25 June, 2014

RECHT AKTUELL
CURRENT LAW
Edition IV-VI/2014

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. No Commission for Brokers in the Event of Dramatic Reduction of the Purchase Price?

In the event that a purchaser of real estate achieves a dramatic reduction of the purchase price as opposed to the purchase price indicated in the initial offer forwarded by the broker (e.g. 50 %), the broker may not get any commission (*Bundesgerichtshof* / German Federal Court, February 2nd, 2014 – III ZR 131/13). The Court argued that the initial offer could no longer be considered to be the same offer. Reductions of 15 % would be normal, however, reductions of 50 % or beyond indicate under no circumstances an identity of the initial offer with the deal actually made. Nevertheless, the Court pointed out that the decision may not be as clear in cases concerning reductions between 15 to 50 %. In such cases a ruling would depend on the circumstances of the individual case.

2. Usury on Real Estate Deals

The exorbitant sales price of 90 % over the fair market value indicates a reprehensible attitude of the seller. Such a real estate deal is usury-like and therefore invalid. Background: In the event of a considerable imbalance between an item and the purchase price given in consideration of this item, the purchase agreement must be considered invalid if further circumstances indicate reprehensible motives of the winning side. But if the price is obviously excessive (by more than 90 %) further circumstances indicating reprehensible motives are not to be proven in order to claim the invalidity of the agreement, according to a recent ruling of the *Bundesgerichtshof* / German Federal Court, January 24, 2014 – V ZR 249/12. In the case at hand the seller resold an apartment for EUR 118K which he had bought for EUR 53K just 2 month before. The fair market value was only EUR 65K.

3. Commercial Lease: Validity of a Waiver of the statutory Requirement of Written Form?

According to Section 550 BGB (*Bürgerliches Gesetzbuch* / Civil Law Code) commercial lease agreements have to be made in written form in the event that the lease is supposed to run for a fixed term longer than one year. This means that any contractual terms and specifically also any amendments of the agreement must be made in writing. Otherwise the contract may be terminated unilaterally before the term initially agreed upon. That is why many parties agree on a salvatory clause or waiver regarding the statutory requirement of written form. Recently the *Oberlandesgericht Hamm* / Court of Appeals of Hamm has approved such a clause (see Current Law I/2014 No. 2). However, the *Bundesgerichtshof* / German Federal Court, January 22, 2014 – XII ZR 68/10 has ruled in this matter: At least, the purchaser of the real estate would not be bound by such a clause made by the former landlord and tenant.

4. Managing Shareholders of a GmbH: Risky Pension Commitments

Recently, the *Bundesfinanzhof* / German Federal Fiscal Court had to deal with several cases regarding pension commitments of *GmbHs* (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) to managing directors controlling the majority of the shares. The Court came to the conclusion that specific pension commitments had to be qualified as taxable disguised profit distributions (*vGA*):

For instance a GmbH had made initially a pension commitment of EUR 72.000 as soon as the managing director would have reached the age of 65. However, the managing director waived such claims at the age of 62 against a compensation payment of app. EUR 170.000 because he wanted to transfer his shares in the company to his son without any further pension commitment of the company. The Court, September 11, 2013 - I R 28/13 qualified this commitment of payment as a "spontaneous" act lacking any clear and definite agreement that should have been made beforehand. Therefore, the payment had to be treated as a *vGA*. According to the court this applies at least in cases where such waivers and payments are made before the respective pension age is reached.

Difficulties occurred also in a pension commitment which provided: "You will receive a onetime payment of DM 750.000 as soon as you have reached the age of 60 and have retired from services for our company". A few days after his 60th birthday, the managing director actually received the onetime payment but he continued his work as managing director of the company. The fiscal administration considered the payment to be a *vGA* and the Court*,* October 23, 2013 – I R 89/12 agreed. According to the court a pension commitment requires not only a prior clear and definite agreement but also the actual execution of the terms of such an agreement. That had not been the case since the managing director had not left the company. The Court left explicitly open the question whether the retirement age of 60 hat been too early, anyways.

In another case which concerned a managing director who continued to work for the company since leaving the company was not a condition precedent to the pension commitment, the Court*,* October 23, 2013 – I R 60/12 ruled that this may not be a problem as long as other income from the company is deducted from the pension payment. This had not been done. Therefore, the Court considered the surplus as a *vGA.*

In none of the cases mentioned, the Court allowed a neutralized tax treatment of the *vGA* although the specific companies had actually duly reversed the respective pension accruals which triggered taxable income. The Court argued that an "individual business incident approach" must be taken in these matters rather than an "accounting approach", the Court, October 23, 2013 – I R 89/12*;* September 11, 2013 - I R 28/13*;* October 23, 2013 – I R 60/12.

5. Cross-Leasing: No Tax Deductibility in Case of an Abusive Arrangement between Closely Related Individuals and Entities

In case of a commercial lease agreement with closely related individuals and entities, the intention of earning profits must be asserted for each object, in order to allow deductions of expenses. According to the *Bundesfinanzhof* / German Federal Fiscal Court, October 9, 2013 – IX R 2/13 there are no general assumptions on the base of case law as opposed to residential lease agreements. Any deduction of expenses must be denied if the contractual arrangement or the performance of a lease differs from terms and conditions that would usually apply among third parties. The case at hand dealt with two loss making lease agreements made vice versa between two parties. The Court denied the deduction of expenses by any of the parties involved.

JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)
Attorney at Law, Commercial Mediator
Certified Tax Attorney
Certified Trade and Corporate Attorney
Joachim.HundvHagen@aclanz.de

DR. JOACHIM WICHERT
Attorney at Law
Certified Employment Law Attorney
Commercial Mediator
Joachim.Wichert@aclanz.de

DOMINIK HOIDN
Attorney at Law
Dominik.Hoidn@aclanz.de

---

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.)