VAT Comment - Specific topics. Real estate - Supplies (Update on 01.01.2020)

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B OEKWERK V I: Specific topics

Chapter 16. Specific topics

Section 1 - Real estate - Supplies

Updated according to the state of the legislation applicable on **01.0 1.2020**

[version 01.07.2018]

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2. Principles

A. Intended goods

Like all tangible property, intangible real estate can also be the subject of taxable supplies.

The rights in rem, other than the proprietary right, which give the rightholder the power to use a property, are in principle regarded as tangible property for the purposes of VAT (Article 9, second paragraph, 2 °, of the VAT Code see Title 4).

B. Tax liability of the transferor

In order for the supply of a good referred to above to be taxed, it must, in principle, be carried out by a taxable person in the pursuit of an economic activity which gives him the status of taxable person and which is not exempted under Article 44. of the VAT Code.

With respect to:

- the alienation of new buildings or parts of new buildings and the associated grounds, or
- the establishment, transfer or re-transfer of real rights within the meaning of Article 9, second paragraph, 2 °, of the VAT Code that apply to such goods

is granted to the person were engaged in an economic activity which consists **controlled** buildings or parts of buildings (Article 1, § 9, paragraph 1, of the VAT Code) set up for, to establish whether using obtain VAT to:

- alienate them or
- to establish real rights in respect of those goods (see Title 4) or
- transfer or re-transfer the relevant rights in rem which he has acquired or which have been transferred under the application of VAT.

When there is no question of any economic activity or a regular economic activity that consists in establishing, arranging or acquiring with payment of the VAT of goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code with a view to making taxable deliveries, the VAT Code also offers the possibility of applying VAT to persons who only accidentally make deliveries with regard to new buildings or parts of new buildings and the associated grounds. The same also applies to persons who accidentally establish, transfer or re-transfer an above-mentioned rights in rem (Article 8, §§ 1 to 3 of the VAT Code).

C. Basic exemption

In principle are exempt from tax, the supplies of real estate by its nature and the establishments, transfers and re-transfers of real rights, in the sense
of Article 9, second paragraph, 2 °, of the VAT Code on such goods (Article 44, § 3, 1 °, a) and b) of the VAT Code).

D. Exceptions to the principle of exemption: Tax by operation of law or by option

By way of derogation, the exemptions of Article 44, § 3, 1 °, a) and b) of the VAT Code must, or may, with regard to supplies of real estate of their nature as well as the establishments, transfers and retransfers of the aforementioned business duties relating to such goods shall not be applied where the agreements in question have been concluded not later than 31 December of the second year following the year of the first putting into service or the first taking of those goods.

In that case, those buildings or parts of buildings are considered new and the associated land can also be taxed with VAT (see Titles 3, 4, 5 and 6, below).

By "part of a building" as intended by Articles 1, § 9, first paragraph, 1 °, and 44, § 3, 1 °, of the VAT Code, is meant in particular any part of a building that is entirely or is partly subject to the compulsory co-ownership system (more specifically the apartments) (see circular AOIF No. 10/2007 (No. ET 109.976) of 12.04.2007 , marginal 85 and decision No. ET 119.318 of 28.10.2010) .

In order to be taxed, the transactions in question must be performed by a person who has the status of taxable person for that type of transaction, that is to say:

- a taxpayer as referred to in Article 12, § 2 of the VAT Code (often referred to as professional founder, building promoter, project developer)
- a (accidental) taxpayer as referred to in Article 8, §§ 1 to 3 of the VAT Code, provided that certain formalities have been completed
- any other taxable person, subject to the same formalities (see Title 7, below).

With regard to the nature of the agreements relating to the aforementioned supplies, reference is made to Title 8 below.

After determining the taxable amount, taking into account the minimum taxable amount (see Title 9), this section discusses the following topics, taking into account the distinction between taxable persons who regularly supply real estate and other taxable persons:

- the time of claimability of the tax (see Title 10)
- the deduction of input tax and the time when the right to deduct may be exercised (see Title 11)
- the corrections of the deduction by means of transactions treated as taxable supplies (withdrawals ...) (see Title 12).

E. Consequences in the field of registration rights

To the extent that the supplies described above are taxable with VAT, they are exempted from the proportional registration duty under Article 159, 8 ° of the Code of Registration, Mortgage and Registry Rights.

F. Taxed non-exempt real estate supplies: overview and references

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	De vestigingen, overdrachten en w ederoverdrachten van zakelijke rechten	Titel 4
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3. New buildings or parts of buildings

A. The concept of a building or part of a building

A building or part of a building is understood to mean any structure that is permanently connected to the ground (Article 1, § 9, first paragraph, 1 °, of the VAT Code).

The concept presupposes in the first place the realization by **nature of raw materials** (concrete, asphalt ...) or of materials (pipes, poles, floor stones ...).

Thus are meant the real estate by its nature to which a cadastral income of built real estate can be attributed (ordinary houses and villas, flats, industrial, commercial or agricultural buildings, dividing walls ...), and the industrial equipment that realizes from their nature.

However, this concept also applies to **infrastructure works** (road network, water, gas and electricity channels, gutters, car parking area consisting of surfacing of the topsoil) and, more generally, to all works permanently connected to the ground and therefore immovable by their nature, such as:

- roads, railways, concreted canals, inland ports, locks, bridges, aqueducts, tunnels, fence walls, dikes, dams, electrical lines, lighting posts, pipelines, gas, water and electricity lines, sewage networks ...
- and, insofar as their layout is not limited to smoothing the ground (ie an area of tamped soil) or to simply applying a layer of stone but containing an adhering road surface: parking areas, quays for unloading, places (areas) for handling or transhipment, places for storage of goods, roadsides, entrance lanes to waterways, reservoirs for the recovery of rainwater and other infrastructure works.

Because there is this respect , however, the absence of incorporation of the materials in the ground, the areas of which the device consists of planting and / or sowing land (for example, the ramps (taluuds) and the collar in the form of green spaces), and, a fortiori, the non-concreted canals and ditches (canals) are not buildings, as they cannot be classified as "works that are permanently connected to the ground".

This is so even if the lay-out of these soils required smoothing, excavation, raising, moving soil, dredging... (Circular No. AFZ 24/2002 (No. ET103.009) of 06.12 2002 , margins 7 to 13; see also Title 5, below).

B. New buildings or parts of buildings

For the purposes of VAT, a building or part of a building is generally considered to be new until 31 December of the second year following the year of first occupation or first occupation (Article 44, § 3, 1 ° of the VAT Code).

The contracts for the supply of such a building or part of a building must therefore be concluded before the expiry of that period (see Title 6 below).

Proof of the date of first putting into service or taking possession can be furnished by all factual information and all legal remedies (written parliamentary question No. 443 by Mr MP Richard Fournaux of 27.07.2004).

It is noted that newly erected buildings or parts of buildings as well as certain converted old buildings or parts of buildings can be classified as new (see Title 3, Section C, below).

C. Converted old buildings or parts of buildings

In the spirit of the text of Article 44, § 3, 1 °, of the VAT Code, a previously constructed building or part of a building, which has been renovated in such a way that it acquires the characteristics of a newly erected building or part of a building assimilated to a newly erected building or part of a building (decision no. ET 19.497 of 20.02.1976).

Three assumptions can be made in this regard.

- First case

Due to the works carried out in the old building or part of a building, this has undergone a profound change in its essential elements of its structure (load-bearing walls, floors, stairwells, elevator shaft...), namely in its nature, its structure and, where appropriate, in its destination (Note No 16/1973 of 28.06.1973 , marginal 10.3 °).

This assumption undeniably concerns a newly erected building or part of a building, which, incidentally, is also the cost of the work carried out compared to the value of the property before this change.

- Second case

The works carried out on the old building or part of a building did not change it in its essential elements, as in the first case above, but were intended either to ensure the maintenance of the building or to improve its comfort , as is the case when installing central heating, furnishing a bathroom, renewing the roofing ...

This assumption is not a building or part of a building that has undergone changes in its essential elements. The resale of this building or of a part of this building and associated land or the establishment, transfer and re-transfer of real rights, other than the right of ownership, relating to such property cannot, in principle, be subject to VAT, not even when the cadastral income of the good was increased and the cost of the works carried out is very high compared to the value of the good in the state in which it was before the works began.

- Third case

When the work being carried out is such that it involves a significant change to the building or part of a building, it is usually difficult to determine whether the good has undergone a major change in its essential elements, as referred to in the above first case.

However, it can be accepted that it is a new building or part of a building if the cost, excluding VAT, of the work on the building or part of a building carried out by the owner or by third parties on his behalf is at least 60% of the market value of the building or part of a building on which the works were carried out, disregarding the land, at the time of completion of those works.

This third case takes into account, on the one hand, the value of the material works carried out on the building or part of a building itself (excluding intellectual work, such as the fees of an architect or a safety coordinator), including necessary demolition works and, on the other hand, the market value of the finished building or part of a building, determined taking into account article 32, first paragraph and article 36 of the VAT Code. Moreover, it is of no importance that the value of the works thus carried out includes the value of the works that increase comfort.

In addition, for the act relating to this converted building or part of a building to constitute a supply subject to tax in the first and third cases mentioned above, it is further required that:

- the renovation carried out gives rise to the change in the cadastral income that was allocated to the building or part of a building before the start of the works
- the intended act takes place within the period specified in Article 44, § 3, 1 ° of the VAT Code
- the person under whose VAT is due and payable to the administration demonstrates the importance of the work performed. In order to avoid any difficulties in providing evidence, it is advisable in this respect to present the permit whereby the municipal authority has granted permission to carry out the work in question, when the issue of such permit is in accordance with the urban planning regulations in force is mandatory.

Incidentally, the building or part of a building to be renovated in this way can be considered as new, within the meaning of what has been said above, without waiting for the actual execution of the works, insofar as its size, as well as the change in the cadastral income. stand firm.

In the three aforementioned cases, each unit should be considered separately as it will exist after the works have been completed. A separate unit is understood to mean a complete residential unit in itself that functions completely independently and can be rented or transferred separately.

The renovation works carried out on an old building or part of a building, of which the sale or sale of a part as well as the associated land is taxable due to VAT because this has made a building or part of a building new within the meaning of the above first or In the third case, they can benefit from the reduced rate of 6% if all the other conditions provided for by heading XXXI of Table A of the Annex to Royal Decree No 20 are met (written parliamentary question No 53 by Mr de Clippele, Member of Parliament) from 26.11.1990).

D. Special case: movable property belonging to immovable property

The following applies to movable property by its nature which is considered to be immovable property by destination in the field of civil law:

- **movable property used for the service and operation of a property of its nature** (Article 522, first paragraph, and Article 524, first and second paragraph, of the Dutch Civil Code), follow

the same rules on VAT as by their nature movable property, whether sold together with the property or separately. Its supply is therefore in principle taxable with VAT.
For example, the sale of a factory (land and buildings) together with the equipment it contains is, in principle, subject to VAT with regard to the equipment, irrespective of the system applicable to the real property (the factory with the ground).

- **the movable property that is permanently linked to a property of its nature** (Article 524, last paragraph, and Article 525 of the Civil Code) follow the regulation of the property with which they are connected, if they are sold together with it. It is therefore entirely a real estate sale. Such a sale gives rise to a supply that is normally exempt from VAT. However, if the real estate is a new building or part of a building that is sold under VAT, the sale of these movable objects is also subject to VAT (Article 44, § 3, 1 °, a) of the VAT Code).

However, when the movable property is separated from the property and is the subject of a separate sale, they are treated as movable property by its nature. Their delivery therefore follows its own tax regime, irrespective of the tax regime applicable to the property with which they were originally associated.

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4. Rights in rem to new buildings or parts of buildings

A. Intended business rights

Article 15 (2) (b) of Council Directive 2006/112 / EC of 28.11.2006 on the common system of value added tax , which has been transposed into Belgian law, allows the rights in rem that the to grant a rightholder the right to use a property, to be regarded as tangible property (Article 9, second paragraph, 2 °, of the VAT Code), so that the transfer or establishment of such rights must be regarded as a supply of goods in the meaning of Article 14 (1) of Directive 2006/112 / EC, aforementioned (Article 10, § 1, of the VAT Code).

The main characteristic of the establishment of a right in rem that the right holder is entitled to the
authority to use a property, *which it has in common with rental, is that the holder is granted the right for an agreed period of time, against payment, to use a property as if he were the owner of it and everyone else of it. to exclude enjoyment of that right* '(see Court of Justice of the European Union, *Goed Wonen* , Case C-326/99, 04.10.2001 , paragraphs 54 and 55).

More specifically, Article 9, second paragraph, 2 ° of the VAT Code regards as property the rights in rem, other than the property right, which grant their holder a right of use and disposition equal to that of an owner, although they are civil rights as temporary rights. are considered.

Although Article 9, second paragraph, 2 ° of the VAT Code does not list the real rights, only the **usufruct** , the **right of superficies** , the **right of leasehold** , the **right of use** , the **right of habitation** and where applicable if the **easement is** the subject of an act subject to VAT, because only those rights, as stated above, confer an economic right of use on the holder.

Although the right of habitation and the right of use are not transferable, they can nevertheless be established by the owner for the benefit of the resident or the user.

The property to which the real right pertains must necessarily be a new building or part of a building. In other words, the establishment, transfer and retransfer of such rights in rem must take place no later than 31 December of the second year following the year of the first occupation or first occupation of the building or part of the building (see Title 3 , section B, above).

B. Exceptions in the context of real estate leasing

With regard to VAT, is not regarded as a physical good, the right of leasehold:

- that is established or transferred by a company that specializes in real estate financing rent within the context of real estate financing rent within the meaning of Article 44, § 3, 2 °, b) of the VAT Code (compliance with the conditions laid down in the Royal Decree No. 30 of 29.12.1992 regarding the application of value added tax to the real estate finance lease). The establishment or transfer of such a right under a real estate finance lease agreement is considered a service, to the extent that the agreement is not exempted by Article 44, § 3, 2 °, b) of the VAT Code
- for which the option for taxation as referred to in Article 44, § 3, 2 °, d) of the VAT Code was exercised (contract in which the conditions laid down in Royal Decree 30, aforementioned, are not complied with).

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5. Lands

A. Delivery of a site, whether or not a building site

The delivery of sites, whether or not a building site, is in principle exempt from VAT pursuant to Article 44, § 3, 1 °, a), first paragraph, and b), first paragraph, of the VAT Code.

Pursuant to Article 12 (3) of Directive 2006/112 / EC, the aforementioned, a building site is the site defined as such by the Member States, whether or not it is ready for construction.

Firstly, it should be recalled in this regard that, in defining which sites are to be classified as 'building sites', Member States have the objective of Article 135 (1) (k) of Directive 2006/112 / EC, aforementioned, which must exempt from VAT only the supplies of unbuilt-in land that is not used as a surface for a building (Court of Justice of the European Union, Judgment of the *Maasdriel Housing Foundation* , Case C-543/11, 17.01. 2013 , paragraph 30 and Judgment *KH* , case C-71/18, of 09/04/2019 , paragraph 53)

Grounds on which works were carried out prior to the erection of a building in the usual sense of the word (houses...), such as the survey of the site, the leveling of the ground, the demolition of old buildings, the incorporation into the underground of pipes , of cables, of drain pipes, of the pipes for connecting the plot to the public domain ... must be regarded as sites that have been made ready for construction.

Consequently, the supplies of land that has been prepared for construction to self-builders, such as private lots sold to private persons in the context of an allotment, are completely exempt from the tax pursuant to Article 44, § 3, 1 °, a) of the VAT Code. as well as the supply of sites that have not been prepared for construction.

The situation may be different when it comes to an associated site with a building or part of a building (see section B).

B. Delivery of an accompanying site to a building or part of a building

Article 1, § 9, 2 °, first paragraph, of the VAT Code defines the native land as the site for which permission has been granted for it to build to and transmitted by the same person at the same time the building or part of a building to which it belongs. Reference can be made to the cadastral parcel or the cadastral parcels for which the building permit was obtained (for example under a permit to build or to parcel out).

In order for the associated site, as intended by Article 1, § 9, 2 °, first paragraph, of the VAT Code, to be taxed, it must be an associated site for a 'new building' or for 'a part of a new building "subject to tax (ie a building or part of a building that is the subject of an act that is excluded from the exemption provided for in Article 44, § 3, 1 ° of the VAT Code).

Among other things, it is required that the building, or part of the building, and the associated grounds are transferred simultaneously and by the same person.

For further explanation, reference is made to decision no. ET 119.318 of 28.10.2010 .

C. Delivery of a site and a building to be demolished: a single operation or not?

The sale of a property consisting of a site and a building that is intended to be demolished is only considered as a single transaction concerning the delivery of an unbuilt site and not as the delivery of a building and its site. certain objective circumstances arise, showing that the sale is so closely linked to the demolition of the building that it would be artificial to disassemble it: the state of progress, on the date of delivery of a property consisting of a terrain and a building, of the demolition work or the renovation work that the seller carries out, the use of that property on the same date and the obligation for the seller to carry out demolition work with a view to future construction.

Consequently, an act consisting in the delivery of a site on which a building is in full operation on the date of that delivery cannot be classified as the delivery of a 'building site' when that act is economically independent from other services and does not constitute a single act together with those achievements, even though the parties intended that the building be demolished in whole or in part to make way for a new building (Court of Justice of the European Union, KH judgment, case C-71/18, of 04.09.2019 , points 42, 43, 61 and 62).

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6. Time of the alienation with regard to a building or part of a building and the associated grounds

A. Newly erected buildings or parts of buildings

a. Regel

The exemption referred to in Article 44, § 3, 1 °, a) and b) of the VAT Code is excluded for:

- the deliveries of buildings or parts of buildings and the associated terrain
- the establishments, transfers and retransfers of real rights within the meaning of Article 9, second paragraph, 2 °, of the VAT Code, which relate to such goods

when the relevant agreements have been concluded no later than 31 December of the second year following the year of the first occupation or first occupation of those buildings or parts of buildings.

The aforementioned contracts must therefore be concluded before that period expires in order for supplies to be made subject to VAT.

This rule also applies to converted old buildings or parts of buildings that become new as a result of the renovation and for which, in order to determine the starting point of the period, the first re-use or repossession of these converted buildings must be taken into account or parts of buildings, without prejudice to what is said in Title 3, section C, above.

b. Concept of putting into service and taking possession

The question whether a commissioning or possession of the goods intended by Article 1, § 9, first paragraph, 1 ° of the VAT Code takes place is primarily a matter of fact.

It is recalled that, in order to establish a cadastral income, the owner, owner, leaseholder, owner of a building or usufructuary of a built property is obliged, of its own accord, to put it into use or to let it, if it precedes putting it into use, of new to declare real estate erected or rebuilt within thirty days of the event (Articles 471 and 473 of Income Tax Code 92). On the other hand, the withholding tax on real estate is determined on 1 January of the tax year named after the year whose income serves as the basis of that withholding tax (Articles 254 and 255 of CIR 92).

In other words, commissioning normally entails the allocation of a cadastral income that serves as the basis for the assessment of the property tax on 1 January of the year following the year of commissioning.

For buildings or parts of buildings that are susceptible to enrollment , the submission of the spontaneous declaration required by Article 473 CIR 92 can only constitute a presumption of putting the property into use or taking possession of it at the latest at the time of that filing.

However, proof of the actual start-up date can be provided by all factual information and all remedies.

Example:

- The owner of a building submits the declaration required by Article 473 CIR 92 on 05.01.2017.
  However, information gathered by the administration shows that the owner lives at the address of the building and has actually used it since 13.11.2016.
  It is of course this date that must be taken into account to determine the period in which the building can always be considered as new. In this case, the period expires on 31.12.2018.
- The submission on 25.12.2016 by the owner of a building of the declaration required by Article 473 CIR 92 constitutes a fact from which the administration might suspect that the

commissioning took place in the course of 2016 and that therefore the period for the application of VAT expires on 31.12.2018.
However, the owner-seller can always provide proof that the actual taking into use of the building took place after the submission of the said declaration, for example on 15.01.2017, in which case the period only expires at the end of December 2019.

c. Partial or complete commissioning

In principle, it is not necessary for the building to be occupied or occupied for the entire building in order for the period for applying VAT to start. Partial commissioning is sufficient.

The occupation of only the ground floor of a single-family house causes the term for the application of VAT to run for the whole of the house, notwithstanding the fact that the rest of the house has not yet been furnished.

On the other hand, for buildings such as apartment or office buildings, the ownership of which can be divided between different persons according to lots, each of which contains a privative part and a share in common parts (compare article 577-3 of the Civil Code), the putting into service or occupancy to be assessed lot by lot, on the understanding that the undivided shares in the common parts are subject to the regulation applicable to the privative parts to which they relate.

Example:

A taxpayer referred to in Article 12, § 2 of the VAT Code sells, by notarial deed of 20.10.2018, a building erected in 2014 containing 10 apartments, one of which has been let since 01.07.2015 and another from 01.01 2016.

On the date of the deed, the other apartments are still uninhabited. The building will be sold to a single buyer for a global price of 2,000,000 euros excluding tax, which equates to a value of 200,000 euros excluding tax per apartment.

Only the apartment that has been in use since July 2015 cannot be transferred under VAT. After all, the deadline for this apartment expired on 31.12.2017. On the other hand, the apartment with new occupancy will remain new from 01.01.2016 to 31.12.2018 and the apartments that have not been taken into use are of course also new.

This shows that the transfer of this building will be subject to VAT up to the value of the new apartments that can still be transferred with VAT, or 1,800,000 euros.

The fact that the occupation of an apartment since 01.07.2015 entails, ipso facto, the occupancy of all common parts, has remained without effect since then. Only the undivided share of the common parts of this apartment will escape the application of VAT, while the value itself of the undivided parts of the apartments sold under the application of VAT will be subject to this tax.

d. Apartment or villa used as a show house

When an apartment or a villa is used only for visits by prospective buyers (which excludes, for example, any use as a residence or office), the time limit for VAT application cannot start to run.

B. Converted old buildings or parts of buildings

The reference to the first occupation or the first occupation of the building or part of a building does not in principle cause any difficulties if this commissioning or occupation was interrupted during the duration of the renovation works due to the nature or the importance of the works carried out. This will normally be the case when the renovations are major.

However, it cannot be excluded that, in certain situations, notwithstanding the importance and the scope of the work carried out, the commissioning or occupancy of the building or part of a building would not be interrupted during the construction work.

The transfer of these buildings or parts of buildings is in principle exempt from VAT.

Notwithstanding uninterrupted use of the building or part of a building, the Administration allows the transfer of such goods to be subject to VAT under certain conditions and, moreover, that:

- in the course of the two years preceding the year in which the prior declaration was submitted to the SME or GO management team, as referred to in Article 1, 1 ° of the Royal Decree no. 14 of 03.06.1970 with regard to the alienations of buildings , parts of buildings and the associated land and the establishments, transfers and retransfers of a real right within the meaning of Article 9, second paragraph, 2 °, of the Code of value added tax on such goods , or have substantial changes or the total amount of the renovation works reaches the required 60%
- and the building or part of the building is transferred by December 31 of the year following the prior declaration.

In the case where a converted old building or part of a building is classified as a new building because the building has been substantially modified in its essential elements, namely in its nature, its structure and, where appropriate, in its purpose (see Title 3, Section C, first case, above), moreover, only the substantial changes that the building or part of a building has undergone from the second year preceding the year in which the said prior declaration was submitted are taken into account.

With regard to the application of the 60% rule (see Title 2, section C, third case), the administration states that this limit must be reached at the latest when the works are completed. It should be clarified that the additional condition as referred to under marginal 59 of circular AFZ No. 24/2002 (No. ET 103.009) of 06.12.2002 means that only the amount of the renovation

works will be carried out from the second year prior to the year of the submission of the prior declaration as referred to in Article 1, 1 °, of the Royal Decree no. 14, aforementioned, is eligible for the calculation of the above limit.

This may be the case, for example, for houses for private occupancy which are the subject of successive renovations spread over several years, the total value of which even exceeds the resale value of these buildings after renovation. This may also be the case for certain industrial infrastructures, which are immovable in nature and of which certain parts have to be renewed regularly due to wear.

Moreover, only the tax levied on the works carried out from the beginning of the period specified above can be taken into account for the exercise of the right of deduction.

C. Start of the period

A building or part of a building can be sold on a plan, that is, before its construction has started.

For the application of the VAT system, there is no fixed period within which the works must be started after a sale on plan.

The alienation before the construction of the building or the part of a building can occur both a month and a year or more before the actual works start.

A business right can also relate to a future building or part of a building and therefore be the object of a delivery within the meaning of Article 10 of the VAT Code.

However, this does not prevent VAT from being payable earlier (see Title 10 below).

D. End of the period

As a rule, the VAT period expires on December 31 of the second year following the year of the first putting into service or the first possession of goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code.

E. Special case: transfer under suspensive condition

Attention is drawn, however, to a special feature with regard to real estate, whereby a transfer under suspensive condition is not taken into account with regard to the application of Article 8 and Article 44, § 3, 1 ° of the VAT Code. that is not fulfilled within the period set in these articles. In the event that the condition is fulfilled after 31.12 of the second year following the year of the first occupation or the first occupation of a building or part of a building, the alienation of that property can no longer take place with the application of VAT .

F. Proof of the time of the alienation

When the alienation of a building or part of a building and the associated land, the establishment, the transfer or the transfer of a real right to such a property is taxed with VAT, the input tax can be deducted in whole or in part according to the normal rules are being brought.

This deduction is not possible if the transfer is subject to the proportional registration duty. It is therefore important that the transfer takes place within the period set by law.

Proof of the alienation can only arise from a deed of which **the date is enforceable against third parties** (for example a notarial deed or a private deed that has a fixed date, for example because it was registered or due to the death of one of the signatories). However, the administration assumes that proof of the date of the alienation may also be evident from **elements other than** documents and documents issued by the parties themselves, for example from the payment of the price by bank transfer or postal transfer, the notification of the deed to a public administration, the application for the acquisition of a loan by one of the parties addressed to a credit institution ...

It goes without saying that if the building or part of a building in question is the object of a physical provision with a view to its layout, this provision will follow from the transfer of the power to own the property as owner and the delivery takes place with this material provision, without a legal transfer of ownership having already taken place.

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7. Capacity of the transferor

It is important to investigate the status of the person a new building or part of a building transfers along with the associated land or establish a right in rem in respect of that property, transfer or werder transfers .

A. Presentation of the three categories of taxable persons involved

The aforementioned actions can be performed by three categories of persons.

In the first place, the person concerned will be accorded the status of taxable person when he carries on an economic activity consisting of regularly regulating the goods intended by the establishment of Article 1, § 9, first paragraph, 1 °, of the VAT Code. have it set up or obtained under application of VAT to:

- alienate them
- to establish real rights in relation to those goods
- relating to real rights acquired or transferred to him with tax payment.

It concerns a taxable person as referred to in Article 12, § 2 of the VAT Code, who has the status of taxable person by law within the meaning of Article 4 of the VAT Code (this person is designated as a professional founder).

The possibility of alienation with the application of VAT outside the context of a regular economic activity or even any economic activity is also given by the VAT Code to those persons who only happen to be a delivery in respect of a new building or part of a new building and associated site. The same applies in respect of persons who happen meant a real right in Title 4, above, establish, transfer or re-transfer .

The persons belonging to the second and third groups have to fulfill a number of conditions and formalities in order to tax the supply of a new building or part of a building with VAT (Royal Decree 14, aforementioned) (see sections C and D).).

It is pointed out that this may also be a government body as referred to in Article 6 (1) of the VAT Code.

B. First category: the taxable person who carries out a regular economic activity consisting of the supply of real estate under the VAT system (Article 12, § 2, of the VAT Code) - Income tax

a. Taxpayer referred to

The natural or legal person who, by unambiguous acts, wishes to supply new buildings or parts of new buildings (and the associated land) regularly , acquires the status of taxable person for that activity as soon as he commits those acts.

It is therefore a taxable person whose regular economic activity consists of:

- the goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code, which he has set up or have set up or has obtained with payment of VAT, no later than 31 December of the second year following the year of the first commissioning or occupation, to be disposed of for consideration
- whether the goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code, which he has set up or have set up or has obtained with payment of VAT, encumber with a business right as referred to in Article 9, second subsection 2 ° of the VAT Code, or to transfer or re-transfer within the same period the aforementioned commercial right to be established or transferred to him with payment of VAT.

Accordingly, as soon as the person in question commits the above-mentioned acts, he can deduct, according to normal rules, the input tax relating to that activity.

b. Legal presumption

Pursuant to Article 64, § 1, of the VAT Code, all goods acquired or produced for sale - insofar as those goods may of course be the subject of a taxable transaction, which is only the case for new buildings or parts of new buildings and the associated land and the real rights to such goods - subject to evidence to the contrary, are deemed to have been delivered under the conditions that make VAT payable.

The rebuttal to the presumption stipulated in Article 64, § 1 of the VAT Code must be provided by the person referred to here. The aforementioned must demonstrate that the buildings or parts of buildings and the associated land or real rights in respect of such goods, which have been erected by or for which VAT has been charged, are either still in stock or have been allocated a destination that is subject to VAT or other reason, has not fallen due.

In this regard, it should be noted that the alienation of a new building or part of a new building and the associated land or establishment, the transfer or re-transfer of a real right to such property by the above-mentioned professional founder does not apply in accordance with the proportional registration fee as proof to the presumption set by the aforementioned Article 64, § 1, of the VAT Code, so that even if the aforementioned transactions were subject to registration, the VAT is due and payable.

For the sake of completeness, it is also pointed out that under Article 159, 8 ° of the Code of registration, mortgage and court registry fees, when alienating new buildings or parts of new buildings and the associated land, when establishing, transferring or retransferring from commercial rights to such goods is exempt from registration duty only to the extent that that transaction is subject to VAT.

c. Regional housing companies and social housing companies recognized by them. Government bodies

The social housing whose regular activity inside goods is contemplated by Article 1, § 9, paragraph 1, of the VAT Code to establish to alienate them, are tax liable under Article 4 of the VAT- Code. These companies are in fact professional founders within the meaning of Article 12, § 2 of the VAT Code.

The services and regieën of provinces and municipalities, and certain public institutions, may also proceed to the creation of goods envisaged by Article 1, § 9, paragraph 1, of the VAT Code with a view to its disposal.

They are taxable persons for that activity, insofar as treatment as a non-taxable person would lead to significant distortions of competition (Article 6, second paragraph, of the VAT Code (circular AAFisc no. 42/2015 (no. ET 125.567) of 10.12). .2015 ; decision no. ET 129.914 of 27.04.2016 and circular 2017 / C / 91 of 22.12.2017 on practical applications of the tax liability of public sector entities (no. ET 130.932) .

C. Second category: any taxpayer who pursues an economic activity other than that referred to under heading B - Optional taxation

a. Taxpayer referred to

The said taxable person is the taxable person whose economic activity does not consist in the regular sale of goods referred to in Article 1, § 9, first paragraph, 1 °, of the VAT Code, with the application of VAT (see section B of this title 7), but:

- who has had a building or a part of a building (and the associated land) that he erected, erected or obtained with payment of VAT, for consideration, with application of that tax, within the period referred to in Article 44, § 3, 1 ° of the VAT Code (Article 44, § 3, 1 °, a), third indent, of the VAT Code), or
- or who had the aforementioned goods erected, erected or obtained with payment of VAT, encumbered for consideration with a business right referred to above or which the business established or transferred to him for purposes of VAT law within the same period, transfers for consideration or re-transfer (Article 44 § 3, 1 °, b), third indent of the VAT Code).

The fact that the economic activity pursued is tax exempt or not does not affect the present scheme.

It may therefore concern, for example, a doctor or a lawyer who alienates the building that is still new as a cabinet.

The taxable person referred to under this point, being a taxable person with a right of deduction who does not alienate the relevant building or part of a building (and associated terrain) with the application of VAT or who establishes a real right to the property not with application of VAT , transfer or re-transfer , either because the building or part of the building is not new, either because he did not opt for that alienation for the application of VAT, is held the VAT levied on the acquisition of that property or a business right to review that property in accordance with Article 48, § 2 of the VAT Code and Articles 6, 9, 10, 4 ° and 11 of Royal Decree No. 3 of 10.12.1969 with regard to the deduction scheme for the application of value added tax .

b. Option for accidental delivery tax

Although the person referred to in subsection a, above, already has the status of taxpayer with or without a right to deduct because of the pursuit of an economic activity, the accidental alienation of a building or part of a building and the associated terrain, the establishment, the transfer or re-transfer of a real right to such a property, even if the latter was used in the context of that economic activity, not automatically and by operation of law under the VAT system as referred to in Article 1, § 9, 1 °, of the VAT Code can be regarded as new.

The subjection to VAT of this transaction must be **opted for within the period set by Article 44, § 3, 1 ° of the VAT Code** .

On the other hand, **that option is limited to the building or part of the building and the associated land that is the subject of the legal act.**

For example, a grocer who sells two new buildings and the associated land in which he carried out his economic activity will have to opt for each sale.

The person referred to here who only accidentally alienates , for consideration, a good intended by Article 1, § 9, 1 ° of the VAT Code, or who establishes a real right on that good or transfers a right to that good or retransferred cannot normally subject that transaction to VAT .

However, he may opt to place that transaction under the VAT system, which will enable him to recover the VAT levied on the acquisition of the building or part of the building and the associated land or on a real right on that property:

- or fully if the transferor has the status of taxpayer without a right to deduct (for example, a doctor who sells his new apartment, furnished as an office)
- either partially and to the extent that such VAT could not originally be deducted if the transferor has the status of taxable person with full or partial right to deduct (for example, a baker sells his new house that was partly used for professional purposes and partly for private purposes , a psychologist who mixed tax debtor sells his office as new furnished apartment).

The benefit of the option is therefore that it allows the deduction of the VAT which has encumbered the transaction, on the one who opts.

The taxable person with a full right to deduct does not have to revise the deducted VAT when selling under VAT, which would have been the case if he had the building or part of the building and the associated land under registration law sold.

The option usually exercised by the person who owns such a new building or part of a building or a business right to such property may also be exercised by the notary in charge of the sale resulting from an executive attachment or by the bankruptcy trustee in the case of a sale at the request of that bankruptcy trustee (letter no. 26/1978 of 31.08.1978 , marginal 21 amended by letter no. 8 of 29.03.1994).

If, in accordance with Articles 11 and 18, § 3, of the VAT Code, moreover, no VAT is due on the transfer, the option and complying with the formalities provided for by the Royal Decree 14, aforementioned, have no reason to exist. After all, this transfer is not regarded as a supply of a good and, moreover, the fiction of the continuation of the person of the transferor by the person of the transferee applies (circular AOIF No. 46/2009 (No. ET 110.663) of 30.09.2009 , point IV, 1).

c. Option form and time

The intention to perform the aforementioned transaction with payment of VAT must be notified both to the State and to the contracting partner.

- To the State

In order to place the above-mentioned transaction under the VAT system, the person who makes the transfer is obliged to submit a declaration in duplicate to the SME or GO management team under which he reports. In this statement he expresses the intention to express the transaction with payment of VAT (Article 1, 1 ° of the Royal Decree No 14, aforementioned).

Forms in which this declaration must be made are available in the office of the teams management SME or GO. One of the copies provided with a receipt will be returned to the transferor.

This statement may be the object of one or more buildings or parts of buildings and the associated terrain.

It can be revoked in whole or in part as long as the agreement to alienate the building or part of a building and the associated land or to establish, transfer or re-transfer a right in rem within the meaning of Article 9, second paragraph, 2 °, of the VAT Code on such goods is not closed.

In addition, it remains in any case without consequences if the data subject intends to to perform this transaction with payment of VAT has not notified the co-contractor in the manner specified under point “To the co-contractor”, hereinafter.

Lastly, the declaration may be made before any such act exists, but it must be made before the agreement to dispose of, establish, transfer or re-transfer has been concluded.

However, the person who has not made the declaration within the prescribed time-limit may be relieved of the lapse of the right to subject the transaction in question to VAT if the circumstances show that the parties, unequivocally, intended the transaction under the VAT system. Nevertheless, this person must comply with what is said under point “To the contracting partner”, below.

- To the contracting partner.

In addition, to alienate a building or part of a building under VAT, encumber it with a real right or transfer or transfer a real right to such good, it is also required that the transferor, the transferor or the transferee informs his co-contractor of his intention to have the transaction take place with payment of the VAT.

He can only fulfill this formality **by a mention in the first act which is the title of the said act between them** (Article 1, 2 °, of the Royal Decree no. 14, aforementioned).

However, where the first instrument, which is the title of the act between the contractors, is confirmed by an authentic instrument offered up to the formality of the registration before that first instrument, the administration agrees to subject the act to VAT and not subject to registration law if the aforementioned statement is included in the authentic instrument or at the bottom of that instrument, provided that, in the latter case, it is signed by both parties.

In the case of a **public sale** , the seller generally informs the buyer of his intention to make the transfer with payment of the VAT by a statement in the deed of final assignment.

The question was raised whether the condition referred to here is also met when the clause relating to a public sale includes the clause stipulating that the sale will take place with the application of VAT in the event of sale to a third party, and with the application of the registration fee in case of sale to a co-seller. Although the charge as such is not a document that is the title of the alienation, the answer is affirmative. In the definitive allocation, the clause contained in the charge list must of course be observed, in order to avoid misleading the prospective buyers .

Where a new building or part of a new building and its associated land has been put up for sale publicly and has been allocated subject to the right of auction, the transfer may not take place under application of VAT if only the record in which it is established If no higher offer was made,

state the intention of the buyer to acquire the property under the tax (decision no. ET 19.885 of 28.05.1975).

d. Payment of the VAT due on the accidental delivery

- **Obligation to file a separate declaration**

  The person who, within the framework of an economic activity other than that of the professional founder, happens to alienate a building or part of a building and the associated grounds, a right in rem within the meaning of Article 9, second paragraph, 2 °, of the VAT Establishing, transferring or retransferring such a good on those assets and which has opted for taxing that accidental transaction, must submit a separate declaration for that transaction (Article 2, first paragraph, of the Royal Decree No. 14, aforementioned).

  Accordingly, the VAT payable on that transaction should **not be included in the periodic VAT return** which he is required to file, where appropriate, for the exercise of his regular economic activity.

  This separate declaration must be submitted in triplicate to the SME or GO management team to which the transferor belongs; a copy of the declaration will be returned to him, accompanied by a notification of receipt and with the postal account to which the due and payable VAT must be paid.

- **Time of submission of the separate declaration**

  The separate declaration must be filed within one month from the time that the tax has become due and payable on the full taxable amount (Article 2, second paragraph, of the Royal Decree No 14, aforementioned).

  No declaration must be filed before that time, even if, pursuant to Article 17, § 1, of the VAT Code, VAT has already become payable on part of the price of the supply in respect of the building or part of the building and the associated site (for example because the buyer made a payment before the chargeable event of the delivery).

- **Calculation of the VAT due on delivery - Deduction**

  - Transfer of a building or part of a building and the associated terrain

    When the transaction consists in the transfer of a building or part of a building and the associated land, the VAT is calculated on everything that the transferor obtains or must obtain in return from the person to whom the property is transferred or from a third party (Article 26 , § 1, first paragraph, of the VAT Code).

Pursuant to Article 4 (1) of Royal Decree No 14, the aforementioned, the transferor may deduct from the tax payable on account of the transfer:

* the tax levied on the real estate assets (Article 9, § 2, second paragraph, of the Royal Decree No. 3, aforementioned), being the tax levied on the acts that serve or contribute to the establishment of the assets referred to in Article 1, § 9 , first paragraph, 1 °, of the VAT Code intended goods, as well as the acquisition of goods referred to in Article 1, § 9, first paragraph, 1 °, of the VAT Code and which have been transferred
* the tax levied on transactions directly related to the transfer.

The tax levied on the transferor's general expenses is therefore not deductible. Furthermore, if the building is rented out in a first phase, the transferor may not deduct the tax levied on the services (commission, advertising ...) relating to the rental of the building (decision no. ET 16.214 of 03.08.1977) .

Example:

In the course of 2016, a doctor will set up a villa for the price of 250,000 euros with the intention of using it partly for professional and partly for private purposes.

The architect's fee was 15,000 euros.

However, this building is sold the same year for the price of 500,000 euros and the seller expresses the intention to alienate with payment of VAT.

Tax due on sales:

500,000 euros at 21% =		105.000 euro
Deductible VAT:		
250,000 euros at 21% =	52.500 euro	
15,000 euros at 21%	+3.150 euro	
	55.650 euro	-55.650 euro
To be paid to the State:		49.350 euro

In order to exercise his right of deduction, the seller must be in possession of the invoices or documents referred to in Article 3 of Royal Decree No 3, referred to in Article 4 (4) of Royal Decree No 14, aforementioned). .

He must be in possession of these documents at the time when he submits the declaration in which he exercises the right to deduct. If this were not the case, the deduction would for the time being be limited to the VAT for which he has invoices.

Example

If the seller in the previous example had only received invoices from the contractor in the amount of 225,000 euros, the deduction would be limited to:

225,000 euros at 21% =47.250 euro
15,000 euros at 21% = +3.150 euro

50.400 euro

So that he would have to pay: 105,000 euros - 50,400 euros = 54,600 euros.

If the seller subsequently receives an invoice from the contractor for the remaining 25,000 euros, he will be able to complete his right to deduction by an additional deduction of 5,250 euros (25,000 euros at 21%) within the period provided for in Article 5, § 2. (1) of Royal Decree No 14, aforementioned.

This 5,250 euros will be returned to him on condition that he submits an application to the SME or GO management team under which he is responsible (see 'Book IV: Settlement of the tax - Chapter 14: Refund of the tax').

- Establishment of a business right on a building or a part of a building and the associated grounds

  The person who establishes such a right may, in accordance with Article 4, first paragraph, of the Royal Decree 14, aforementioned, deduct input tax levied on transactions directly intended or contributing to:
  * the erection of the building or part of the building
  * or the acquisition of the building or part of the building and the associated land as well as the tax levied on acts directly related to the establishment of such a right in rem.

  In this regard, the administration accepts that the services of advisers used to establish a right in rem should be regarded as acts directly related to the establishment of such a right.

- Transfer or re-transfer of a real right to a building or a part of a building and the associated terrain

  A person who transfers or re-transfers such a right in rem , may, in accordance with Article 4, first paragraph, of the Royal Decree No 4, aforementioned, be liable to pay the tax for the transfer or re-transfer of the right in respect of the said building or part of the building. building and associated land, deduct the tax levied on the establishment or transfer of the right in rem, as well as the tax levied on transactions directly related to that transfer or retransfer.

- Time of payment of VAT

In accordance with Article 2, third paragraph, of the Royal Decree No. 14, aforementioned, the VAT whose chargeability is evident from the special declaration to be submitted must be paid within the period set for the submission of the declaration, i.e. within one month from the time that the VAT applicable to the transaction has become due on the full taxable amount (see subsection d, second point, above).

No VAT must be paid before that date, even if VAT has already become payable on part of the price under Article 17, § 1 of the VAT Code (for example, because the buyer made a payment before the chargeable event).

- A declaration per taxable transaction

In principle, one declaration must be submitted for each delivery of a building or part of a building and the associated site, as well as for each establishment, transfer or re-transfer of a real right to such property.

However, there is nothing to prevent the taxable person exercising the option of subjecting the above-mentioned transactions to tax from understanding several supplies in one and the same declaration, provided that the declaration for all relevant taxable transactions is lodged in time.

D. Third category: the taxable person who does not engage in an economic activity - Option for the status of a casual taxable person (Article 8 of the VAT Code)

a. Taxpayer referred to

The intended person is the person who, with regard to the said building or part of a building, does not carry out an economic activity as referred to in Article 4 of the VAT Code, but:

- to have the building or part of the building and the associated land that it has erected erected or acquired with payment of VAT, is disposed of with the application of VAT
- or the like good with a rem adversely, or still with the satisfaction of the VAT obtained rem on such a well by applying or transferring of the VAT re-transmits .

This category shall include individuals, legal persons and non-taxable persons who exercise an economic activity but the aforementioned acts not claim in the context of the economic activity.

For example, it could be a federal official who sells the building he erected or a doctor or lawyer who sells his private home.

b. Option for the status of taxable person (Article 8 and 44, § 3, 1 °, a), second indent or b), second indent of the VAT Code)

As the person referred to under heading C, who already has the status of taxable person, must opt for the subjection to VAT of the act that he happened to have (alienation of a building or part of a building and the associated land or land). establishment, transfer or re-transfer of a right in rem to such property), the person referred to in this section D must also opt for the status of VAT taxable person with regard to the relevant accidental act.

In both cases, the option has the same objective, which is to place the disposal of the building or part of the building and the associated land or site, the transfer or re-transfer of the real right to such a property under the VAT system.

c. Time when the status of taxable person arises

The person referred to here acquires the status of taxable person **at the time when the alienation with VAT** of the building or a part of the building and the associated land or the establishment, the transfer or the transfer of a real right to such property takes place.

Disclosure of the option is therefore required to have taxable status (see Title 7, Section C, subsection c, above).

d. Reference

What is said about the option in section C above applies mutatis mutandis to taxable persons referred to in this section D.

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8. Nature of the contract

Due to the combined application of Articles 2 and 10 of the VAT Code, a supply of goods subject to VAT requires the following elements:

- A contract for consideration
- A contract for the transfer or designation of ownership or, more generally, of the power to own an asset as an owner (see section B)

A. Contract for consideration

In order for VAT to be due on the supply of a building or part of a building and its premises or on the establishment, transfer or re-transfer of a real right to such property, this transaction must be carried out under a contract for consideration , that is to say that the transferee must provide a consideration.

It is noted that the transfer of a new building or a part of a new building and of the associated land for free or the establishment, transfer or retransfer of a real right to such property free of charge is not subject to VAT in pirncipe unless the withdrawal of such goods for free supply, under certain conditions, is equated with a supply for consideration, in which case the tax is therefore due and payable (see Article 12, § 1, first paragraph, 2 °, of the VAT). - Code).

B. Contract for transfer or designation of ownership (or of the power to own an asset as an owner)

Ownership is transferred but does not go out. Only the disappearance of the property can make the property right disappear, while the usufruct, the leasehold, or the building right are rights of a temporary nature.

The property right has extensions and limitations.

- Extensions to the right of ownership

  Ownership of a movable or immovable property confers entitlement to all that it produces and to what is associated with it. This right is called the right of access (Article 546 of the Civil Code).

  The owner of a site automatically becomes, by operation of law, the owner of the buildings that are erected there. The real estate mechanism is regulated by Article 555 of the Civil Code.

  The transfer of a building by drawing (by operation of law) to the owner of the site is a delivery of a property referred to in Article 10, § 2, a) of the VAT Code.

- Property restrictions

  Property rights have limitations:
  - in the public interest with regard to expropriation. For the purposes of VAT, the expropriation of a new building or part of a building and the associated land is equated with a supply for consideration (Article 10, § 2, a) of the VAT Code.
  - in the interest of the neighborhood, for example with regard to the easements referred to in Article 9, second paragraph, 2 °, of the VAT Code that may be imposed on certain

properties.

Apart from these details, the normal application case is **sales** .

This may relate to full ownership, to bare ownership (decision no. ET 20.368 of 12.11.1975) and, by extension, to actions concerning real rights (see Title 4 above).

The **sale under resolutive condition** and the **sale with deferred transfer of ownership** render the VAT due without having to wait for the fulfillment of the condition or the effective transfer of ownership, insofar as there is a supply of goods (buildings, parts of buildings and the associated land or rights in rem) within the meaning of Article 9, paragraph 2, 2 ° of the VAT Code) has taken place as referred to in Article 10 of the same Code. The annuity purchase is an example of a purchase contract with deferred transfer of ownership.

On the contrary, for a **sale on a suspensive condition** , the VAT is only payable after the condition has been fulfilled, insofar as this takes place at the time that this building or part of the building is still considered new. If this is not the case, the sale will inevitably be exempt from tax in accordance with Article 44, § 3, 1 °, a) of the VAT Code.

In **exchange** , there are two reciprocal transfers. VAT may be due for each of these transfers.

If VAT is not due for the transfer of one of the exchanged goods (due to the nature of that good or because of the capacity of the transferor), the proportional registration fee on the transfer of that good is levied together with the VAT due to the transfer of the other good.

VAT is also payable on the **contribution to the company** , regardless of whether it concerns a pure and simple contribution (against shares) or a mixed contribution (against shares and other goods).

Under the conditions of Articles 11 and 18, § 3 of the VAT Code, however, it is not regarded as a delivery, the contribution of a generality of goods or of a business division which also includes buildings, or parts of buildings and the associated grounds or real rights as intended in Article 9, second paragraph, 2 °, of the VAT Code, which apply to such goods (see 'Book VI: Specific topics - Chapter 16: Specific topics, Section 6: Transfer of a generality of goods or of a business department ').

In case of **distribution or transfer that** is **equivalent to distribution** , there is an exchange of undivided parts among partners or a transfer of undivided parts by one to the others. Any exchanged or transferred undivided part owes the VAT.

Example:

A person who has bought a new building with VAT paid dies and leaves two heirs. At the time when the building is still considered to be new, one heir will give half of it to his co- heir against payment . The transferor's heir can opt for the application of VAT.

C. Expropriation

For the purposes of VAT, the expropriation of a new building or part of a new building and the associated site is equated with a supply for consideration (Article 10, § 2, a) of the VAT Code).

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9. Taxable amount

A. General

VAT is payable on the supply of the building or part of a building and associated land.

This is calculated on everything that **is or must be obtained in return** for the person who makes the delivery with regard to the building or a part of the building and associated terrain of the person to whom the good is supplied or for the benefit of the right in rem established, transmitted or re-transmitted whether a third party (Article 26 § 1, first paragraph, of the VAT Code).

If the price consists of a sum of money, the VAT is therefore calculated on that price, plus the charges (for example, measurement costs, paving costs).

If the consideration obtained or to be obtained does not consist exclusively of a sum of money (for example in the case of an exchange), that benefit is counted at its normal value for the purposes of calculating the tax in accordance with Article 32 of the VAT Code.

This normal value consists of the price usually requested and obtained for that consideration.

When a taxable person sells a building or part of a building and associated land as well as a **land, other than the associated land** , at a single price under application of VAT, the tax is calculated on the basis of Article 30 of the VAT Code. stipulated price and charges, after deduction of the sale value of the land other than the associated land, estimated at the time of the alienation, but with due observance of the condition of this land before the start of the work.

In case of expropriation, the VAT is calculated on the received compensation, excluding the compensation for reinvestment.

B. Minimummaatstaf

Pursuant to Article 36, § 1, a) of the VAT Code, the taxable amount with regard to the goods referred to in Article 1, § 9, first paragraph, of the VAT Code (a completed building, part of a

completed building and associated land), which have been disposed of with payment of VAT, are not lower than **normal value** as determined by Article 32, first paragraph, of the VAT Code. "Normal value" means the full amount that a customer would have to pay, in fair competition, to an independent supplier or service provider in the territory of the country where the transaction is taxable in fair competition. , to obtain the relevant goods or services at that time (see "Book II: Determination of the taxable basis and the applicable rate - Chapter 6: Taxable amount, Sections 4 and 5").

The assessment of the taxable amount for VAT is carried out by the Surveys and Valuations Administration of the General Administration of the Heritage Documentation. This administration is also responsible for objections (see Articles 1 and 8 of the decision of 18.12.2014 of the Chairman of the Management Committee of the FPS Finance to determine the tasks entrusted to the Legal Security Administration and to determine the powers and the seat of its operational services; Moniteur belge, 31.12.2014).

To determine the quantity of that normal value, an amicable agreement can be concluded either by the owner of the building or the part of a building and the administration, or the estimation procedure provided for in Article 59, § 2 of the VAT Code. (see 'Booklet VII: Control and recovery of the tax - Chapter 17: Evidence and control measures, section 4').

When it is found that VAT has been paid on an insufficient standard, the additional VAT is payable by the person against whom the valuation procedure is to be initiated, ie the acquirer of the building or the part of a building that has been paid with VAT alienated.

The same person forfeits a statutory fine of the additional tax if the deficit is equal to or greater than one-eighth of the taxable amount (Article 70, § 5, of the VAT Code - see Table E of the Annex of Royal Decree 41 of 30.01.1987 determining the amount of the proportional fiscal fines in terms of value added tax).

If the determined shortfall is apparent from an expert estimate, the aforementioned person is obliged to pay:

- an interest of 0.8% per month counting from the opening act of the procedure (Article 91, § 2 of the VAT Code)
- the costs of that procedure if the deficit established equals or exceeds one-eighth of the taxable amount (Article 13 of Royal Decree 15 of 03.06.1970 regulating the estimation procedure in which Article 59, § 2 of the Value Added Tax Code).

If a minimum taxable amount is required in the case of the transfer of bare ownership, the minimum taxable amount does not apply in respect of establishments of real rights other than ownership (see in particular decision No. ET 20.368 of 12.11.1975 and Written Parliamentary Question No. 1276 by Mr People's Representative Carl Devlies dated 08.05.2006).

C. Special cases

a. Alienation of a building with deferred transfer of ownership

In the case of alienation with deferred transfer of ownership, the price at which the tax is calculated is in principle formed by the total amount of the sums (lease installments) to be paid by the transferee.

However, it is clear from a judgment of the European Court of Justice (Court of Justice of the European Union, Judgment *Muys ' and De Winter's Bouw- en Aannemingsbedrijf BV* , case C-281/91, of 27.10.1993) that the interest is due for postponement of payment from the time of delivery do not form part of the taxable amount of the delivered good, since, according to the Court, a supplier of goods or services which, in return for payment of interest, grants its client payment of interest, in principle an exempted credit within the meaning of of Article 13b (d) 1 of the Sixth Directive, currently Article 135 (1) (b) of Directive 2006/112 / EC, referred to above (Article 44, § 3, 5 ° of the VAT) - Code).

On the other hand, it follows from the same judgment that the interest accruing to the supplier due to deferment of payment until the time of delivery (intercalary interest) is not compensation for the granting of credit but an element of the consideration obtained for the delivery of this good that actually amounts to the taxable amount belongs.

b. Alienation of an annuity building

When the sale of a building or part of a building and the associated land on annuity takes place with the application of VAT, that tax is due on the delivery of the building or part of the building and the associated land on the value of these goods.

In that case, the taxable amount of the VAT on the building, the part of the building and the associated land is obtained by the sales value, plus the agreed charges, of these goods, estimated at the time of the alienation, but with due observance of the state of the building or part of a building before the start of the work, without the value determined in this way being less than the normal value of the alienated building, the part of a building and the associated terrain (Article 36, § 1 (a) of the VAT Code).

c. Rights in rem on buildings, parts of buildings other than property rights (Article 9, second paragraph, 2 °, of the VAT Code)

The real rights, other than the proprietary right, referred to here are those which give the rightholder the power to use a property (see Title 4, Section A, above).

In any case, the right to leasehold established or transferred by a company specializing in real estate finance lease within the context of real estate finance lease within the meaning of Article 44, § 3, 2 °, b) of the VAT Code is excluded. or for which the option referred to in Article 44, § 3, 2 °, d) of the VAT Code was exercised (see Title 4, section B, above).

These rights are considered civil rights as temporary rights, which normally has the consequence that the establishment, transfer or retransfer of such a right is usually subject to periodic compensation.

Although there are no special rules on VAT with regard to the determination of the price with regard to the establishment, transfer or retransfer of rights in rem on new buildings, in principle the general principles for determining the taxable amount apply.

There is no problem outside the control when the establishment, transfer or retransfer of the relevant rights in rem is effected at a cash price agreed in advance between the parties.

However, if periodic fees are stipulated for the establishment, transfer or re-transfer of those rights, the following should be distinguished for determining the taxable amount:

- **Business law established, transmitted or re-transmitted for a fixed term**

Since the establishment, the transfer or re-transfer of a real right to a building or part of a building and the associated land is regarded as the delivery of a good, a cash value will have to be determined for the levy of VAT when the business is right is established, transferred or retransferred for a fixed period against payment of a periodic fee.

This value is normally equal to the amount of the periodic compensation multiplied by the length of the right in rem, where applicable less the capitalization interest.

If, however, when a right in rem is established, a cash price is stated on the invoice or on the document valid as such, it is in principle that price that must be taken into account for the calculation of the VAT due.

It is pointed out that Article 36 of the VAT Code does not apply to the establishment, transfer or re-transfer of a real right other than the right of ownership.

- **Business law established, transmitted or re-transmitted indefinitely (eg usufruct)**

It becomes very difficult when a present value has to be determined with regard to the establishment, transfer or retransfer of an arm's length business for an indefinite period and when periodic compensation is stipulated. The only way to determine a taxable amount is to determine a discount value, taking into account the nature, size and economic useful life of the building or part of a building in question.

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10. Time of payment of VAT

A. Taxable persons referred to in Article 12, § 2 of the VAT Code

a. chargeable event

In accordance with Article 16, § 1, first paragraph, of the VAT Code, the taxable event takes place at the time when the property is made available to the acquirer or the transferee.

b. causes of due and payable

Since the taxpayer referred to in Article 12, § 2 of the VAT Code is obliged to issue an invoice, the time of payment of the tax is in practice determined by the time of issue of the invoice (with a deadline) and by receipt of a prepayment (which takes place before the chargeable event).

The taxable event and the causes of the claimability of the VAT in respect of supplies of goods are discussed in detail in circular 2019 / C / 65 of 09.07.2019 on the claimability of the VAT (no. ET 128.969 / 3) , marginal 6 to 63 .

- Issuance of an invoice

By way of derogation from Article 16 of the VAT Code, for deliveries of goods, the tax becomes due on the amount invoiced at the time the invoice is issued, regardless of whether the invoice is issued before or after the time when the delivery is made (Article 17, § 1, first paragraph, of the VAT Code).

The tax will in any case become due and payable on the fifteenth day of the month following the month in which the chargeable event referred to in Article 16, § 1, first paragraph, of the VAT Code has taken place if no invoice was issued before this date (Article 17, § 1, second paragraph, of the VAT Code).

- Payment of the price

However, if the price or part of it is received before the time when the goods are delivered, the tax becomes due and payable on the amount received, at the time when the payment is received (Article 17, § 1, third paragraph, of the the VAT Code).

The payment of the price is an independent cause of the claimability of the tax on the amount paid if this takes place before the chargeable event, insofar as no other cause of claimability has arisen for this payment, being the issue of the invoice, over an amount equal to or greater than the amount paid.

In case of payment of an advance on the total price (land and building or part of a building), the VAT on this advance is only due and payable insofar as it relates to the building or part of the building and the associated land.

The term 'price' refers to only a sum of money in this respect. When a person connects later directing a at or under construction being building or part supply of a building in exchange for land, in accordance with Article 16, § 1, first paragraph, of the VAT Code VAT in that case only due and payable at the time of delivery of the building or part of a building, although the transfer of ownership of the site, which constitutes the consideration, takes place immediately (decision no. ET 31.163 of 16.03.1979).

c. Expiry of the VAT term

If a new building or part of a new building and accompanying land within the statutory period were sold or if a right in such property within that period was established, transmitted or re-transmitted (see Title 6, above) and joined the expiry of that period has not yet occurred causes that make the VAT payable (delivery, invoicing, payment of the price), then the VAT on the alienation of that building or a part of that building and the associated site or location, transfer or retransfer of that right to such property due and payable upon expiry of this period, in accordance with Article 16, § 2, third paragraph, of the VAT Code.

Example:

A residential house, built in 2015, is first occupied on 01.07.2016. The building is therefore considered new until 31.12.2018.

The house will be disposed of on 01.12.2018 by means of a final and binding sale with a fixed date, which however stipulates that the transfer of ownership will be postponed until 01.02.2019, being the date on which the keys are handed over by the seller who fully fulfills his obligation to hand over fulfills. An invoice will be issued on 01.02.2019 and the full payment will be received.

The disposal will take place within the stipulated period, but the delivery (delivery) would, according to the usual rules, take place outside that period (on 01.02.2019). The special rule that applies here stipulates that the delivery takes place on 31.12.2018 (Article 16, § 2, third paragraph, of the VAT Code).

The tax becomes due on 15.01.2019, being the fifteenth day of the month following that in which the delivery took place, because the invoice is issued late on 01.02.2019 (Article 17, § 1, second paragraph, of the VAT Code).

B. System applicable to taxable persons other than those referred to in Article 12, § 2 of the VAT Code

It is recalled that this concerns the persons:

- who do not act in the exercise of an economic activity

- or whose economic activity does not consist in the regular alienation of buildings or parts of buildings with the application of the tax

a building or part of a building and set up native land, have procured the construction or acquired with payment of the tax that they dispose of or in respect of which a right in rem to establish, transfer or re-transmitted , by 31 December of the second year following the year in which the first occupation or the first possession of the goods referred to in Article 1, § 9, first paragraph, 1 °, of the VAT Code has taken place.

These persons are liable for the tax, which has become due and payable due to the alienation of the building or of the part of the building and the associated land or due to the establishment, transfer or re-transfer of the real right with regard to this property. They fulfill this obligation by means of a special declaration which they must only submit within one month of the date on which VAT becomes due on the full taxable amount (see Title 7, sections C and D, above).

The VAT of which the claimability is due from that declaration must only be paid within the same period of one month, even if, pursuant to Article 17, § 1, third paragraph, of the VAT Code, VAT has already become payable on part of the price of the transaction (for example, because the buyer made a payment before delivery).

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11. Deduction of input tax

A. Principles

In the preceding sections, the amount of VAT payable to the State was determined by the acquirer of a new building or part of a new building and the associated land to the assignor or by the acquirer of a right in rem relating to a such good to the person who upholds the law , the transferor or the re-transferor.

However, it is not that amount that the latter must pay to the State. He may indeed deduct from that amount the VAT that he himself had to pay in order to erect or acquire the building or part of the building and the associated land, as appropriate, in whole or in part.

If the transaction concerns a transfer or re-transfer of the relevant business right, he can only deduct the VAT that was levied from the establishment or the acquisition of the business right that applies to the building or part of the building and the associated land.

The deduction of input tax is discussed in detail in 'Bookwork III: Right to deduct input tax - Chapter 11: Right to deduct'.

The deduction is only discussed here to the extent that it is specific to actions with regard to new buildings or parts of new buildings and the associated terrain, more specifically with regard to:

- the amount of the deduction, in view of the fact that the delivery within the meaning of Article 10 with regard to land other than the associated site is an exempt transaction under Article 44, § 3, 1 ° of the VAT Code
- the time of the deduction.

B. Extent of the right to deduct

a. Other terrain than the associated terrain

Considering that the delivery within the meaning of Article 10 of the VAT Code, with regard to a site other than the associated terrain, is an exempt act within the meaning of Article 44, § 3, 1 ° of the VAT Code (see title 5), can respect no question of right of deduction.

b. Taxable person other than the professional seller of real estate

Anyone who carries out an act as referred to in Article 8 or in Article 44, § 3, 1 °, a), third indent, and b), third indent, of the VAT Code has the status of taxable person for this act in accordance with the provisions of Royal Decree No 14, aforementioned.

He therefore has the right to deduct VAT charged on transactions:

- that serve or contribute to the construction of the building or part of the building that has been sold or on which a real right has been established
- relating to the acquisition of that building or part of a building,
- directly related to the transfer of the building or part of the building or the establishment of a right in rem.

c. Establishment of a business right on a building, part of a building and the associated grounds

In connection with the determination of the right to deduct input tax when a business right is established on a building or part of a building subject to VAT, the deduction of the input tax specified in the previous paragraph is only complete when the sales price of commercial law approximates the amount of the costs of the acts directly related to the establishment of such a right (compare written parliamentary question No. 710 by Mr de Clippele, Member of Parliament of 22 September 1993).

The associated land, even if it is subject to VAT, should not be taken into account when calculating the deduction rate.

In other words, it is sufficient on the one hand to pay the requested price for the right in rem, which does not take into account the value of the land, and on the other hand the price for the construction or purchase of the building or part of the building, with the exception of the price for the acquisition of the site, to be compared.

The full deduction of VAT charged on the formation costs or the purchase price of the building or part of a building is accepted:

- if the price requested for the establishment of the real right on a building or a part thereof is at least 95% of the formation price (or the purchase price) in full ownership, including, where applicable, the sales value of the existing buildings and the cost price of its possible demolition but with the exception of the purchase price of the land, if the right is established for a period of less than 10 years
- if the requested price is at least 97.5% of the formation price (or the purchase price) in full ownership, including, where applicable, the sales value of the existing buildings and the cost price of any demolition, but excluding the purchase price of the site, if the law is established for a period of 10 years or more.

If the selling price of the corporate right does not reach the above limits, the deduction of input tax will be determined in function of the ratio of the selling price of the corporate right to the incorporation or purchase price of the relevant building or part of a building in full ownership.

d. Supply of infrastructure works (road works ...) to the government (municipality ...) in the context of an allotment

The matter should be distinguished several situations:

- Distance for free

  When the road works are given to the government for free in the context of an allotment, the following distinction must be made.

  It is accepted that allotment promoters who sell buildings or parts of buildings in the usual sense of the word (houses, apartments, warehouses ...) with VAT at the same time as the associated land, can deduct the input tax levied on the infrastructure works insofar as the costs of these works are included in the price of the buildings or parts of buildings (see decision no. ET 109.060 of 15.03.2006 , as well as point 2 of the answer to written parliamentary question no. 1.258 by Mr MP Melchior Wathelet of 02.05 2006).

  This tolerance therefore applies only to infrastructure works relating to built-up areas and to the extent that the costs of this infrastructure transferred to the government are included by the seller in the taxable amount of the built-up areas supplied to purchasers.

On the other hand, it does not apply to the free transfer of buildings or parts of buildings in the usual sense (warehouse, house, all or part of an office building ...), or to the free transfer for the benefit of the government of infrastructure works or others that are not relate to built-up plots.

Nor does the tolerance apply to the construction of roads or canals in the context of an allotment for the sole purpose of selling unbuilt land. After all, in this case, the value of these works can only be passed on in the price requested for the delivery of the land, exempted under Article 44, § 3, 1 °, a) of the VAT Code.

It also does not apply in the case of a sale by an allotment of land together with the sale of a building or part of a building (in the usual sense) by a professional founder or a construction promoter. After all, the costs of the infrastructure were in that case incurred by the shareholder , so that these costs will be passed on in the value of the land sold by the shareholder , which is exempt from VAT, and not in the price of the building or part of a building that is sold by the professional founder or construction promoter under VAT.

When the free transfer road works to be done to the church by a supervisor to whom the verkavelaar granted building rights, the tax levied to the cost of the road works are subtracted by respective supervisor if:

- those road works are related to the plots on which the promoter has erected buildings or has them erected as building owner
- the costs of the road works are included in the taxable amount for the aforementioned buildings or parts of buildings that the promoter sells as owner of the building.

This concerns the sale to the customer of the new building or a new part of a building by the promoter-owner and the sale to that customer of the land by the estate agent-builder.

This arrangement does not apply to alloters who construct road works and who do not sell buildings or parts of buildings in the usual sense of the word, but limit themselves to selling sites that have been prepared for construction.

In that case, there is no deduction from the alloters who donate the roads to the government for free.

- **Sale of undivided shares in road works to the buyers of a building site (self-builders) with the stipulation of a free surrender of those shares by the latter to the municipality**

The situation is different when self-builders, when purchasing a building plot, also purchase undivided shares in road works with an obligation to surrender those shares to the government free of charge thereafter.

Given the the fact that the road works are regarded as a new building or portion of a building, the sale of undivided share of that work is the verkavelaar or promoter-building rights holder to the builders a taxing provision which confers entitlement to deduct the seller.

- **Sale of road works to the government whereby the buyers of a building site (self-builders) act as third-party payers**

  According to a third possibility, finally, the government and the can verkavelaar or the promoter-superficies holder are matched to the road works will be sold to the public with total or partial payment of the price by the purchasers of a building site (third-party payment).

  The road works are thus transferred for consideration by application of VAT to the government so that the verkavelaar can bring or the promoter building rights holder to the tax deduction (see paragraphs 1 and 3 of the reply to written parliamentary question no. 1258 of Mr. Member of Parliament Melchior Wathelet from 02.05.2006).

  Where this solution is adopted, the transfer for consideration of the infrastructure works and the modalities of payment to which the purchasers are held with regard to their share of the price must be mentioned in the allotment permit, in the offers and in the sales contracts relating to the lots, as well as invoices addressed to the government and the buyers of the lottery tickets.

  The amount paid by the buyers must be stated separately as an amount including VAT on the invoice, as must the express mention that this tax is in no case deductible under the buyer (decision no. ET 124.513 of 23.12.2013).

e. Built-in appliances integrated in kitchens

For the purposes of Articles 8 or 44, § 3, 1 °, a), third indent and b), third indent, of the VAT Code, the administration accepts that the VAT charged on the supply of household electrical appliances that are permanently attached is deductible from the building or part of a building (built-in appliances integrated in the kitchen furniture), provided that:

- this equipment is transferred together with the building or part of the building
- its value is included in the taxable amount of the supply of the building or part of the building or of the establishment of the right in rem.

The permanent attachment of the equipment to the building or part of a building may have been carried out by the seller of the equipment, a taxable company or the owner of the property.

The taxpayers concerned can invoke the decision no. ET 125.655 of 13.03.2014 , subject to the period provided for in article 5, § 2, of royal decree 14, mentioned above.

C. Time of deduction

The right of deduction can be exercised by the three categories of transferors mentioned above (see Title 7). They are discussed separately below.

a. first category

As a reminder, the person whose regular economic activity consists of:
- have the buildings or parts of buildings that he erected erected or acquired with payment of VAT, to be disposed of for consideration within the stipulated period
- encumber such building or parts of buildings with a business right as referred to in Article 9, second paragraph, 2 °, of the Code
- to transfer or remit such a benefit established or transferred to him with payment of VAT within the same period.

Example:

In the course of a given month of 2018, supplies of goods and services, on which VAT was levied, are invoiced for two apartment buildings to be constructed, namely:
- amounting to 60,000 euros VAT for the first building
- amounting to 70,000 euros VAT for the second building.

During the same month, four apartments of the first building are sold on plan, on which advances are paid for a total amount of 1,000,000 euros, attributable to the price of the building (due VAT, at 21%: 210,000 euros); the second building is not sold. Both the amount of EUR 60,000 and that of EUR 70,000 are deductible from the claimable 210,000 euros .

b. Second category

A taxpayer who, in the context of his economic activity, which is not referred to in subsection a above, happens to alienate a new building or part of a new building and the associated land under application of VAT or to establish a commercial right on that property or obtained a business transfer or right in relation to such goods re-transfers .

Depending on the use of that good, this person, as a taxable person with full or partial right to deduct, has already enjoyed full or partial right to deduct when the property in question was acquired or acquired, or the business right to that good.

It goes without saying that the portion of the VAT that originally could not be deducted becomes deductible, where appropriate, at the time of the alienation, establishment, transfer or retransfer of the right in rem.

c. Third category

The person who happens other than the exercise of an economic activity, a building or part of a building and alienates the native land, real rights draws on such goods, transfer or re-transfer .

This person acquires the status of taxable person only at the time when he takes the said transaction with regard to goods and only with regard to the goods in question.

In the cases referred to in Article 8, §§ 1 and 2 of the VAT Code, the right to deduct is limited to the VAT levied on transactions that serve or contribute to the construction of the building or part of a building and the associated land and the actions directly related to the alienation of the building or part of a building and the associated land or with the establishment of a right in rem (see Title 7, sections C and D, above).

The right to deduct the tax paid or due before the VAT becomes due on the full taxable amount (see Title 7, sections C and D, above) only arises at that time.

In the cases mentioned in Article 8 § 3 of the VAT Code, the right to deduct is limited to VAT charged by the establishment (or transfer to his benefit) of the transmitted (or re-transferred) rem and actions have as their direct transfer or re-transfer purpose.

Example:

A furniture dealer has a building with six equivalent flats erected in 2018. The total construction price is 450,000 euros, to which he paid 94,500 euros VAT.

In the same year, after the building was completed, he sold two apartments to the same buyer for 200,000 euros together , of which 160,000 euros for the building and 40,000 euros for the share of the land.

The seller opts for the application of VAT.

He may only deduct 1/3 of the VAT payable for this sale (200,000 euros at 21% = 42,000 euros) from the VAT charged to himself, so that he will have to pay the State an amount of 10,500 euros (42,000 - 31,500) .

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12. Transactions treated as taxable supplies (withdrawals...)

A. Taxable persons whose regular economic activity consists of the supply of real estate under the VAT system (Article 12, § 2 of the VAT Code)

Are the taxpayers (professional founder or project developer) whose regular economic activity consists of:

- to have buildings or parts of buildings and the associated land which they have erected erected or to have acquired for VAT, for consideration, within the stipulated period
- to encumber such a building or part of a building, within the stipulated period, with a business right as referred to in Article 9, second paragraph, 2 °, of the VAT Code for consideration.
- to transfer or remit for consideration within the same period, the business right established or transferred to them with payment of VAT for their consideration (see Title 7, section B, above).

The professional founder is obliged to tax:

- the withdrawal of immovable property, in accordance with Article 12, § 1, first paragraph, 2 °, of the VAT Code, in particular, the provision thereof free of charge (see subsection a below)
- the commissioning of immovable property as a business asset, in accordance with Article 12, § 1, first ld, 3 °, of the VAT Code (see subsection b below)
- owning a real estate on termination of the economic activity, in accordance with Article 12, § 1, first paragraph, 5 °, of the VAT Code (see subsection c above)
- the withdrawal of a property upon expiry of the period within which a building can be considered new, in accordance with Article 12, § 2 of the VAT Code (see subsection d below).

On the other hand, the construction of a building intended for sale by a taxable person referred to in Article 12, § 2 of the VAT Code, is not equated with a service for consideration (service to oneself) in accordance with Article 19, § 2, second paragraph. , of the VAT Code (see circular 2019 / C / 19 of 01.03.2019 on equating a work in real estate with a service for consideration (Article 19, § 2 of the VAT Code) (no. ET 133.041) , margins 45 to 49).

a. Withdrawal of the good for free

Article 12, § 1, first paragraph, 2 °, of the VAT Code aims at the withdrawal with a view to the issue of the relevant good free of charge. Since the aforementioned provision does not distinguish between movable and immovable property, a professional founder owes the VAT in respect of the building or part of a building, and, if applicable, the associated land, or the right in rem with regard to that property that he donates. It is of course necessary that it concerns a new building or part of a building.

Example:

During the year 2017, a professional founder had a building (villa) erected for sale. The building was still not sold in June 2018. Therefore, in July, he gives the usufruct of that villa for an indefinite period to his mother who occupies the villa on 01.08.2018. The formation or cost price is 300,000 euros.

In the example, the villa is still new within the meaning of the VAT Code, since the intended building at the time of the donation was still not taken into use.

In accordance with Article 12, § 1, first paragraph, 2 °, of the VAT Code, the professional founder will therefore have to subject the withdrawal to tax as will be the case with regard to any other taxpayer who withdraws a good from his stock in order to not to provide.

The tax will be payable on a standard determined pursuant to Article 33, § 1, 1 ° of the VAT Code.

In this case, it will of course have to be taken into account that this concerns the donation of a usufruct. For practical reasons, the parties will have to determine a value discount , which of course does not prevent the stated value from being checked by the administration.

In particular, the construction price of the building and the age of the usufructuary will be taken into account. It is true that, strictly speaking, it is not possible to invoke the fixed sales value for usufruct as it applies with regard to registration rights (article 47 of the Code of registration, mortgage and court registry fees).

b. Commissioning the good as a business asset

Article 12, § 1, first paragraph, 3 °, of the VAT Code aims at the transaction consisting in a new building or part of a new building, and, if applicable, the associated site, or a business right to such property. that was originally intended for sale, to be used as a business asset.

The use as a business asset by a professional founder of the real estate in question includes not only the use for the effectively taxable and non-exempt economic activity, but also for an exempt economic activity (for example, real estate rental to private individuals).

Furthermore, for the application of the aforementioned Article 12, § 1, first paragraph, 3 °, of the VAT Code, it is not important whether the intended use relates to all or part of the building or part of a building, for insofar in the latter case that part is per se susceptible to use for which it is used.

Moreover, it will be borne in mind that if the commissioning referred to in Article 12, § 1, first paragraph, 3 °, of the VAT Code could not be applied, in any case the withdrawal referred to in Article 12, § 2, of the VAT Code remains applicable.

Where the economic activity of a professional founder is the erection or acquisition of buildings or parts of buildings which, as the case may be, are either for sale or for rent, the following distinction should be made for the purposes of VAT:

- when letting the buildings or parts of buildings originally intended for sale, Article 12, § 1, first paragraph, 3 °, of the VAT Code applies at the time of the effective commencement of

the rental. VAT is deductible if the option for taxation of the real estate lease under Article 44, § 3, 2 °, d) of the VAT Code has been exercised

- If that building or part of a building is sold within the period specified in Article 44, § 3, 1 ° of the VAT Code, VAT is of course automatically applicable to this delivery, since the seller is a professional founder.
  As a result of this sale, the VAT that was owed when it was taken into use as a business asset, could not be deducted because of the exemption from Article 44, § 3, 2 ° of the VAT Code (no application of the optional taxation possible), again deductible.
- when the buildings or parts of buildings originally intended for rental are sold within the period specified in Article 44, § 3, 1 ° of the VAT Code, VAT also applies without the tax being levied on this action must be opted for.

In the event that the initial real estate lease was exempt from VAT by Article 44, § 3, 2 ° of the VAT Code, VAT is levied on the creation or, where applicable, on the acquisition of the buildings or parts of buildings, which were of course not deductible originally, are fully deductible.

Example:

A professional founder bought a two-story building with VAT in 2016 for sale. During the same year and in the absence of a buyer, the first floor will be used as an office on 1 August of that year by that professional founder. On September 1 of the same year, the ground floor is let with VAT exemption.

The purchase of the building is 250,000 euros, both floors are equal.

The building will eventually be sold on 01.07.2018 for a price of 375,000 euros (including the value of the land in the amount of 50,000 euros).

The VAT is due and payable due to the commissioning as a business asset on 01.08.2016 of the first floor as an office (Article 12, § 1, first paragraph, 3 °, of the VAT Code). If administrative tolerance, such as the invoice, the date of the tax due and payable, the date on which the document is drawn up, and not later than 09.15.2016 (15 ^{the} day of the month following that in which the chargeable event if document was not drafted on that date) (Article 4, § 1, of Royal Decree No. 1, aforementioned).

In application of Article 33, § 1, 1 ° of the VAT Code, the taxable amount is equal to the purchase price, or 125,000 euros.

The VAT payable due to the commissioning of the relevant floor amounts to: 125,000 euros x 21% = 26,250 euros.

However, that tax becomes deductible, taking account, where appropriate, of the rules specific to the status of mixed taxpayer (Note 17/1975 of 29 July 1975 , marginal 17 and 18).

The VAT is also due on 01.09.2016 due to the commissioning as a business asset of the ground floor that is intended for rental (Article 12, § 1, first paragraph, 3 °, of the VAT Code) with the

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Properties

Title : VAT Comment - Specific topics. Real estate - Supplies (Update on 01.01.2020)

Summary : VAT Comment, real estate delivery)

Keywords : new building , remodeled old building , travaux immobiliers , droit réel , real estate rights , land , occupation of a new building , occupation , occupation , maison témoin , proof of delivery , building with associated land ,

same administrative tolerance with regard to the claimability of the tax. as before.

The payable VAT in the amount of 26,250 euros is not deductible.

In connection with the above, is it to be noted that the implemented commissioning work respectively on 08/01/2016 and 01/09/2016 the application of Article 12 § 2 of the VAT Code at the end of the VAT period 31.12.2018 to exclude .

The disposal of the building on 01.07.2018 is subject to VAT, without any option having to be exercised.

The payable VAT is:
375.000 euro x 21% = 78.750 euro.

Because of the thus effected transfer with the application of VAT, the professional founder can still deduct the VAT due on taking into use of the ground floor that was rented and that could not originally be deducted.

For the sake of completeness, it is pointed out that a professional founder who designates a building or part of a building acquired or erected under VAT as a business asset from the start, which is in particular the case for a building or part of a building that he / she uses for the rental or to be used as an office, to the extent not intended by Article 12, § 2 of the VAT Code.

Consequently, in the case of the construction of a building or part of a building in that case (or the finishing of such a good obtained under application of VAT), the exception is provided for in Article 19, § 2, first paragraph, 1 °, a), of the VAT Code not applicable. In other words, Article 19, § 2 of the VAT Code applies when the taxable person decides from the outset to use the building or part of a building as a business asset, insofar as the work is carried out by another taxable person does not grant a full right to deduct (circular 2018 / C / 20 of 12.02.218 regarding the adjustments to the VAT Code by the law of 29.11.2017 , marginal 12 to 24).

On the other hand, the said building or part of a building cannot be the subject of the commissioning referred to under this point, since it was set up as a business asset (after all, Article 12, § 1, first paragraph, 3 °, refers to the commissioning of a good that otherwise was established as a business asset, obtained ...).

c. Having the good under control when economic activity ends

Article 12, § 1, first paragraph, 5 °, of the VAT Code aims at the situation in which the taxpayer or his beneficiary, a new building or part of a new building and the associated site, or a business right with regard to a retains such good upon termination of their economic activity.

The aforementioned provision applies irrespective of whether the professional founder still had the new building or part of a new building and the associated land in stock as intended for sale, or this building or this part of a building and the associated land as business assets in had taken use.

regular economic activity , professional founder , professional founder of new buildings , assujetti occasionnel ,contribuable , presunzione semplice légale , recognized social housing , option option , act under consideration , base d'imposition , expropriation , minimum tax basis , deferred ownership , annuity sales , subsidiary caused due and payable , net of VAT , the right to deduct VAT , infrastructure work , built-in appliances in kitchens , withdrawal by a professional founder ,withdrawal from property for private purposes , taking into use as a business asset , taxable person without right to deduct , cessation of professional activity , bien immobilier

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Notes

The assimilation to a supply for consideration applies, of course, only to the extent that the professional founder pays the input tax in respect of the construction of the building or part of the building, and, if applicable, the associated land or the acquisition of the right in rem with regard to has been able to deduct such good.

Thus, the aforementioned withdrawal does not take place with regard to apartments that have been set up or have been acquired by applying a VAT, which are intended for (exempt) rental, since the VAT charged on the creation or acquisition of those apartments could not be deducted .

Article 12, § 1, paragraph 5 ° of the VAT Code nor applies where the rechtheb bands of the activity of the taxpayer concerned, following the transfer of a totality of assets or a business department, under the terms of the continue Articles 11 and 18, § 3 of the VAT Code.

Examples:

- A professional founder acquired a building with VAT on 25.04.2016 for sale at the price of 200,000 euros excluding VAT.

  The person concerned uses the ground floor as of 01.09.2016 as an office.

  Both floors of the building are equal.

  On 30.04.2017, the taxpayer concerned terminates its economic activity. He sells his entire business with the exception of the building mentioned above. From 01.05.2017 he and his family will occupy the upper floor and will make the lower floor available to a charity free of charge from the same date.

  The VAT relating to the acquisition of the building originally intended for sale was fully deducted. The professional founder concerned exercises his right to deduct according to the rule of actual use.

  The ratio calculated according to the rules normally followed to determine the general ratio was provisionally fixed for the year 2016 at 80% and finally at 90% (Note 17/1975 of 29.07.1975 , marginal 17 and 18).

  The building must be classified as new until 31.12.2018.

  First of all, the VAT is due and payable due to the commissioning as a business asset of the ground floor on 01.09.2016 (Article 12, § 1, first paragraph, 3 °, of the VAT Code).

  The VAT due on commissioning is:
  100.000 x 21% = 21.000 euro

  The deductible VAT related to this commissioning amounts to a total of EUR 18,900 , which is 90 % of EUR 21,000 (EUR 16,800 when applying the provisional ratio at the time the tax becomes due and EUR 2,100 additional on 20.04.2017 after revision of the ratio).

The taxpayer concerned retains the entire building on 30.04.2017, so that, in application of Article 12, § 1, first paragraph, 5 °, of the VAT Code, the VAT is due and payable on account of the possession of that property upon termination of its economic activity.

The taxable amount is determined in accordance with the criteria set out in Article 33, § 1, 1 ° of the VAT Code.

There is therefore claimable:

200.000 euro (100.000 euro x 2) x 21% = 42.000 euro btw.

The taxpayer concerned may, on the other hand, deduct the VAT payable due to the commissioning of the ground floor as an office of the building intended for sale to the extent that the tax was not deductible at the time of the commissioning as a business asset. In this way, an additional amount of 2,100 euros can be deducted.

It is noted that assuming that the person concerned would use the ground floor from 01/09/2016 to rent out with VAT exemption, the VAT payable on account of this commissioning would not be deductible from the professional founder.

In that case, he would not have to pay VAT for the ownership of the ground floor upon termination of his activity . In view of the aforementioned use, he would not have enjoyed full or partial deduction for that property (namely the exempt rental of the ground floor of the building), so that the application of Article 12, § 1, first paragraph, 5 °, of the VAT -Legal would be out of the question.

- Same example as above under subsection a, in which the withdrawal referred to in Article 12, § 1, first paragraph, 2 °, of the VAT Code was discussed. We assume that the relevant professional founder will fully terminate his activity on 30.04.2018.

  Having the bare ownership of the villa on 30.04.2018 means that he will keep the property in his possession, albeit encumbered with a usufruct.

  For this possession of the bare ownership of the good at the time of cessation of activity, the VAT will be due and payable on the basis of Article 12, § 1, first paragraph, 5 °, of the VAT Code. The taxable amount will be equal to the purchase price of the good or similar good or, if there is no purchase price, the cost price of the good concerned (Article 33, § 1, 1 ° of the VAT Code).

  However, this good is encumbered in this example with a usufruct, so this must be taken into account. The administration therefore accepts that VAT due on the transfer of the building in application of the aforementioned Article 12, § 1, first paragraph 5 °, of the VAT Code, is due on the donation of the usufruct (Article 12, § 1, first paragraph, 2 ° of the VAT Code) is allocated.

d. Expiry of the period within which a building can be considered as new (Article 12, § 2 of the VAT Code)

The taxpayer who regularly establishes, has set up or acquires, with payment of the tax, goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code, to alienate them no later than 31 December of the second year following the years of their first occupation or first occupation and **who has not disposed of the property at the expiry of this period, is deemed to remove the unalienated building or part of it from its company for its own needs** (Article 12, § 2, first paragraph, of the VAT Code).

When such a taxpayer has a real right within the meaning of Article 9, paragraph 2, 2 °, of the VAT Code on goods, as intended by Article 1, § 9, paragraph 1, 1 °, of the VAT Code, to his advantage. established or transferred to him with tax payment, at the expiry of the aforementioned period has not transferred or retransferred , he is deemed to withdraw this business right from his company for his own needs, that is, to deliver to himself on the time when that period expires (Article 12, § 2, second paragraph, of the VAT Code).

However, the application of this withdrawal is excluded if this taxable person has already carried out the putting into service referred to in Article 12, § 1, first paragraph, 3 °, of the VAT Code, for the reason that he has put the good into use as a business asset (for example by renting it out).

VAT is calculated on the purchase price of the good or similar goods, or if there is no purchase price, on the cost price of the extracted good, calculated at the time of the withdrawal (Article 33, § 1, 1 ° of the VAT Code).

A special situation arises when a professional founder alienates a new building or part of a new building or a business right to such a property under a suspensive condition.

Sales under a suspensive condition are taxable only on the fulfillment of that condition.

The taxable person as referred to in Article 12, § 2 of the VAT Code, who has sold a new building or part of a new building under suspensive condition, must pay the VAT on the basis of the aforementioned Article, when the expiry of the the time limit referred to in the same article is not fulfilled (decision No ET 8.140 of 06.06.1975).

The same taxpayer in whose favor a real right within the meaning of Article 9, second paragraph, 2 ° of the VAT Code was established or transferred to him with payment of the tax must, pursuant to Article 12, § 2, pay the VAT if the real right has not been transferred or retransferred at the expiry of the period referred to in the same article, since the suspensive condition under which it was transferred or retransferred will only be fulfilled after the expiry of the said period.

It should be noted that the taxpayer is also deemed to withdraw the associated land if it is entitled to full or partial deduction.

B. Any taxable person engaged in an economic activity other than that referred to in section A

Are referred to as taxable persons whose economic activity does not consist in the regular sale of goods intended by Article 1, § 9, first paragraph, 1 °, of the VAT Code with payment of VAT, but

who:

- happen to have a building or a part of a building and the associated land that they have erected, erected or obtained with payment of VAT, within the stipulated period, for consideration, to transfer that tax
- Establish a commercial right as referred to in Article 9, second paragraph, 2 ° of the VAT Code within a stipulated period for consideration on a building or part of a building and associated grounds
- with the application of VAT to their benefit established or transferred to them referred to in rem within the same time transfer for consideration or re-transfer . (see Title 7, Section C, above).

a. Taxable persons without right to deduct

On behalf of the persons referred to here who, because of an exemption as referred to in Article 44 of the VAT Code, are not entitled to deduct and therefore also levy VAT on the construction or acquisition of a building or part of a building that is could not be deducted within the framework of the exempt economic activity, the provisions of Article 12, § 1, first paragraph, of the VAT Code do not apply.

After all , the applicable transactions with regard to a good referred to in Article 12, § 1, first paragraph of the VAT Code are only equated with a taxable supply if a right to full or partial deduction of tax has arisen for that good or its components. .

Example:

A doctor will not have to apply the withdrawal referred to in Article 12, § 1, first paragraph, 5 °, of the VAT Code, on the cessation of a new building used as a cabinet , upon termination of his economic activity.

b. Taxpayers with a right to deduct

Under a VAT taxable person with a right of deduction who is not a professional founder, in respect of a new building or part of a new building and the associated land or a real right to such property from which all or part of the right to deduct has arisen , Article 12, § 1, first paragraph, of the VAT Code only applies:

- at the transfer free of charge (Article 12, § 1, first paragraph, 2 °, of the VAT Code)
- in keeping the aforementioned good or business right after termination of the economic activity (Article 12, § 1, first paragraph, 5 °, of the VAT Code).

As mentioned above, the taxpayer referred to under heading B of this title can only realize the transfer of a new building or part of a new building and the associated land or site, the transfer or re-transfer of a real right to such property with the application of VAT if opting to subject those transactions to VAT.

The same applies with regard to the withdrawals or the "deliveries to oneself" as referred to in the aforementioned Article 12, § 1, first paragraph, 2 ° and 5 °, of the VAT Code.

After all, the delivery (to himself) of a new building or part of a new building and of the associated land by a taxable person who is not a professional founder can only take place with payment of VAT, provided that he is within the limits set by the VAT Code. opts for its application.

In the absence of the exercise of the aforementioned option as a result of which the withdrawal does not take place, the revision of the deduction within the meaning of Article 48, § 2 of the VAT Code, determined in Article 10 of Royal Decree No 3, aforementioned to be applied.

Examples:

- On 10.10.2015, an independent tax adviser buys a new apartment and the associated land from a construction promoter, which he furnishes and will use as an office, as well as the associated land. The purchase price is 105,000 euros.

  This apartment will be used for the first time on 01.02.2016.

  On 01.09.2016, the tax advisor moves into another apartment that is larger and which was also furnished as an office. In December 2016, he will donate his apartment, which he bought on 10.10.2015, to his son.

  Since the VAT term runs until 31.12.2018, the tax adviser generally has the choice between:
  - performing the withdrawal provided for in Article 12, § 1, first paragraph, 2 °, of the VAT Code, provided that it is performed in the manner and under the conditions laid down in Royal Decree No. 14, mentioned above for the application of the VAT.
    If that option is actually exercised, the exigible VAT amounts to: 105,000 euros x 21% = 22,050 euros.
    As a result of this withdrawal, the revision of the deduction provided for in Article 10, 1 °, in fine of Royal Decree No. 3, is excluded.
  - to perform a revision of the deduction provided for in Article 10, 4 °, of the Royal Decree No. 3, aforementioned, if he does not opt for the application of VAT.
    The fifteen-year revision period starts on 01.01.2016 and runs until 31.12.2030. With regard to the real estate assets, taken into use from 01.01.2012, as referred to in Article 9, § 1, last paragraph, of the Royal Decree No. 3, the aforementioned is based on the fifteen-year revision period on the 1st January of the year in which those assets put into service (decision no. ET 121.450 of 27.03.2012).
    As from the entry into force of the Royal Decree of 12.05.2019 (BS 27.05.2019), the starting point of the revision period on 1 January of the year in which the operating assets have been put into use is an agreement on Article 9, § 1, of the Royal Decree no. 3, aforementioned. This applies to all company assets.
    The revision of the originally deducted tax is therefore to be carried out: EUR 22,050 x 14/15 = EUR 20,580 .

- The same example as above, except that the buyer of the apartment on 10.10.2015 is a mixed taxpayer who, as a result of an accident, stops his business on 01.10.2016 and retains

the apartment bought for his economic activity. It is subject to the general ratio and the final general ratio for the years 2015 and 2016 is 60%.

As mentioned in the first example, since the mixed taxpayer is still a new building (the VAT term expires on 31.12.2018), he has the choice between a delivery to himself as a result of having the apartment in his possession upon termination of his economic activity (Article 12, first paragraph, 5 °, of the VAT Code) if he opts for the application of VAT or the revision provided for in Article 10, 5 ° of Royal Decree No. 3, aforementioned if he does not opt.

The consequences of that choice are:

- if he opts for delivery to himself (Article 12, § 1, first paragraph, 5 °, of the VAT Code):

  payable VAT: 105,000 euros x 21% = 22,050 euros

  in principle, revision in favor of the taxpayer provided for in Article 10, 3 ° of the Royal Decree No. 3, aforementioned (see 'Book III: Right to deduct input tax - Chapter 12: Corrections to the right to deduct (revisions, withdrawals and entry into service), Section 5 '):

  originally non-deductible VAT (at 21%): 22,050 euros x 40% = 8,820 euros.

  With the aim of respecting the principle of equality, the administration has decided that every taxpayer, whether he is
  * is a professional founder
  * a taxpayer who has opted for the application of the tax (Article 44, § 3, 1 °, a) and b), third indent of the VAT Code)
  * an accidental taxpayer as referred to in Article 8 of the VAT Code, with the transfer or removal of a building or part of a building with application of VAT,

  the **full deduction** of the tax levied on the construction, acquisition or removal of the transferred building or part of a building, even if this building was used in whole or in part before the transfer or withdrawal for purposes for which no right on deduction.

  Thus, the VAT or portion of the VAT that could not originally be deducted by the mixed taxable person becomes deductible at the time of sale.

- if he adjusts the deduction (Article 10.5 ° of Royal Decree No 3, aforementioned):

  to conduct review of the initially deducted tax effected:
  22.050 euro x 60% = 13.230 euro x 14/15 = 12.348 euro.

C. Taxable persons who do not engage in an economic activity (Article 8 of the VAT Code)

Refers to persons who, other than in the pursuit of an economic activity:

- have a building or part of a building and the associated land that they have erected, erected or acquired with payment of VAT, within the stipulated period, for consideration, transferring that tax
- have a building or part of a building and the associated land that they have erected, erected or obtained with payment of VAT, within the stipulated period, for consideration, with a real right as referred to in Article 9, second paragraph, 2 ° of the VAT Code objections
- with the application of VAT to their benefit established or transferred to them referred to in rem within the same time transfer for consideration of application of the charge or re-transfer (see Section 7, section D, above).

No provision of Article 12, § 1, first paragraph, of the VAT Code applies to the persons referred to here.

After all, the VAT paid on the acquisition of a new building or part of a new building and the associated land or a business right to such property can only be deducted in whole or in part by the persons concerned, as the case may be if those new buildings or those parts of new buildings and the associated land or a business right to those goods are either transferred or those goods are encumbered with a business right.

The non estranged buildings or parts of buildings and the accompanying land or re-transmitted real rights to the goods are therefore in any case burdened with VAT in the possession of those involved.

D. Taxable amount

If Article 12 of the VAT Code applies, VAT is calculated on the **purchase price of the goods or similar goods, or if there is no purchase price** , **on the cost of the extracted good** , calculated at the time of the withdrawal, if applicable taking into account the second and third paragraphs of Article 26 and Article 28 of the VAT Code (Article 33, § 1, 1 ° of the VAT Code; decision no. ET 41.665 of 27.02.1992).

A judgment of the Court of Justice of the European Union has thus clarified (Court of Justice of the European Union, Judgment *Property Development Company NV* , case C-16/14, of 23.04.2015) that in case of rental by a taxable person in section A, of Title 12, above, of buildings which he had erected and which were originally intended for sale, the taxable amount is equal to the purchase price applicable at the time of this lease for buildings whose location, the size and other essential characteristics are comparable to those of the building concerned. It is irrelevant whether part of this purchase price is the result of the payment of intercalary interest.

With regard to real rights, reference is also made to section A of Title 12 above.

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