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CURRENT LAW

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Focus in this edition: Real Estate and Tax Law

aclanz Partnerschaft von Rechtsanwälten mbB

Alemanniahaus
An der Hauptwache 11
60313 Frankfurt am Main
T +49 (0)69 / 2 97 28 73 – 0
F +49 (0)69 / 2 97 28 73 -10

Palais am Pariser Platz
Pariser Platz 6a
10117 Berlin
T +49 (0)30 / 21 48 02 28 – 0
F +49 (0)30 / 21 48 02 28 – 1

info@aclanz.de

www.aclanz.de

1. Residential Tenancy Law: Termination due to Personal Needs of Landlord

If a landlord wants to use the rented apartment himself for commercial purposes, his wish cannot be equated with the statutory justification of a termination of lease for personal needs. According to the *Bundesgerichtshof* / German Federal Court in Civil Matters, March 29, 2017 - VIII ZR 45/16 the specific case requires further review whether the commercial interest of the landlord outweighs the tenant's interest in staying in the apartment. The criterion of personal needs mentioned in Section 573 (2) Sentence 2 No. 2 BGB (*Bürgerliches Gesetzbuch* / German Civil Code) would not be fulfilled if a landlord does not want to use the apartment for residential purposes but wants to use it for commercial purposes. Therefore, the courts would have to determine in case-by-case-decisions whether there is a special legitimate interest of the landlord justifying the termination of the lease (Section 573 (1) BGB). The landlord would have to demonstrate and to prove a disadvantage of some weight caused by the continuation of the residential tenancy relationship.

2. Land Purchase: The Buyer of a Property is Entitled to Claim Lease before Transfer of Title

If the parties agree in a real estate purchase agreement that rights, risks and duties of the property are transferred to buyer as soon as the full purchase price has been paid, the buyer is entitled to claim also the lease even before transfer of title (*Oberlandesgericht* / Court of Appeals of Düsseldorf, February 2nd, 2017 – 24 U 103/16). According to Section 566 (1) BGB normally the transfer of title through registration in the real estate registry triggers the transfer of rights, risks and duties of a lease contract to the buyer. According to the Court this would not apply if the parties agreed on a clause as the one they agreed on in the case at hand. Such a clause would have to be qualified as an assignment of claim to the buyer.

3. Commercial Tenancy Law: Possible Transfer of the Risk of Permit to the Tenant by Individual Agreement

The landlord is obliged to ensure that the property can be used for the intended purpose including that the relevant public permits are granted unless the parties have agreed otherwise by an individually negotiated clause (*Oberlandesgericht* / Court of Appeals of Frankfurt, July 7, 2016 – 2 U 144-15). In the case at hand, the property was used as gambling hall. Although the parties were aware that changes to the law on gambling halls were planned, they agreed in the specific case that the risk of permit as gambling hall shall be borne by the tenant. Due to this transfer of the permit risk to the tenant in the lease agreement, the tenant could not assert any rights against the landlord despite the public interdiction of use.

4. Losses from Private Sales: At what point in Time do such Losses become Tax Deductible in the event of Payment by Instalments?

If the parties agree that the purchase price for a loss bringing private sale is paid in instalments, the seller may claim the tax loss proportionally on the basis of the partial payment actually received in a given calendar year in relation to the total amount of payments agreed, *Bundesfinanzhof* / German Federal Fiscal Court, December 06, 2016 – IX R 18/16. In the case at hand, the plaintiff had agreed on a purchase price of EUR 250,000 for real estate which had been paid by instalments in 2007, 2008 and 2009. Overall, there was a loss which the plaintiff wanted to take into account in 2007 but the fiscal administration would accept losses only in 2009. The Court ruled that the actual purchase price was decisive regardless of when and how it was to be paid. In the event of payment by instalments, it would be appropriate to make a pro rata calculation and allocation of the loss. That would not be countered by the fact that profits from private sales may have to be treated differently.

5. Tax Hazardous Tax Gifts among Business Friends

If an entrepreneur makes a business gift to a business friend, he may only deduct its costs (including the flat tax of 30 %) for tax purposes if the total amount does not exceed the amount of EUR 35,- per recipient and business year (*Bundesgerichtshof* / German Federal Fiscal Court March 30, 2017 – IV R 13/14). According to the Court the flat tax opted to by the entrepreneur counts as an additional gift because it leads to a tax exemption in favor of the donee.

6. Voluntary Participation in a Severance Payment Program: Tax Benefit according to the Fifth-Part-Rule?

Severance payments and compensations for the loss of employment may be tax privileged according to the fifth-part-rule. However, it is crucial that the employee acted under some type of pressure e.g. that he accepted the offer only in order to avoid further conflicts. The *Finanzgericht* / Fiscal Court of Münster, March 17, 2017 – 1 K 3037/14 E, confirmed that such a conflict situation can be observed if the employee participates voluntarily in a severance payment program. In the case at hand, the conflict situation consisted in the request of the employee for a higher compensation which he would have claimed in court. To avoid this dispute the parties agreed on the severance payment program. The judgement is not final, yet. It may still be subject to further review by the Federal Fiscal Court (reference: IX R 16/17).



aclanz

JOACHIM HUND-VON HAGEN, D.E.A. (PARIS II)

Attorney at Law, Commercial Mediator
Certified Trade and Corporate Law Attorney
Certified Tax 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

SABA MEBRAHTU

Attorney at Law
Saba.Mebrшту@aclanz.de

MONIQUE SANDIDGE

Attorney at Law
Monique.Sandidge@aclanz.de

FRANK SAUVIGNY

Attorney at Law
Frank.Sauvigny@aclanz.de

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F +49 (0)69 / 2 97 28 73 -10

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10117 Berlin
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F +49 (0)30 / 21 48 02 28 – 1

www.aclanz.de (legal disclosure q.v.)