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CURRENT LAW

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Focus in this edition: Real Estate and Tax Law

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1. Invalidity of Decorative Repair Clauses in Lease Agreements for Unrenovated Commercial Premises

If the tenant has leased unrenovated commercial premises, he cannot be obliged to take over any decorative repairs or be obliged to return renovated premises by a pre-formulated lease agreement of the landlord (*Oberlandesgericht Celle / Court of Appeals of Celle, July 13, 2016 - 2 U 45/16*). The Court ruled that commercial premises should be treated the same way as case law treats residential premises in this regard. Not only tenants of residential premises but also tenants of commercial premises would be disadvantaged inappropriately by such clauses. The decision makes clear that it is necessary to also take into consideration the development of case law regarding residential lease agreements when drafting commercial lease agreements.

2. Mixed Residential and Commercial Lease Agreement: Applicability of VAT?

If the parties have made a mixed residential and commercial lease agreement, the landlord can not invoice any VAT for the residential part of the premises (*Oberlandesgericht Celle / Court of Appeals of Celle, July 7, 2016 - 2 U 37/16*). According to the lease agreement in question, most rooms had been rented for operating a law office by the tenant, but the tenant was entitled to use one of the rooms for living. The landlord asked for VAT on the whole rent. But the Court denied the request of the landlord and stated that even a contractual clause contrary its ruling would be irrelevant. Only the commercial part would be subject to VAT according to tax regulations applicable. Such regulations could not be changed by erroneous clauses of the parties.

3. Notary Fees for Draft of Purchase Agreement: No Liability of Real Estate Agent

Already the draft of a real estate purchase agreement triggers notary fees. If the parties fail to sign, the question arises: Who has to bear the fees? In a case dealt with by the *Landgericht Freiburg / Regional Court of Freiburg, February 2, 2016 – 3 OH 29/15* the real estate agent is not liable for these costs. The Court ruled that the real estate agent may be held personally liable for damages caused by futile reliance on a legitimate expectation only. Further liability would be excluded because the real estate agent acted in good faith. Without power of attorney of the real estate agent the notary would not have had a fee agreement. Services rendered on the basis of an invalid fee agreement could not be qualified as a damage.

4. No Inheritance Tax on Residences used by the Owner himself

A residence used by the owner himself can be passed on to his children or grand-children without any inheritance tax according to sect. 13 (1) N° 4c *Erbschaftssteuergesetz*/ Inheritance Tax Act. However, also the heir is required to use the residence for himself - and this must be done at least for a minimum period of 10 years starting immediately after the succession. A transfer of property to a third person would exclude the tax privilege even in the event that the heir reserves usufruct in a way that he continues to use the residence himself (*Finanzgericht Münster / Financial Court of Münster, September 28, 2016 – 3 K 3757/15*). Also letting the residence free of charge to a third but close person, e.g. the mother of the wife of the deceased, is not privileged (*Bundesfinanzhof / Federal Tax Court, October 5, 2016 – II R 32/12*). The *Finanzgericht Münster / Financial Court of Münster, September 28, 2016 – 3 K 3793/15* ruled that the use of the property through the heir within 6 months after the succession remains within the scope of the required immediate use. If it takes more than 6 months to start using the property, the heir needs to provide reasons which can prove that he is not responsible for the delay.

5. Reduced Purchase Price for Company Shares Sold by a Third Party to Employee: Taxable Salary?

A reduced purchase price for shares sold by the shareholder of a company affiliated to the employer may be qualified as taxable salary (*Bundesfinanzhof / German Federal Fiscal Court, September 1st 2016 - VI R 67/14*). According to the Court, advantages granted to an employee by a third party are not treated differently from advantages granted by the employer. Thus, it must be determined whether the advantage is a "fruit" growing from the services of the employee or not. The courts would be inclined to review this in the context of an overall assessment of all the circumstances of the individual case. For instances, clauses eliminating valuation losses of the shares or linking the ownership of the shares to the fate of the employment relationship may indicate that the advantage of the purchase price reduction is in fact taxable salary.

6. Bankruptcy of Real Estate Buyer: Seller's Obligation to Pay the Full Amount of Real Estate Transfer Tax?

There may be no exception in the valuation of the purchase price according to its nominal value for the purposes of the calculation of the Real Estate Transfer Tax even in the event of bankruptcy of the buyer (*Bundesfinanzhof / German Federal Fiscal Court, May 12, 2016 – II R 39/14*). In the case at hand, the Court rejected the reduction of Real Estate Transfer Tax (EUR 219.691) although the seller had only received EUR 2.567.800 instead of EUR 6.276.907 initially agreed upon in the Purchase Agreement due to the insolvency of the buyer. Also special tax reliefs would not apply because no applications in this regard had been filed in due course within the 2-years-deadline provided in section 16 (3) *Grunderwerbsteuergesetz / German Real Estate Transfer Tax Act*.



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