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Commercial Property - Austria

Supreme Court questions basis for taxation of property transactions

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Introduction

In Austria, certain property-related taxes are assessed not on the basis of the market value of the property, but rather on the basis of the tax value. This tax value was laid down for each plot of land in 1973 and today, in many cases, is significantly lower than the market value.

The Constitutional Court recently declared unconstitutional an article of the Court Fee Act, under which the fee for the registration of a new owner in the Land Register by reason of a deed of gift is taxed on the basis of the tax value.

Although this judgment concerns court fees only, it calls into question all occasions where property transactions are taxed on the basis of the tax value rather than the market value.

Case study

In the case at hand the registration of a real property partition in the Land Register was a bone of contention. Two people were registered in the Land Register as co-owners of a property. The real property was subsequently divided and each of the co-owners became sole owner of the respective part of the land.

In the course of the registration of this transaction with the Land Register, the court levied registration fees on both proprietors. The transaction was qualified as an exchange, where both parties gave up their co-ownership share of the whole real property (ie, half ownership of the whole property) in exchange for sole proprietorship of the respective part of the real property (ie, sole ownership of half the property).

The registration fee of 1% (now 1.1%) for an exchange was assessed on the basis of the value of the consideration received - that is, 1% of the market value of the traded property part.

The Constitutional Court considered this to be an inappropriate, less favourable treatment. For acquisition without consideration (eg, by way of gift), or where the consideration could not be determined, the registration fee is assessed not on the basis of the market value, but on the basis of a multiple of the tax value. In the court's view, the outdated tax value is not suitable as a basis for the assessment of registration fees. The court could not identify an objective reason for the fact that the level of the registration fee depends on the method of purchase.

Impact of the judgment

The provisions of the Court Fee Act that govern the preferential treatment of acquisitions without consideration were abrogated by the Constitutional Court, effective as at December 31 2012. Should the legislature fail to enact new legal provisions before this date, the registration fee for gifts effected as at January 1 2013 must also be assessed on the basis of the market value of the property.

In addition, the judgment has an indirect impact on other transaction-related fees. Apart from the Land Register registration fee and the property tax, the 3.5% land transfer tax is in certain cases assessed on the basis of the tax value.

Land transfer tax is calculated on the basis of three times the tax value in the following assignments without consideration or when a consideration cannot be determined:

- certain gifts and partial gift when exceeding the tax-free amount;
- inheritance when exceeding the tax-free amount;
- assignment by way of security; and
- consolidation of shares and assignment of the entire shares in a company that is the owner of real property.

Land transfer tax is calculated on the basis of twice the tax value if the requirements of the Reorganisation Tax Act are met for, among others:

- mergers and demergers;
- changes of corporate form; and
- contributions in kind.

The present judgment has no immediate consequences on these taxes and fees. However, for the second time, the court has held that there is no objective justification for the level of the tax being dependent on the type of acquisition. This reasoning also applies to the aforementioned taxes and fees. Therefore, it can be expected that the legislature will not only reform the system of court fees, but also revise other regulatory frameworks that are potentially unconstitutional. Should the legislature fail to adopt reforms, further complaints are likely to be taken to the Constitutional Court and revisions may be triggered.

Comment

Given the present climate of budgetary concern, it does not seem implausible that the legislature might seize this Constitutional Court judgment as a chance to eliminate existing fiscal privileges. In its commentary to the present proceedings, the federal government has already announced that in case of abrogation of the mentioned provisions, "essential parts of the Court Fee Act would have to be revised".

It can safely be assumed that in the course of revisions, the land transfer tax and registration fees will continue to be treated uniformly. Otherwise, administrative costs for these generally jointly levied dues would become disproportionately high.

The developments must be observed closely and potentially upcoming property transfers should be carried out as a matter of priority.

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