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Focus in this edition: Real Estate and Tax Law

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1. Letting an Apartment to Tourists Requires Special Construction Permit

Letting an apartment to tourists for days or weeks constitutes a change in use of the building that requires prior approval by the building authorities. Otherwise the authorities may order a ban on the use of it. According to a decision of the *Oberverwaltungsgericht* / High Administrative Court of Berlin-Brandenburg, May 30, 2016 – 10 S 34.15 such use of the building qualifies as use as a holiday home which must be distinguished from the use as a permanent home. Any change of use of an apartment would require a construction permit. But the plaintiff neither held nor had applied for such a permit beforehand. The ban on use could only be lifted in exceptional cases (e.g., in cases where a plaintiff could lay an obvious claim to such a permit).

2. Handling Fees for Real Estate Loans are Void - Not only for Consumers but also for Entrepreneurs?

Charging handling fees just provided in general terms and conditions of a real estate loan may be qualified as an unreasonable disadvantage to the borrower according to Section 307 (1) Sentence 2, (2) No 4 *Bürgerliches Gesetzbuch* / German Civil Code. This applies even in the event that the borrower qualifies as entrepreneur (*Oberlandesgericht* / Court of Appeals of Frankfurt/M., February 25, 2016 – 3 U 110/15). The Court did not agree with the idea that simply allocating funds, the processing of a loan application, credit assessment, consulting of customers, understanding customer wishes and -data, negotiations, or the submission of a bid should be considered as additional services deserving additional remuneration. This would not only apply to loan contracts with consumers but also with entrepreneurs.

3. Are Real Estate Brokers Obligated to Publish Energy Details of Buildings?

According to § 16a (1) *Energieeinsparverordnung* / Energy Conservation Regulations sellers of real estate and landlords are obliged to publish also certain information on the energy use of the building in ads. But is this also applicable for real estate broker? No, says the *Landgericht* / District Court of Berlin, January 28, 2016 – 52 O 204/15. The Court argues mainly that the wording of the regulation does not mention real estate broker explicitly. Other courts have a different point of view on this and actually apply the regulation also to real estate brokers (e.g. *Landgericht* / District Court of Würzburg, September 9, 2015 – 1 HKO 1046/15 or *Landgericht* / District Court of Traunstein, February 2, 2016 – 1 HKO 3385/15). Therefore, the legal situation is not clear, yet.

4. European Court of Justice Says No to Discrimination of UK-Residents by New German Tax Regulations

Also the new regulations for Gift and Inheritance Tax providing for an opt-in solution to the benefit of non-residents (in this case: UK-residents) holding real estate in Germany consists in a discriminatory limitation of the freedom of movement of capital guaranteed by the European Union (European Court of Justice (ECJ), June 8, 2016 – C-479/14). aclanz has reported on the ECJ's former ruling in 2014 which had already declared void the predecessor of this regulation and the likelihood that also its successor may have to be considered void (see Current Law IX-XI/2014 No. 6). In fact that has actually happened now and the German fiscal jurisdiction has implemented the new ruling of the ECJ in favor of all EU-residents in other EU Member States almost immediately (e.g. *Finanzgericht / Fiscal Court of Düsseldorf*, July 13, 2016 - 4 K 488/14 Erb). Of course, it remains to be seen what will actually happen in this respect to UK residents after implementation of BREXIT.

5. "Treaty Override" is not Unconstitutional

The legislature can enact binding statutes, even if such legislation violates international treaties (*Bundesverfassungsgericht / German Federal Constitutional Court*, December 15, 2015 – 2 BvL 1/12). According to the Court this applies also to additional obligations to produce additional documentation in order to get certain tax breaks on income from employment abroad according to a restatement of Section 50 (8) Sentence 1 *Einkommensteuergesetz / Income Tax Act*, which violates double taxation treaties with some countries. Overruling provisions of a treaty by the legislature (=Treaty Override) would be constitutional; subsequent legislatures would have to be able to revoke acts of previous legislatures; neither the rule of law nor the constitutional principle of the constitution's openness to international law would justify a different result. The Court sees itself in line with its previous judgments and public international law. Public international law would not exclude the internal effectiveness of national legislation violating public international law.

6. Overtime Wage Account in favor of Managing Directors: Disguised Profit Distribution?

The implementation of an overtime wage account in favor of a managing director being at the same time controlling shareholder of the GmbH (*Gesellschaft mit beschränkter Haftung / German Limited Liability Company*) does not comply with the arm's-length principle. Therefore, it may constitute a disguised profit distribution (*Bundesfinanzhof / German Federal Fiscal Court*, November 11, 2015 – I R 26/15). According to the Court, the arm's-length principle requires taking into consideration the fact that managing directors generally have broader responsibilities than regular employees and that it is usually irrelevant how much time they actually spent personally on completing their responsibilities as long as they are completing them properly. In any case, managing directors would be able to determine their own working hours by themselves.



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