aclanz RECHTSANWÄLTE

February 5, 2013

RECHT AKTUELL

CURRENT LAW

Edition I-II/2013

Focus in this edition: Real Estate and Tax Law

aclanz Partnerschaft von Rechtsanwälten
An der Hauptwache 11 (Alemanniahaus), 60313 Frankfurt am Main
Tel.: +49 (0)69 / 2 97 28 73 - 0, Fax: +49 (0)69 / 2 97 28 73 - 10
E-Mail: info@aclanz.de, Web: www.aclanz.de

1. Invalidity of Clause Charging Expenses for "Center Management", "Insurances", "Janitor" and "Maintenance and Repair of all Technical Facilities" to Commercial Tenants?

A pre-formulated clause providing that a commercial tenant has to bear expenses for "Center Management", "Insurances", "Janitor" and "Maintenance and Repair of all Technical Facilities" violates the statutory regulations on general terms and conditions and is therefore invalid (*Bundesgerichtshof* / German Federal Court in Civil Matters, September 26, 2012 – XII ZR 112/10). Charging expenses for center management and insurances without a specification or fixing an upper limit would violate the requirement of transparency, section 307 (1) sentence 1, sentence 2 BGB (*Bürgerliches Gesetzbuch* / German Civil Code). Charging expenses for a janitor would be possible in general. However, if the tenant runs the risk of having to bear parts of the expenses for maintenance and repair of joint areas of a shopping center, such a clause would cause an unreasonable disadvantage to the tenant, section 307 (1) sentence 1, (2) BGB. The same would apply to expenses for maintenance and repair of all technical facilities. Such a clause could also include costs not related to the tenant's individual use of the premises leased and thus the tenant would have no chance to calculate the costs involved.

2. Indexation Clause Invalid if a Commercial Lease Agreement Violates the Requirement of Written Form?

If a long-term lease agreement on commercial premises does not meet the requirement of written form laid down in section 550 BGB (*Bügerliches Gesetzbuch* / German Civil Code), it may be terminated at any time. Therefore, also an indexation clause included in that agreement would be invalid (*Oberlandesgericht Brandenburg* / Court of Appeals Brandenburg, October 17, 2012 – 3 U 75/11). In general, such an indexation clause would require a lease agreement with a fixed term of at least 10 years, thus excluding the possibility of a premature termination (see section 3 *Preisklauselgesetz* / German Price Clause Act). However, this condition is not fulfilled if a long-term lease agreement violates the requirement of written form.

3. Purchase Price 100 % above Market Value contrary to Public Policy and Void

If the purchase price for real estate is 100 % above the proper market value the underlying purchase contract violates public policy and it is therefore void (Court of Appeals Celle, June 30, 2012 – 13 U 135/11; see also Court of Appeals Berlin, June 15, 2012 – 11 U 18/11). According to the Court, public policy is violated in case of a gross inadequacy between purchase price and real estate sold. Such a gross inadequacy can be proven by a price check of similar real estates. A proven gross inadequacy proves also *prima facie* that the seller acted in bad faith. Consequently, the contract is void according to section 138 BGB (*Bürgerliches Gesetzbuch* / German Civil Code).

4. Are Discounts Taxable Salary?

Discounts offered by a third party to an employee are not subject to salary tax unless they have to be considered as a fruit of the employee’s work for employer from the employee’s point of view. This will not apply simply because of the fact that the employer had just cooperated for the offer of the third party (*Bundesfinanzhof* / German Federal Fiscal Court, October 18, 2012 – VI R 64/11). This ruling is a clear rejection of a fiscal administration’s point of view that had been prevailing for decades. The fiscal administration had been all too willing to consider third party discounts as salary simply because employers were somehow involved in the process of offering discounts. A couple of months earlier, the Court had made it already clear that also discounts which the employer himself usually grants to both, his employees and third parties, are not subject to salary tax (BFH, July 26, 2012 – VI R 27/11).

5. Gift Tax for Disguised Profit Distributions?

A disguised profit distribution made by a *GmbH* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) to a person close to its shareholder may be relevant not only for income tax but also for gift tax. However, such a disguised profit distribution would be considered as a donation of the company rather than as

one of the shareholder himself (*Finanzgericht München* / Fiscal Court of Munich, May 30, 2012 – 4 K 689/09). In the case at hand the fiscal administration collected gift tax from the father of a sole shareholder of a *GmbH* because the *GmbH* had paid an annual rent of 534.000 DM for real estate owned by the father which exceeded pricing according to the arm's length principle by 200.000 DM. This happened to be particularly unfortunate for the father: The fiscal administration decided not to grant tax benefits that would be applicable to a son-father-donation since it considered the donation to be a donation of the GmbH and not as one of the son. The Court confirmed this point of view. However, the judgment is not final, yet. An appeal has been filed to the German Federal Fiscal Court (BFH II R 94/12).

6. A Logical Second Can Be very Expensive with Regard to Trade Tax Losses Carried Forward

Losses that have been left unconsidered in previous fiscal years can be carried forward in order to reduce trade tax in future fiscal years. However, it is absolutely mandatory that the trade tax subject preserves its identity for the entire time – not even interrupted by one single logical second - throughout the process of carrying losses forward (*Bundesfinanzhof* / German Federal Fiscal Court, October 11, 2012 – IV R 3/09). The case at hand dealt with a limited partner (K) who transferred his share in the limited partnership K-LP, which had a considerable amount of losses that could be carried forward according to section 10 a sentence 1 GewStG (*Gewerbesteuergesetz* / German Trade Tax Act), to a limited partnership called A-LP effective by the end of the year. In return, A-LP granted membership rights to K. The transaction was based on a transfer agreement that stipulated the extinction of K-LP for the end of the same year. The extinction would be caused automatically by the withdrawal of the unlimited partner from K-LP, thus transferring all of K-LP's assets to A-LP of which, by now, K had become limited partner. As to the Court this would require that K, for at least one logical second, was only an indirect shareholder of K-LP. Thus, identity of the trade tax subject had not been preserved when the assets were transferred from K-LP to A-LP. K lost all tax advantages deriving from his former losses.

aclanz RECHTSANWÄLTE

JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)
Attorney at Law
Certified Tax Attorney
Commercial Mediator
Joachim.HundvHagen@aclanz.de

DR. JOACHIM WICHERT
Attorney at Law
Certified Employment Law Attorney
Commercial Mediator
Joachim.Wichert@aclanz.de

SOFIA DIAMANTOPOULOS
Attorney at Law
Sofia.Diamantopoulos@aclanz.de

RECHT AKTUELL / CURRENT LAW summarizes jurisdiction, legislation and other legal issues but does not give legal advice on a specific case or problem. Decisions mentioned in the articles just represent a review of the respective judgment despite a future rescission or a change in legislation. Therefore, we do not accept any liability for the content of this letter. Please contact us for further information.

---

aclanz Partnerschaft von Rechtsanwälten
An der Hauptwache 11 (Alemanniahaus), 60313 Frankfurt am Main
Tel.: +49 (0)69 / 2 97 28 73 - 0, Fax: +49 (0)69 / 2 97 28 73 - 10
E-Mail: info@aclanz.de, Web: www.aclanz.de (legal disclosure q.v.)