Real Estate - Austria

New tax bill: heavy burden on share deals involving real property

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As part of its overall tax reform, the government recently proposed a new act to amend the taxes relating to real estate transactions. The act is expected to be passed in July 2015 and will enter into force on January 1 2016.

Existing legislation

To date, the taxation of real estate transactions has been limited to direct acquisitions of property (asset deals). Share deals trigger real estate tax only if a single person acquires 100% of the shares in a company which owns real estate. Companies which are part of the same value added tax (VAT) group, or that would be part of the same VAT group if they had their seat in Austria, are treated as a single person for these purposes. Thus, real estate transfer tax (RETT) can easily be avoided by structuring a share deal in such way that a second purchaser acquires a nominal stake in the company.

In the case of share deals, the tax base is three times the value of the uniform tax, with a cap at 30% of the market value. The uniform tax value is typically between 5% and 15% of the fair market value.

New taxable transactions

The act introduces two new types of taxable transaction – the transfer of shares in a partnership and the transfer of shares in a corporation.

The transfer of shares in a partnership triggers RETT if at least 95% of the shares are transferred within a five-year period. Unlike the existing regime, it is irrelevant if these shares are transferred to a single person or multiple buyers. The act concerns changes in partners which hold a capital interest. A change in partners with no capital interest in the partnership will not be considered a taxable event.

The transfer of shares in a corporation triggers RETT if a single person acquires at least 95% of the shares. In this case, no time limit applies. Companies forming a group of companies pursuant to Section 9 of the Corporation Tax Act are treated as a single person. The reference to the Corporation Tax Act (as opposed to the VAT Act under the existing legislation) serves to increase legal certainty, because – unlike VAT groups – companies form a group under the this act only if this has been formally declared by an order from the financial authorities.

In both cases, shares held by a trustee will be attributed to the trustor (ie, the beneficial owner). Thus, if a trustee is instructed to hold shares no longer on behalf of one person, but rather on behalf of another person, this will trigger RETT, if it concerns (alone or in connection with other transactions) at least 95% of the shares.

Tax base

The act introduces an entirely new tax base, which is the higher of the property value or the consideration received for the property. In the case of a transfer of shares or reorganisation measures (eg, mergers, demergers and in-kind contributions), the property value is always decisive.

Under the new act, 'property value' is defined as one of the following:

- three times the value of the land, plus the value of the building – the method of calculating the land value and the value of the building will be spelled out in detail for each Austrian region in a separate regulation;
- the value stated in a real estate price index – a regulation will clarify which indices may be used and whether depreciations from the index are permitted; or
- fair market value.

The act aims to ensure that the first two possibilities will lead to a value below the fair market value in order to encourage taxpayers to use existing data, rather than presenting individual expert opinions on the fair market value for each transaction.

Tax rate

The tax rate generally remains at 3.5% of the tax base. However, preferential rates apply in certain cases.

The transfer of shares in partnerships and corporations, as well as the transfer of shares by reason of reorganisation (eg, mergers, demergers and in-kind contributions), is taxed at a reduced tariff of 0.5%.

Transactions without consideration (and transactions between certain family members) are taxed at a progressive rate of:

- 0.5% for the first €250,000;
- 2% for the next €150,000; and
- 3.5% for property values in excess of €400,000.

Transactions are deemed to be without consideration if the purchase price (or other consideration) is less than 30% of the property value. On the other hand, if the purchase price (or other consideration) is more than 70% of the property value, the entire transaction will be deemed to be for consideration. If the purchase price is anywhere between these figures, the transaction is deemed partially against remuneration, which means that the progressive rate applies to that part of the transaction which is without consideration and the standard rate applies to the rest.

Other changes

The act introduces a number of other changes to the real estate tax regime, including the following:

- The act increases the income tax rate from 25% to 30% for all profits derived from real estate sales. When calculating the profit, the seller can no longer deduct for inflation.
- The act changes the depreciation rate for buildings which are held for the operation of a business to 2.5%, instead of 2%, 2.5% or 3%, respectively. The depreciation rate regarding buildings which serve as income from rent remains unchanged at 1.5%. Further, the act sets out a presumption that 40% of the acquisition costs relate to the land and thus only 60% are attributed to the building. Only the latter serve as a basis for depreciation.
- The reduced VAT rate of 10% has increased to 13% for certain services (eg, accommodation in furnished living rooms and bedrooms).

These amendments will enter into force on April 1 2016.

Comment

As the new act will significantly increase the tax on real estate transactions, in most cases it is advisable to effect share deals involving real property before the act enters into force on January 1 2016.

After that date, share deals involving property will require a different structure in order to avoid paying RETT at 0.5% of the property value. One possibility will be to transfer the shares of the shareholder, rather than the shares in the company which owns the real estate. In the case of a partnership, RETT can be avoided by transferring less than 95% at the first stage and transferring the remaining shares only after the five-year waiting period has expired. However, as after any major reform, it will take some time before settled case law has emerged which allows for prudent tax planning in connection with a contemplated transaction.

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