



## **RECHT AKTUELL**

## **CURRENT LAW**

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**Focus in this edition: Real Estate and Tax Law**

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### **1. No Commission if Real Estate Agent's Commission Exceeds 200% of the Usual Commission?**

A real estate agent contract is invalid if it provides for a commission, which exceeds 200% of the usual amount for such a commission: In consequence, the agent may not receive any commission at all (*Landgericht Berlin / Regional Court of Berlin, May 30, 2013 - 9 O 540/11*). The case at hand concerned a real estate agent who sold on behalf of his client apartments in a building in Berlin. The commission agreement stated that every apartment should be sold for a pre-determined price. If an apartment was sold for a higher amount, the agent would be entitled to the surplus. Actually, the provision led to commissions of 16.5% and more. The client refused payment and the Court agreed with the client: The usual rate for a commission for the real estate dealings in that specific case would have been 7.14% only. Thus, the agent had requested more than twice as much. Pointing out that the provision had been proposed by the real estate agent himself and that the client had been rather inexperienced the Court considered this deal as contrary to public policy.

### **2. Sale of Condominium: Missing Building Permit is a Defect Covered by Warranty**

A missing building permit is a defect covered by warranty and entitles a buyer to rescind a real estate purchase agreement (*Bundesgerichtshof / German Federal Court, April 12, 2013 – V ZR 266/11*). In the case at hand the seller had made major construction changes including a new balcony before the condominium was sold. However, he had never obtained a building permit for the changes made. The building administration placed a ban on the use of the condominium. As to the Court, the missing of a building permit required for the proper use of the condominium at the point of time of the passing of risk from seller to buyer must be considered as a defect that justifies the rescission of the purchase agreement.

### **3. Early Termination of Commercial Lease in Case of Increase of Rent by Oral Agreement**

If the parties to a long term lease agreement regarding commercial premises agree not in writing but just orally on a rent increase the tenant is entitled to terminate the lease prematurely with notice (*Oberlandesgericht Düsseldorf / Court of Appeals Düsseldorf, March 19, 2013 – 24 U 103/12*). Background: According to section 550

*BGB* (German Civil Code) long-term lease agreements are to be concluded in writing otherwise they may be terminated prematurely. This also applies to subsequent amendments of the agreement such as increasing the rent by mutual agreement. In the case at hand the landlord could have invoked also unilaterally a contractual indexation clause for an increase of the rent. But the clause did not help him in this specific case since the increase orally agreed upon did not reflect the terms of the indexation clause.

#### 4. No Warranty in Case of Illegal Employment

The *Bundesgerichtshof* /German Federal Court in Civil Matters, August 1, 2013 – VII ZR 6/13 confirms the ruling of the *Oberlandesgericht Schleswig* / Court of Appeals Schleswig, December 21, 2012 – 1 U 105/11 (see Current Law IV-V/2013, No. 2): The client is not entitled to any warranty claims against the contactor since both have agreed on a deal "without any invoice" ("*Ohne-Rechnung-Abrede*").

#### 5. Deductibility of Premiums for Life Insurance of a Partner?

Premiums for insurances covering private risks are not tax deductible as operating expenses of a partnership. This applies especially to premiums of a life insurance covering general risks the insured individual has to live with, e.g. falling ill or becoming a victim of an accident. It is of no relevance in this regard whether the partners of a partnership have agreed in their partnership agreement that the expenses of the insurance are born by the partnership and that the latter shall also receive the benefits of the insurance (*Bundesfinanzhof* – German Federal Fiscal Court, April 24, 2013 – VIII R4/10). However, the Court has indicated that things may be seen differently if the insurance covers job-related risks of illness and accidents.

#### 6. Commercial Premises: Tax Deductibility in Case of Long Term Vacancy?

If it becomes apparent - due to long term vacancy - that commercial premises cannot be let because of the way they were built, the landlord may have to modernize and refurbish the building in order to prove his continuing intent to realize income (*Bundesfinanzhof* / German Federal Fiscal Court, February 19, 2013 - IX R 7/10). As to the Court, setting up an advertising panel, running an ad and contacting of potential tenants would not be enough - especially since the premises were offered

for sale at the same time according to a real estate agency. Similar restrictions apply to long term vacancies of housing premises (see Current Law IV-V/2013 No. 5).

## **7. Managing Director Becoming Majority Shareholder: What will Happen to the Pension Accruals?**

In the event that a Managing director and minority shareholder of a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited) becomes majority shareholder pension accruals are not to be reversed to the extent required by the general principles applicable to pension accruals for Managing Directors who are majority shareholders at the same time. They simply need to be “frozen” at the level they are as long as they are to high (*Finanzgericht Köln*– Fiscal Court of Cologne, September 06, 2012 – 10 K 1645/11). The Court’s decision referred to the principle that it depends on the conditions at the time of the conclusion of a pension contract in order to determine whether or not pension accruals can be recognized. The case is still pending because the highest fiscal court in Germany will have to confirm the ruling due to the remedies which have been filed against it (*Bundesgerichtshof* / German Federal Fiscal Court – I R 72/12).



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