

Insolvency & Restructuring - Austria

Supreme Court clarifies application of real estate income tax following insolvency

Contributed by **Graf & Pitkowitz**

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In 2012 a tax was introduced on capital gains realised from the sale of real estate by individuals. If real estate is sold, the difference between the cost of its acquisition and the sale proceeds is taxed at a flat rate of 25%, with an option for regular progressive taxation.

However, one issue that remained unclear since the introduction of the tax was the question of who must pay if the property owner is insolvent, the property is sold in connection with the insolvency proceedings and the sale proceeds are transferred to pledgees that hold pledges in relation to the property. Legal scholars have argued that the pledgees (eg, banks) would have to pay such tax. Since the general creditors do not benefit from the sale proceeds, the tax represents costs for the special management, sale and distribution of the property. As such, it constitutes part of the so-called 'costs of the special estate' and is payable solely from the sale proceeds.

On May 28 2013 the Supreme Court rejected these arguments⁽¹⁾ and ruled that real estate income tax is a special form of income tax, payable from the general estate. In connection with an assessment of such tax, a taxpayer may opt for regular progressive taxation, rather than the flat rate of 25%. The court argued that there was no clear link to the sold property that would justify payment of the tax as costs of the special estate from the sale proceeds.

The judgment clarifies existing uncertainties for pledgees, especially banks, which feared that loans which they had assumed to be fully secured were subject to some sort of default risk if the tax were payable from the proceeds generated from the sale of the property. However, as a consequence of the judgment, the recovery rate of unsecured creditors of the general estate will be reduced, since the payment of real estate income tax from the funds of the general estate will reduce the distributable recovery rate.

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Endnotes

(1) 8 Ob 141/12m.

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