Insolvency & Restructuring - Austria

New taxes on real estate sales: consequences for insolvencies

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Like other European countries, Austria has been forced by the prevailing financial crisis to consolidate its public finances through cuts and extra taxes. Against this backdrop, a new real estate income tax was introduced as of April 1 2012. Income from the sale of real estate, and hence the added value, is now taxable at a fixed rate of 25%. All properties purchased after April 1 2002 are taxable.

Before the introduction of real estate income tax, any gains from the sale of real estate constituted speculative income and were subject to income tax, provided that the property was sold within the first 10 years of acquisition. Taxation of speculative income was hardly relevant in insolvency cases.

When land encumbered by liens is now sold in the course of insolvencies, the question arises as to whether the new real estate tax qualifies as special estate costs. 'Special estate costs' are those relating to the management and sale of collateral, payable on a preferred basis from the proceeds from sale of the collateral (eg, a property encumbered with liens). The collateralised creditor will receive not the full proceeds from sale of the pledged item, but an amount less special estate costs. Should the new real estate income tax be qualified as special estate costs, the amounts paid to the collateralised creditor would be noticeably lower, which could result in a shortfall in collateralisation.

In connection with an old form of speculation tax, the Supreme Court ruled that the tax resulting from the sale of property did not constitute a claim against the special estate - and thus was a claim against the (general) estate.[1]

However, some legal scholars believe that despite this ruling, the newly introduced real estate income tax can be qualified as special estate costs after all. Reference is made to the Supreme Court judgment in Case 8 Ob/08a,[2] which attributed the costs of capital gains tax to interest income on special estate costs. Since the new real estate income tax was modelled on capital gains tax and triggers similar effects in case of private sales, it was suggested that real estate income tax would be attributable to special estate costs.

The Supreme Court is eventually likely to clarify whether the new real estate income tax constitutes special estate costs. However, until this happens, creditors should note that reduced amounts will be attributed to them from the proceeds from the sale of collateral. This may have significant adverse commercial effects on the collateralised creditor's position, as income from the sale of properties in insolvency proceedings is often lower than the collateralised claim, and the creditor is not fully satisfied anyway. The costs of sale payable from the sales proceeds will also reduce the funds paid to the collateralised creditor. The amount attributable to the collateralised creditor from the sale of the collateral would again be significantly reduced should the collateralised creditor now be required to pay the new real estate income tax on the sales proceeds as well.

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Endnotes

(1) OGH April 26 2011, 8 Ob 87/10p.

(2) OGH April 2 2009.

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