



RECHT AKTUELL CURRENT LAW

Edition 8/2011

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. Personal Liability of Managing Director for Company Lease

A Managing Director of a GmbH (*Gesellschaft mit begrenzter Haftung*/ German Limited Liability Company) may not terminate a rent security deposit he had made also in his own name even if he retires from office and he had not been a shareholder of the company (*Bundesgerichtshof* / German Federal Court in Civil Matters, July 20, 2011 – XII ZR 155/09). The Managing Director in question had once signed a lease agreement as a “tenant and jointly and severally liable debtor”. After his dismissal he gave notice of termination of his personal security engagement to the landlord. The Court ruled that the resignation of a managing director cannot be considered as a reason for a termination for cause. The landlord was considered as an external third party and, therefore, was not affected by internal corporate affairs.

2. Liability of Real Estate Agent

A real estate agent is held liable for misleading advice if he rushes his client into an unprofitable purchase of a real estate (*Oberlandesgericht Hamm* / Court of Appeal in Hamm, June 27, 2011 - 18 W 11/11). Encouraging the client to purchase real estate is a breach of the real estate agent’s obligation to provide advice if the agent knows that the client is only able to finance the purchase if he sells other real estate and the agent describes the possibility of selling this real estate as “realizable without any problems” (*problemlos realisierbar*). The agent in question was held liable for any of his client’s damages arising from his misleading advice.

3. Termination of Lease Agreement without Notice due to Deceit about Defect Caused by Tenant

The landlord may immediately terminate the lease agreement if the tenant claims a defect in the premises let to him even though it was actually the tenant himself respectively a third party acting for the tenant who was responsible for the defect (*Oberlandesgericht Düsseldorf* / Court of Appeal in Dusseldorf, March 21, 2011 - 24 U 102/10). In the case at hand, the tenant asked a third party to clean the heater. Due to the way the heater was cleaned it came off and injured another person. However, the tenant claimed the responsibility of the landlord and stated that the heater had not been installed correctly. When the landlord learned about the cleaning action, he immediately terminated the lease agreement. The Court concluded that the incomplete story told by the tenant must be considered as a breach of mutual trust serious enough to entitle the landlord to terminate the lease agreement without notice.

4. Taxation of Members of a Management Board of a Swiss Corporation

The remuneration paid to a delegate of a Management Board of a Swiss stock corporation is not liable for German taxation even if the delegate is tax resident of Germany (*Bundesfinanzhof* / German Federal Fiscal Court, March 14, 2011 – I R 23/10). According to Article 15 para 4 of the German-Swiss Double Taxation Treaty,

Germany has no right to tax Managing Directors, Directors, Chief Executive Officers or other authorized representatives (e.g. *Prokurist*) of Swiss corporations. The same applies to delegates, even though not specifically mentioned, because their positions are at least equal to an authorized representative. The Court pointed out that the lower court failed to affirm that the plaintiff was solely working outside of Switzerland – this could have been an alternative reason to tax such remuneration in Germany.

5. Shutdown of Foreign Permanent Establishment: Losses Must Be Taken into Account in Germany

The loss realized with the sale of the assets of a permanent establishment in Belgium and the current loss in the year of sale has to be taken into account in the same financial year when determining the profits in Germany if the loss has had no effect in Belgium in the same year or in the following years (*Niedersächsisches Finanzgericht / Fiscal Court of Lower Saxon, June 16, 2011 – 6 K 445/09*). According to the respective Double Taxation Treaty, the income of a permanent establishment usually has to be taxed in Belgium. However, according to the Court, European Jurisdiction as well as the *Bundesfinanzhof / German Federal Fiscal Court* have clarified that EU-Law, e.g. Freedom of Establishment, by way of exception requires that losses abroad are to be taken into account in the state in which the business is resident if they are absolutely not realizable in the source state (so-called final losses). The shutdown of the permanent establishment was considered as a fact that rendered the losses in question final. The re-opening of the permanent establishment in the source state would not cause any practical problems for the fiscal administration. The fiscal administration could correct the tax assessments retroactively. The appeal to the *Bundesfinanzhof / German Federal Fiscal Court* has been admitted (I R 48/11).

6. Real Estate Partnership: Losses of Assets Deriving from Recourse to Securities Do Not Cause any Income Related Tax Losses

The loss of real estate by a partnership due to the utilization of land charges that were once granted as security to creditors of fellow partners may not be claimed as income-related tax losses by the other partners, even if, prior to this, (taxable) interest was paid for the risk of providing security (*Finanzgericht Baden-Württemberg / Fiscal Court of Baden-Wurttemberg, June 19, 2009 – 10 K 3254/08*). According to the Court, there was no reason to treat the suing partners differently from a (private) lender failing to reclaim his loan. Loan interest would be taxable in those cases, too, and nevertheless the *Bundesfinanzhof / German Federal Fiscal Court* would refuse to treat the default of the repayment of such a loan as a tax loss.



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

RAFAEL HERTZ

Attorney at Law
Rafael.Hertz@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.)