

Research on Whether Tax Transfer Clause Belongs to Standard Clause in Judicial Auction

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Abstract: In recent years, with the increase of judicial auction of real estate, tax-related disputes are also increasing year by year. The problem of bearing taxes and fees involved in the judicial auction of real estate is not only a hot issue with high attention, but also a difficult problem that puzzles the court's implementation. In particular, the court stipulated in the auction announcement that the buyer should bear all taxes and fees, which has always caused controversy. Some scholars believe that this clause is a standard clause and belongs to the invalid situation in Article 497 of the Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code). At the same time, it will also damage the legitimate rights and interests of the buyer; Some scholars believe that this practice only changes the actual payer of taxes and fees, but does not change the legal taxpayers, and it is not a standard clause. In the judicial auction of real estate, whether the tax transfer clause belongs to the standard clause has always been a controversial issue in judicial practice. Whether it belongs to the standard clause and whether it is legal and effective is not only related to the protection of the legitimate rights and interests of the buyer, but also related to the orderly development of the judicial auction of real estate in China. Therefore, whether the tax transfer clause in the judicial auction of real estate belongs to the standard clause is worthy of in-depth study and discussion.

1. Introduction

In practice, contracts or agreements are generally signed by consensus between the parties, but many industries use "standard clause contracts" for convenience, feasibility and efficiency. According to the provisions of the Civil Code, the party providing standard clauses should take reasonable measures to remind the other party to pay attention. Then, whether the tax transfer clause in judicial auction belongs to the standard clause will be demonstrated in detail below.

2. The meaning of tax and fee transfer clause

Tax transfer clause is also called "tax package clause". Refers to the terms agreed by both parties to the contract that the taxes and fees arising from the transaction shall be fully borne by one of them. Usually, the party who actually bears taxes and fees is not a legal taxpayer. This term is summed up from various tax-related transaction practices, not a rigorous legal term, but originated from the normative documents of the State Administration of Taxation, which is widely popular in

the field of tax practice. In order to visually display the substance of the so-called "tax package clause", this paper adopts the name of "tax transfer clause". In terms of form, the tax transfer clause is a clause agreed by both parties to the contract that the taxes and fees arising from the transaction shall be borne and paid by one party; In essence, non-legal taxpayers usually bear the responsibility of paying taxes. Therefore, the tax transfer clause usually means that the party that enjoys advantages or has strong negotiation power in the transaction requires the counterparty to bear the tax generated, so as to promote the smooth progress of the transaction.[1]

3. Whether the tax transfer clause in judicial auction belongs to the standard clause

According to the first paragraph of Article 496 of the Civil Code, standard clauses are clauses drafted in advance by the parties for repeated use and not negotiated with the other party when concluding a contract. At the same time, the invalid circumstances of the standard clauses are stipulated in paragraph 497. (1) It has the invalid circumstances stipulated in Section 3 of Chapter 6 of Part I of this Law and Article 506 of this Law; (two) the party providing the standard terms unreasonably exempts or reduces its responsibilities, aggravates the other party's responsibilities and restricts the other party's main rights; (3) The party providing the standard terms excludes the other party's main rights. However, in judicial practice, it has been pointed out that the tax and fee transfer clause in the court's Auction Announcement belongs to the standard clause and is one of the invalid situations, which should be deemed invalid. Although there is no explicit provision in the law, generally speaking, standard clauses are mainly applicable to civil transactions, where one party is a weak consumer or the other party has a monopoly position. In commercial transactions, as a rational market transaction subject, no matter whether the other party prompts or explains it, it should be able to pay attention to and identify the clauses in the contract that have a significant impact on the rights and obligations, and make transaction decisions accordingly. Therefore, it is often difficult to establish the reason for defending the existence of standard clauses in commercial contracts.[2]

In the process of judicial practice, some parties think that the tax transfer clause in the Auction Announcement belongs to the standard clause. In a certain case, the undertaker of tax transfer claims that the tax transfer clause in the Auction Announcement was drafted and issued in advance by the court itself in order to conclude contracts with many unspecified bidders, and belongs to the format clause stipulated in the Civil Code. In the aforesaid clauses, one party unreasonably exempts or reduces its responsibilities, increases the other party's responsibilities, and limits the other party's main rights or obligations to explain the aforesaid clauses. Therefore, this part of the contents is an invalid standard clause and cannot be used as an integral part of the contract. Even if the contents of the aforementioned standard clauses are not invalid clauses, after the dispute arises between the two parties in this case, it is obvious that their understanding should be interpreted against the party making the standard clauses. The court held that the auction announcement was a general contract clause, not a standard clause.

Therefore, the two main issues to discuss whether the tax transfer clause belongs to the standard clause are: first, whether the clause is drafted in advance for repeated use; Second, if it belongs to the standard clause, whether it belongs to the invalid situation stipulated in Article 497 of the Civil Code.[3]

4. An analysis of whether the tax transfer clause in judicial auction belongs to the standard clause

Article 496, paragraph 1, of the Civil Code follows the definition of standard clauses in Article 39, paragraph 2, of the original Contract Law, and is still characterized by "pre-drafting" and

"repeated use" in form and "failure to negotiate with the other party when concluding a contract" in substance. According to legal data, "for repeated use" only describes the use purpose and external manifestation of standard clauses, while "not negotiating with the other party" is the key to define standard clauses in essence, that is, the provider of standard clauses has not actually negotiated with the other party on the contents of clauses, and the other party has no right to actually modify the contents of clauses. Standard clauses usually have the following four characteristics:

First, the formulation of the subject is unilateral. The provider of standard clauses formulates the contents of relevant clauses in advance, but the other party does not conduct substantive consultation and participate in the formulation of clauses, so it can only accept or reject all relevant clauses. [4]

Second, the popularity of trading objects. Generally speaking, the providers of standard clauses are industry monopolists, large enterprises, institutions or groups, while the trading objects are mass consumers or unspecified objects in specific industries.

Third, the content of clauses is stereotyped. These provisions are often unmodifiable, and once established, they will remain stable for a period of time, treating all unspecified objects equally.

Fourth, the use of clauses is repeated. The purpose of making standard clauses is to improve the convenience of transactions and reduce costs, and its purpose is to reuse, not to make special clauses for a specific transaction or several transactions.

4.1 On the cognizance of "repeated use" in standard clauses

The definition of standard clauses in Article 496, paragraph 1, of the Civil Code includes the expression of "for repeated use". When determining standard clauses in trial practice, whether the relevant clauses have been repeatedly used is a controversial issue, which is of great significance for judging whether they belong to standard clauses. During the drafting process of the Civil Code, the expression of "for reuse" was deleted, but after repeated study and consideration, the legislative department finally restored the expression of the original Contract Law and retained "for reuse". According to relevant legislative materials, the combination of "for repeated use" and "without consultation with the other party" is conducive to the better unification of its external performance and substantive characteristics, so as to make the judgment standard clear and easy to operate; In practice, many contracts are provided by one party and signed by the other party for confirmation. If "for repeated use" is deleted, it will make the standard of how to determine "not negotiated with the other party" vague and difficult to master. Of course, "for reuse" here explicitly refers to the purpose of using the standard terms, rather than considering the specific use times of the standard terms provider in detail. Therefore, as long as the standard terms provider has the purpose of reuse, it is not necessary to prove its actual use times, and it can be regarded as "for reuse" in practice. Some scholars also believe that "repeated use" is not the essential feature of standard clauses, but only for the purpose of "pre-formulation". In practice, some standard clauses are only used once and are not reused, while some ordinary contract clauses freely negotiated by both parties can be reused many times instead. If special emphasis is placed on the characteristics of repeated use of standard clauses, the counterpart should prove the fact that the clause has been repeatedly used when determining whether a certain clause is a standard clause, which is inevitably too harsh on it. At present, the above consensus has been basically reached in academic and practical circles, which is also an important factor that the Civil Code can finally retain the expression of "for reuse" in the original Contract Law without causing confusion in relevant understanding.[5]

It can be seen that from the original Contract Law to the contract compilation of the Civil Code, no matter which version, the format clauses are defined by the expression of "for repeated use". However, whether the actual standard clauses are repeatedly used is not a necessary condition for

judicial determination of standard clauses. Therefore, when determining standard clauses, judicial practice should pay attention to distinguishing the external performance and substantive characteristics of standard clauses, focusing on understanding the logical relationship among the elements that constitute standard clauses, such as "for repeated use", "pre-drafting" and "not negotiating with the other party".

4.2 On the cognizance of "unreasonable" in the invalid situation of standard clauses

Item 2 of Article 497 of the Civil Code stipulates that the standard clauses are invalid, that is, when the standard clauses provided by one party exempt or reduce its responsibilities, increase the other party's responsibilities or restrict the other party's main rights under unreasonable circumstances, it is required to judge whether this situation is reasonable when determining the validity of the relevant standard clauses. So, how to define "unreasonable"? How to judge its degree? Compared with Article 40 of the original Contract Law: "The clauses that one party exempts its responsibilities, aggravates the other party's responsibilities and excludes the other party's main rights are invalid." Some scholars believe that this provision is too broad. According to the legal purpose, if this exemption clause is a necessary condition for the reasonable operation of the enterprise, or exempts the general fault liability, or only applies to minor breach of contract, and the provider has assumed the relevant prompt obligation, this exemption clause should be considered effective. According to some legislative materials, some standard clauses in practice, although they contain the content of "exempting or mitigating responsibilities, increasing the other party's responsibilities and limiting the main rights", do not go beyond the reasonable range and conform to the principle of fairness, so they should not be regarded as invalid. Therefore, the qualifier "unreasonable" has been added to the Civil Code, which is different from the situation of excluding the other party's main rights, because excluding the other party's main rights seriously violates the principle of fairness and can directly lead to the invalidation of the standard clauses. To judge the "unreasonable" standard, it is necessary to evaluate according to the specific agreement and the nature of the contract, so as to confirm whether the contents of the clauses lead to the imbalance of the rights and obligations of both parties, which violates the principle that the standard clauses determine the rights and obligations of both parties fairly as determined by the Civil Code. For example, the parties have the right to sue for relief after disputes, which is their main right. If the standard clause stipulates that no action can be brought, it excludes the main rights of the parties and should be regarded as invalid. However, if the standard clause provides that the parties need to sue in the court where the provider is located after the dispute, it is a restriction on the main rights of the parties, and this restriction may be reasonable. If the provider of standard terms fulfills the duty of presentation, the terms shall be valid terms.

Therefore, when applying the standard of "unreasonable" in Item 2 of Article 497 of the Civil Code, we should make a specific analysis according to the specific case, and consider the factors such as the nature of the transaction involved, the purpose of the contract, the setting of clauses, and the risk bearing. It is necessary to carefully measure whether the rights and responsibilities of the provider and the opposite party of the standard clauses are inclined to an unreasonable degree, and should not be deemed invalid just because of the imbalance of rights and responsibilities.

5. Suggestions for improvement

At the judicial level, courts at all levels can be guided to make consistent judgments in the same cases by issuing more detailed judicial interpretations. In addition, guiding cases are published for the reference of courts at all levels, so as to unify the court's ruling standard on whether the tax transfer clause in the Auction Announcement is a standard clause.

In recent years, the Supreme People's Court has improved the frequency and quantity of guiding cases and typical cases, and achieved remarkable results. It has become an important reference and

a tool for improving quality and efficiency for courts at all levels, especially in handling similar cases. The author thinks that for the problems caused by the tax transfer clause in judicial auction, it is necessary not only to refine the judicial interpretation, but also to issue typical judicial precedents as guiding cases for the reference of courts at all levels in trial.

Because the understanding of laws and policies by court investigators at all levels varies for various reasons, there may be differences of opinion due to the application of laws and policies in the specific case handling process. Guiding cases and typical cases are produced from specific cases in courts at all levels in China. After expert argumentation and authoritative certification, they play a key role in handling representative cases in judicial practice, especially for some new, difficult and complex cases, such as fact determination, evidence acceptance, law application and policy definition. Therefore, making good use of guiding cases can effectively resolve the differences in judicial case handling, and at the same time, with the help of the rule of law spirit and thinking mode contained in guiding cases, improve the understanding and problem solving ability in the process of implementing laws and policies.

The published cases clearly explain the application of laws and the determination of facts. Compared with general legal documents, the cases demonstrate the core issues more intensively and directly. This kind of judicial openness helps people understand the true meaning of law through cases and enhance their supervision ability. On the other hand, through the guiding cases and typical cases issued by the Supreme People's Court, and through strict examination procedures, the ideas and methods of handling cases have been recognized. These ideas and methods are not only the standards for courts at all levels to deal with similar cases, but should be observed or referred to; At the same time, it also provides a good reference for people to supervise judicial cases.

Therefore, we should give full play to the exemplary and leading role of guiding cases and typical cases in grasping the boundaries of laws and policies, and give full play to their guiding, demonstrating and leading functions.

6. Conclusions

Based on the above analysis, although the Auction Announcement is prepared by the auctioneer in advance, it is not set for repeated use for multiple auction targets, but to inform multiple bidders of use during the auction of the targets involved in the case. Therefore, this kind of "auction announcement" with the particularity of auction target belongs to general contract clauses, not standard clauses. From the process of contract conclusion, the Auction Announcement belongs to an invitation to offer, not an offer. After the appellant as a bidder accepts the contents of the Auction Announcement, he takes the contents of the Auction Announcement as an offer, and after the auction transaction confirms the commitment, the contract between the two parties is established. The auction contract is the true intention of both parties. The content of the contract is true, does not harm the public interest, and does not exempt one party from liability, aggravate the other party's liability, and exclude the other party's main rights. Therefore, it is a valid contract, and both parties should abide by it.

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