



# RECHT AKTUELL CURRENT LAW

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

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## 1. Commercial Lease Agreement with a Partnership: One Signature May Be Enough with Regard to the Requirement of Written Form

A commercial lease agreement can be concluded effectively with a partnership notwithstanding the requirement of written form according to section 550 BGB (*Bürgerliches Gesetzbuch* / German Civil Code) if just one of the partners signs it and sets the partnership's stamp on it (*Bundesgerichtshof* / German Federal Court in Civil Matters, January 23, 2013 – XII ZR 35/11). In the case at hand, the tenant, a partnership of lawyers, had tried to argue for an early termination of its long term lease agreement on the grounds of an alleged violation of the requirement of written form. According to the Court, however, the use of the partnership's stamp made it sufficiently clear that the agreement was signed on behalf of the partnership so that the requirement of written form was actually not affected.

## 2. No Warranty in Case of Illegal Employment?

If the client agrees with the contractor to make a so-called “deal without any invoice” (“*Ohne Rechnung-Geschäft*”) the agreement is invalid as a whole and, thus, the client will not even be able to claim any warranty for the works performed under such an agreement (*Oberlandesgericht Schleswig* / Court of Appeals Schleswig, December 21, 2012 – 1 U 105/11). According to the Court the invalidity of the contract arises from section 1 (2) No. 2 SchwarzArbG (*Schwarzarbeitergesetz* / German Illegal Employment Act) and section 134 BGB (*Bürgerliches Gesetzbuch* / German Civil Code) according to which certain violations of law make agreements unenforceable. The ruling differs from previous rulings of the highest court in civil matters in Germany, the BGH (*Bundesgerichtshof* / German Federal Court in Civil Matters). Whether the BGH will confirm the decision remains to be seen.

## 3. No Lease Agreements with a Member of a Labor Union: No Discrimination on the Grounds of Religion or Belief?

A landlord unwilling to enter into a lease agreement because the potential tenant is a member of a labor union is no discrimination on the grounds of religion or belief according to the AGG (*Allgemeines Gleichbehandlungsgesetz* / German General Equal Treatment Act). The *Amtsgericht München* / Local Court of Munich, October 18, 2012 – 423 C 14869/12, pointed out that a membership in a labor union could not be considered as a matter of religion or belief.

#### 4. No Gift Tax for Disguised Profit Distributions

Profit distributions by a corporation to a shareholder are not made out of generosity and therefore, they are not relevant for gift tax no matter whether the shareholder receives them as a disguised or as an open profit distribution (*Bundesfinanzhof* / German Federal Fiscal Court, January 30, 2013 II R 6/12). Such benefits would rely on the shareholder's special relationship to the corporation. Thus they could have income-, trade- and corporate tax consequences only. According to the ruling of the highest fiscal court in Germany, this applies also to disproportional disguised profit distributions, where a shareholder receives a greater amount than his ownership interests would actually allow. This ruling is a clear rejection of opposing tendencies in the fiscal administration and in several lower fiscal courts. On the other hand, the Court did not rule out the possibility that there may be some cases which may include separate acts that must be considered as gifts subject to gift tax. The Court will soon have the opportunity to specify its rulings in this context (see [Current Law I-II/2013, No. 5](#)).

#### 5. Tax Deductibility in Case of Long Term Vacancy?

Expenses arising from a vacancy of an apartment already let by the landlord before are tax deductible. Nevertheless, the landlord bears the burden of proof that he has a continuing intent to realize income (*Bundesfinanzhof* / German Federal Fiscal Court, October 11, 2012 - IX R 14/12). In the case at hand, the apartment had been vacant for more than ten years. As to the Court, the taxpayer had to provide evidence that, apart from his unsuccessful ways to let the apartment, he had tried to put in more effort than before, e.g. reducing the rent, changing the ad etc.

#### 6. Taxation Date for Employee's Stock Options

The benefit of an employee's stock option granted by the employer is taxable for the employee, as soon as the employee exercises the option or makes other use of it. Another use is also given in cases where the employee transfers his option to a corporation held by him (*Bundesfinanzhof* / German Federal Fiscal Court, September 18, 2012 – VI R 90/10). As a result, the employee in the case at hand would not have to tax the increase in value of 1,800 % occurred within not even one year between said transfer of the option and the date when the option was drawn by the corporation. However, the Court remanded the case to the Fiscal Court of Munich which must now check the actual circumstances of the alleged transfer. Thus, as to the employee, it remains to be seen if this comes to a good end.



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