

Parliament stomps on stamp duty for residential leases

November 24 2017 | Contributed by [Graf & Pitkowitz Rechtsanwälte GmbH](#)

Introduction

Overview

Residential lease agreements

Non-residential leases

Comment

Introduction

In the run up to the recent snap elections, Parliament passed a bill exempting rent agreements for residential leases from stamp duty. This bill entered into force on November 11 2017, notably the date which marks the beginning of carnival season in Austria. Unfortunately, the exact scope of the exemption is far from clear.

Rent agreements for non-residential leases remain subject to stamp duty, and the act has missed the opportunity to clarify certain open issues in this regard.

Overview

In Austria, the execution of a written lease agreement triggers stamp duty. This fee depends on two factors: the agreed rent and the duration of the lease.

The agreed rent includes all payments from the tenant to the landlord for the use of the leased premises, including one-time payments (eg, contributions to building costs) and ongoing payments (eg, rent, operating costs, value added tax, costs for hot water and heating and insurance costs).

The duration of the lease can either be for a fixed or indefinite term. In a fixed-term lease, the stamp duty is 1% of the agreed annual rent for every contract year. Thus, in a five-year contract, the stamp duty would be 5% of the annual value of the agreed rent. For long-term agreements, the maximum stamp duty is 18% of the annual value of the agreed rent. Indefinite leases can be terminated at any time; for such leases, the stamp duty is 3% of the annual value of the agreed rent.

Although both the landlord and the tenant are liable to pay stamp duty, the tenant usually pays.

Residential lease agreements

The Fee Act contained certain privileges for residential leases. In particular, stamp duty was capped at 3% of the annual value of the agreed rent; this also applied to long-term agreements. The new act abolishes this limit and exempts agreements for residential apartments from stamp duty altogether.

The new law entered into force on November 11 2017. It does not specify its scope in terms of timing. Stamp duty is generally triggered by the execution of the lease agreement. Thus, lease agreements will fall under the new regime if they are signed by both parties after that date, irrespective of the start date of the lease. Renewals of existing leases are also exempt if signed after November 11 2017.

AUTHOR

[Martin Foerster](#)



Non-residential leases

The stamp duty on non-residential leases – in particular, commercial and retail leases – remains unchanged. However, these leases are being re-evaluated due to recent case law from the tax authorities.

Until recently, the tax authorities treated lease agreements where one party waived the termination right for a fixed term and the other party had a rolling break right as unlimited leases, triggering stamp duty of 3%. This was also true for lease agreements which were – like (most) commercial leases – subject to tenant protection under the Rent Act.

This loophole was used for many commercial leases. For example, a lease would be concluded for a fixed term. The tenant would then waive the right to terminate the lease for the entire duration of the term. The lease would provide for a rolling break clause for the landlord. However, this break clause was limited by statutory law, which allowed the landlord to terminate the lease agreement only for good cause (eg, non-payment of the rent). Although this was effectively a fixed-term lease, the tax authorities considered it to be an unlimited lease.

Recently, the tax authorities have picked up this issue and ruled that such leases should be treated as fixed-term leases, triggering 1% stamp duty for every year of the lease term. The case is pending before the Administrative Court. It remains to be seen whether the Administrative Court will change this case law.

Comment

While the new act is to be welcomed, it is also an example of hurried drafting of laws.

In particular, the previous provision (which capped stamp duty for residential leases at 3%) referred to the lease of "buildings or parts of a building used predominantly for residential purposes". It explicitly included "ancillary rooms and ancillary parts of the property, such as basements, attics, storage rooms or garden areas", which were typically rented together with apartments.

By contrast, the new exception refers only to the lease of living space, thus prompting the question of whether premises used predominantly – but not exclusively – for residential purposes or ancillary spaces are also exempt. If they are not exempt, this would mean that stamp duty now applies without the 3% limit.

In most cases it will be hard, if not impossible, to determine whether premises are used exclusively or only predominantly for residential purposes. Think of someone using his or her flat as home office for a couple of hours per week. Similarly, it would be extremely difficult to allocate a certain part of the rent to the flat (exempt) and another part to (potentially not exempt) ancillary spaces, like a garden area.

Given that the aim of the act is to alleviate the tax burden from tenants, the lawmakers likely intended these scenarios to fall under the exemption. However, it remains to be seen whether the tax authorities share the same view.

For further information on this topic please contact [Martin Foerster](#) at Graf & Pitkowitz by telephone (+43 1 401 17 0) or email (foerster@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).