

Corporate Finance/M&A - Austria

Tax ruling puts real estate M&A transaction structure at risk

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A recent ruling of the Independent Fiscal Senate deemed a very common scheme used to prevent triggering real estate transfer tax to be an "abuse of tax law" according to Article 22 of the Federal Fiscal Code, and thus capable of triggering tax.

Real estate transfer tax

In general, the transfer of real estate located in Austria triggers a tax of 3.5% of the total amount paid for it. This tax is also levied when 100% of shares in a legal entity holding real estate are transferred to a single purchaser. In share deals, this tax is thus typically avoided by using a two-purchaser structure in which one purchaser acquires the majority interest and a second purchaser acquires a minimum interest (eg, 1%) in the real estate holding company. This approach has been approved in the past by the Administrative Court in several instances and is further backed by literature and practice.

Independent Fiscal Tribunal ruling

On June 25 2010 the Independent Fiscal Senate for the State of Tyrol ruled on whether a transaction in which 99% of the shares in a real estate owning company were transferred to the purchaser and 1% of the shares remained with the seller (which, in addition, formally acted as trustee for the purchaser) triggered real estate transfer tax. In its decision, the Senate established an economic (substance-over-form) approach, arguing that the chosen transaction structure was to be treated as an "abuse of law" because there were no non-tax reasons to structure the transaction this way. According to the ruling, the purchaser and the seller were liable to pay tax despite the fact that the shares in the company were formally held by two different entities.

The ruling has been appealed to the Administrative Court and a final decision is expected later this year.

Impact on transaction structuring

While the decision of the Administrative Court is pending, two steps should be followed in order to minimise the risk of triggering real estate transfer tax when doing real estate related share deals.

In two-purchaser acquisition structures, the second purchaser should not simply acquire a minimum share in the target, but rather a significant interest, to avoid the appearance that the second purchaser has no economic interest in the target. While it is currently not clear what constitutes a 'significant interest', Austrian commentators on this issue are advocating that the purchaser acquire at least 5% in the target. Formal trusteeships in this context should also be avoided.

Further, and as stated above, the Senate scrutinised whether the structure had been chosen solely for purposes of avoiding tax, with no other material reasons for the structure being apparent. In practice, the reasons for choosing the two-purchaser structure should thus be documented before executing the deal to be able to prove that the structure was chosen for other reasons (eg, group policy or finance related) as well.

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