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LEGAL WISE BY MDME | INTEGRATED RESORTS VERSUS FINANCE BUREAU

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A grant of use (also known as "GOU") is an agreement required to rightfully operate a retail business and is commonly used by owners (landlords) in Macau (and other regions and countries) to regulate the operation of retailers. The GOU is the instrument through which landlords of retail spaces in shopping malls and hotel and casino complexes are able to regulate the businesses that are renting their retail space, businesses that are all profiting from several common services provided by the owner of the property, such as security, cleaning, promotion and others.



Tiago Vilhena*

Although not expressly established in the Macau Civil Code or under any specific law, this type of agreement is currently accepted as valid and enforceable by the unanimous jurisprudence of Portuguese courts and by legal experts in Portuguese law. Accordingly, the GOU is viewed as an atypical contract, where the provisions of the Macau Civil Code ruling (commercial) lease agreements have no applicability whatsoever.

In the same way, due to the atypical nature of the GOU, the Macau Stamp Duty Ordinance (Law no. 17/88/M) does not expressly subject it to the payment of any particular stamp duty as for lease agreements, having created a grey area for nearly a decade.

However, in 2013, contrary to its common practice, the Macau Finance Bureau (DSF) notified certain owners in Macau that GOUs needed to be qualified as lease agreements for tax purposes and, subsequently, were subject to stamp duty at a 0.5 percent tax rate of the value of such agreements for the whole duration of the contract. A number of disputes have therefore been brought to the Macau courts against DSF, who has been collecting the taxes at stake up to now.

Nevertheless, a recent development made the retail industry smile again: the Macau Last Instance Court (TUI) has concluded in a judgment issued two weeks ago that GOUs are not subject to stamp duty for lease agreements, as tax law does not allow application by analogy or extension, as imposed by DSF. In addition, according to TUI, "there was no evidence that the desire of the legislator was to include, in the concept of leasing, the contracts of the shops in the shopping centers," as he could have done so when the said Ordinance came up for revision in 2001, 2011 and 2012, and these type of agreements had already been widely spread across Macau integrated resorts since the COTAI inception. As a result, the tax paid by the applicant (roughly MOP4million) shall be reimbursed by DSF.

The decisions of TUI are final and without appeal and although the rule of precedence is not an established rule in Macau's legal system, the lower courts tend to follow the interpretations of TUI. Hence, the present ruling is of particular relevance, and DSF is expected to abide by it.

Despite the current recession in Macau and the opening of new integrated resorts, the Chief Executive explained recently in a Q&A session on the 2017 Policy Address that the Government expects the city to need an extra 360,000 square meters of retail space by 2025. Meaning that the retail industry will continue to expand in the years ahead, becoming one of the most prominent and important industries of Macau.

Now, when raising income generated from non-gambling sources is the order of the day, shall we expect the Government to persuade the legislator to invert this matter in the near future by updating the Stamp Duty Ordinance? We're inclined to think so.

* Senior Associate, MdME

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