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1. Preclusion of Warranty for Defective Real Estate: Relevant Point in Time of Purchaser's Knowledge of Defects

If the parties of a real estate transaction have concluded an invalid purchase agreement which has only become valid at a later point in time due to the fact that there has been a valid registration of the transaction with the land registry, the purchaser is not precluded to claim warranty regarding any defects of the real estate that he has discovered in the period between the conclusion of the (invalid) purchase agreement and the registration of the real estate transaction. (*Bundesgerichtshof* / German Federal Court in Civil Matters, May 27, 2011 – V ZR 122/10). In the case at hand, the purchaser had learned about certain defects of the real estate after the notarization of the purchase agreement. On the other hand, the purchase agreement was invalid as a whole because a kick-back agreement had not been properly included in the notarization of the purchase agreement. The seller argued that the purchaser could not claim warranty because he knew about the defects at the time when the agreement became valid by formal registration with the land registry. The Court maintained that the relevant point in time for precluding knowledge would be the time of conclusion of an agreement and not its registration, no matter whether it was valid or not.

2. Lease Running Out: Termination of Water Supplies Illegal?

A landlord may not simply terminate the water supply even if he has a legitimate interest to evict the tenant. In such cases all interests at stake from both sides have to be considered. Therefore, the fact that the tenant has made advance payments and the fact that he was in urgent need for water supplies had to be considered in favor of the tenant's right to water supplies. (*Kammergericht Berlin* / Court of Appeal in Berlin, May 16, 2011 – 8 U 2/11). The case at hand dealt with the continued use of the rental premises by a barber after his lease had run out. The barber was in urgent need of water in order to continue his business and he kept paying advances for operating costs at the same time.

3. Landlord's Compensation for Noise in the Neighborhood

A real estate owner letting his real estate is entitled to compensation against his neighbors if the noise level of construction activities in the neighborhood is unreasonable. The noise level is unreasonable if justified reductions of tenants' lease payments are above the local average net result of lease payments. (*Landgericht Berlin* / District Court Berlin, March 31, 2011 – 51 S 245/10). The case at hand took place in Berlin and the average net result was assessed at a rate of 5%, the justified rate of reduction on lease payments was assessed at 15%. Thus, 10% had to be compensated. Previously the *Landgericht Hamburg* / District Court Hamburg, March 12, 1998 - 327 S 97/98 – took a similar approach.

4. City's Obligation to Intervene in Case of Construction Noise

The city of Frankfurt/Main is obliged to intervene if the level of construction noise exceeds the limits stipulated in the *AVV Baulärm* (*Allgemeine Verwaltungsvorschriften zum Schutz gegen Baulärm* / General Administrative Ordinance for the Protection against Construction Noise of August 19, 1970) by 5 db(A), (*Hessischer Verwaltungsgerichtshof* / Administrative Court of Hesse, May 31, 2011 - 9 B 1111/11). According to the Court, only the noise deriving from the specific construction site has to be taken into consideration.

5. Disguised Profit Distributions: Consulting Fees to Retired Managing Director of a GmbH

Consulting Fees to a retired Managing Director and shareholder of a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) are disguised profit distributions and therefore taxable if they are not in line with the arm's length principal. That is the case where a consulting contract runs automatically for a six year period, e.g. beyond the age of 82 of the consultant, who also receives an annual lump sum remuneration of EUR 120.000,00 p.a. and has sole discretion in the performance of his services (*Finanzgericht München* / Fiscal Court of Munich, July 19, 2010 - 7 K2384/07). Retirement arrangements and related agreements with Managing Directors who are also shareholders must correspond to the arm's length principal from the tax point of view. In the case at hand, the respective tax office, at first, merely refused to accept a pension payment in the amount of about EUR 60.000,00 p.a. which had been granted on top. Income resulting from continuing work of a retired individual would usually reduce the regular pension claims. The Court confirmed this point of view, but made it clear that it could have come worse for the company in question: The entire amount of EUR 120.000,00 p.a. should have been treated as a disguised profit distribution. However, since a decision of the tax office cannot be amended to a worse one by a court, the court had to leave things as they were.

6. No VAT Refund in Case of Inaccurate Invoice for Temporary Agency Work

There will be no VAT refund, even if the recipient of the invoice acted in good faith, in a case where the invoice did not include the correct information as to the mandatory items of information that must be included in an invoice, e.g. seller's name and services supplied. The term "cleaning services" is insufficient if there is no indication that the services actually consisted in temporary agency work (*Finanzgericht Saarland* / Fiscal Court of Saarland, June 16, 2011 - I K 1176/07). According to the Court, previous rulings of the European Court of Justice exonerating an invoice recipient

acting in good faith in cases of carousel fraud would not apply in this specific case. On the other hand, in certain cases the tax office could grant a relief for exceptional circumstances upon special application. However, such an application was not subject of the court proceedings in this specific matter.

7. No Tax Losses Deriving from Lease if the Premises are Resold in Short Term?

If a landlord resells real estate about 1 year after the purchase he cannot claim tax losses deriving from lease, even if the initial purchase had been financed on a long-term basis and the landlord had entered into a lease agreement without fixed term (*Thüringer Finanzgericht* / Fiscal Court of Thuringia, November 25, 2009 - I 822/05). The Court doubts that there would be a genuine intension of the landlord to gain income from lease in cases where the premises are resold after such a short period of time with no reasonable necessity to do so. This applies even if the buyer and new landlord of the premises was a company in which the seller continued to hold shares. The decision is not final, yet. The *Bundesfinanzhof* / German Federal Fiscal Court - IX R 50/10 - has recently admitted the appeal against the judgment in order to review the matter again.

8. New German-Swiss Taxation Treaty: Taxation of Income Generated on Swiss Accounts in the Past

According to the *BMF* (*Bundesfinanzministerium* / German Federal Ministry of Finance), the new Double Taxation Treaty with Switzerland will not only provide for a withholding tax on future income from dividends and interest to be collected by the banks in Switzerland for the benefit of Germany but it will also provide for two further options how German residents may pay taxes on income generated on Swiss accounts in the past: First, a flat-rate taxation indirectly by the respective Swiss bank in the amount of 19 – 24 % of the assets, depending on the length of the banking relation as well as the opening stock and the final stock of the capital. Second, there will be the possibility to disclose bank transactions and investments in Switzerland to the German tax office for an individual reassessment of taxes in the past. However, in the aftermath of the BMF's press release on August 10, 2011 there has already been a fierce debate between the government and the opposition about the final results of the negotiations between the Swiss and the German governments.

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