# Real Estate Newsletter

This edition of our Real Estate Newsletter once again zooms in on some recent tax, legal and other hot topics affecting the Belgian real estate sector.

Now that Belgium finally has a new Federal Government, new tax measures are inevitable, all the more so in times of crisis. One of the tax measures announced in the government agreement will most likely also affect the real estate (development) sector as it relates to the **reduced VAT rate of 6% for demolition and reconstruction**.

Also very relevant for the real estate (development) sector, is the **recent decision of the Court of Justice that addresses VAT deduction** in relation to brokerage fees, publicity and general costs in the context of segregated land and construction companies.

Next to that, some interesting **legal changes to co-ownership legislation** have been implemented as a result of a decision of the Constitutional Court of February this year.

And last but not least, our real estate financial advisory specialist shares some interesting views on the re-definition of the **purpose of office buildings in the 'new normal'**.

Happy reading.

## Reduced VAT rate demolition and reconstruction of dwellings

In it's agreement, the new Federal government announced the expansion of the reduced VAT rate of 6% for the demolition and reconstruction of dwellings to the Belgian territory within the context of the social housing policy. What are the new rules?

The current 6% for the demolition and reconstruction of dwellings applicable in the 32 cities, will continue to be applicable just as it is today. The new regime that will be applicable for two years starting on 1 January 2021, introduces an extended scope of the 6%.

As from 1 January it will be possible to apply the reduced rate for any dwelling in Belgium that will be built on behalf of a private person. The latter needs to be the person who is responsible for the demolition and reconstruction of his single and own dwelling (residence) that cannot exceed 200m². The destination and his residence needs to be maintained for at least five years starting from 1 January of the first occupancy year. If not, the tax advantage of 15% needs to be proportionally reversed for the remainder of the 5-year period. The reduced rate will also be possible for the sale of the dwelling, under the same conditions (natural person who buys a max. 200m² dwelling, residence …) and thus not limited to construction contracts. This is an important extension of the current rules for developers, as they now can supply a new dwelling with application of 6% in both the cities and any other place in Belgium. The reduced rate is also applicable for dwellings that will be rented out by a social housing office (sociaal verhuurkantoor / agence immobilière sociale).

The draft bill provides also for transitional measures, i.e. projects that span the legislative changes. For projects that are currently being build, the reduced rate can be applied for invoices that will be issued as 2021 in so far as the client files a notification with the authorities before April 2021. For projects for which the building permit has been filed as from 1 July 2022 an advance billing will be allowed for maximum 25% of the envisaged works.

## VAT deduction agency fees, publicity and general costs

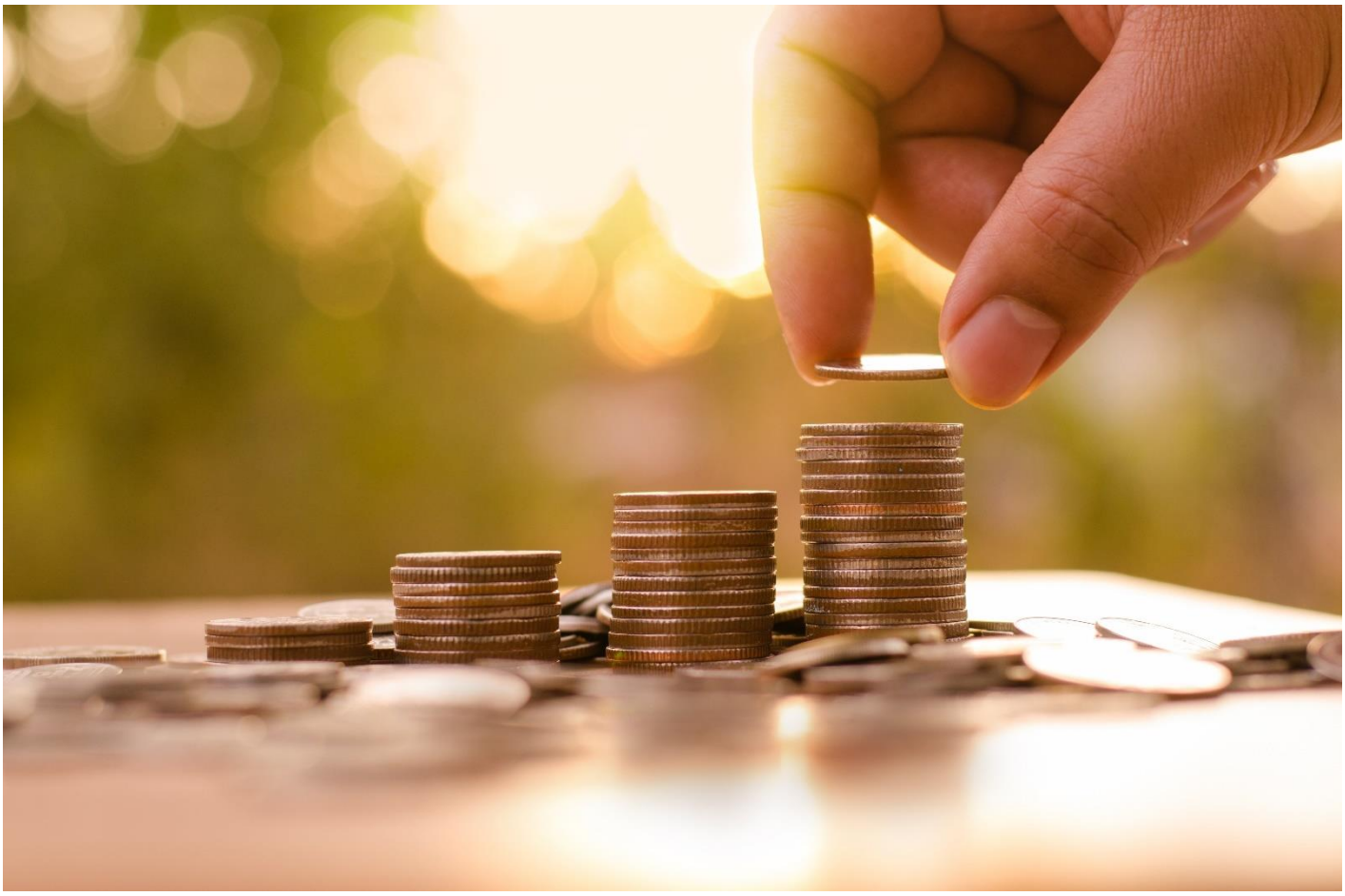
Belgian VAT authorities take the view that publicity, administration and brokerage fees need to be split between the land owner and the building company and reject a part of the VAT as non - deductible being associated to the land (owning company).
The split between deductible and non-deductible VAT is, according to the position taken by authorities, proportional to the split between the land price and the construction price.

As several real estate developers deducted the full quantum of input VAT via the VAT return of their construction company, the Belgian authorities started a significant amount of audits, some of which resulted in court cases including a procedure before the European Court of Justice that rendered its decision on 1 October 2020.

In its decision, the Court accepted that a full VAT deduction is defendable when these costs do have a clear link with the activities of the construction company, whereas the benefit to the land company is ancillary. However, at the same time it emphasizes the importance of a *direct link* to assess any VAT deduction. As a consequence, if these costs do not have a general character but can be linked directly to the activities of the land company, the construction company cannot recover the relating VAT. Will that in the future be deemed the case when the construction company has the possibility to recharge these costs to the land company?

Lastly, when the factual circumstances lead to the conclusion that VAT is not fully recoverable, the non-recoverable part needs to be based on the objective content of the services, the contracts and the economic and commercial reality. Based on the daily practice, it is sure that the mere split between the land and the construction price isn't an appropriate allocation key to calculate any potential non-recoverable VAT.

It is now up to the Belgian Supreme Court to render its decision based on the guidelines from the European Court of Justice and to elaborate on the way how VAT deduction should be assessed.



## Co-ownership: Majorities and (un)certainties in the event of complete demolition and reconstruction

Demolition and reconstruction are far reaching infringements of property rights. It is not, therefore, self-evident that these can be forced on a (co-)owner without his consent. Yet this was the path followed by the legislator in 2018, when the possibility of a decision by a four-fifths majority was introduced in the general assembly ('algemene vergadering') to proceed with the demolition or reconstruction of a plot.

However, the Constitutional Court pulled the brakes by the decision of 20 February 2020 in which it stated that infringements of property rights must be proportional and necessary in light of the objective pursued. Additional safeguards to protect that right were therefore introduced by the law of 31 July 2020.

**Legislation of 18 June 2018**

In the law of 18 June 2018, the legislator modified the system of majorities applicable to the general meeting of co-owners ('algemene vergadering van mede-eigenaars'). The Civil Code already provided for a dual system of unanimity and special majorities. Art. 577-7 CC lists the various matters on which the co-owners may decide by a four-fifths majority.

Art. 167, 7 ° of the law of 18 June added the following situation: 'the complete demolition and reconstruction of the building for reasons of hygiene or safety or when the cost of adapting the building to the legal provisions would be excessive'. This deviates from the usual unanimity required for demolition and reconstruction as provided for in art. 577-7 §3 CC, but only for those reasons exhaustively listed above. However, the co-owner who did not wish to give his approval had (and has) the option to abandon the ownership right on his plot for the benefit of the other co-owners. This possibility exists on the condition that the value of the lot is lower than the share it represents in the total cost of the works. In that case the co-owner is entitled to a compensation agreed by mutual agreement. In the absence of a mutual agreement, the compensation shall be determined by the judge on the basis of the market value of the plot in question without taking into account the fluctuations in value after demolition and reconstruction.

**Judgment no.30/2020 of 20 February 2020 of the Constitutional Court**

Art. 167, 7 ° of the Law of 18 June 2018 was nullified by the Constitutional Court due to an excessive erosion of the right to property that is not proportional to the public interest pursued – facilitating real estate-neutral decisions regarding the demolition and/or reconstruction of the building – by the legislator. Greater protection of property rights was demanded by the Court as a result.

The Court ruled, for example, that the right of initiative to bring the case before a judge in the event of a disagreement regarding demolition and reconstruction should not lie with the co-owner of the plot in question, but with the general assembly of co-owners. However, under the law of 18 June 2018, this was the general rule which led the Court to decide that a fair balance between the right of property and the public good had not been struck by the legislator. Such a legislative change was thus required by the court in the light of an established infringement of art. 1 1st Prot. ECHR.

**Law of 31 July 2020**

With the law of 31 July, the legislator responded to the unconstitutionalities established by the Court. In art. 577-9 §1 CC, an additional protection of the right to property was introduced in the event that the decision to demolish or rebuild is not taken unanimously. The general assembly of co-owners will then have to file a lawsuit within four months from the date on which the general assembly took place. The claim is directed against all co-owners who, with voting rights in the general assembly, did not approve the decision. In addition, the decision to demolish or rebuild will be suspended until the court's decision has become final

The costs associated with the claim are to be borne by the association of co-owners (art. 577-9 §8 CC).

The concerns raised by the Constitutional Court regarding the right of initiative were also addressed by the legislator, whereby that right will fall entirely to the association of co-owners. They have a period of four months in which to initiate a claim. The court of 1st instance ("vredegerecht"/ "juge de paix"] can conduct a legality test and order an expert investigation to investigate the reasonableness of the compensation.

**Conclusion**

After a period of legal uncertainty, the legislator has addressed the concerns raised by the Constitutional Court by providing some safeguards for the co-owner. Despite these adjustments, it remains undeniable that the ownership right of the co-owner has become more relative in the cases listed in art. 577-7 CC. Nevertheless, with this latest legislative amendment, the legislator seems to have done what is necessary to remedy the situation of unconstitutionality and thus neutralize the legal uncertainty in this area. The new law entered into force on 18 August 2020.

## Offices in the next “New Normal”

In just a few weeks’ time, the coronavirus pushed the global corporate workforce to embrace remote working.

While 69% of the population worked less than 1 day a week from home before the pandemic, remote working has become an omnipresent part of 1.9 million corporate workers’ lives.

Obviously, not everything can be done from home (several industries tend to be site-specific such as retail, healthcare, manufacturing, construction, and obviously, the hospitality sector) but the forced experiment in home office seems to be shaping our preferences. According to recent studies, 80% of the corporate population is willing to work 2 to 3 days a week remotely. At the other end of the spectrum, people now willing to spend the entire week at the office represent less than 5% of the respondents.

Switching from office to remote working has impacted the nature of work. The recent literature reported that those who worked from home during the lockdown tended to work longer hours and were able to attend more meetings thanks to more flexibility. Moreover, a considerable number of people interviewed consider the most important benefits of remote working to be the extra hours recouped by not commuting and the enhanced work life-balance. During the lockdown, traffic was more or less non-existent and commuting time for workers was divided by 4. About one-third of the time saved went into working longer. The remainder was devoted to childcare, leisure activities and home improvement.

With the generalization of remote working and the benefits coming out of it, some may wonder why companies would keep all or part of their offices, especially now that companies themselves have started to re-evaluate their future space requirements.

We firmly believe that the rise of remote working will not result in the extinction of offices, but rather in an occasion to redefine their purpose.

During the lockdown, a majority of employees missed their life at the office substantially. Top reasons were the lack of interactions with their colleagues and the absence of a professional and structured environment.

Post-pandemic physical workplaces will hence be more important than ever before but will embrace the new role of bringing people together, showcasing the company’s brand and culture, boosting creativity and attracting and retaining talent.

In order to do so, the workplaces will need to shift from full-day desk occupancy and individual focused spaces to a greater mix of experimental, collaboration, human connection and inspiration spaces supporting teams and broadcasting culture. Offices will become social hubs that create value through collective and shared experience, rather than through combined individual contributions.

We are convinced that each way of working brings its own value, but neither can fully replace the other. Companies’ new challenge will be to find the right mix combining and leveraging the best of both solutions.

Our final word goes to Joseph Allen (Harvard University) : “the true cost of operating buildings is not energy, waste and water; it is the people inside. It is perhaps the greatest untapped business and health opportunity of our time”.

## Get in touch


### Danny Stas
Managing Partner, Deloitte Legal-Lawyers
Real Estate Industry Leader
Deloitte Legal – Lawyers
dstas@deloitte.com
+32 2 800 70 11

### Frédéric Sohet
Managing Partner, Financial Advisory
Deloitte Belgium
fsohet@deloitte.com
+32 2 639 49 51

### Maximilien van de Werve
Partner, Real Estate
Deloitte Legal - Lawyers
mvandewerve@deloitte.com
+ 32 2 800 71 73

### Joaquim Heirman
Director, Indirect Tax
Deloitte Legal - Lawyers
jheirman@DELOITTE.com
+32 2 800 71 27

### De Halloy De Waulsort, Stéphanie
Consultant, Real Estate
Deloitte Belgium
sdehalloydewaulsort@deloitte.com
+ 32 2 800 25 03