

The Federal Constitutional Court ruled that the German land tax is in breach of the German constitution

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In Brief

The German Federal Constitutional Court ruled in its decision¹ on 10 April 2018 (Az: 1 BvL 11/14, 1 BvL 12/14, 1 BvL 1/15, 1 BvR 639/11, 1 BvR 889/12), that the method for the determination of the assessment basis of German land tax is in breach of the German Constitution. The current method of determining the fiscal values remains applicable however until at least 31 December 2019.

German Land Tax

Background

With tax revenues of almost EUR 14 billion per annum German land tax is one of the most important source of revenues for German municipalities.

Land tax is a recurring annual tax levied by the municipality and payable under the provision of the Land Tax Act (*Grundsteuergesetz*). All domestic real estate is subject to land tax unless a tax exemption applies (e.g. if land is used for public benefit).

The land tax is assessed in a two step procedure. In the first step, the tax authorities determine the base value (*Steuermessbetrag*) by multiplying the fiscal value of the property (*Einheitswert*) with the applicable basic federal rate (*Steuermesszahl*). In the second step, the municipal authorities apply their local tax rate (*Hebesatz*) to the base value determined in step 1.

The fiscal value is based on the value at 1 January 1964 (for properties in the territory of the former West Germany) and

1 January 1935 (for properties in the territory of the former East Germany). Generally, the fiscal value of real estate is substantially lower than the current fair market value.

The economic burden of land tax is usually transferred to the tenants by including it in the incidental rent charges.

Determination of the assessment basis

The method to determine the assessment basis for land tax – namely the fiscal values from the years 1964 and 1935 – has been subject to substantial discussions in the past years.

Legislative bodies discussed several different models for a revised Land Tax Act and a Bill was passed by the upper house of parliament (*Bundesrat*) and is currently pending at the Lower House of German Parliament (*Bundestag*). The key difficulty in this revision of the Land Tax Act is the complexity and cycle for determining the market value of each real estate property as the assessment basis for this tax. This is why under the current draft Act the new land

¹ http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/04/1s20180410_1bvl001114.html;
http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-021.html;jsessionid=4D4F4D58554848B2DC5C99F12128845B.2_cid361

values are to be determined as at 1 January 2022 and the draft law is to apply from 1 January 2027.

In the meantime, the Supreme Fiscal Court has found the present valuation procedures for land tax purposes to be in breach of the rule of equality of the German constitution and filed the named procedures at the German Federal Constitutional Court.

Decision of the German Federal Constitutional Court

In its decision on 10 April 2018 the German Federal Constitutional Court ruled that the determination of land tax based on the present fiscal values derived from 1935 and 1964 constitute a breach of the equality rule (Art. 3 of the German Constitution). This breach is not triggered by a deviation of the fiscal value from the market value itself but from the divergent development of the market values over a longer period.

Such breach of the equality rule cannot be justified e.g. due to administrative simplification or by the fact that all properties are valued below market value.

The court therefore came to the conclusion that the current determination of fiscal value is unconstitutional and that the legislator must amend the respective Land Tax Act to comply with the German constitution.

To meet this obligation the court has set two deadlines for the legislator. The current method of determining the fiscal value can be applied until 31 December 2019. If the legislator has not passed a new Land Tax Act by this date, the current regime will cease to be applicable. If, however, the legislator passes a new Land Tax Act by 31 December 2019 the current method of determining the fiscal value can be applied for a maximum additional 5 years after the announcement of the new Land Tax Act (Longstop date: 31 December 2024.).

Our view

As expected, the court found the current method of determining the fiscal value under the Land Tax Act to be unconstitutional. This verdict has, however no immediate effect on real estate investments as the land tax assessments for past years and up and until at least 31 December 2019 will most likely remain unchanged.

The deadline for the amendment of the Land Tax Act of 31 December 2019 and the additional extension of the current method until 31 December 2024 is shorter than the legislator initially hoped

for. However, in the light of the clear breach of the right of equality these two deadlines are longer than expected. It is not known whether the tax administration will be in the position to undertake the required revaluations within this timeframe.

It should be noted, that the court did not state the period in which such re-assessments have to be performed. Based on the wording of the decision it seems that the court would consider a time period of at least 6 years to be in line with the constitution.

Therefore, this decision does not require immediate action of real estate owners. However, landlords

- should ensure that any new lease agreements signed are sufficiently clear that the tenant can also be held liable for tax charges under the revised Land Tax Act, and
- should be ready to assist the German authorities in re-assessing the land tax value once the new law has been passed and
- should be prepared that revaluations will take place on a more regular basis going forward.

At present, it remains open whether this procedure will trigger an overall increased tax burden for real estate owners and tenants in Germany as the legislator is in principle free to adjust the tax rate in order to compensate for the increase in the fiscal value.

However, the shift of the tax burden between the individual real estate assets may certainly trigger an increased tax exposure for those assets that have seen an above average increase in value since the last valuation dates in 1964 and 1935. For those assets where the land tax is not on-charged to the tenant in particular, these increased costs will have to be reflected in the underlying business plan.

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