

## **THE RESPONSIBILITY OF THE TAX ADVISOR IN COMPREHENSIVE CONSULTATION FOR MICRO-ENTERPRISES**

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**Abstract:** *For tasks that can be delegated, the tax advisor has sole decision-making rights. However, the tax advisor bears the primary burden based on a comprehensive mandate from their client contract, particularly in non-delegable “executive tasks”, involving their obligation to prepare decisions or provide advice on tax and business-related matters. In addition to material tasks, the micro-entrepreneur has personal management tasks, such as selection, information and control duties (management responsibility) towards the tax advisor. As long as the entrepreneur fulfills these obligations, they generally cannot be attributed with advisor negligence. The tax advisor must strive to mitigate tax disadvantages for the entrepreneur as much as possible. If they are unable to fulfill advisory tasks according to generally accepted standards but proceed nonetheless, liability for assumption of responsibility may arise. The micro-entrepreneur does not have the authority to give instructions to the tax advisor due to their duty of action. However, this may be a reason for their leadership responsibility. The legal basis for the liability of the tax advisor can primarily be found in §§ 280 and 241 of the German Civil Code (BGB).*

**Keywords:** *Responsibility for action, management tasks, advisory process, takeover liability, liability*

### **INTRODUCTION**

The tax-paying micro- or small entrepreneur must dedicate themselves to existential questions and the medium- and long-term goals of their business, delegating tax responsibilities to the tax advisor, up to where it is legally permissible. The tax advisor, in turn, holds the responsibility of stepping in the micro-entrepreneur or contractor's lack of tax expertise and legal knowledge (BGH 2005, IX ZR 127/04).

This “interplay” between the micro-entrepreneur and tax advisor is outlined here in basic terms. It is assumed that the delegation of responsibility to the tax advisor encompasses the broadest possible scope of advisory services in terms of a comprehensive mandate. Specifically, the tax advisor maintains the books, prepares financial statements, prepares tax returns, and assists in fulfilling accounting obligations. However, they are not allowed to provide legal advice but may present academic papers.

In providing comprehensive advice to the micro-entrepreneur, the tax advisor has also taken on business advisory tasks (as implied by the mandate agreement). However, the consultancy agreement cannot impose further obligations beyond providing advice (Gräfe et al. 2023, 236).

A contract between the micro-entrepreneur and a tax advisor is a service contract according to §§ 611, 634, 635 of the German Civil Code (BGH, 2006-IX ZR – 63/05). If a tax advisor merely prepares the tax return based on documents provided by the client (i.e. single contract), a contract for work and services according to § 631 of the German Civil Code may also be present. In contrast to a service contract, where the emphasis lies on providing a service or expertise, the entrepreneur is required to produce a specific and predetermined outcome with a work contract.

The micro-entrepreneur can expect the tax advisor to provide comprehensive advice and inform them proactively about all tax-related details and their consequences. The tax advisor also has a duty to protect the micro-entrepreneur from harm to the greatest extent possible. The demands placed on tax advisors regarding their professional qualifications are particularly high in service contracts with micro-entrepreneurs. Thus, they must possess or acquire extensive tax law knowledge in order to advise the entrepreneur in all phases of decision-making preparation. This is especially true in cases where the

micro-entrepreneur delegates decision-making authority over material tasks to the tax advisor.

It should also be noted that the term “tax advisor” mentioned here is a generic term for tax agents, lawyers, tax consulting companies (as AG, GmbH, OHG, etc.), auditors, joint accountants and assistance providers in tax matters, such as notaries and cooperative auditing associations.

The contractual partner of the tax advisor is the micro-enterprise, defined as a business with up to nine employees and an annual turnover of up to 2,000,000 euros. This figure corresponds to the definition provided by the European Commission (Recommendation 2003/361/EC). Higher values apply to small, medium, and large enterprises. This classification into size categories is intended to provide information about the significance and economic performance of the businesses. In Germany (2017), there were over 2,000,000 micro-enterprises, approximately 400,000 small enterprises, around 75,000 medium-sized enterprises, and fewer than 20,000 large enterprises.

### **ACTION RESPONSIBILITY**

The tax-paying micro-entrepreneur fulfils material tasks (or professional tasks) that they must personally and independently undertake. These tasks are fundamental top-level responsibilities of the organizational leadership, which belong exclusively to the competence of the micro-entrepreneur. This includes mandatory tasks according to legal norms, jurisprudence, and guidelines of the tax authorities. In the area of accounting obligations, the principles for proper management and preservation of books, records, and documents in electronic form, as well as for data access (GoBD) of the Federal Ministry of Finance dated November 28, 2019, are particularly relevant, and must be strictly adhered to in the company. These non-delegable tasks of the micro-entrepreneur are subject to the prohibition of so-called further delegation. (Höhn 1995: 79)

It is widely believed that a managing director may delegate the tasks assigned to them along with the corresponding authority to a suitable employee, either wholly or partially. Of 200 surveyed managing directors, 85 percent considered this to be their prerogative because they were ultimately responsible for everything. However, this is a fundamental misconception that can lead to serious liability consequences in individual cases.

The prohibition of further delegation is also an international legal principle. The Latin formulation for this is: *Delegatus non potest delegare*. According to this principle, a delegate cannot delegate and cannot grant sub-authority. No one can transfer more rights than they have themselves. Each person can only act effectively within the scope of their own authority (§ 164 of the German Civil Code).

“The transfer of responsibility is often referred to in the literature as 'delegating leadership tasks.' According to the principle of responsibility, this leadership task is unnecessary because there is nothing to delegate” (Borsch and Borsch 2019, 114).

The tax advisor also has non-delegable tasks to fulfil. They cannot further delegate their decision-making authority, for example, to one of their tax clerks, who, through the unauthorized delegation, independently allowed the incorporation and processing of unchecked records into the VAT return (BFH 2007, VII B 345/06 NV and Kuhni 2020, 335). The breach of duty on the part of the tax advisor lies in not having made the decision themselves where they were obligated to decide.

Of course, the preparation and execution of non-delegable material tasks can be responsibly delegated. For example, in the case of the micro-entrepreneur, this could be delegated to the tax advisor as an external consultant, and within the tax advisory firm, to tax specialists and tax clerks. In these cases, these employees are involved in decision preparation. They serve as advisors in the decision-making process. If they are purely advisors and do not have any decision-making authority whatsoever, their tasks are referred to as staff functions (e.g., employees, lawyers, environmental and security professionals).

Several employees may also be involved in this decision preparation for tasks that can be broken down into subtasks. This is illustrated in Fig. 1

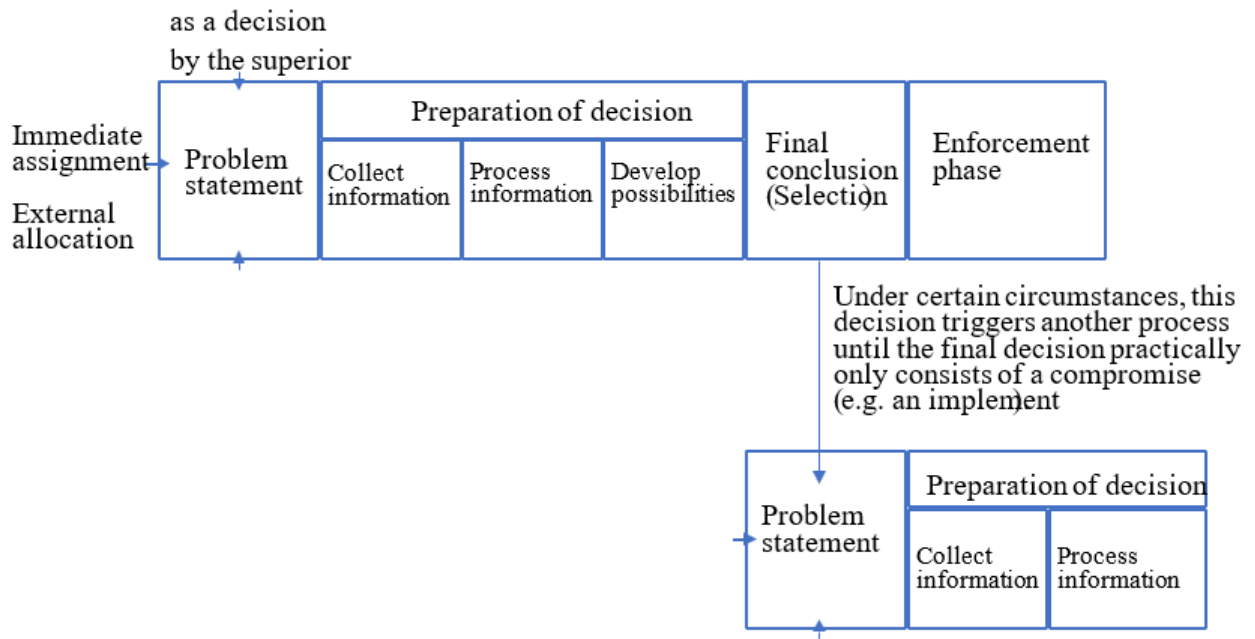


Fig. 1. Structure of corporate decision-making and implementation based on Raidt (1972, 26)

Instead of the above task analysis, a process analysis is often suggested in the literature. However, this perspective cannot be further explored here. As Schreyögg (2015, 122) states: “It is proposed to decompose the overall task into processes, meaning that attempts should be made to identify holistic work units or sequences of activities with clear starting and ending points.” It is worth mentioning that the goal of process analysis is to avoid unnecessary fragmentation of workflows.

In summary, the action responsibility of the entrepreneur as well as that of the tax advisor in their firm extends to the non-delegable material tasks to be performed. Any delegation of these tasks is only permissible within the framework of preparation and execution (decision preparation). The distribution of responsibility is as follows on Fig. 2.

Originally, Fig. 2 (as is generally seen in the literature) depicted the separation of non-delegable tasks of the micro-entrepreneur from the “delegable” ones. However, this would not be correct, as the micro-entrepreneur does not inherently have these tasks. On the contrary, according to the principles of responsibility delegation, subordinate employees, as well as the tax advisor, have these tasks “as their own.” Delegation is not a separation of the entrepreneur's powers. The employee acts on behalf of the organization and not on behalf of management. According to the principle of responsibility: Competencies are not delegated. You are delegated.

Therefore, in the overview down (under Micro-entrepreneur), the tasks assumed by subordinate employees were referred to as “delegable” decision tasks.

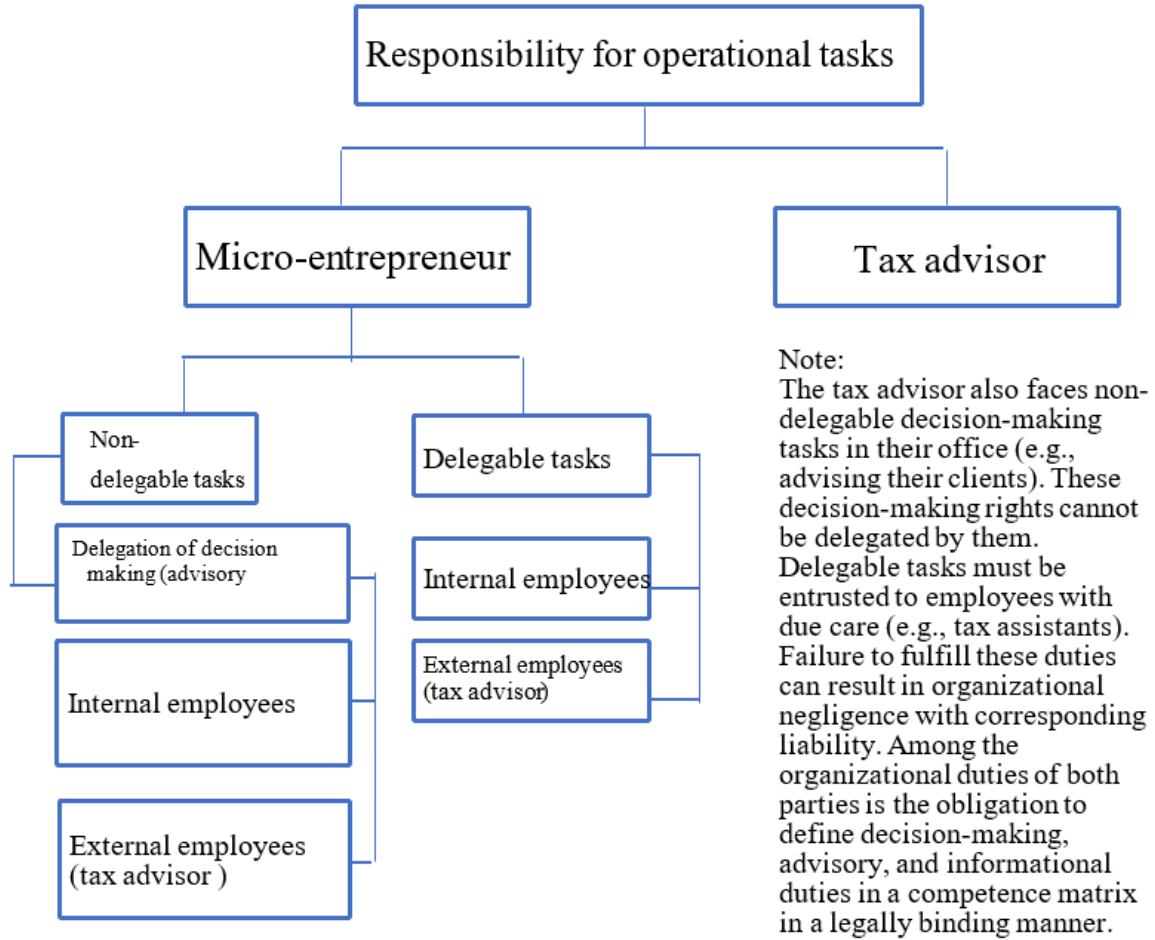


Fig. 2. Action responsibility for material tasks

### LEADERSHIP RESPONSIBILITY

According to the principle of responsibility, all employees, including the company management, act with freedom for self-development in their own name and by their own right when performing their tasks. Competencies are given to them to create their own area of responsibility, within which they act and decide independently in normal cases (action responsibility). External employees, including tax advisors, are also included in this category of “external employees”.

Some of these employees in the company, in addition to their task-oriented duties, also have person-oriented duties within their leadership responsibility. The focus here is on the three classical leadership tasks known since antiquity: selection, information, and control, as daily supervisory duties. This is the most important duty of care for every supervisor, namely *cura in eligendo* (selection), *cura in instruendo* (information), and *cura in custodiendo* (control).

This trilogy is fundamental for a legally secure leadership and employee relationship, such as between a micro-entrepreneur and the tax advisor as an external employee.

The micro-entrepreneur is in an employment contract relationship with the tax advisor. He must fulfill his leadership duties as mentioned above. Thus, he must find the “right” tax advisor, especially fulfilling his duty of selection. The Federal Fiscal Court (BFH), in its decision on August 30, 1994, VII R 101/92, dealt with these selection, instruction, and control duties within the framework of leadership responsibility and found, among other things, the following regarding the personal culpability of the taxpayer:

“So the negligence of a tax advisor cannot be attributed to a person designated in § 34 AO [German

Tax Code] who uses a tax advisor in preparing a tax return if they are not at fault in their selection or supervision and there was no reason to verify the content accuracy of the tax return.”

The mentioned advisor negligence is based on the following explanations. It is noted that in addition to negligence in selection, both micro-entrepreneurs and tax advisors must also consider what is known as takeover negligence. According to Borsch and Borsch, 2019: 154, it is stated that every manager must ensure “that their directly subordinate employees consistently perform their assigned tasks professionally. This includes structurally enabling them to perform these tasks according to generally accepted standards.”

The requirement for a high qualification of the tax advisor is particularly important in cases of (presumed in this work) comprehensive advice provided by the tax advisor, who in most cases also holds a long-term mandate with the micro-enterprise.

“In the case of a long-term mandate, the tax advisor must inform unsolicited about tax-relevant issues and civil law design options” (BGH n jw 98, 1221, as well as Palandt, BGB, 2016, § 280, para. 76).

For the employment contract relationship, Figure 3 illustrates the individual types of person-oriented leadership tasks as well as the extent of leadership responsibility.

The tax advisor is in an employment contract relationship (§ 611 BGB), belonging to the liberal professions. The scope of services is primarily determined by the desired success. The obligation of the tax advisor consists of “taking action towards success.” Thus, all service contracts that are not time-based are performance-based service contracts (Tillmanns 2007, 2 and 80–83).

Within the scope of action responsibility, there is no right of instruction by the micro-entrepreneur. The right of control of the service recipient arises solely from the leadership tasks (see Figure 3). “Case law regularly affirms the right of instruction of the service recipient in individual cases” (see “Instructional Right of the Client towards the Lawyer”, BGH 1968 VersR 1968, 792, Tillmanns 2007, 3 and 30).

The obligated service providers include not only tax advisors but also lawyers, auditors, and investment advisors.

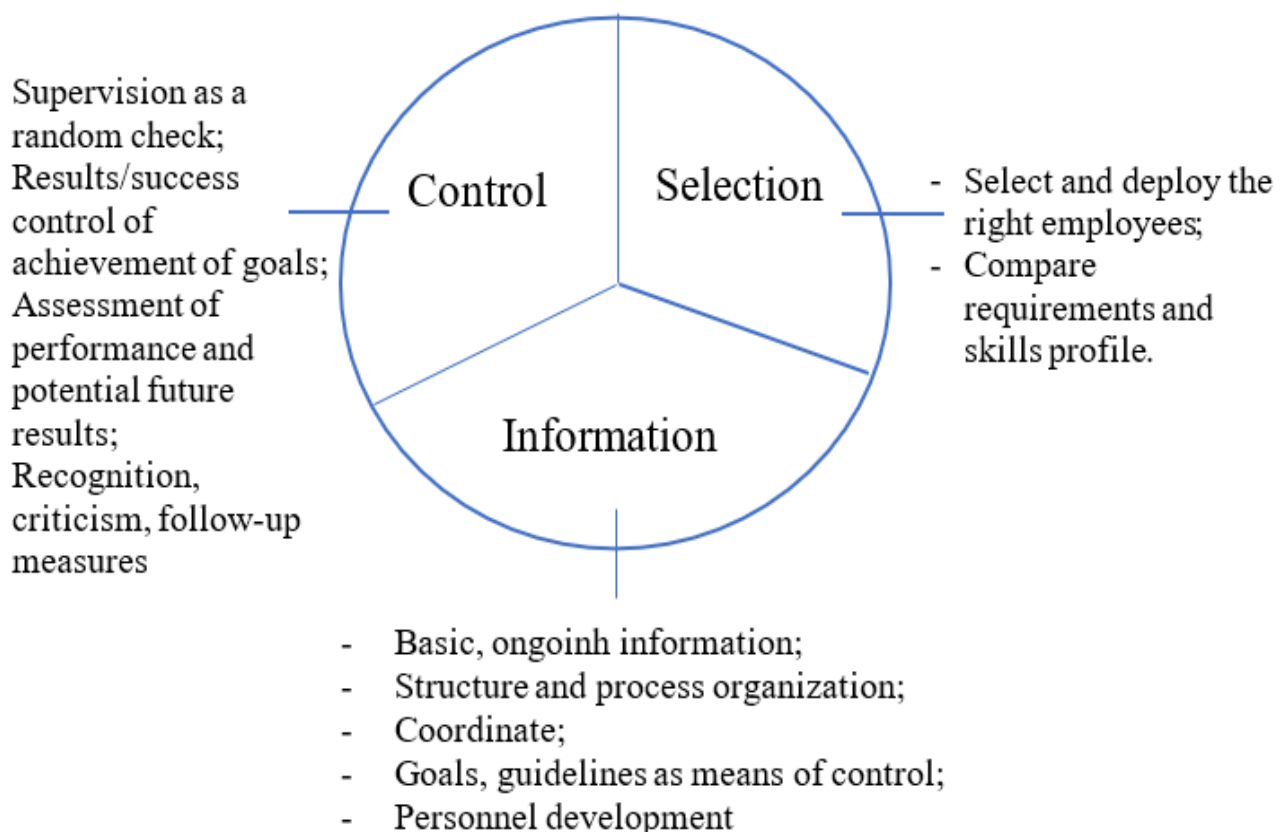


Fig. 3. Classical leadership tasks with current individual duties (Borsch and Borsch 2019, 148)



## **CONSULTATION RESPONSIBILITY**

The author recalls the following experience regarding consultation:

The managing director of a GmbH expressed to the tax advisor that he was not satisfied with the results of previous consultations. He felt a lack of greater initiative on the part of the tax advisor, especially concerning information regarding the development of certain case law. The tax advisor responded:

“Tell me specifically what you think we can do better, and I will immediately adjust my work, in addition to the usual tasks, including goal setting.” The managing director responded as follows:

“I am not capable of that; you are the expert responsible for it. I am not paid to advise you. Rather, it is your duty to advise me and tell me what needs to be done to navigate the tax issues out of the apparent dead end. I will then decide whether I want to follow your advice or not. You don't want to delegate responsibility back to me, do you?”

Consultation is a process of decision preparation (see operational decision-making under “action responsibility”). Terms such as “consultation,” “listening to,” and “in a staff function” also fall under consultation.

In the consulting task of the tax advisor, consultation precedes the decision of the entrepreneur. There is little indication in the literature regarding the criteria associated with consultation. Some authors limit themselves to noting that consultation “lacks the characteristic of binding influence.” Specifically, Höhn, R., 1995, 279–280, explains this as follows:

“This merely indicates the effects of consultation. However, nothing is said about the criteria that constitute the knowledge of proper consultation, namely:

- Presenting alternatives.

A single proposal would limit the decision-making ability of the person being advised.

- Weighing the pros and cons of each alternative.

Even if the advisor believes they have found the optimal solution, they are obliged to present other available options.

- Providing a mature proposal, i.e., recommending the solution that appears most favorable to the advisor and providing a thorough justification for it.

This is of particular importance. The advisor must therefore decide what they believe is the right approach. In terms of their responsibility for proper and conscientious consultation, this is crucial.”

However, the tax advisor should not be overwhelmed by the consultation. Consultation responsibility means: The service contract is a contract of performance controlled by the micro-entrepreneur. According to Tillmanns (2007, 467), “in the service contract, creditor and debtor not only work together, but it is the creditor who directs this collaboration. The service provider acts as an 'extended arm' of the service recipient; the service recipient remains 'the head' of the enterprise.”

## **LIABILITY OF THE TAX ADVISOR**

The tax advisor advises, represents, and assists their clients in fulfilling their tax obligations (§ 1 and § 33 StBerG). According to §§ 57, 60 StBerG and §§ 3 and 4 BOSTB, there are obligations for self-responsible activities, conscientious completion of specific tasks, and continuing education. A culpable violation of these duties triggers contractual liability. Liability entails responsibility for the consequences of actions and omissions based on §§ 280 and 241 of the German Civil Code (BGB).

Professionals, such as tax advisors and lawyers, are subject to strict liability according to case law.

The tax advisor is liable, among other things, for:

- Objectively erroneous, tax-detrimental advice.

- Lack of knowledge of tax law.

- Inadequate continuing education.

- Incomplete clarification of facts.

- Failure to provide information on tax-saving opportunities.

- Failure to provide information on tax risks in structuring options.

- Organizational negligence. They must organize their office in a way that minimizes procedural

errors such as missed deadlines.

Despite the micro-entrepreneur's responsibility for, for example, the tax return they sign, the tax advisor may be liable for errors. These errors must be demonstrably attributable to the tax advisor or their staff. In court, according to Zinner (2021), these six errors are recognized:

- Tax advisors have a duty to advise. They cannot assume that, for example, a long-standing entrepreneur is sufficiently informed about tax matters. If the entrepreneur wishes to save taxes by changing the company's legal form, the tax advisor must point this out. This was neglected by the tax advisor of a company up for sale. The Higher Regional Court of Hamm deemed the advice insufficient (Case No. 25 U 167/99).

- Not only if the tax advisor fails to give recommendations but also if they provide objectively wrong and possibly tax-detrimental advice, they are responsible according to the Saarbrücken Higher Regional Court (Case No. 1 U 52/85).

- Furthermore, according to the Federal Court of Justice (Case No. IC ZR 211/07), the tax advisor has the duty to draw attention to their own omissions. If they recognize errors during the preparation or after submission of the tax return, they must inform their client.

- If, due to upcoming changes in tax law, the tax advisor realizes that a different approach would be more favorable for their client in the future, they must also point this out. A tax advisor is obligated to do so even without explicit instruction from the client (Case No. 3 U 174/10).

- If, due to inadequate research, a tax assessment disadvantageous to the taxpayer is issued, this can have negative consequences for the tax advisor. Because among their duties is also the clarification of unclear and contradictory information provided by the taxpayer. If they fail to do so, they violate their duty of careful professional practice (Hamburg Regional Court, Case No. 313 O 203/92).

- In the context of tax legislation, there are a number of deadlines that the tax advisor must know and adhere to. Particularly important is the deadline for filing objections. If the tax advisor misses this deadline, according to the Düsseldorf Higher Regional Court (Case No. 23 U 207/02), they must compensate their client for any resulting losses.

The aforementioned § 280 BGB is the most important legal basis for assessing the duty of care of the tax advisor. These duties or the breach of their advisory tasks are extensively discussed based on additional practical cases of case law in the commentary Palandt Civil Code, 2021, § 280, paras. 76–78.

The tax advisor is insured against financial losses of the micro-entrepreneur. According to § 67 StBerG, the tax advisor must take out professional liability insurance against financial losses. The insurance coverage must be at least 250,000 euros. Covered are damages caused by the tax advisor or their employees through negligence.

To conclude these remarks, it should be noted that the discussion of the criminal and administrative liability of the tax advisor is not the subject of this work. It is only mentioned that according to § 25 (1) StGB, the “perpetrator” can generally only be the tax advisor who acts outwardly and provides information to the tax authorities. Direct perpetration is not considered in cases of purely internal activities, such as consulting, bookkeeping, or preparing tax returns (Gräfe et al. 2023, 72).

However, another topic should be particularly emphasized towards the end: Personal trust between the micro-entrepreneur and the tax advisor is certainly a prerequisite for good cooperation. Both generate a strong sense of responsibility and obligation through positive behavior of trust. A spiral of trust is set in motion. Seneca (Roman philosopher, 1–65 AD) wrote: “If you regard him as faithful, you will make him so” (Borsch and Borsch 2019, 33).

Regarding this, the Higher Regional Court of Frankfurt, on June 12, 2013, Case No. 1 U 30/11, stated:

“The tax advisor commits a breach of trust towards their client and thus a serious breach of duty, regarding the concluded tax advisory contract, if they induce their client to enter into a contract with a third party but do not disclose that they receive a commission for such a contract.”

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## ОТГОВОРНОСТТА НА ДАНЪЧНИЯ КОНСУЛТАНТ В ЦЯЛОСТНАТА КОНСУЛТАЦИЯ ЗА МИКРОПРЕДПРИЯТИЯ

**Резюме:** По отношение на задачите, които могат да бъдат делегирани, данъчният консултант има изключителни права за вземане на решения. Въпреки това данъчният консултант носи основната тежест въз основа на изчерпателен мандат от договора с клиента, особено при неделегиремите „изпълнителни задачи“, включващи задължението му да изготвя решения или да предоставя съвети по данъчни и бизнес въпроси. В допълнение към материалните задачи микропредприемачът има лични управленски задачи, като например задължения за подбор, информация и контрол (управленска отговорност) спрямо данъчния консултант. Докато предприемачът изпълнява тези задължения, по принцип не може да му се вмени небрежност от страна на консултанта. Данъчният консултант трябва да се стреми да намали в максимална степен неблагоприятните данъчни последици за предприемача. Ако той не е в състояние да изпълни консултантските задачи в съответствие с общоприетите стандарти, но въпреки това действа, може да възникне отговорност за поемане на отговорност. Микропредприемачът няма право да дава указания на данъчния консултант поради задължението му да действа. Това обаче може да е причина за тяхната отговорност за ръководство. Правното основание за отговорността на данъчния консултант може да се намери преди всичко в §§ 280 и 241 от Германския граждански кодекс (BGB).

**Ключови думи:** отговорност за действие, управленски задачи, консултантски процес, отговорност за поглъщане, отговорност

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