Proposals for the Reform of the Legislative Framework for Real Estate Taxation

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DEFINITIONS

CIT	Corporate Income Tax (*Impuesto sobre Sociedades*)
DGT	General Tax Directorate (*Dirección General de Tributos*)
IGT	Inheritance and Gift Tax (*Impuesto sobre Sucesiones y Donaciones*)
NRIT	Non Resident Income Tax (*Impuesto sobre la Renta de no Residentes*)
PIT	Personal Income Tax (*Impuesto sobre la Renta de las Personas Físicas*)
Transfer Tax	Tax on Capital Transfers made for Valuable Consideration (*Modalidad transmisiones patrimoniales onerosas del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados*)
TIVUL	Tax on the Increase in Value of Urban Land (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana*)
SML	Securities Market Law (*Ley 24/1988, de 28 de julio, del Mercado de Valores*)
SOCIMI	Spanish REIT (*Sociedades Cotizadas de Inversión en el Mercado Inmobiliario*)
Stamp Duty	Tax on Transactions Evidenced by Legal Documentation (*Modalidad actos jurídicos documentados del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados*)
VAT	Value Added Tax (*Impuesto sobre el Valor Añadido*)
WT	Wealth Tax (*Impuesto sobre el Patrimonio*)

EXECUTIVE SUMMARY

1.1 INTRODUCTION

The real estate sector has played a key role in sustaining economic growth in Spain over the past two decades. However, in the current situation of economic crisis, we need to consider new measures which will breathe fresh life into the real estate business in this country and ensure that the sector mains a lead role in the new economic model which will eventually emerge.

With this aim in mind, the *Fundación Impuestos y Competitividad* has sponsored this Project for the Reform of the Legislative Framework regulating the Real Estate Business, the purpose of which is to detect the main imperfections and problems present in the current legislation on real estate taxation and offer a series of recommendations and proposals for improvement which, taking as their starting point the many merits of the current tax system applicable to the real estate business, facilitate a review of it and, in conjunction with measures adopted in other areas, assist in bringing about the necessary recovery of this sector.

This report does not set out to propose a new political taxation model; instead, it proposes a series of measures which take into account the different sensitivities and interests (which do not always coincide) in the many areas which bear a relation to the matter being studied. In this respect, it is to be noted that the authors of this report have confined their work to stating their opinions and making their proposals; this does not signify that each and every one of them necessarily shares all the opinions expressed or supports all the proposals made throughout this Project.

Without prejudice to the specific proposals which are set out below, there are a number of guiding principles underlying this Project and which are worth considering.

On the one hand, attention is drawn to the need for greater coordination between public administrations at different levels in order to reduce the level of complexity and ensure that the disparity in the tax treatments applicable in the different Autonomous Communities to situations which are identical, does not lead to distortions of supply and demand at territorial level, thereby affecting the business decision-making process.

On the other hand, although the information system in place is, in general, well suited to its objectives, there is a need for greater legal certainty for investors. This requires clarification of the taxable events for certain taxes and the establishing, by the Administration, of the criteria and lines of interpretation to be applied.

Another important recommendation made, in line with the principles established in Community legislation, is for Value Added Tax ("**VAT"**) legislation to cover the real estate business in its entirety, without the taxation issues assuming a key role in the business decision-making process.

In terms of the Project's structure, the first part of this study contains an analysis of financial authorities and competences. Based on a detailed review of the impact of the real estate crisis on the collection of taxes, this section advocates, among other measures, the aforementioned coordination between the different public administrations at regulatory level and in relation to their areas of competence.

The second part of the study makes a detailed technical analysis of the various different taxes, seeking to identify areas in which there is room for improvement and make recommendations for the design of a system of taxation for real estate transactions which, while eliminating the uncertainty and distortion which currently exist, provides the incentives required for the sector's economic recovery.

Although the Constitutional right to adequate housing should ideally be guaranteed through active welfare policies implemented by public authorities, at a time such as this it is worth considering the establishment of incentives of other kinds whereby access to housing can be promoted through taxation. Along these lines, this study presents throughout its content proposals for amendments to Personal Income Tax ("**PIT**") legislation, such as the possible maintaining of the deduction for the acquisition of a main home restricted to tax-payers on low incomes, or the introduction of a permanent deduction for the renovation of a main home.

Another priority is the promoting of rentals as another way of reducing the stock of empty residential properties. Based on a current tax treatment which we consider favourable, there are measures which could be adopted to help achieve this, such as the introduction of an exemption from taxation on capital gains when residential properties are disposed of in order to acquire others which are to be rented out, or the treatment of income from rentals, for PIT purposes, as savings income. Another possibility to be

considered is that of extending the benefits available for Wealth Tax ("**WT**") and Inheritance and Gift Tax ("**IGT**") purposes so that they cover the pursuit of real estate rental activities without the requirement that there exist a premises and employees, since this is costly and often unnecessary.

In the area of Corporate Income Tax ("**CIT**"), although the current economic situation calls for budgetary restrictions and has made it necessary to adopt measures which bring forward the payment of this tax (such as the introduction of limitations on the tax deductibility of amortisations or financial expenses or the limitations on the offsetting of tax losses), the possibility could be considered of introducing amendments which reduce the negative impact of the restrictions approved in the case of real estate companies, which have been particularly badly affected by the current cycle. For example, an amendment could be introduced whereby the capital gains deriving from the sale of real estate assets are taken into consideration when calculating the operating profit for the purposes of the limitation on the deduction of financial expenses, in such a way that the tax treatment no longer constitutes an obstacle to the pursuit of real estate investment activities.

As it has been mentioned above, VAT legislation should envisage the taxation of all the business or professional activities relating to real estate, from the commencement of the development process (without taking into consideration time criteria or the effective commencement of the works) through to the point at which the property is put to private use (levying this tax, for example, on second supplies of buildings which have not been put to private use, a situation which is currently very common due to the mortgage foreclosures being executed by credit institutions). Also to be recommended are clarification as to where the boundary lies between VAT and Transfer Tax in cases such as transfers of businesses on a going concern basis, to ensure that the tax treatment is neutral and has no impact on the adoption of business decisions, and provisions which make it possible to opt for the subjection to VAT of acquisitions of real estate. In relation to this point, we greatly welcome the recent reform of Article 108 of the Securities Market Law ("**SML**"), although clarification of the main questions arising in relation to the application of the new rule would be desirable.

Another issue of particular significance, bearing in mind the large number of transactions for the refinancing of debts secured by mortgage guarantee taking place over recent years, is the situation of legal uncertainty in which the debtor is placed in

relation to the application to these operations of the Stamp Duty. Although a change in the legislation would be desirable for the clarification of the tax treatment corresponding to these operations, our recommendation is that the Administration make every effort to specify the arguments based on which certain conclusions are reached with regard to the taxation of novation and subrogation operations, in its responses to taxpayers' consultations, and that it unify the treatment applicable for the purposes of certain taxes when there exist no legal grounds substantiating the application of a different form of taxation.

In relation to the Non Resident Income Tax ("**NRIT**"), although the Spanish legislation can be considered well-structured in general terms, in our opinion there is scope for the improvement of certain aspects in order to boost investment, such as the simplification of the regime for refunds of this tax, or clarification of the tax treatment in Spain of the investments which are ever more frequently being made by certain foreign entities not envisaged in the Spanish legal system (such as *trusts, partnerships* and other entities without legal personality).

Attention is drawn also to the problems generated by the uneasy co-existence of differing valuations assigned to the same assets for the purposes of local taxes, Autonomous Communities taxes and State taxes. In this respect (and without prejudice to the prevalence, where appropriate, of the price actually paid), it is to be recommended that the valuations communicated by the Administration at the request of taxpayers, by way of information provided prior to acquisitions or transfers of real estate, be considered binding upon all the administrations and for the purposes of all taxes.

Finally, in relation to local taxes, mechanisms need to be put in place to ensure that cadastral values actually performs their function as a measurement of the economic capacity deriving from real estate ownership. The objective calculation method used to arrive at the tax base for the Tax on the Increase in Value of Urban Land ("**TIVUL**") also requires amendment, to ensure that such base reflects the appreciation actually obtained, since in practice, situations are arising in which the amount of tax exceeds the increase in value obtained by the transferor, in breach of the principles to which tax Law is required to adhere.

These points, and others, certainly indicate that there is the need for some serious reflection on the way in which the real estate sector is taxed. It is hoped that the

publication of this Project will provide the bases for such reflection, which will undoubtedly require the cooperation of all the parties involved.

1.2 ANALYSIS OF TAX AUTHORITIES AND COMPETENCES

- It is clear from the study made that the relative importance of the real estate sector in the Spanish economy has diminished as a result of the economic crisis, which has had a particular impact on such sector's key economic indicators. These problems have had a serious adverse impact on the collection of taxes associated with real estate activity in Spain, with autonomous and local tax authorities being particularly badly affected.

- The fiscal design of the real estate business cycle in a multi-jurisdictional tax system such as that in place in Spain requires a comprehensive approach supporting a vertical distribution better suited to the taxable events associated with planning regulation and the construction business, and with the marketing, financing, acquisition, enjoyment and conveyancing of real estate. In this respect, the establishment of similar technical valuation elements to be used for the purposes of an ensemble of taxes as varied and complex as that associated with real estate would help contribute to the efficiency of the design of the taxation of this sector.

- On the other hand, the regional and local differences in the exercising of regulatory authority over the taxes applicable to this sector necessarily make the tax legislation more complex, involving a differentiation which, when it affects only the potential beneficiaries, is not necessarily negative. If can, however, in certain situations, lead to distortions at territorial level in the supply and demand for real estate in a market which is to a great extent inter-connected and subject to a multiple tax system. In these cases, greater coordination between governments at different levels would facilitate the adoption of more adequate tax measures and allow for greater transparency in the real estate sector.

1.3 TECHNICAL TAX ANALYSIS

1.3.1 PERSONAL INCOME TAX

- The purchasing and renting of homes require similar regimes of state aid, so as not to produce distortion in the process whereby an individual decides upon a way of obtaining housing. Accordingly, the deduction for the acquisition of a main home should be maintained in the case of taxpayers with a tax base of less than Euros 24,107.20.
- The maximum tax base limit for entitlement to a deduction for rental (and the proposed deduction for a purchase) should be raised to at least Euros 28,381.43.
- The following corrections of a technical nature need to be made to the reduction in favour of the lessor regulated in Article 23.2.1 of the PIT Law:
  - The rule that it is not possible to apply the reduction to income not declared by the taxpayer and discovered by the Administration should be eliminated.
  - The application of the reduction to negative income should be eliminated.
  - The reduction should be extended to include rental income from a business activity and which is therefore taxed as income from economic activities.
  - The reduction should be extended to include rentals to public leasing corporations and housing lease companies.
- The PIT regulations applicable to lease-to-own arrangements should be improved.
- There should be a permanent and separate deduction for renovation for PIT purposes which is available to all taxpayers, irrespective of their level of income, and in respect of all properties, regardless of their nature.
- The taxation of a capital gain resulting from the conveyance of a rented property as savings income -irrespective of whether the asset in question may or may not be considered allocated to a business activity- should be considered correct within the dual taxation system in place for PIT purposes. The income

generated by capital employed in the pursuit of a business activity -which in this case generates non-recurring or extraordinary income- should not be taxed as an increase in income from the economic activity.

– There are currently two types of exemption in the taxation of capital gains deriving from the conveyancing of real property which constitutes the taxpayer's habitual dwelling, i.e. the exemption for reinvestment in a new habitual dwelling, and the exemption for a conveyance made by a person over sixty-five years of age; the view held is that these two types of exemption should be maintained. Both respond to two basic circumstances: the constitutional right guaranteeing access to housing and the guaranteeing of the financing of situations of dependence among persons aged over sixty-five, who are allowed to realise the asset which is their home without such realisation being taxed.

– In view of the current economic climate, the need to favour expansion of the rented homes market, and the need to reduce the stock of residential properties up for sale, consideration should be given to the possibility of a legislative amendment which broadens the scope of the exemption for reinvestment, making it available not only in respect of main homes but also for the conveyance of any type of property insofar as the sole purpose of the reinvestment made is the acquisition of housing which is to be rented out for a significant period of time.

– The current treatment of income from savings – which excludes income from capital deriving from the rental of real estate assets – generates a distortion in the tax treatment given to this income from capital which is difficult to substantiate on the grounds of the neutrality which the dual taxation system for PIT purposes is intended to achieve.

– The taxation of income generated by the rental of real estate assets as income from savings should be applied, both when such income is generated in the pursuit of a business activity -and therefore through an organised structure of material and human resources- and when it is not.

1.3.2 TAXES ON CAPITAL: THE INHERITANCE AND DONATIONS TAX AND WEALTH TAX

– Clarification is required of the criteria used to determine whether real estate assets are allocated to an economic activity, relativising the single criterion -i.e. fixed premises and hired personnel- currently being applied in respect of rentals of real estate assets. In this respect, a criterion similar to that envisaged for PIT purposes -specifically, in Article 29 of the PIT Law- could be opted for. According to point 1.c) of this rule, any asset necessary in order to generate the respective return is classed as being allocated. At the same time, the rule excludes expressly assets representing stakes held in the capital and reserves of an entity and the assignment of capital to third parties. Therefore, by excluding moveable assets from those assets which can be considered allocated, the Law, by contrast, appears to be leaning towards the classing of real estate assets as assets allocated to a business activity, provided that they are necessary for such activity.

– Furthermore, there should be the possibility of evidencing, in each specific case, that the real estate asset is necessary for the business activity, without making this conditional upon the existence of a fixed premises and hired personnel. In short, far greater flexibility should be permitted in the criteria used to determine whether a real estate asset is linked to an economic activity, based on the need for such asset for the purposes of pursuing the activity which constitutes the business's purpose. There should be greater probatory freedom and liberty in the overall evaluation of all the evidence presented, with particular importance being attached to books of account.

– The inclusion of a new situation of exemption from WT -either total or partial- for real estate assets rented out by their owners as housing could prove highly efficient, for the following reasons:

  – Because logically, the tax treatment of a property which is rented out should not be the same as that given to a property which is unused, since the economic functions served in either case are very different.

  – Because this would favour the growth of the property rentals market, particularly the market for rentals of residential properties.

– Because in this way the creation of fictitious organisational structures by taxpayers who have a small number of properties rented out could be avoided.

– Because this would simplify subjection to this tax.

– Because it would to some extent favour convergence -which in our opinion is necessary- with other taxes, e.g. VAT.

– Because this would be a measure favourable to the protection of savings (as opposed to an investment incentive) when channelled through the acquisition of productive assets such as real estate which are rented out.

– Because it would help simplify for many taxpayers the planning of family wealth, provided that this measure was accompanied by concordant amendments to the IGT system in relation to the reductions applicable to the tax base.

1.3.3 CORPORATE INCOME TAX

– Leaving aside the provisions of special CIT regimes -such as the regime for entities engaging in the renting out of residential properties or the regime for Listed Real Estate Market Investment Companies (Spanish REITs, with the acronym "**SOCIMI**")- , it would be worth reviewing also certain aspects of the general CIT regime to eliminate certain areas of legal uncertainty and ensure the effectiveness of those tax incentives hoped to be established and which -irrespective of the manner in which they may be adjusted in view of budgetary circumstances- cannot be ruled out at the present time.

– In relation to incentives, it is to be noted that once the rules on accelerated amortisation have been repealed, their potential will be at the lowest level ever known in respect of this particular tax. Speaking of those incentives which already exist or which would be easiest to implement, it would seem reasonable to request, at least, clarification of the requirements to be met for the application of the deduction for reinvestment -eliminating those which are purely formal in nature and reviewing some of the temporal parameters-, and the recovery -adjusted as may be considered appropriate- of a system of amortisation for tax purposes which is not subject to strict bookkeeping

requirements. Similarly -turning our attention to a measure which, rather than acting as an incentive, would avoid a disincentive currently in place-, it would be advisable to include a specific treatment for real estate activities within the context of the rule placing restrictions on the deductibility of financial expenses –interest deduction barrier rules-.

– On the other hand, from the point of view of legal certainty, it would be advisable to address the increase in the level of litigation which could arise in relation to the deductibility of impairment losses on real estate assets. This could be achieved through a specific tax regime, similar to that established in Article 12 of the CIT Law in relation to assets of a different kind.

– The amendments to the Law on SOCIMIs will no doubt help to ensure that these entities are given the chance to play a major role in the real estate market in Spain. The putting into practice of these new regulations will undoubtedly bring to light aspects which are controversial or areas in which there is room for improvement; in the meantime, however, attention is drawn to the well-thought-out nature of the changes made to the tax regime applicable to these companies, and in particular, to the fact that the CIT rate applicable to them has been set at nought per cent.

– On the other hand, with a view to promoting the use of other vehicles for investment in real property -such as Real Estate Investment Funds and Companies- we advise flexibilising -insofar as is possible and without reducing the necessary protection which is afforded to small investors- the excessively stringent requirements imposed in the pertinent regulations in relation to their functioning.

1.3.4 TAXATION OF NON-RESIDENTS

– As it has been mentioned, legal certainty and non-discrimination are two of the most important aspects taken into consideration by any foreign investor when evaluating a potential investment or disinvestment, in the real estate sector also.

– Although in general terms the Spanish rules on the taxation of non-residents may be considered reasonable in this respect, our understanding is that certain measures could be adopted to improve upon the two aspects mentioned.

– The possibilities in this respect include the following (i) clarification of the rule whereby the tenancy of a rented real property in Spain is classed as a permanent establishment (for the purposes of both the NRIT and VAT); (ii) clarification of the tax treatment in Spain of investments made by certain foreign entities not envisaged in the Spanish legal or tax system (*trusts*, *partnerships*, trusteeships, investment funds, *REITs*, etc.); (iii) making comparable the tax regime applicable to income from the renting out of residential properties located in Spanish territory obtained by non-resident natural persons; (iv) the amendment of the regime whereby taxes are withheld and subsequently refunded, where appropriate, on income received from the renting out of real estate by taxpayers resident in the European Union and without a permanent establishment in Spain (so that the deductibility of expenses can be carried into effect); and (v) establishing the comparability to the Spanish Real Estate Investment Funds, for tax purposes, of certain foreign real estate funds.

1.3.5 VALUE ADDED TAX

– There are some major areas of uncertainty in relation to the subjection to VAT of land development operations. These aspects need to be addressed by objectivising the subjection to VAT of these operations, and by clarifying the treatment to be given to transactions in respect of land use rights and the effects of the inclusion of owners in planning bodies such as equalisation committees and similar.

– The exemption of second and subsequent transfers of buildings should also be reviewed to exclude from it -i.e. to make subject to VAT- supplies of new buildings prior to their use for the first time, irrespective of such transfers as may have taken place prior to such first use.

– The waiver of the exemption in certain real estate operations causes problems owing to the need for the acquirer to be a business or professional entitled to deduct input VAT in full; this is another aspect which should be revised.

– There is also some uncertainty regarding the setting of the tax rate applicable to supplies of residential assets, although this could be set based on the objective characteristics of such assets.

- Besides, there is some uncertainty in relation to aspects such as the subjection to Transfer Tax of the transfer of real estate assets included in the transfer of a business as a going concern, the increase in the Stamp Duty rates when the exemption from VAT is waived, or the conditions for the taxation of transfers of real estate companies when Article 108 of the SML is applied.

- The indirect taxation of transfers of businesses as going concerns is one of the issues which has sparked most interest among scholars in the areas of administrative and case law. The differing consequences, in practical terms, of a particular operation involving the conveyance of real estate assets being subject or not subject to VAT can have an impact on the viability of many operations bearing in mind that the cost deriving from the application of Transfer Tax to the value of such properties is not recoverable.

- The General Directorate of Taxation ("**DGT**") has issued a great many rulings to taxpayers' consultations regarding the definition of a going concern, and these rulings show that there has been a process of evolution from the approaches initially adopted -in which the application of the non-subjection only to universal transfers of business assets and liabilities was considered- to the recent and more developed responses.

- The variety of cases to which these responses relate, however, indicate that there is a need to provide the party applying the rule (i.e. the taxpayer) with general interpretative criteria which ensure that there is a degree of legal certainty. In this respect, it would be advisable for the definition of this legal concept to adhere as closely as possible to equivalent concepts in other areas of Law (in particular, the concept of the line of activity for CIT purposes).

- Our understanding, however, is that the administrative interpretation is not sufficient to eliminate some areas of uncertainty or avoid certain results which are less than satisfactory. For this, the possibility should be considered of making legislative changes which allow for the rectification of certain technical flaws (the lack of synchronisation between the rules for taxation under Transfer Tax and VAT, in relation to the definition of those cases in which the first of these taxes can be applied), or which avoid unnecessary tension between these two indirect taxes which can artificially impact the business decisions adopted

by taxpayers (making non-subjection optional, reducing the Transfer Tax rate applicable when the non-subjection to VAT is applied, and making changes to the scope of territorial competences to avoid contradictory interpretations).

1.3.6 TRANSFER TAX AND STAMP DUTY

– The provisions regarding the classing of real estate for legal purposes as subject to Transfer Tax and Stamp Duty should be contained and defined in the Transfer Tax and Stamp Duty Law itself, since the referral made to the Civil Code or to administrative Law leave room for interpretation in this respect, especially in relation to administrative concessions of public works.

– Public deeds which document subrogation to the position of creditor or the amending novation of finance contracts secured by mortgage guarantee should be subject to Stamp Duty only in cases in which the requirements of Article 31.2 of the Transfer Tax and Stamp Duty Law are met: in other words, the document (i) must be the first copy of a notarised deed or certification; (ii) its object must be an amount or thing whose value can be measured; (iii) it must record transactions or agreements which can be entered in the Land Registry, the Companies Registry, the Industrial Property Registry or the Registry of Moveable Assets; and (iv) it must not be subject to the IGT, Transfer Tax or Capital Duty.

– Taxpayers are clearly left in a position of legal uncertainty in relation to the tax treatment applicable to subrogation and mortgage novation deeds. Such uncertainty derives, in part, from the unsatisfactory wording of rule 31.2 of the Transfer Tax and Stamp Duty Law -particularly in relation to the requirement that the transaction or contract documented have a content whose value can be measured- and in part from expert opinion in the area of administrative law which is in some aspects flawed and requires rectification by the DGT.

– In our opinion, the interpretation which is most correct is that the amending novation of a financing contract secured by mortgage guarantee should only be subject to Stamp Duty insofar as there is an amendment to the mortgage liability secured, which forms the tax base and is the element required for the transaction documented in the contract to have a content of measureable value. It is important, however, for legal scholars in the area of administrative law to

establish criteria which -even if they lead to a different conclusion- are clear and do not vary, thereby permitting the extrapolation of generic conclusions to make them applicable to any specific case.

– It is highly advisable that the Administration make a particular effort to correct the deficiencies detected, by (i) clarifying the facts involved in the cases to which published consultation responses relate, and developing in detail the arguments based on which certain conclusions have been reached in relation to the tax treatment of novations and subrogations of mortgage financing contracts, and (ii) unifying the tax treatment applicable (to establish taxation or otherwise) to these transactions when there exist no legal grounds for applying a different form of taxation.

– The new wording of Article 108 of the SML, introduced by means of the first final provision of Law 7/2012, corrects some of the deficiencies for which this legislative measure has traditionally been criticised. As a result, *the exception to exemption* envisaged in Article 108 of the SML is to apply only when the acquisition of shares or participations takes place on the secondary market. It is also established that there is to be no change to the tax applicable as a result of the measure; therefore, if the acquirer is a business or professional, VAT is to be applied instead of Transfer Tax. Finally, the intention is to reinforce the function of this rule as a measure to combat the avoidance of taxation, by attempting to apply it only in cases involving avoidance.

– In this latter case, the legislator undertaking the reform had the possibility of including a rule based on valid economic grounds, yet opted to stipulate expressly those circumstances in which the acquisition or participation is presumed to have been made for the purposes of tax avoidance; this is in line with the North American system, which has set out to codify forms of conduct aimed at tax avoidance. This approach has been taken based on the understanding that it is more reasonable, in terms of legal certainty, to provide a list of situations implying avoidance than to establish an open-ended *business purpose test* clause. The basic principle applied in the new wording of Article 108 of the SML, however, based on the allocation to an economic activity of the real properties included in the assets of the company whose shares or participations are acquired, gives rise to the problems of vagueness referred to

above since the rule speaks of the allocation of real properties to economic activities and this does not eliminate the uncertainty present.

– More problems arise in relation to the application of VAT as a result of Article 108 of the Securities Market Law, which takes place when the acquirer is a taxable person for the purposes of this tax. The conversion of an acquisition of shares or participations, by authority of the law, into an acquisition of real property, by means of an anti-avoidance rule not relating to VAT, may give rise to the problem of whether the tax administration is to accept, based on the specific legislation in respect of VAT, the deduction of an input VAT charge borne on an exempt operation (an acquisition of shares or participations) which is reclassed as an operation subject to this tax (the acquisition of real property) by means of a mechanism falling outside the scope of VAT rules and the VAT Directive.

– For this reason, in addition to considering the possibility of eliminating Article 108 of the SML, which would be desirable, it could perhaps be proposed, at least, that this rule should not be applicable to acquisitions of shares or participations made by businesses or professionals.

– The rules regarding the increase in the Stamp Duty rates owing to the waiver of the exemption from VAT include certain technical flaws which have led to the utilisation of business alternatives aimed at avoiding the application of this increased rate. Doubts arose as to whether this increase in the tax rate should be applied when the waiver of the exemption is established in a prior private document (for example, in a contract formalising a promise of purchase and sale). In these cases, upon formalisation of the deed, the parties simply place on record the subjection to and charging of VAT.

– The wording of these autonomous rules leaves loopholes which make it possible to avoid the increase in the Stamp Duty rates. This indicates the poor technical quality of these rules, whose purpose is, exclusively, the collection of more taxes.

– The possible breach of the principle of economic capacity, the provocation of tacit offsetting operations, and the possible contradiction of the terms of the VAT Directive, all justify the repeal of these autonomous legal rules or,

alternatively, the setting by the State of a minimum and maximum increased rate, to avoid situations of inequality in taxation between different territories.

– With regard to the verification of values, valuations made by the Administration at the request of taxpayers as an information procedure taking place prior to the acquisition or transfer of real properties, as envisaged in Article 90 of the General Tax Law, should be considered binding for all administrations and in respect of all taxes. In this respect, the valuation should have binding effect when the information reported by the individual is concordant with the value assigned by the Administration, when such value is to be reflected in the consulting party's return, which must be filed within six months counted as from the communication of the valuation.

– The valuation by the Administration should be fully binding upon it, and this should mean that such valuation cannot be subjected to verification proceedings in the future; also, it should be possible to appeal against it. In addition, an alternative method should be envisaged, whereby the party concerned can propose a value in respect of an asset, as in the case of prior assessment agreements. In this case, failure by the Administration to issue a resolution would have the effect of signifying the acceptance of the value proposed by the taxpayer.

1.3.7 LOCAL TAXATION

– Measures should be taken to promote the updating of cadastral values through the General State Budgets Law, by applying coefficients differentiated by value areas and basic construction modules.

– It is also necessary to envisage situations in which collective valuation procedures of general scope would take place automatically. The idea would be for such procedures to be triggered not at the request of the municipality concerned, but by alterations in the market which give rise to significant variances in cadastral values.

– The tax base for TIVUL purposes should be made to reflect the increase in value actually obtained. There can be no better way of achieving this than by applying the rules established for the purposes of the personal taxes levied on such increases, i.e. PIT and CIT. The imputation of the increase in value to the

land would then be effected using the percentages reflected by the cadastral value.

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