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# RECHT AKTUELL CURRENT LAW

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

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## 1. Commercial Lease: Constraints on Tenant's Claims to Reduction of Lease?

A commercial lease agreement may modify the tenant's claims to reduction of lease in case of a defect by requiring the tenant to deposit the reduction amount on a notary's escrow account or on a lessors account. This applies even if the agreement has been made on the basis of a blanket agreement pre-arranged by the lessor (*Kammergericht Berlin / Court of Appeals Berlin, July 11, 2013 - 8 U 243/12*). The Court ruled that the clause in question would not inappropriately disadvantage the tenant because he could recover the amounts deposited after a law suit regarding the defects.

## 2. Commercial Lease: Salvatory Clause regarding Written Form Prevents Early Termination Due to a Violation of the Written Form

An early termination of a commercial lease agreement due to the violation of the requirement of written form according to section 550 BGB (*Bürgerliches Gesetzbuch / German Civil Code*) is invalid if the parties have agreed on a specific salvatory clause regarding the requirement of written form. (*Oberlandesgericht Hamm / Court of Appeals Hamm, April 26, 2013 – 30 U 82/12*). The ruling of the Court limits the effects section 550 BGB which states: "If a lease agreement for a longer period of time than one year is not entered into in written form, then it applies for an indefinite period of time. However, termination is only allowed at the earliest at the end of one year after use of the residential space has been permitted." The *Bundesgerichtshof / German Federal Court* has not confirmed the validity of such a salvatory clause, yet.

## 3. Neighbour Law: Compensation for Loss of Profits due to Disruptive Construction Works

A neighbour may request compensation for loss of profits due to disruptive construction works from the constructor even in the event that the constructor has obtained a special public permit for the works from the construction administration (*Oberlandesgericht Bremen / Court of Appeals Bremen, June 17, 2013 – 3 U 36/1*). In the case at hand the neighbour ran a restaurant just across the street where the construction works took place. He suffered from a loss of turnover in the amount of € 70.000 and asked the constructor for compensation. The Court confirmed the claim because the restaurant had been unreasonably affected by the works. It could not be reached by car and by foot only partially for 20 months. Thus, there had been a gross violation of the right of passage justifying compensation claims according to section 906 (2) S. 2 BGB (*Bürgerliches Gesetzbuch / German Civil Code*).

#### 4. No Salary Tax on Expenses Regarding Company Celebration

Expenses simply facilitating a company celebration - e.g. lease or expenses for the organizing event agency - cannot be considered as income of the employees. Thus, such expenses have to be taken into account neither for the tax exempt flat rate for each employee (€ 110) nor for flat rate taxation of income granted in kind by the employer (*Bundesfinanzhof* / Federal Fiscal Court, May 16, 2013 - VI R 94/10). The case at hand concerned the 125 years anniversary of a company for which the company decided to rent a sports arena. The lease was € 121.000. The fiscal administration could not resist levying taxes on this event but the Court could. According to the Court only goods and services which can be consumed directly by the employees - e.g. food, drinks or music - should be considered as income of the employees. No taxes became due because the expenses for good and services directly consumable stayed below the amount of € 110 per employee.

#### 5. No Deduction of Lease Expenses for Trade Tax Purposes

Lease already deducted from income must be partially re-added to income for trade tax purposes. According to the *Finanzgericht Münster* / Fiscal Court of Münster, June 16, 2013 – K 3679/12, this applies also if premises generate additional income because they are released. According to the Court the applicable statutory provision (section 8 no. 1 e *GewStG* / German Trade Tax Code) should be interpreted extensively. The prohibition to deduct would not have to be considered unconstitutional because the object of trade tax would not be primarily income as such but rather the business itself. Specifically, its ruling would not violate the constitutionally guaranteed principles of equal treatment, freedom of profession, guarantee of property, taxation in accordance with the individual capacities or the interdiction to tax the substance of assets. The plaintiff has already filed remedies against this rather controversial judgment. In contrast to the Fiscal Court of Münster the *Finanzgericht Hamburg* / Fiscal Court of Hamburg, February 2, 2012 - 1 K 138/10, has proven more scruples and has sent a similar matter right away to the *Bundesverfassungsgericht* / Federal Constitutional Court.

#### 6. German-French Double Taxation Treaty: No Permanent Establishment due to a Loan Transaction

A company based in France does not constitute a permanent establishment in Germany simply because it has given a loan to a subsidiary and has received interest on the loan. In order to tax the interest as income of a German permanent establishment Article 10 (2) of the German-French Double Taxation Treaty requires that the underlying loan is treated as a positive asset in Germany from a functional point of view (*Finanzgericht Münster* / Fiscal Court - 13 K 3679/12, June 13, 2013). In the case at hand the loan was obviously a negative asset in Germany. Currently the matter is pending at the *Bundesfinanzhof* / Federal Fiscal Court (BFH - IV B 80/13). The Federal Fiscal Court will have to decide whether a new statute that has come into force a few days after the ruling of the Fiscal Court of Münster can override the ruling without violating constitutional and treaty law.



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