose of determining the appropriate planning authorisation and the necessity to resort to an architect, for constructions which do not constitute any "floor areas".

The distinction between SHON and SHOB will continue to apply to planning permission applications and to prior declarations under examination as at 1st March 2012[6]. However, in Concerted Development Zones (ZAC) and subdivision estates which exist as at 1st March 2012, the purchaser of a lot may apply for his development rights to be maintained as SHON if the conversion into floor areas should prove to be unfavourable.

2. The planning code will undergo other amendments. In particular, an ordinance of 22 December 2011[7], related to certain corrections to be made to planning authorisations, has amended and clarified the regime applicable to subdivision estates[8]. It also provides a legal framework for the practice of "hollow shells" by authorising the delivery of a planning permission for an establishment receiving the public, of which not all of the interior fit-out is known as the time of the planning permission application. The establishment may however only open once an additional authorisation has been delivered. The draft order of this implementation statute provides for entry into force as at 1st March 2012. An ordinance of 5 January 2012[9] applies, for its part, to the clarification and to the simplification of the processes pertaining to the preparation, amendment and revision of territorial coherence schemes (SCOT), local zoning plans (PLU) and municipal plans, by essentially making alterations and qualifications to the existing regimes.

3. Finally we would indicate, that even before entry into force of the development tax, set for 1st March 2012, the bylaw of 22 December 2011[10] increased the flat-rate bases applicable

[3] *See our article "The tax system applicable to planning matters: a new mechanism for 2012", Real Estate Newsletter, issue of 21 March 2011.*
[4] *Order no. 2012-88 of 25 January 2012.*
[5] *Order no. 2011-2054 A of 29 December 2011.*
[6] *Article 5 of ordinance no.2011-1539 of 16 November 2011.*
[7] *Ordinance no.2011-1916.*
[8] *See our article "The new reform of subdivision estates: clarifications and qualifications", the Real Estate Newsletter issue of 28 November 2011.*
[9] *Ordinance no.2012-11.*
[10] *NOR : DEVL11323593A*

to 785 Euros in the *communes* of the Ile-de-France region and to 693 Euros in all other *communes*, that being an increase of 5 %.

This same bylaw reappraised, as at 1st January 2012, the flat-rate values of the tax on the creation of office, commercial and storage premises, these values being, for each of the three districts, 361.24 Euros, 224.73 Euros and 90.31 Euros (for office premises).

In conclusion, any planning permit application filed as from 1st March 2012 will require greater care regarding the satisfactory incorporation of these reforms. ■

The taxation of landlords on constructions carried out by their tenants who purchase the property during the lease

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The *Conseil d'Etat*, in a ruling dated 28 July 2011, extended to those leases governed by standard rule of law, its case law already applicable to building leases. The situation concerned is the following: a lease agreement provides that the constructions or fit-out works carried out by the tenant, which are normally incumbent on the owner, will return free of charge to the latter at the expiry of the agreement. However, prior to this date, the tenant purchases the building that it occupies, thus retaining the constructions that it may have carried out. One must then consider that there has been a tacit and voluntary termination of the lease prior to its term-end, before the sale. During this lapse of time, the tenant received the constructions thus carried out, and their value is to be construed as additional rent which is taxable as property income.

It is the fair market value of the constructions at the date of the sale which will be taken into account as property income, unlike the building lease, for which it is the cost price, which is often lower.

Another difference: if for the latter a tax relief is contemplated as from the 18th year of the lease, reaching an exemption after thirty years, no such mechanism is contemplated for standard leases.This new case law is therefore much stricter with regard to these.
However, the *Conseil d'Etat* has demonstrated a certain leniency: those works which have not been contemplated in the lease agreement, and whose execution took place subsequently to the signature of the sale and purchase agreement, are not to be taken into account for the calculation of the landlord's property income. This exception being merely in line with the rationale behind the system: the constructions are then considered as being carried out by the tenant in its capacity as future purchaser, and do not correspond to the compensation of a reduction in rent to give rise to taxation. ■

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