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Occupational disability leads GmbH into insolvency

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No occupational disability pension (BU pension) for managing directors of GmbHs despite pension commitment

The Mittelstands-GmbH gets more and more often into a crisis, because a managing director becomes professionally unfit. An isolated incident? No. Insolvency administrators observe that the occupational disability of the managing director has become an increasing reason for insolvency. But what are the causes and liability traps? What should be considered? The pension commitment is a model for initially saving taxes at the GmbH. But even in the case of old-age pensions – pure old-age pensions – little is known about the fact that the necessary funds must be about twice as high as they are tax deductible. This means that the company has to set aside profits and pay tax on about half of them. Often agents explain to the customer that there is no possibility of insurance in the case of certain pre-existing conditions. Later, disability occurs and a new broker investigates. It then follows that the customer would have been insurable. As a result, the former agent must now pay the disability pension.

The risk of the provision values

Provisions for a pension commitment are calculated on the basis of the Heubeck mortality tables with an interest rate of currently 6.0 percent p.a. net. For this to happen, however, an investment or insurance policy would have to generate a gross return of about 10.0 percent per annum. However, pension commitments are

still reinsured today with a German endowment life insurance policy. However, the return on German life insurance policies is now only about 4.0 percent p.a. gross, i.e. about 2.40 percent net after taxes (tax rate 40 percent of the GmbH). The missing money when the managing director retires must be serviced by the GmbH from its own cash flow and often for the next 20 years until the end of his life. In addition, a typical medium-sized company cannot afford to have a managing director become an invalid. His occupational disability leads to obligations that lead straight to insolvency. Business economists speak of “incongruent reinsurance” if the managing director is promised an occupational disability pension in his pension commitment but there is no special reinsurance for this risk. Then in the case of damage the GmbH must carry the financial expenditure alone.

The risk in the insurance solution

In the past, an occupational disability pension was often included in the pension commitment, as this is an original field of business for insurance companies. Good premiums can be earned in the process, accounting for almost 20 to 30 percent of the total premium for the insurance policy. This risk premium built into the overall contract has the disadvantage that there are insufficient funds available in old age for the savings portion of the insurance needed to finance the retirement pension. So if only 70 to 80 percent of savings flow into the reinsurance for the old-age pension, the capital required to finance the pension is usually not available at the start of the pension. A vicious circle, because if the company cannot be financed, the tax office can point to hidden profit distribution, which in turn can lead to insolvency. In the best case scenario, however, the GmbH has covered the occupational disability risk with a pension from an insurer, which is the case in around 90 percent of all pension commitments on the market. This is where another drama often begins: If the customer is healthy and the occupational disability pension is accepted by the insurer, everything seems to be fine. However, many old pension commitments were based on a benefit from the BÜRente in relation to the statutory pension insurance. Which used to be true as long as there was a BÜRente from the legislature. However, this was dropped when the changeover to the reduced earning capacity pension took place and therefore there is no longer a BU pension from the legislator. It is fatal for the GmbH and the GGF if there is a clause for the payment of an occupational disability pension in the commitment, but the GmbH is not allowed to pay the pension to the GGF for the aforementioned reasons.

Have the clause urgently reviewed

Every GmbH should urgently review this clause in the interest of its GGF or have it redrafted accordingly. In any case, it would be important to adjust the occupational disability pension to the current insurance conditions of the respective insurance company. This means that the GmbH is only obliged to pay a pension in the event of occupational disability if the insurance company also pays out on the basis of the conditions, otherwise insolvency again looms. Not infrequently, a comparative calculation for the tax optimisation of the burden is missing. Two design errors are typical here: First of all, the fact that such pensions also have to be taxed was simply overlooked in the model calculation for determining needs. The manager will then consider whether the model calculation was seriously flawed and he can claim the missing annuity to pay the tax from the insurance intermediary. In addition, in individual cases it may be “on balance” cheaper to cover occupational disability privately via a pure risk insurance, i.e. not via a pension commitment in the company. Usually, such settlement calculations are prepared by the tax advisor at a later date, as proof of loss. Some agents overlook this task as well, and fail to “fix” this liability trap.

Problem: Disability pension in the company pension scheme

However, the probably highest tax risk in the case of premature occupational disability benefits for the managing director is the balance sheet risk. A relatively high disability pension as part of a pension commitment of a GmbH to the managing director is always problematic. In the event of invalidity, the GmbH is exposed to high risks, which are then generally to be covered by a reinsurance policy. Unfortunately, invalidity is often not indisputably ascertainable, and it is also subject to many conditions. In the case of the disability pensions under discussion, very often the insurer does not initially recognise the obligation to pay benefits. It is then often enforced through lengthy disputes and litigation. Recent rulings on this controversial issue of occupational disability show that it is virtually impossible for a self-employed person (especially also controlling GmbH shareholder-managing directors – GGF for short) to receive such a pension. Example: A decision of 18 February 2005 by the Higher Regional Court of Hamm dismisses the action of a restaurant owner against his occupational disability insurer (Ref.: [20 U 174/04](#)). Reason: A self-employed person is only then incapable of working if there are no areas of activity open to him in his business in which he can

still work to the conditional extent with his health impairment. The judges stated that a self-employed person was obliged to reorganise his business if necessary in the event of a health impairment. In plain language: If a company has fields of activity which are still reasonable for the owner in terms of health, or if a reasonable reorganisation of the company would open up such possibilities, the court is convinced that this excludes a conditional occupational disability. Any reorganisation would have to take into account, where appropriate, redundancies and the recruitment of other staff. Conclusion: The owner of a restaurant who is no longer able to lift and carry heavy loads and to walk and stand for long periods of time is left, for example, with a supervisory job. Furthermore, the difficulty arises that the conditions of the reinsurer and those of the pension commitment are difficult to reconcile. The theoretically possible reference in the pension commitment to the conditions of the insurer is problematic from a tax point of view because an independent definition of benefits is required here. Moreover, it does not protect against the following curiosity arising in the end: In the event of disability, the employer (GmbH) must pay the disability pension under the contract between it and its GGF, whereas the insurer may successfully defend itself against this. In this case, the GGF would insist on his benefits with the consequence that the GmbH would have to provide a considerable amount of capital as cover for the disability pension. However, the GGF could possibly waive its claims. However, this could be interpreted as unusual for him for tax purposes, with the consequence that the tax office would define a hidden equity contribution subject to wage tax for him in the amount of the cash value of the disability pension. For this reason, consideration should generally be given to keeping the disability or BO pension out of a company pension commitment. This is especially true if the GmbH is managed by several participating managing directors (or authorized signatories), so that the remaining partner has to deal with this problem. Management consultant A. Bosl from MBD sees a considerable need for advice here in existing pension commitments and suggests the following solutions: "It is better here to shift the coverage of occupational disability to the private sphere, because then the GmbH and its GG are not burdened. In addition, pure risk insurance for occupational disability is often much cheaper and also usually has better insurance cover, depending on the BU rating of the insurance company." An existing BU pension could also be limited to the so-called debit/partial value of the provisions. This has the advantage that the GmbH pays an occupational disability pension to the GGF in the event of a claim, but only on the significantly lower provision values at the time of the occupational disability. The balance sheet risk is then completely eliminated and the GmbH can often easily absorb these pension payments. However, the pension commitment and reinsurance policy would have to be redesigned and the residual risk of disability would have to be covered by an inexpensive private occupational disability pension with a good insurer. Here it should be checked in advance to what extent the new insurer covers the occupational disability risk on the basis of the existing health conditions. Only then should the existing contract be restructured. Worthwhile, if one considers that u. U. alone by the balance jump risk often 200,000 to 300,000 euro reserves must be booked profit-reducing by the tax adviser into the balance, which can mean inevitably an insolvency for the GmbH. A sensible alternative for managers or directors is also a Keyman policy against, for example, 36 serious illnesses, which provides an immediate high capital sum and can be claimed as a tax-reducing business expense. This policy makes more sense because the sums due immediately provide the GmbH with a high level of liquidity. This can be used, for example, to pay off high loan obligations from the company. Disputes in court are often avoided because the illnesses defined in the contract automatically lead to the insurer's obligation to pay benefits.

Authors: RA Dr. Johannes Fiala, lawyer (Munich), (www.fiala.de); Andreas Bosl (management consultant, (Der-Bau-Unternehmer February/March 2007)

Courtesy of www.der-bau-unternehmer.de.

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Dr. Johannes Fiala

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