

A horizontal banner image divided into several vertical panels. From left to right, the panels show: a pair of scales of justice, a wooden gavel, a magnifying glass over a document, a computer keyboard, and another wooden gavel. The text "JONES DAY" is in a smaller font above the word "COMMENTARY", which is in a large, bold, white sans-serif font.

# JONES DAY COMMENTARY

## TAXATION OF REAL ESTATE TRANSACTIONS

# SUMMARY OF THE MAIN PROVISIONS OF THE “BERSANI DECREE”

In recent months the Italian government approved an important reform of the taxation of real estate transactions. The so-called Bersani Decree (named for the proposing minister) has had an immediate impact on real estate investors, mainly for the retroactive effects of the new rules. The Italian Parliament converted the decree into law (Law 248 on 4 August 2006) with several changes, after many protests and a heated debate. The new law became effective on 12 August 2006. This *Commentary* contains several charts summarizing the main provisions of the new law, with particular regard to the transfer of land and buildings, the lease of buildings and businesses, financial leases and construction contracts.

## TRANSFER OF BUILDINGS

ASSETS	VAT	REGISTRATION TAX	MORTGAGE & CADASTRAL TAXES
“Business” buildings (1) (2)	<p>If the transferor is a VAT person, the transaction must be subject to VAT in the following cases:</p> <p>(i) The transferor is a construction company or a restoration company (3) and the transfer takes place within 4 years of the completion of the works;</p> <p>(ii) The transferee is a VAT person but cannot deduct more than 25% of VAT paid due to its activities (banks, insurance companies, hospitals, doctors, etc.); or (4)</p> <p>(iii) The transferee is not a VAT person (individuals, private entities other than companies, public entities such as municipalities).</p>	The transfer is also subject to registration tax in a fixed amount (€168).	The transfer is also subject to mortgage tax (3%) and cadastral tax (1%). (9) (10)
	If the transferor is a VAT person but is not in any of the above cases, the transaction is subject to VAT only if the transferor “opts” for VAT. (5)		
	If the transferor is a VAT person and does not “opt” for VAT, the transaction is VAT-exempt.		
	If the transferor is not a VAT person, the transfer is not subject to VAT.	The transfer is subject to registration tax (in general 7%). (7)	The transfer is subject to mortgage tax (2%) and cadastral tax (1%). (10)
“Nonbusiness” buildings (in most cases, residential properties) (1)	If the transferor is a VAT person (and is a construction or restoration company) and the transaction takes place within 4 years of the completion of the works, the transaction is subject to VAT. (6)	The transfer is also subject to registration tax in a fixed amount (€168).	The transfer is also subject to mortgage and cadastral taxes in a fixed amount (€168).
	If the transferor is a VAT person but is not a construction company or a restoration company, the transaction is always VAT-exempt.	The transfer is subject to registration tax (in general 7%). (8)	The transfer is also subject to mortgage tax (2%) and cadastral tax (1%). (11)
	If the transferor is not a VAT person, the transfer is not subject to VAT.		

## TRANSFER OF LAND (12)

ASSETS	VAT	REGISTRATION TAX	MORTGAGE & CADASTRAL TAXES
Land on which it is possible to build (13)	If the transferor is a VAT person, the transaction must be subject to VAT.	The transfer is also subject to registration tax in a fixed amount (€168).	The transfer is also subject to mortgage and cadastral taxes in a fixed amount (€168).
	If the transferor is not a VAT person, the transfer is not subject to VAT.	The transfer is subject to registration tax (in general 8%). (14)	The transfer is also subject to mortgage tax (2%) and cadastral tax (1%). (10)
Land on which it is not possible to build	The transfer is not subject to VAT.	The transfer is subject to registration tax (in general 8%, but up to 15% for agricultural land).	The transfer is also subject to mortgage tax (2%) and cadastral tax (1%).

The new provisions grant the Tax Office the power to amend the annual VAT return when the consideration for the transfer of real estate assets (land and buildings) included in the return is lower than the *“normal value”*. “Normal value” means the price or the consideration applied on average for the same kind of assets or similar assets in free market conditions and at the same level of commerce, at the time and in the place where the transaction under review occurred, or as near as possible to that time and place. The new provisions created a presumption for the determination of the normal value: the normal value of any real estate transfer, which has been financed by means of a bank loan or real estate financing, cannot be lower than the principal of the loan advanced to the borrower. Similar provisions apply in relation to the registration tax and income taxes.

Furthermore, even in the case of the transfer of assets subject to VAT, the parties must represent in the deed the method of payment, whether there was any go-between, the commission paid and the related method of payment. In case of violation, an administrative sanction of €500 to €10,000 is applicable, and the Tax Office shall carry out the assessment of the value of the assets for the purposes of the application of the registration tax.

## LEASES OF BUILDINGS AND BUSINESS LEASES

ASSETS	VAT	REGISTRATION TAX (15)
"Business" buildings	<p>If the landlord is a VAT person, the rent must be subject to VAT in the following cases:</p> <p>(i) The tenant is a VAT person but cannot deduct more than 25% of VAT paid due to its activities (banks, insurance companies, hospitals, doctors, etc.); or (4)</p> <p>(ii) The tenant is not a VAT person (individuals, private entities other than companies, public entities such as municipalities).</p>	The rent is subject to a 1% registration tax.
	If the landlord is a VAT person and is not in any of the above cases, the rent is subject to VAT if the landlord "opts" for VAT. (5)	
	If the landlord is a VAT person and does not "opt" for VAT, the rent is always VAT-exempt.	
	If the landlord is not a VAT person, the rent is not subject to VAT.	
"Nonbusiness" buildings (in most cases, residential properties)	If the landlord is a VAT person, the rent is VAT-exempt, and the landlord has no right to "opt" for VAT.	The rent is subject to a 2% registration tax.
	If the landlord is not a VAT person, the rent is not subject to VAT.	
Business leases or leases for part of a business	The rent for a business lease or leases for part of a business must be subject to VAT.	The rent is subject to registration tax in a fixed amount (€168) if the value of the real estate assets is lower than 50% of the value of the business.
		The rent is subject to registration tax (1%) if the value of the real estate assets is equal to or higher than 50% of the value of the business. (16)

## FINANCIAL LEASES

TRANSACTIONS	VAT	REGISTRATION TAX	MORTGAGE & CADASTRAL TAXES
Rent	The same new provisions established for ordinary leases apply.	The same new provisions established for ordinary leases apply.	Not applicable.
Transfers: - Purchase by the financial lease company - Repurchase by the user	The same new provisions established for transfer of real estate assets apply.	The same new provisions established for transfer of real estate assets apply.	The transfer is subject to mortgage tax (1.5%) and cadastral tax (0.5%). <a href="#">(17)</a>

The parties to the lease agreements, business leases and financial leases in effect before 4 July 2006 shall file a special registration tax application. The Tax Office shall issue special rules to establish terms and procedures for the filing and payment of any registration tax due.

## CONSTRUCTION CONTRACTS

PARTIES	OBLIGATIONS	SANCTIONS AND LIMITATIONS
Principal	The principal has the duty to check the payment of withholding taxes, and social security and mandatory insurance contributions due by the construction company for its own employees working in accordance with the construction agreement.	In case of violation, there is an administrative sanction of €5,000–€200,000. <a href="#">(18)</a> <a href="#">(19)</a>
Construction company	The construction company shall be jointly liable for the payment of withholding taxes, and social security and mandatory insurance contributions due by subcontractors for their employees.	The liability of the construction company cannot exceed the consideration due to the subcontractor. <a href="#">(18)</a>  The construction company can exclude liability by checking the documents evidencing payment of withholding taxes and social security contributions.  The construction company has the right to suspend payment of the consideration to the subcontractors until the subcontractors have delivered the necessary documents. <a href="#">(18)</a>
	The invoice submitted by the subcontractor to the construction company does not include VAT. The construction company must add VAT to such invoice and pay it together with its own VAT.	The provisions will become effective as soon as the EU authorities have authorized them.

## NOTES

- (1) The new tax rules for transfers and leases of buildings may have an impact on VAT deduction taken in prior tax years. In the case of “business” buildings, there is no duty to rectify the VAT deduction taken with reference to buildings already owned on 4 July 2006 during prior tax years, and the update must be made only at the time of the first transactions after 12 August 2006 if there is no option for subjecting the transaction to VAT. In the case of nonbusiness assets (residential properties), there is no need to rectify the VAT deduction with reference to (i) buildings owned on 4 July 2006, and (ii) buildings owned by construction companies and restoration companies for which the four-year term after the completion of the works expired before 4 July 2006.
- (2) Buildings classified in Groups “C” (shops, warehouses), “D” (industrial sites, plants, hotels), “E” (stations for transportation services, special buildings) and “A/10” (offices).
- (3) “Construction companies” and “restoration companies” are those that have built the buildings, also by means of a construction contract with another party, or have carried out the restoration works.
- (4) According to commentators, changes that will take place in the years after the signing of the agreement are not relevant to determining the possible application of VAT.
- (5) The option to apply VAT must be indicated expressly in the purchase/sale deed or in the lease agreement.
- (6) The standard VAT rate is 20%. Reduced rates may be applicable (4% if the buyer enjoys the benefit of a “first home” purchase).
- (7) Registration tax is reduced to 3% for historical/artistic assets and to 1% for transfers of land and buildings in areas that are subject to special zoning plans for the implementation of subsidized residential developments through *Convenzioni* with the public authorities (defining sale prices and rent). Registration tax is a fixed amount (€168) for transfers of land and buildings entered into by entities that implement public or private restoration plans.
- (8) Registration tax is reduced to 3% in the following cases: (i) the purchaser has a right to the “first home” reduction, and (ii) for historical/artistic assets. Registration tax is reduced to 1% in the following cases: (i) the purchaser is a real estate company that agrees to resell the assets within three years, and (ii) transfers of land and buildings in areas that are subject to special zoning plans for the implementation of subsidized residential developments through *Convenzioni* with the public authorities (defining sale prices and rent). Registration tax is a fixed amount (€168) for transfers of land and buildings entered into by entities that implement public or private restoration plans.
- (9) As of 1 October 2006, real estate funds will enjoy reduced rates for mortgage tax (1.5%) and cadastral tax (0.5%).
- (10) Mortgage and cadastral taxes are a fixed amount (€168) in the following cases: (i) transfers of land and buildings in areas that are subject to special zoning plans for the implementation of subsidized residential developments through *Convenzioni* with the public authorities (defining sale prices and rent), and (ii) transfers of land and buildings entered into by entities that implement public or private restoration plans.
- (11) Mortgage and cadastral taxes are a fixed amount (€168) in the following cases: (i) the purchaser has a right to the “first home” reduction; (ii) the purchaser is a real estate company that agrees to resell the assets within three years; (iii) transfers of land and buildings in areas that are subject to special zoning plans for the implementation of subsidized residential developments through *Convenzioni* with the public authorities (defining sale prices and rent); and (iv) transfers of land and buildings entered into by entities that implement public or private restoration plans.
- (12) The new rules have clarified that land can never be amortized. If a building has been constructed on the land, it will be necessary

to apportion the total value between the value of the buildings and the value of the land and appurtenances. In particular, the cost of the land is determined to be equal to the expert's evaluation and in any event not lower than 20% (30% for industrial buildings) of the total cost.

- (13) A piece of land is a “building site” if it is possible to build on it in accordance with general zoning plans adopted by the municipality, regardless of the approval of the plan by the region and the approval of any implementation plan.
- (14) Registration tax is reduced to 1% for transfers of land and buildings in areas that are subject to special zoning plans for the implementation of subsidized residential developments through *Convenzioni* with the public authorities (defining sale prices and rent). Registration tax is a fixed amount (€168) for transfers of land and buildings entered into by entities that implement public or private restoration plans.
- (15) Mortgage and cadastral taxes are not applicable.
- (16) These are obviously “anti-avoidance” rules. Their application is unclear, and there is a risk that they will be very expensive in practice.
- (17) Reduced tax rates will apply as of 1 October 2006. Until such date, the new increased rates (mortgage tax 3% and cadastral tax 1%) shall apply. Furthermore, it will be possible to deduct registration tax paid on rent from the mortgage and cadastral taxes due at the time of the repurchase of the assets by the user.
- (18) The provisions will become applicable as soon as the competent ministry has issued the appropriate rules to determine which documents must be delivered by the construction company or the subcontractor.
- (19) The current rules will remain in effect regarding the duty of the principal (who is also an entrepreneur or an employer) for a period of one year after completion of the works to (i) pay the salaries and the social security contributions of the employees of the construction company, and (ii) be jointly liable for the payment of the withholding taxes on employment income.

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