



# RECHT AKTUELL CURRENT LAW

Edition VII-2012

**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](mailto:info@aclanz.de), Web: [www.aclanz.de](http://www.aclanz.de)

## 1. Real Estate Agent's Commission Published in an Internet Ad

The wording "Provision 7,14%" / commission fee 7,14% in an online ad for a real estate (here: Immobilienscout24) indicates clearly that the real estate agent will request this commission from a purchaser and such a purchaser agrees implicitly to this commission if he responds to the real estate agent's ad and requests his services (*Bundesgerichtshof* / German Federal Court in Civil Matters, May 3, 2012, III ZR 62/11). The Court dismissed the purchaser's objection that he had actually assumed that it would be the seller who had to pay the commission. According to the Court such an assumption is not plausible; there would be no other plausible reason why a real estate agent would disclose his commission in an ad but his intention to request this commission from a purchaser.

## 2. Calculation of Commercially Used Rental Space in Case of Absence of a Contractual Calculation Method

If a lease agreement on commercial premises does not stipulate a specific calculation method, the landlord is free to choose any permitted method for calculating the renting space – e.g. DIN 277, favorable to landlords (*Oberlandesgericht Düsseldorf* / Court of Appeals of Dusseldorf, November 17, 2011 – I-24 U 56/11). Background: the tenant is entitled to reduce the lease if the renting space is in fact 10 % smaller than the space designated in the contract. Hence, the method of calculation may be of considerable importance. The majority of the courts usually applies the calculation method generally used in the specific area if the lease agreement does not state otherwise. The Court seems to share this point of view no longer by granting the landlord a right to choose in such cases.

## 3. Owner-Occupied Real Estate: Deductibility as Renovation Expenses?

Renovation expenses spent on owner-occupied real estate may be tax deductible as extraordinary expenses in accordance with section 33 para 1 EStG (*Einkommensteuergesetz* / Income Tax Act) if they are inevitable / "zwangsläufig" and not merely serve the removal of a construction defect (*Bundesfinanzhof* / German Federal Fiscal Court, March 29, 2012 – VI R 21/11, VI R 0/10 and VI R 47/10). The deductibility requires especially: (1) the constructional measure must be necessary to remove a specific health hazard, (2) the health hazard could not be detected at the time of the construction / purchase of the real estate and (3) viable claims for compensation were previously asserted to a third party. The Court had to deal with a roof tiled with asbestos, a building infested with dry rot and the usage of a wood pre-

server which, at the time the building was constructed, had not been considered illegal with regard to public health reasons.

#### 4. **IFG (Informationsfreiheitsgesetz / Freedom of Information Act): Receiver's Right to Request Disclosure of Tax Files?**

Despite the tax secret to be observed by the tax administration according to section 30 AO (*Abgabenordnung* / German Fiscal Code) the receiver has the right to request disclosure from the tax administration of the annual account statements of the debtor subject to receivership (*Bundesverwaltungsgericht* / Federal Administrative Court, May 14, 2012 – 7 B 53/11). According to the highest Court in administrative matters section 30 AO is not final with regard to exemptions from the tax secret in cases in which a third party requests disclosure. Thus, the general right to request disclosure from administrative bodies as set forth in the Freedom of Information Act of the State North-Rhine Westphalia applies also in favor of a receiver. Furthermore, the lower court had pointed out earlier in this matter that according to Section 97 para 1 s. 1 InsO (*Insolvenzordnung* / German Insolvency Act), also a debtor placed under receivership has a personal obligation to disclose all circumstances to the receiver (*Oberverwaltungsgericht Münster* / Higher Administrative Court of Münster, June 15, 2011 – 8 A 1150/10). Both the Federal Legislator and 13 of the 16 Federal State Legislators have instituted Freedom of Information Acts for their respective administrative bodies.

#### 5. **Reduction of Pension Accruals in Case of a Salary Cut?**

A salary cut does neither lead automatically to a reduction of the pension nor to a reduction of the pension accrual due to a so-called oversupply from the tax point of view. However, pension accruals must be reduced if the salary cut is permanent (*Bundesfinanzhof* / German Federal Fiscal Court, March 27, 2012 – I R 56/11). According to the Court, the reasons for such a permanent salary cut or its validity with regard to employment law are irrelevant.

#### 6. **183-Days-Tax-Rule: Only Physical Presence in the Host State Counts?**

According to the 183-Days-Tax-Rule (art. 13 para 4 No. 1 German-French Double Taxation Treaty) an employee residing in France and whose actual, physical presence in Germany did not exceed 183 days, is not subject to the German income taxation (*Bundesfinanzhof* / German Federal Fiscal Court, October 12, 2011 – I R 15/11).

The Court specifies that, during project-related working trips and stays in Germany, tax offices cannot include brief interruptions such as a trip home over the weekend in order to achieve the 183 days in Germany. Contrary agreements between German and French Fiscal Administrations are not binding for a court since they do not qualify as law. Whether also the respective decree, which has become effective on January 1, 2010 as a substitute to law in this regard would change the outcome of the decision, despite the principle of clarity according to Art. 80 GG (*Grundgesetz / German Constitutional Law*), is still open.

## **7. New Mediation Act Effective**

The New Mediation Act has become effective on July 26, 2012 (*BGBL. 2012 I 1577/ German Federal Law Gazette 2012 I 1577*). The Mediation Act sets general standards for alternative dispute resolution in accordance with EU-Law (Directive 2008/52/EC) also with regard to commercial disputes and even with regard to ongoing tax litigation. aclanz Partnership of Attorneys is experienced in court and out-of-court mediation proceedings and closely follows up legislative developments also in this regard (see also link to the [symposium](#) held by the Cologne Research Center for Commercial Mediation on June 28, 2012, in cooperation with aclanz Partnership of Attorneys and supported by the Minister of Justice of the State of North Rhine-Westphalia and (see also [photo documentation](#)).



**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  
Commercial Mediator

[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)

---

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](mailto:info@aclanz.de), Web: [www.aclanz.de](http://www.aclanz.de) (legal disclosure q.v.)