

THE RESPONSIBILITY OF THE MANAGEMENT OF AN LTD FOR PROPER ELECTRONIC BOOK AND RECORD-KEEPING

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Abstract: *In an Ltd, the taxable entrepreneur holds the responsibility for maintaining accurate and up-to-date records of the company's accounting. This primarily extends to non-delegable tasks that are carried out by the two bodies of the corporation, i.e. the shareholders' meeting and the management. They have an employer – employee relationship, thus the shareholders' meeting has the right to issue instructions to the management. However, this fundamental authority does not apply to matters related to due diligence for corporate taxes and accounting obligations. Both bodies of the Ltd can delegate material tasks to subordinate employees, including tax advisors, during the decision-making process (their advisory responsibility). In these cases, the shareholders' meeting and management retain the accountability for ensuring that selection, information and control duties are carried out properly. The same applies to delegable decision-making tasks that are dutifully transferred to subordinates. This is done in order to avoid organizational negligence. Superiors at all hierarchical levels, including the executive bodies, assume responsibility for compliance with legal principles of regularity in tax law within the scope of their authority.*

Keywords: *responsibility, limited liability company, right to issue instructions, action and management responsibility, regulatory requirements*

INTRODUCTION AND ACCOUNTABILITY

In addition to partnerships, such as the civil law partnership (GbR), the open commercial partnership (OHG), and the limited partnership (KG), the limited liability company (Ltd) presented here is a capital company. Here, shareholders are shielded from personal liability for the company's debts, with only the assets owned by the Ltd being liable to the company's creditors. (Section 13 Para. 2 GmbHG). The Ltd acts through its bodies as shown in Fig. 1.

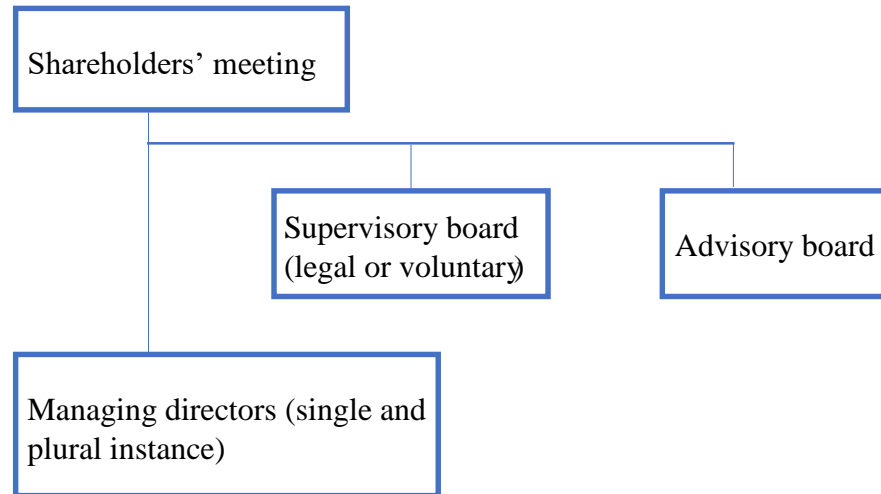


Fig. 1. Organizational plan of the shareholders' meeting/managing director

The shareholders' meeting is the most important management and decision-making body. As a shareholder, you have “the right to (positively) control and (negatively) limit the managing directors in almost all of their managing activities – i.e. not just with regard to the representation of the company externally – through instructions and other requirements. In contrast to the non-hierarchically stratified AG with its own responsible board of directors (Section 76 Para. 1 AktG), the shareholders are superior to the managing directors” (Kleindick 2023, 973).

The shareholders have the authority to determine the approval requirements for the supervisory board/advisory board.

The shareholders' meeting and management therefore have an employer-employee relationship or a supervisor-employee relationship. This shows in particular “the shareholders” right to issue instructions and the corresponding follow-up obligation of the managing directors” (Kleindieck 2023, 979).

However, there are transactions without explicit instructions where such would be illegal. This applies to the area of taxes and accounting, and to the decision to declare bankruptcy. The managing directors are therefore obliged to ensure proper bookkeeping (responsibility for action according to Section 41 GmbHG). “This means that the management and no one else, including the shareholders’ meeting, has this duty of care. The law has imposed this highly personal official duty on every managing director in the public interest, primarily to protect creditors. It is mandatory public law” (Höhn 1995, 7). Within the context of this work, “management” refers specifically to the responsibility for maintaining electronic books and records accurately.

According to the principle of responsibility, the division of responsibility in the case of an accounting obligation can be carried out as shown in Fig. 2.

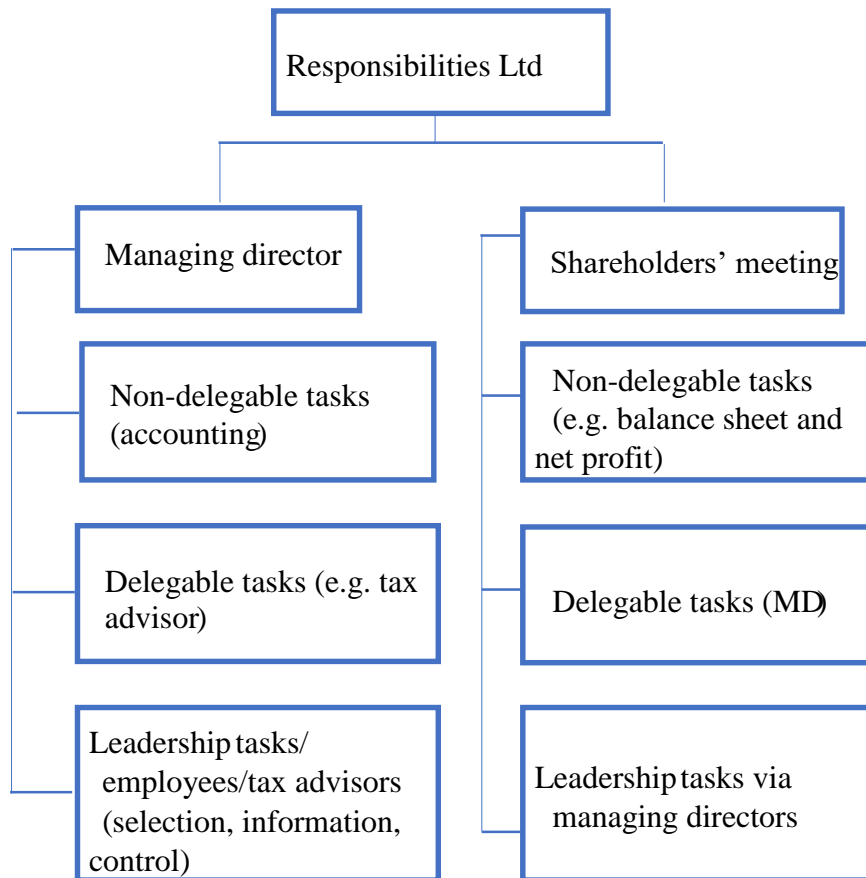


Fig. 2. Responsibilities of the general manager meeting/management Ltd.

The above overview refers to the non-delegable tasks in both bodies as far as accounting is concerned. That said, the process of decision preparation can be reassigned (e.g. accounting duties to employees, including tax advisors, and the preparation of the annual balance sheet, including net profit, to the managing director).

The material tasks mentioned result from the transfer of competencies (responsibility for action). The respective superior (a body is also a “superior”) carries out his or her management tasks and holds managerial responsibility for them. “The focus here is on the three classic management tasks known since antiquity: “selection”, “information” and “control” (Borsch and Borsch 2019, 147).

TASKS OF THE SHAREHOLDERS' MEETING

The most important technical duty of the general meeting is the approval of the annual financial statements with a resolution concerning the appropriation of the results (Section 46 GmbHG). The managing director holds an advisory role in connection with statements on accounting policy. “In such instances, the managing directors function as advisory entrepreneurs to the companies, serving as the pivotal decision-makers.” (Höhn 1995, 81).

MANAGEMENT TASKS OF THE SHAREHOLDERS' MEETING

The general manager's responsibility directly highlights the managing director's duty to

guarantee appropriate accounting practices. As the managing director's superior, “it follows that the company must fulfill the resulting obligations towards its subordinate employees, namely the managing directors. One of the primary obligations of the shareholders in their function as superiors, in addition to selection and information obligations, is the oversight of the management” (Höhn 1995, 247).

Regarding the supervision of managing directors as outlined in Section 46 No. 6 GmbHG, Bayer (2023: 1334) explains: “Only the shareholders collectively possess the authority to audit and oversee the managing directors. Control measures, such as spot checks, encompass a report from the managing director, provision of information, and presentation of books and other documents.” Addressing doubts about the monitoring obligation raised in literature, Höhn (1995, 247) asserts: “In cases of a culpable breach of public law norms, shareholders, alongside managing directors, bear joint and several liability for neglecting oversight duties” (§ 421 ff. BGB).

DUTIES OF THE MANAGING DIRECTOR

The managing director is obligated to perform non-delegable tasks in compliance with accounting principles (refer to Figure 2). While the director is not required to personally maintain the books, their responsibility lies in ensuring proper bookkeeping (Kleindiek 2023, 1143). All other tasks, termed as delegated tasks, are handled by subordinate employees, including tax advisors. However, the managing director maintains managerial responsibility in these instances. If the director improperly assumes this work, it could lead to organizational negligence.

REQUIREMENTS FOR THE MANAGING DIRECTOR’S ACCOUNTING OBLIGATIONS

The accounting obligations for the proper management of electronic books and records are initially determined by Sections 238 ff, HGB. According to Section 239 Paragraph 2 of the German Commercial Code (HGB), the booking entries must be completed fully, correctly, in a timely and orderly manner.

Zingelmann, 2024, 8, writes: “This understanding of the legal basis for proper accounting constitutes one of the indispensable core competencies of the taxpayer. These encompass primarily tax regulations outlined in the Tax Code (AO), the GmbH Act (GmbHG) along with relevant legal provisions, the general principles of proper accounting (GoB), as well as guidelines or administrative directives such as internal standards of the tax authorities.

At the forefront of these legal references is the letter issued by the Federal Ministry of Finance (BMF) dated November 28, 2019 (BMF letter 2019).”

Based on these regulations, particularly the GoBD as outlined in margin numbers 22–29, Zingelmann (2024: 29) has compiled the following summary of accounting principles that must be adhered to by the managing director and enforced within the company as a non-delegable task. As previously mentioned, it is permissible for employees or tax advisors to undertake the relevant preparatory work under the advisory responsibility. These principles of regularity are shown in the following Fig. 3.

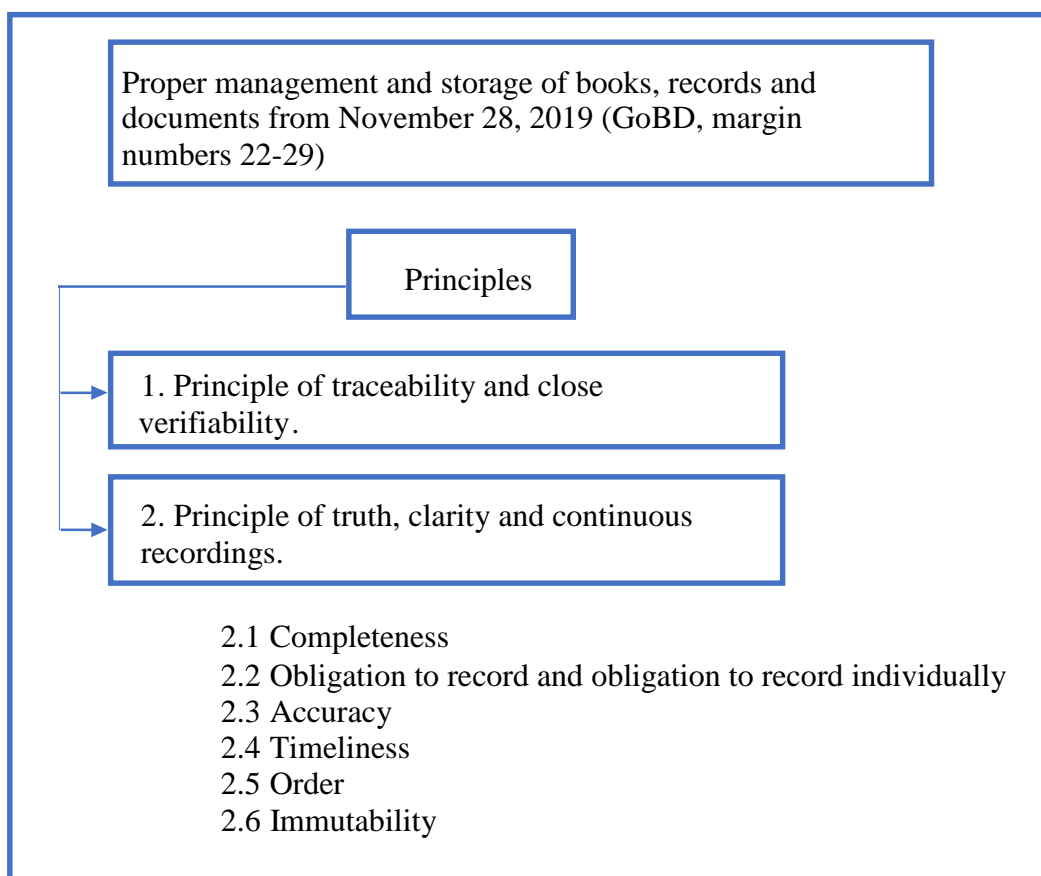


Fig. 3. Principles of the regularity criteria

The regulations and principles are briefly explained as follows:

- Principle of traceability and verifiability
 - According to Section 238 Paragraph 1 Sentence 2 HGB and Section 145 Paragraph 1.
 - AO, the accounting must be such that an expert third party must be able to easily and accurately understand every step from the receipt to the tax return and vice versa (progressive and retrograde auditability). This also applies to the cases when an IT-supported accounting system is used.
- Principle of truth, clarity and continuous recordings. This principle is an “overarching term” for the following individual sub-principles:
 - Completeness
 - This principle requires complete recording of all business transactions. They may not be offset against each other or presented as a balance (König 2021, 1219). “As part of the tax audit, this is analyzed particularly on the expense side to ensure that operating expenses are not recorded multiple times.” (Kling 2020, 41). – Obligation to record and obligation to record individually.
 - On the basis of the GoBD (paragraph 37) and the BFH judgment of 1969, BStB, 1970 II 45:
 - “The GoBD (paragraph 37) generally requires the recording of every business transaction, including every business income and expense, every deposit and withdrawal – to an extent which enables an examination of its basis, its content and its importance for the business. This means not only recording the monetary consideration, but also the content of the transaction and the name of

the contractual partner – as far as it is reasonable, with sufficient description of the business transaction.”

- Accuracy

- Business transactions must be accurately depicted using documentation that reflects the actual circumstances and complies with legal regulations (BFH ruling of June 24, 1997, BStBl II 1998 p. 51), recorded truthfully and correctly accounted for in the accounts (GoBD Rz. 44).

- Timeliness

- This principle includes the assignment of business transactions to accounting periods, combined with the timeliness of bookings and records. For example, cash transactions must be recorded daily.

- Order

- The principle requires systematic recording and clear and comprehensible bookings.

- Immutability

- “Bookings or records may not be changed in such a way that the original content can no longer be determined. If changes are nevertheless made, it must be clear whether they were made originally or at a later date. Since electronic changes or deletions are no longer visually recognizable, they must be recorded. Changes that are not logged are not permitted. The information must neither be suppressed in the data processing system nor deleted, overwritten or changed without description. It is up to the taxpayer to decide which procedure to use in order to ensure the immutability of the data” (Kuhni 2022, 177).

In addition to Section 146 Paragraph 4 of the Tax Code (AO), Section 239 Paragraph 3 of the German Commercial Code (HGB), and GoBD Rz. 58, a crucial regulation ensuring the integrity of digital primary records against manipulation is the introduction of the certified technical security device (TSE) for cash register systems in use since January 1, 2020.

In his book mentioned above, Kuhni (2020) has shown an abundance of possible manipulation programs to reduce taxes (magic key, baker's key, cancellations and returns, training sales, phantom cash registers, etc.). The described requirements for keeping books and records according to GoBD, Rzn. 22–29, permeate the entire tax law, in particular the provisions of the tax code through Sections 140–154. Sections 238, 240, 241, 242–256 HGB are particularly applicable.

Based on the German Commercial Code (HGB), Tax Code (AO), and Principles of Proper Accounting (GoBD), the following additional tax principles are noted, contributing to the management's duty of action and the responsibility for decision preparation by internal staff and tax advisors:

1. Recording of receipts for goods (§ 143 AO). This enables the tax authority to check the operating results and possibly carry out a subsequent calculation (König et al. 2021, 1207).

2. Recording of outgoing goods (§ 144 AO). The outgoing goods must be recorded separately here.

3. Receipt principle: “Complete and correct booking also requires each entry to be supplemented by a receipt. For business expenses for which no receipts are usually issued, the taxpayer must create their own receipts” (König et al. 2021, 1219). The verifiability of a business transaction is the prerequisite for the evidentiary value of the accounting (Section 158 AO). Every process must be documented in accordance with the legal requirements and the actual circumstances. It is therefore crucial not to have a booking that is missing a receipt (cf. Kuhni 2020: 43).

4. Storage: To the extent that a taxpayer is required to keep accounts or records in accordance with Section 140 AO, he or she must retain the documents within the meaning of Section 147 Paragraph 1. The retention period can be six or ten years, depending on the type of documents.

“If data, data records, electronic documents and such that require recording and retention have been created or received in the company, they must also be stored in this form and may not be deleted before the retention period has expired” (GoBD Rz. 119).

If commercial or business letters and accounting documents are received in paper form and then recorded electronically (e.g. scanned or photographed), the resulting electronic document must be stored in such a way that the reproduction corresponds visually to the original when it is made legible.

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ОТГОВОРНОСТТА НА РЪКОВОДСТВОТО НА ООД ЗА ПРАВИЛНОТО ВОДЕНЕ НА ЕЛЕКТРОННИ КНИГИ И ЗАПИСИ

Резюме: В ООД данъчно задълженото лице носи отговорност за поддържането на точни и актуални счетоводни документи на дружеството. Това се отнася преди всичко за неделегирани задачи, които се изпълняват от двата органа на дружеството, т.е. от събранието на съдружниците и от ръководството. Те се намират в отношения на работодател и служител, поради което събранието на акционерите има право да дава указания на ръководството. Това основно правомощие обаче не се прилага по отношение на въпроси, свързани с надлежната проверка за корпоративни данъци и счетоводни задължения. И двата органа на ООД могат да делегират съществени задачи на подчинени служители, включително на данъчни консултанти, по време на процеса на вземане на решения (тяхната консултативна отговорност). В тези случаи Общото събрание на съдружниците и ръководството запазват отговорността за гарантиране на правилното изпълнение на задълженията за подбор, информация и контрол. Същото се отнася и за делегираните задачи при вземането на решения, които по задължение се прехвърлят на подчинените служители. Това се прави с цел да се избегне организационна небрежност. Ръководителите на всички йерархични нива, включително изпълнителните органи, поемат отговорност за спазването на правните принципи за редовност в данъчното право в рамките на своите правомощия.

Ключови думи: отговорност, дружество с ограничена отговорност, право на издаване на инструкции, отговорност за действие и управление, регулаторни изисквания

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