

Commercial Property - Austria

Taxation of real estate lotteries can be a gamble

Contributed by [Graf & Pitkowitz](#)

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Following the rise in demand for real estate in recent years, owners hoping to maximise their profits have started to look for new opportunities for liquidating their property. Willing to take extra risks, they have entered unfamiliar legal territory. Two recent Higher Administrative Court decisions regarding real estate lotteries show that such an approach is not always successful.

Background

The sale of property in Austria generally triggers a land transfer tax of 3.5% of the overall consideration. If no consideration exists, the historically assessed tax value of the property is considered as a basis. Tax computed in this way generally lies substantially below the land transfer tax on the basis of the actual market value.

Certain agreements, such as contracts involving uncertain benefits (eg, bets and gambles), are subject to stamp duty of between 2% and 25%.

In general, land transfer tax and stamp duty are mutually exclusive (ie, an agreement that triggers real estate transfer tax does not trigger stamp duty).

Recent decisions

In the first case before the court, a property with a market value of at least €1.5 million was offered in a raffle. After all 21,999 tickets had been sold at a price of €99, the lottery was held and the winner was awarded the property. The tax authority determined that the tax base for the 3.5% land transfer tax was the overall sum paid by all applicants (ie, €2,177,901). The buyer argued that the lottery and the property transfer were two separate legal events. Therefore, as there was no consideration for the property transfer, the land transfer tax should be based on the historically assessed tax value of the property.

The court confirmed the close inner coherence between the conditions of the lottery and the transfer agreement. It argued that both legal acts should be seen as a uniform process, as the property would not have been transferred if the condition of the sale of all lots was not fulfilled. The imposition of the land transfer tax of 3.5% on the basis of the overall sum paid by all applicants (ie, €2,177,901) was therefore appropriate. It was irrelevant who provided the consideration.

In the second case, the lottery was unsuccessful because only one-fifth of the total 16,000 lots issued (at €99 each) were sold. The owner was thus entitled to withdraw from the lottery and the property was not transferred. The tax authority claimed a fee of €190,080 from the owner, arguing that two different transactions (ie, the lottery and the purchase of land) had taken place. The legal basis for the fee was the Fees and Duties Act. In his complaint to the court, the owner referred to Section 15(3) of the act, according to which legal transactions subject to the transfer tax law are exempt from fees and duties.

As in the first case, the court highlighted that the public offer of lots itself (not the transfer of the property) was the relevant legal event triggering land transfer tax. Due to the close connection between the lottery and the (potential) transfer of property, only one legal act was identified by the court. The imposition of fee was therefore deemed unlawful.

Comment

No matter what creative marketing strategy the seller follows, if at the end of the day the

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property is transferred, this will trigger real estate transfer tax on the basis of the money (or other consideration) received.

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