



RECHT AKTUELL CURRENT LAW

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Focus in this edition: Real Estate and Tax Law

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1. Termination of Lease Agreement for Landlord's Business Purposes

The intention of the landlord to use residential premises for his own business purposes may be sufficient to justify a termination of the lease according to Section 573 (2) No 2 BGB (*Bürgerliches Gesetzbuch / German Civil Code*) (*Bundesgerichtshof / German Federal Court in Civil Matters*, September 26, 2012 – VIII ZR 33/11). However, the statutory provision in question mentions in this regard dwelling purposes only. Nevertheless, the Court argued that the freedom of profession and business guaranteed by constitutional law (Article 12 GG *Grundgesetz / Fundamental Law for the Federal Republic of Germany*) must be considered at least as important as the interest of a landlord to use his premises for dwelling purposes.

2. Tenant's Obligation to Reveal Radical Political Views?

There is no obligation for a politically radical commercial tenant to disclose any of his radical views if this fact does not affect the actual use of the premises leased (*Landgericht Berlin / Regional Court of Berlin*, July 23, 2012 – 12 O 506/11). In the case at hand, the media reported about the fact that the tenant was actually a representative of the NPD, a radical right-wing party in Germany. As a consequence, the landlord decided to give notice of termination and argued that the tenant should have informed him beforehand. The Court did not agree. Such a measure would only be justified if any of the radical views of the tenant affected the actual use of the premises leased, e.g. if the tenant sold products associated with such radical views. This was actually crucial in another case decided before by the *Bundesgerichtshof / German Federal Court in Civil Matters*, August 11, 2010 – XII ZR 192/08 (e.g. tenant sold "*Thor Steinar*"-products without informing the landlord beforehand).

3. Bogus Lease Agreements between Relatives: Not only Irrelevant but also Subject to Criminal Prosecution?

If a lease agreement made between relatives does not correspond to the arm's-length principle and the tax payer is well aware of this fact and the fact that the lease agreement is not performed as stipulated, it is not only bogus but also the tax payer in question may face criminal charges for tax evasion (*Finanzgericht Berlin-Brandenburg / Fiscal Court of Berlin-Brandenburg*, March 8, 2012 – 9 K 9009/08). In the case at hand a tax payer deducted negative income deriving from a lease agreement with his mother from other of his earnings. The tax office later withdrew this deduction on the grounds that the lease agreement was only made for the sake of appearance. The Court agreed. The lease agreement did not satisfy the arm's-length principle. For years, operating costs had not been raised or billed. A rent security deposit was not paid. Moreover, the tax payer had equal access to the premises. The Court pointed out also, that the tax payer may even face criminal charges for tax evasion.

4. Tax-Deductible Invitation: Ship Cruise or Sports Arena VIP Lounge?

Expenses for a cruise with clients or colleagues are not tax deductible even if they are related to business unless private entertainment can be positively excluded as a motivating factor (*Bundesfinanzhof / German Federal Fiscal Court, August 2, 2012 – IV R 25/09*). Such expenses would have to be considered as expenses for special representative purposes which are not tax deductible even if they were actually expenses related to business (Section 4 (5) sentence 1 No 4 EStG *Einkommensteuergesetz / German Income Tax Act*). Only if the ship was used merely as a “floating conference room” or simply as a transportation device such expenses would be deductible. The possibility to simply split the expenses on the grounds of a flat rate arrangement – as provided by the *Bundesfinanzministerium / Federal Ministry of Finance* by circulars dated August 22, 2005 and July 11, 2006 particularly for VIP Lounges in sports facilities – would not be binding for the courts. Anyhow, their requirements were not met either in the case at hand.

5. Deductibility of Interest on Loan if Real Estate is sold with a Loss?

Interest on loan facilities for the purchase of real estate remains tax deductible in the event that the real estate is sold with a loss if the sale itself must be regarded as a taxable transaction according to section 23 (1) sentence 1 No 1 EStG (*Einkommensteuergesetz / German Income Tax Act*), (*Bundesfinanzhof / German Federal Fiscal Court, June 20, 2012 – IX R 67/10*). According to section 23 (1) sentence 1 No 1 EStG profits from real estate sales are taxable if the sale takes place within a period of ten years after purchase. In that event, according to the court, future interest on loan facilities should be tax deductible as well. In another case, the Court made it clear that there will be definitely no tax deductibility for future interest in the event that the ten year period has been already exceeded (*Bundesfinanzhof / German Federal Fiscal Court, August 1, 2012 – IX R 8/12*).

6. Pension Scheme for Majority-Shareholders of an AG

Unlike Managing Directors who are at the same time majority-shareholders of a GmbH (*Gesellschaft mit begrenzter Haftung / German Limited Liability Company*), a Member of the Management Board who is at the same time majority-shareholder of an AG (*Aktien-gesellschaft / German Public Limited Company*) may only be considered to be recipient of a (taxable) disguised profit distribution if the underlying agreement between the AG and himself is obviously made in a biased way in favor of himself and does not consider appropriately mutual interests (*Finanzgericht Berlin-Brandenburg / Fiscal Court of Berlin-Brandenburg, November 9, 2011 – 12 K 12174/08*). The Court argued that usually the majority-shareholder of an AG has less influence on the company than a majority-shareholder of a GmbH. Thus the principles generally applicable to GmbHs would not necessarily apply to AGs, e.g. the principle that a retroactive raise of the pension would be questionable especially with regard to the fact that the beneficiary would not be available for the company throughout a further period of 10 years.



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