



# RECHT AKTUELL CURRENT LAW

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

**aclanz** Partnerschaft von Rechtsanwälten  
An der Hauptwache 11 (Alemanniahaus)  
60313 Frankfurt am Main  
E-Mail: [info@aclanz.de](mailto:info@aclanz.de)  
Web: [www.aclanz.de](http://www.aclanz.de)

## 1. New UK German Double Taxation Treaty has come into Effect

The new UK-German double taxation treaty has entered into force and has effect in the United Kingdom in respect of income tax and capital gains tax, for any year of assessment beginning on or after April 6, 2011; in respect of corporation tax, for any financial year beginning on or after April 1, 2011, in respect of taxes withheld at source, to income derived on or after January 1, 2011. In Germany it has effect in respect of withholding taxes and tax periods beginning on or after January 1, 2011. The new treaty replaces the double taxation treaty of November 26, 1964 and provides for various new safeguards in order to prevent fiscal evasion (“subject to tax-clause”, “switch over”- regulations to the transition of exemption method to the credit method, as well as “anti-treaty shopping”-regulations etc.).

## 2. Exemption from Punishment for Voluntary Disclosure of Tax Evasion: Stronger Restrictions

The *Bundestag*, the German Parliament, has passed legislation on March 17, 2011 for stronger restrictions on voluntary disclosures which are made in order to obtain an exemption from punishment for tax evasion : (1) A voluntary disclosure must include any tax crime committed with regard to the kind of tax which is subject to the disclosure as long as its persecution would not be time-barred (2) According to the regulatory impact statement, voluntary disclosures shall no longer be possible after the point in time where an audit order has been issued. (3) If the subsequent tax payment sums up to more than EUR 50.000,00, an additional amount of 5 % on the amount of tax evaded will become due, in addition to the interest payment in the amount of 6 % p.a. (4) In some ways the wording of the new regulations does not seem very precise: According to the wording there will be an exemption from persecution only “if the offender pays the tax evaded for his own personal gain”. However, in real life there may also be offenders who have evaded taxes not for their own good but for the business they have worked for. It will have to be specified in practice if and who will be entitled or obliged to pay the taxes evaded in order to obtain an exemption from punishment in such cases. (5) Yet, when it comes to earlier partial voluntary disclosures, the new regulations are very generous: As opposed to some recent tendencies in case law the legislator has confirmed in its new regulations that indeed partial disclosures were and are valid in order to obtain a (partial) exemption from punishment if they are made before the point in time the new regulations enter into force. It is expected that the bill will be confirmed by the *Bundesrat* / Federal Council and signed by the *Bundespräsident* / the President on April 15, 2010. After that point in time any future partial disclosures will be invalid.

## 3. Losses deriving from Non-Resident Subsidiaries must be deducted fiscally in the Final year, not in the Year of Origin

Already in the case *Marks & Spencer*, the European Court of Justice held that the state of residence of a parent company (in the case in question this was the UK) must consider losses of the non-resident subsidiaries for the taxation of the parent company if they are final.

Losses are final as soon as the parent company sells or closes the foreign subsidiary. However in Germany, it was actually not clear in which fiscal year such losses have to be deducted. The *Bundesfinanzhof* / Federal Fiscal Court has clarified now in a judgment (November 9, 2010 – I R 16/10) that such losses would not be deductible in the year of origin, but rather in the year in which they have become final. Yet, due to the fact that the claimant had applied for deductions just in the years of origin, e.g. the wrong year, the court has simply left open another question which is even more controversial: Will there be any further conditions to such a deduction required? Further specifications by case law remain to be seen.

#### 4. Termination of Lease in order to Build Modern Apartments

The lessor is entitled to terminate the lease agreement in order to tear down an apartment respectively an apartment building in need of renovation if he plans to build modern housing facilities (*Bundesgerichtshof* / German Federal Court in Civil Matters, February 9, 2011 - VIII ZR 155/10). However, the precondition for such a termination is a so-called termination due to appropriate commercial use (“*Verwertungskündigung*”) according to section 573 para. 2 no. 3 *BGB* (German Civil Code): First, the apartment must be in such a bad state that measures of maintenance and repair won’t be enough to remove that state. Second, the lessor’s building project has to be reasonable and useful.

#### 5. UK Limited as Contracting Party of a German Lease Agreement

A Ltd. will become contracting party if the lease agreement has been made with a Ltd. founded under UK law. The lessor may seek eviction action against the Ltd. on the grounds of overdue rent. But there are no grounds to sue also a director of such a Ltd. unless he is specifically mentioned as lessee in the lease agreement (*Oberlandesgericht* / Court of Appeals Düsseldorf, April 29, 2010, 24 U 323/09). The concept of piercing the corporate veil (“*Durchgriffshaftung*”) cannot be applied on a Ltd. Only if the Ltd. does not exist in reality, the director will be held liable.

#### 6. A Commercial Partnership cannot Terminate a Lease Agreement on the Grounds of a Termination for Interest in the Personal Use

A commercial partnership as lessor cannot terminate a lease agreement regarding housing facilities on the grounds of a termination for interest of one of its partners in the personal use of the property (*Bundesgerichtshof* / Federal Court in Civil Matters, December 15, 2010 – VIII ZR 210/10). The case at hand dealt with a *GmbH & Co. KG* / a German limited partnership run by a *GmbH* (German limited liability company) as general partner. However, according to the court the same should also apply to a *Kommanditgesellschaft* (*KG* / a limited partnership with a non-corporate individual as general partner) and an *Offene Handelsgesellschaft* (*OHG* / a general partnership). This restriction applies even more so to corporations as lessors. On the other hand it may not apply to civil law partnerships (*Gesellschaften bürgerlichen Rechts*).



**JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)**

Attorney at Law  
Certified Tax Attorney  
Commercial Mediator  
[Joachim.HundvHagen@aclanz.de](mailto:Joachim.HundvHagen@aclanz.de)

**DR. JOACHIM WICHERT**

Attorney at Law  
Certified Employment Law Attorney  
[Joachim.Wichert@aclanz.de](mailto:Joachim.Wichert@aclanz.de)

**SOFIA DIAMANTOPOULOS**

Attorney at Law  
[Sofia.Diamantopoulos@aclanz.de](mailto:Sofia.Diamantopoulos@aclanz.de)

**RAFAEL HERTZ**

Attorney at Law  
[Rafael.Hertz@aclanz.de](mailto:Rafael.Hertz@aclanz.de)

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