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# CURRENT LAW

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

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## 1. The Written Form According to sect. 550 German Civil Code can be Exceptionally Respected by an Orally Concluded lease Agreement

Lease agreements for a fixed term of more than one year have to be concluded in written form according to Section 550 *Bürgerliches Gesetzbuch (BGB)* / German Civil Code, otherwise they can be terminated prior the end of their term. This provision ensures that a buyer of a property can inform himself about all rights and duties of the lease agreements of which he becomes a party by law. The *Bundesgerichtshof* / German Federal Court, June 17, 2015 – XII ZR 98/13 has decided that this purpose may also be sufficiently safeguarded in the event that the contract is concluded orally but on the base of an identical draft already procured in writing. In the case at hand the tenant did sign the draft of the lease agreement but the landlord did amend it before he countersigned and sent it back. Thus, the lease agreement was actually not concluded in the written form according to Section 126 German Civil Code and the amended draft would only be considered as a new proposal. However, at the end of the day the parties actually agreed orally on the first draft and actually started to execute the lease agreement. The Court ruled that this would be sufficient in order to respect the written form according to Section 550 German Civil Code.

## 2. Shingles Containing Asbestos: Purchase of Defective Real Estate?

A mere potential health risk due to shingles containing asbestos does not present a defect entitling the purchaser to any compensation. The *Oberlandesgericht Koblenz* / Court of Appeals Koblenz, March 4, 2015 – 5 U 1216/14 – maintains that the claimant has to ascertain a concrete health risk in order to justify compensation. That was not the case since the real estate could still be used as a residence without health risks. The Court took also into consideration that a replacement of the shingles was possible without stirring up asbestos in any harmful way in the case at hand.

## 3. Mold: Tenant is Responsible for Sufficient Ventilation

Whenever there is mold formation without being caused by constructional defects, the tenant is responsible of keeping the apartment well-aired. Ventilation must take place 3 or 4 times a day, which is still possible and reasonable for an employed tenant (*Landgericht Frankfurt* / Regional Court of Frankfurt, January 1, 2015 – 2/17 S 51/14). In the case at hand, the tenant reduced the rent due to mold formation. The expert witness determined that the mold formation was not caused by constructional defects but due to a lack of ventilation by the tenant. Therefore, the Court ruled that the tenant was not allowed to reduce the rent: Also a tenant not working at home can be requested to ventilate the apartment 3 to 4 times a day. However, this does not require ventilation during the tenant's absence, since there would be no cooking or showering during his absence causing any mold formation.

#### 4. Partial Tax Deductibility of Expenses for a Birthday Party

The expenses for a birthday party that has both private and business character can be split up on the basis of a head count and may be tax deductible as far as they concern the business guests. The highest German Tax Court, the *Bundesfinanzhof* / German Federal Fiscal Court, July 8, 2015 – VI R 46/14 I, accepted this principle in a case regarding a 30 years birthday: 99 guests showed up. 46 of them were actually colleagues and the rest just relatives and friends. According to the Court it did not matter that there were also relations of friendship with the colleagues that counted for the deductibility of part of the expenses.

#### 5. Tax Free Redundancy Payments for Employees Moving to Switzerland

In the case at hand, the employment was terminated by mutual agreement with effect as of July 31 of the following year. The employee was put on garden leave and decided to move from Germany to Switzerland in April the following year actually before receiving the redundancy payment of EUR 780.500. In his tax declaration the employee claimed that he had to pay no German taxes for the redundancy payment according to Article 15 of the Swiss German Double Taxation Treaty of 1971. On the other hand, also the Swiss Tax Administration did not claim any Swiss taxes in this regard. However, the German Tax Administration claimed German taxes on the grounds of so-called consultation agreements between the Finance Ministries of Switzerland and Germany. The employee sued and the German Federal Fiscal Court ruled that the German Tax Administration was wrong: According to the rule of law no administrative regulation may overturn legislation in place. Also, neither administrative practice nor retroactive regulations would change such fundamental principles of law.

#### 6. Tax Deductibility of Currency Losses due to Foreign Real Estate Loans?

Currency Losses due to a Swiss Frank loan financing the purchase of real estate are not tax deductible according to the *Finanzgericht Hamburg* / Fiscal Court Hamburg, May 2, 2015 – 2 K 197/14. In the case at hand the purchaser financed the purchase of real estate through a loan in Swiss Franks at a time when Swiss Franks were cheaper and when interest-rates for such loans were comparatively low. The fiscal administration accepted the lower interest rates but not the currency risk inherent when it came to the issue of tax deductibility. The Court agreed: Primarily, due to the fact that the purchaser had not paid back his loan yet. Secondly, it questioned whether the purchaser could argue that there was a close link between income from lease and currency losses from loans as there would be for business loans.



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