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1. Commercial Lease: Liability in the event of Deviations in Size

If the parties have agreed on a so-called real square meter lease and the agreed size of the premises leased is smaller than the actual size, the lease is automatically reduced for the past and for the future (*Oberlandesgericht Dresden / Regional Appeal Court of Dresden, July 1st, 2014 – 5 U 1890/13 –*). While a deviation in size usually only matters if it goes beyond 10 per cent, the Court ruled that the agreement in the case at hand must be qualified as a real square meter lease and, therefore, any deviation counts.

2. Conclusion of a Real Estate Agent Agreement Simply by Visiting Premises or by Receiving a Prospectus on the Features of a Building?

A real estate agent agreement is not concluded simply by visiting a building or by receiving a prospectus on the features of the building. An (implied) agreement in this regard would require actual knowledge of the client that commission is owed and that it will be his personal obligation to pay commission (*Oberlandesgericht München / Regional Appeal Court of Munich, June 18, 2014 – 7 U 2697/13*). The Court pointed out that the real estate agent bears the burden of proof for such an agreement. Thus it is the agent's obligation to be very clear about whether and who owes commission in the event that he discloses any information.

3. Soil Pollution: No Impairment during Ongoing Decontamination

Real estate owners cannot demand future decrease in value, if their property's soil is contaminated but the decontamination works are still going on while the property can still be used properly (*Oberlandesgericht Köln / Court of Appeals Köln, June 16, 2014 – 12 U 44/13*). In the case at hand, leaking kerosene pipelines had caused soil pollution and the responsible party had been already held liable for the decontamination costs. The Court ruled that the owner could not request additionally a specific amount of compensation for the decrease in the market value of the property. According to the Court it was still open whether and to what extent the value of the property would be affected. The completion of the decontamination works should have been awaited. Therefore, the only option to ensure future compensation would be an action for a declaratory judgment confirming the liability for a potential future decrease in value.

4. Discount on Shares for Future Managing Director: Taxable Salary

Any discount on shares that is granted with regard to the future employment as Managing Director is income and as such taxable salary (*Bundesfinanzhof / Federal Fiscal Court, June 26, 2014 – VI R 94/13*). In the case at hand the designated Managing Director received 50 per cent of the shares in the GmbH (*Gesellschaft mit beschränkter Haftung / German Limited Liability Company*) from the shareholder.

The purchase price was EUR 74.000,- . The fiscal administration estimated an actual value of EUR 550.000,- and taxed the difference thereof as salary income. The Court agreed and underlined that also advantages granted by third parties – e.g. the shareholder of the employer – must be considered as salary if they have to be considered as a fruit of the employee's work for employer from the employee's point of view and are connected with the employment relationship. In the hearings, the Managing Director had admitted that the shares were offered to him in order to make him work for the GmbH.

5. Tax Consequences of Retroactive Agreement regarding Withdrawal of Partner

A retroactive agreement regarding the point in time of the withdrawal of a partner from a GbR (*Gesellschaft bürgerlichen Rechts* / German Civil Partnership) is binding in exceptional cases also from the tax point of view, e.g. if the parties were initially in disagreement or if the relevant point in time was unclear (*Finanzgericht Münster* / Fiscal Court of Münster, June 6, 2014 – 13 K 3330/11 F). In the case at hand, the respective partners had been initially in disagreement regarding the validity of a withdrawal of partnership as of May 31st, 2008. However, they agreed in an amicable settlement in a civil court hearing on November 24, 2009 that the withdrawal became effective on July 1st, 2008. The partner who withdrew argued that the relevant tax date would be November 24, 2009. The Fiscal Court ruled: No, only July 1st, 2008 must be considered as the date relevant for the withdrawal – also from the tax point of view.

6. Unequal Treatment of Non-Residents and Residents with regard to Inheritance and Gift Tax Violates European Law

Lower tax-exempt amounts (EUR 2.000,- instead of EUR 20.000,- – EUR 500.000,-) for non-residents inheriting or receiving real estate based in Germany as a gift violate European Law at least as far as the regulation applicable in 2011 is concerned (European Court of Justice, 04.09.2014 – C-211/13). Such a regulation would violate the freedom of movement of capital. The Court left open the issue whether the restated regulation in this matter would be in line with EU-Law. The new regulation provides for an option to be taxed like a resident provided that all other gifts and estate inherited are also taxed in Germany. Renowned commentators feel that also the new regulation missed the point of the Court.



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